

MARRIAGE FACTS AND CRITICAL MORALITY

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Our times' marriage issue is this: Do constitutional norms, particularly of equality and liberty, require the redefinition of marriage from the union of a man and a woman to the union of any two persons? In the great judicial contest over that issue, the real fight is not over principles of law but over the facts of marriage. On the relevant principles of law, there is a general and growing agreement. It is sharp division over the facts of marriage that really accounts for the sharp division between the American judges called on to resolve the marriage issue.

This article's initial purpose is to state fully the facts of marriage, as presented by those on each side of the marriage issue, and then to state fully each side's counters to the other side's factual position, insofar as those counters have been developed. Against this background, the article critically examines the divergence between the two sides' respective accounts and concludes that, as between them, the man/woman marriage side has much the better of it.

The article then critically analyzes the widely held assumption that judicial selection of the standard of review – whether rational basis, heightened (but not strict) scrutiny, or strict scrutiny – determines the outcome in the cases addressing the marriage issue. That analysis suggests that it is choice of marriage facts, not choice of a standard of review, that ultimately determines the outcome.

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Finally, on the basis of the defensible marriage facts, this article works through the morality of man/woman marriage. This work is an exercise in critical morality, not conventional morality. That distinction is important because it is fashionable to assert that only conventional morality – indeed, only a religiously based morality that does not qualify as Rawlsian public reason – undergirds public support for man/woman marriage. Although fashionable, this assertion is false, as this article’s concluding exercise in critical morality demonstrates.

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I.

INTRODUCTION

Perhaps no great issue in American constitutional law has been so plagued by conflict, confusion, and carelessness regarding the relevant facts as has our times' marriage issue—whether constitutional norms, particularly of equality and liberty, require the redefinition of marriage from the union of a man and a woman to the union of any two persons. This is not to say that divisiveness over the facts of the subject matter has not played a role in earlier constitutional contests thrust upon the judiciary.¹ But typically in those earlier contests, legislative or administrative action provided some coherent and even authoritative body of facts regarding the large subject matter. For example, in the case of the constitutionality of the post-war restrictions on Communist Party activities, the United States Supreme Court looked to and relied on Congressional findings of fact regarding the nature of the threat posed by the Communist Party and the international communist movement.² A similar reference to Congressional findings occurred when the Court rejected constitutional challenges to the Civil Rights Act of 1964.³ And even in the absence of such legislative or administrative guidance, the courts often managed to find their way through to a clear understanding of the factual nub of a large constitutional issue. Thus, in striking down laws restricting non-whites from

¹ Samuel Freeman Miller, 1816-1890, was appointed to the Supreme Court by Abraham Lincoln in 1862 and is reported to have said: "In my experience in the conference room of the Supreme Court of the United States, which consists of nine judges, I have been surprised to find how readily those judges came to an agreement upon questions of law, and how often they disagree in regard to questions of facts." JEROME FRANK, *IF MEN WERE ANGELS: SOME ASPECTS OF GOVERNMENT IN A DEMOCRACY* 78 (Harper 1942).

² *See Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 5-8, 96-97 (1961); *cf. Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.").

³ *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 252-53 (1964).

marrying whites, the California Supreme Court in *Perez v. Lippold*⁴ and the United States Supreme Court in *Loving v. Virginia*⁵ saw clearly the origin of those laws in white supremacist dogma and political action.⁶ But in contrast to those examples of competent judicial handling of the constitutional facts, we have the judicial performance in the eighteen American appellate court cases that to date have resolved the marriage issue⁷; the picture of the facts of marriage emerging from those cases may be fairly described as confused and even careless.⁸

⁴ 198 P.2d 17 (Cal. 1948).

⁵ 388 U.S. 1 (1967).

⁶ See Monte Neil Stewart & William C. Duncan, *Marriage and the Betrayal of Perez and Loving*, 2005 BYU L. REV. 555, 570-75, available at <http://marriagelawfoundation.org/mlf/publications/Betrayal.pdf>.

⁷ In chronological order, those appellate court decisions are: **Minnesota**: Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971) (appeal dismissed for want of a substantial federal question), 409 U.S. 810 (1972); **Kentucky**: Jones v. Hallahan, 501 S.W.2d 588 (Ky. App. 1973); **Washington**: Singer v. Hara, 522 P.2d 1187 (Wash. App. 1974), review denied, 84 Wash.2d 1008 (1974); **Ninth Circuit**: Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1980); **Pennsylvania**: DeSanto v. Barnsley, 476 A.2d 952 (Penn. Super. 1984); **Hawaii**: Baehr v. Lewin, 852 P.2d 44 (Haw. 1993); *id.* at 68 (Burns, J., concurring); *id.* at 70 (Heen, J., dissenting); **District of Columbia**: Dean v. District of Columbia, 653 A.2d 307 (D.C. App. 1995); *id.* at 361 (Terry, J., concurring); *id.* at 362 (Steadman, J., concurring); **Vermont**: Baker v. Vermont, 744 A.2d 864 (Vt. 1999); *id.* at 889 (Dooley, J., concurring); *id.* at 897 (Johnson, J., concurring & dissenting); **Arizona**: Standhardt v. Superior Court, 77 P.3d 451 (Ariz. App. 2003); **Massachusetts**: Goodridge v. Dep't. of Pub. Health, 798 N.E.2d 941 (Mass. 2003); *id.* at 970 (Greaney, J., concurring); *id.* at 974 (Spina, J., dissenting); *id.* at 978 (Sosman, J., dissenting); *id.* at 983 (Cordy, J., dissenting); **Indiana**: Morrison v. Sadler, 821 N.E.2d 15 (Ind. App. 2005); *id.* at 35 (Friedlander, J., concurring); **New Jersey**: Lewis v. Harris, 875 A.2d 259 (N.J. App. 2005); *id.* at 274 (Collester, J., concurring); *id.* at 278 (Collester, J., dissenting); **New York**: Hernandez v. Robles, 805 N.Y.S.2d 354 (N.Y. App. 2005); *id.* at 364 (Catterson, J., concurring); *id.* at 377 (Saxe, J., dissenting); Samuels v. N.Y. Dep't. of Pub. Health, 811 N.Y.S.2d 136 (N.Y. App. 2006); Seymour v. Holcomb, 811 N.Y.S.2d 134 (N.Y. App. 2006); Kane v. Marsolais, 808 N.Y.S.2d 136 (N.Y. App. 2006); Hernandez v. Robles, 7 N.Y.3d 338 (N.Y. 2006); *id.* at 366 (Graffeo, J., concurring); *id.* at 380 (Kaye, C.J., dissenting); **Washington**: Andersen v. King County, 138 P.3d 963 (Wash. 2006); *id.* at 991 (Alexander, J., concurring); *id.* at 991 (J. Johnson, J., concurring); *id.* at 1027 (Bridge, J., dissenting); *id.* at 1040 (Chambers, J., dissenting); *id.* at 1012 (Fairhurst, J., dissenting); **California**: *In re Marriage Cases*, 49 Cal. Rptr. 3d 675 (Cal. App. 2006); *id.* at 727 (Parilli, J., concurring); *id.* at 731 (Kline, J., dissenting); **New Jersey**: Lewis v. Harris, 908 A.2d 196 (N.J. 2006); *id.* at 224 (Poritz, C.J., concurring & dissenting). The cut-off date for this list is July 10, 2007.

⁸ With respect to the confused and careless treatment of the facts of marriage appearing in judicial decisions on the marriage issue, a large group of family scholars and legal scholars recently noted:

[T]he basic understanding of marriage underlying much of the current same-sex marriage discourse is seriously flawed It is adult-centric, turning on the rights of adults to make choices. It does not take institutional effects of law seriously, failing to treat with intellectual seriousness any potential consequences that changing the basic legal definition of marriage may have for the children of society. In many cases it directly or indirectly seeks to disconnect

This fact of factual confusion in the marriage cases, although not boding well for constitutional adjudication, is perhaps understandable, for three reasons. One, man/woman marriage is an ancient and virtually universal social institution,⁹ and hence those enacting laws in recent centuries in support of the institution apparently sensed little or no need to articulate the factual underpinnings of the man/woman meaning reinforced by those laws.¹⁰ Even Congressional deliberation leading to the Defense of

marriage from its historic connection to procreation. . . . Courts that have moved to same-sex marriage display a distressing tendency to first reduce marriage to a legal construct, unrelated to any natural, biological, or sexual realities, such as the generation of children or the gender asymmetry in parenting.

INSTITUTE FOR AMERICAN VALUES, MARRIAGE AND THE LAW: A STATEMENT OF PRINCIPLES 18-19 (2006). See also Monte Neil Stewart, *Eliding in Washington and California*, 42 GONZ. L. REV. 501, 516-46 (2007), available at http://manwomanmarriage.org/jrm/pdf/Eliding_in_WA_and_CA.pdf [hereinafter Stewart, *Washington and California*]; Monte Neil Stewart, *Dworkin, Marriage, Meanings – and New Jersey*, 4 RUTGERS J. L. & PUB. POL'Y 271, 280-81 (2007), available at <http://manwomanmarriage.org/jrm/pdf/Dworkin.pdf> [hereinafter Stewart, *Dworkin*]; Monte Neil Stewart, *Eliding in New York*, 1 DUKE J. CONST. L. & PUB. POL'Y 221, 231-58 (2006), available at <http://www.manwomanmarriage.org/jrm/pdf/ElidingInNewYork.pdf> [hereinafter Stewart, *New York*]; Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 DUKE J. CONST. L. & PUB. POL'Y 1, 28-77 (2006), available at http://www.manwomanmarriage.org/jrm/pdf/Duke_Journal_Article.pdf [hereinafter Stewart, *Judicial Elision*]; F.C. DeCoste, *Courting Leviathan: Limited Government and Social Freedom in Reference re Same-Sex Marriage* 42 ALBERTA L. REV. 1099, 1102-03 (2005) [hereinafter DeCoste, *Leviathan*]; Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 U. ST. THOMAS L. J. 33, 35-65 (2004) [hereinafter Gallagher, *Reply*]; Maggie Gallagher, *Does Sex Make Babies? Marriage, Same-Sex Marriage and Legal Justifications for the Regulation of Intimacy in a Post-Lawrence World*, 23 QUINNIAC L. REV. 447, 451-71 (2004) [hereinafter Gallagher, *Does Sex Make Babies*]; Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 CAN. J. FAM. L. 11, 41-99 (2004), available at <http://manwomanmarriage.org/jrm/pdf/jrm.pdf> [hereinafter Stewart, *Redefinition*]; F.C. DeCoste, *The Halpern Transformation: Same-Sex Marriage, Civil Society, and the Limits of Liberal Law*, 41 ALBERTA L. REV. 619, 625-28 (2003) [hereinafter DeCoste, *Transformation*].

⁹ E.g., W. BRADFORD WILCOX ET AL., WHY MARRIAGE MATTERS, SECOND EDITION: TWENTY-SIX CONCLUSIONS FROM THE SOCIAL SCIENCES 15 (2005):

Marriage exists in virtually every known human society. The shape of human marriage varies considerably in different cultural contexts. But at least since the beginning of recorded history, in all the flourishing varieties of human cultures documented by anthropologists, marriage has been a universal human institution. As a virtually universal human idea, marriage is about regulating the reproduction of children, families, and society.

¹⁰ See Bruce Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy: Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 472 (1983):

Perhaps because family life is so much a part of the unspecifiable bedrock of society, there has been a puzzling inattention in both legal and other literature to the broad social policies underlying the preference historically given by the law to family relationships.

Marriage Act in 1996¹¹ was more a discussion of the role of individual states in fashioning their own marriage laws than an examination of the policy implications of preserving the man/woman marriage institution or replacing it with a marriage institution where the gender of the parties is legally irrelevant and socially inconsequential.¹² Two, at least until quite recently the key players in the constitutional adjudication (lawyers, judges, and constitutional law scholars) did not know very much about marriage.¹³ Three, they thought they did (that is, know much about marriage), just as all of us do. Marriage is such an ubiquitous social reality, and is therefore experienced in one or more roles by nearly everyone, that nearly everyone believes that he knows what marriage is

This contrasts remarkably with the voluminous scholarly work on individual rights. Domestic patterns universally accepted before the dawn of law and government have hardly seemed to require full-dress justification. Thus, the case law and other commentary on our traditional assumptions seldom go beyond platitudes and cliches. The objectives of a democratic society based on established patterns of marriage and kinship should not be terribly mysterious; serious scholars, however, have seldom felt a need to document them.

¹¹ Pub. L. 104-199, 100 Stat. 2419 (1996), codified at 1 U.S.C. § 7 & 28 U.S.C. § 1738(C) (1997).

¹² The Defense of Marriage Act's legislative history indicates that the bill resulted from concern that, because of the requirements of interstate comity (full faith and credit), a judicially mandated recognition of genderless marriage in Hawaii could limit the power of the other 49 states to decide their own marriage policies. *E.g.*, H.R. REP. NO. 104-199, at 4-10 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2908-2914. This concern is reflected in House Report 199, which observed that "the legal history of the full faith and credit clause... is central to this dispute." *Id.* at 36, *as reprinted in* 1996 U.S.C.C.A.N. 2905, 2939. Testimony in committees focused mainly on issues of full faith and credit, the role of the federal government, and the constitutionality of the bill. *See, e.g., The Defense of Marriage Act: Hearing on H.R. 3396 Before the H. Comm. on the Judiciary*, 104th Cong. 87-117 (1996) (statement of Hadley Arkes, Ney Professor of Jurisprudence and American Institutions, Amherst College); *The Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 202-211 (1996) (statement of David Saperstein, Director and Counsel, Religious Action Center of Reform Judaism); *The Defense of Marriage Act: Hearing on S. 1740 Before the Senate Comm. on the Judiciary*, 104th Cong. 23-41 (1996) (statement of Lynn D. Wardle, Professor of Law, Brigham Young University). The Senate debate had a similar focus, 142 CONG. REC. S10100-123 (1996), as did the House debate. 142 CONG. REC. H7441-83 (1996). The simple fact is that no one debated the fundamental policy issue – whether society would be better served by the existing marriage institution (the union of a man and a woman) or by the proposed new institution (the union of any two persons) – exactly because not one member of Congress stated support for the new one except (briefly and ambiguously) Rep. Barney Frank. *Id.* at H7447.

¹³ *See* Gallagher, *Reply, supra* note 8, at 34 ("[F]or many years, the same-sex marriage debate has been a legal debate, mostly confined to lawyers, judges, and legal scholars, few of whom have any particular background in marriage at all.")

and is all about. But as we will see, that parochial belief—harbored by a number of the elites engaged in some way in adjudication of the marriage issue—can be a serious impediment to defensible legal work.

Before giving the roadmap to this article, a word on terminology is due and probably overdue. By *the facts of marriage* or *marriage facts*, we mean those facts that almost fifteen years¹⁴ of litigating the marriage issue in sixteen states and the District of Columbia¹⁵ have shown to be relevant to that issue. Thus, we use the word *facts* in a narrow, lawyerly way; its referent are those matters disputable in litigation other than legal principles and procedures, a distinction seen in such oft-used phrases as *issue of fact*, *question of law*, and *a mixed question of law and fact*.¹⁶ In this sense, a fact is not necessarily “[s]omething that has really occurred or is actually the case”¹⁷ but is rather what a judge, for purposes of resolving a case, will accept as such – or will accept as something that a reasonable legislator could accept as such. Thus, in the lawyers’ realm,

¹⁴ Before the 1991 commencement of the marriage litigation in Hawaii, the marriage issue was raised in other states. See *supra* note 7. But the Hawaii case, *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), undoubtedly marks the beginning of the organized and strategic effort to redefine marriage by judicial mandate. See William C. Duncan, *The Litigation to Redefine Marriage: Equality and Social Meaning*, 18 *BYU J. PUB. L.* 623, 630-42 (2004).

¹⁵ For the cases that since 1992 have had appellate court decisions, see *supra* note 7. Here in chronological order are the cases that have not yet had such a decision: *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super. 1998); *Li v. State*, 2004 WL 1258167 (Or. Super. 2004); *In re Kandu*, 315 B.R. 123 (Bkrptcy. W.D. Wash. 2004); *Wilson v. Ake*, 354 F.Supp. 1298 (M.D. Fla. 2005); *Deane v. Conway*, 2006 WL 148145 (Md. Super. 2006); *Kerrigan v. Dep’t. of Pub. Health*, 2006 WL 2089468 (Conn. Super. 2006); *Bishop v. Oklahoma*, 447 F.Supp. 2d 1239 (N.D. Okla. 2006); *Varnum v. Brien*, Case No. CV 5965 (Iowa District Court, pending). The cut-off date for this list is July 10, 2007.

¹⁶ One judge has confirmed that such terms are oft-used but suggested that they are not always helpful: We have come to speak of questions of 'facts', 'primary facts', 'subsidiary facts,' 'evidentiary facts,' 'ultimate facts,' 'physical facts,' 'documentary facts,' 'oral evidence,' 'inferences,' 'reasonable inferences,' 'findings of fact,' 'conclusions,' 'conclusions of law,' 'questions of fact,' 'questions of law,' 'mixed questions of law and fact,' 'correct criteria of law,' and so on ad infinitum. The simple answer is that we are all too frequently dealing in semantics, and our choice of words does not always reflect the magic we would prefer to ascribe to them.

Armour & Co. v. Wilson & Co., 274 F.2d 143, 155 (7th Cir. 1960) (Hastings, C.J.).

¹⁷ OXFORD ENGLISH DICTIONARY, *fact* n., 4a.

the notion of *alleged fact* or even *false fact* is not unintelligible¹⁸; in our references to *the facts of marriage* or *marriage facts*, that is our realm.

As a final word on terminology: On one side of the marriage issue are those who want marriage legally redefined to “the union of any two persons,” with the law treating the parties’ gender as irrelevant to the meaning of marriage – hence, *genderless marriage*.¹⁹ On the other side are those who want to preserve “the union of a man and a woman” as a core meaning of the marriage institution – hence, *man/woman marriage*.

The opposing sides have repeatedly presented to the courts two quite different “packages” of marriage facts, and each judge, in upholding man/woman marriage or mandating its replacement by genderless marriage, has to some degree both expressly premised her ultimate legal conclusion on the contents of the supportive package and attempted to counter the contents of the other package. What follows in Section II is a description of the contents of the two packages and a critical examination of their divergence. Section III examines the not uncommon notion that, in adjudication of the marriage issue, judicial choice of a particular standard of review makes all the difference. That notion does not bear up well under Section III’s examination, which supports the conclusion that it is the judge’s choice regarding the facts of marriage that determines the outcome. Section IV builds on Section II’s critical evaluation of the competing packages

¹⁸ *Id.* at 5.

¹⁹ Some proponents of genderless marriage have expressed discomfort with that particular short-hand phrase, suggesting that it somehow neuters or paints as without gender those who enter into such a marriage. But it does no such thing. *Genderless* modifies *marriage*, not the persons participating in the marriage, and of course each man or woman participating in a marriage is just that, a man or a woman – and that will continue to be the case until an extremely radical way of thinking captures and remakes our social reality. I have neither desire nor intent to offend; I simply am not persuaded when those intent on making gender legally irrelevant and then socially unimportant to marriage complain about my use of *genderless* to describe what they fashion.

of marriage facts; more specifically, it builds on Section II's conclusion that the package supportive of man/woman marriage is quite decidedly the more defensible of the two. On that basis and on the reality that man/woman marriage and genderless marriage are mutually exclusive social phenomenon, Section V demonstrates critical morality's strong support for our society's choice of the man/woman marriage institution.

II.

THE FACTS OF MARRIAGE

The following two subsections state the marriage facts that each side foregrounds in litigation of the marriage issue – and *as* each side presents them. I begin with the factual basis of man/woman marriage's constitutionality.

A. THE FACTUAL BASIS OF MAN/WOMAN MARRIAGE'S CONSTITUTIONALITY

Marriage is a vital social institution.²⁰ Like all social institutions, marriage is constituted by a unique web of shared public meanings.²¹ Or, in slightly different words, widely shared meanings are the constituent stuff of institutions. For important institutions, again including marriage, many of those meanings rise to the level of norms.²² Consequently, important social institutions affect individuals profoundly;

²⁰ See, e.g., *Williams v. North Carolina*, 317 U.S. 287, 303 (1942) (“[T]he marriage relation [is] an institution more basic in our civilization than any other.”); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (“Marriage is a vital social institution.”).

²¹ See Stewart, *Judicial Elision*, *supra* note 8, at 8-9.

²² Clayton provides a standard definition of *institution*: “An organized system of social relationships (roles, positions, *norms*) that is pervasively implemented in the society and that serves certain basic needs of the society.” RICHARD R. CLAYTON, *THE FAMILY, MARRIAGE, AND SOCIAL CHANGE* 22 (2d ed. 1979) (emphasis added). And from Nee and Ingram: “An institution is a *web of interrelated norms*—formal and informal—governing social relationships.” Victor Nee & Paul Ingram, *Embeddedness and Beyond: Institutions, Exchange, and Social Structure*, in *THE NEW INSTITUTIONALISM IN SOCIOLOGY* 19, 19 (Mary C. Brinton & Victor Nee eds., 1998) (emphasis in original). And from William M. Sullivan: “Institutions . . . are normative patterns that define purposes and practices, patterns embedded in and sanctioned by customs and law.” William M. Sullivan, *Institutions as the Infrastructure of Democracy*, in *NEW*

institutional meanings teach, form, and transform individuals, providing identities, purposes, practices, and projects.²³ When scholars speak of a person or a “self” being “socially constructed,” in large measure they are referring to the effects of this transformative power of institutionalized meanings.²⁴

Those meanings, as the constituent stuff of social institutions, are therefore the source of the institutions’ respective social goods. In other words, it is by teaching, forming, and transforming individuals across the society that an institution’s constitutive meanings provide the social goods. And it is those social goods that led to the institution’s evolvment and that continue to give reason for its perpetuation.²⁵

Across time and cultures, a core meaning constitutive of the marriage institution

COMMUNITARIAN THINKING: PERSONS, VIRTUES, INSTITUTIONS, AND COMMUNITIES 175 (Amitai Etzioni ed. 1995).

²³ See Stewart, *Judicial Elision*, *supra* note 8, at 9-10; see also William M. Sullivan, *supra* note 22, at 175. These insights are not recent:

As Tocqueville saw it, it was the institutional order, the patterns of normative, sanctioned interaction themselves, which worked through daily life to shape the imagination and character of the citizens. That is, institutionalized mores linked market, state, and civil society into the mutually reinforcing whole Tocqueville identified as American democracy. Besides individual consciousness and social interaction, human life also entails shared, socially sanctioned patterns of purpose. These are the institutional forms of family, school, religious congregation, business firm, and club, which structure the patterns of everyday life.

Id. at 173-74.

²⁴ E.g., Gerald Torres, *Understanding Patriarchy as an Expression of Whiteness: Insights from the Chicana Movement*, 18 WASH. U. J.L. & POL’Y 129, 131 n.5 (“By social constructions, I mean ideas created by the institutions of social relations. . . . [R]ace and gender are social constructions”); Jennifer Minear, *Performance and Politics: An Argument for Expanded First Amendment Protection of Homosexual Expression*, 10 CORNELL J.L. & PUB. POL’Y 601, 623 (speaking of “the self as socially constructed through institutions such as the legal system, religion and the family.”); cf. JUDITH BUTLER, *GENDER TROUBLE* 172-80 (1999).

²⁵ This link between the value of institutionally-produced social goods and evolvment or perpetuation of the institution must certainly be more than just definitional (although it is that); that link would also seem to be essential. That the link is definitional is seen in Clayton’s standard definition of *institution*: “An organized system of social relationships (roles, positions, norms) that is pervasively implemented in the society and *that serves certain basic needs of the society.*” CLAYTON, *supra* note 22, at 22 (emphasis added). The idea that the link is also essential arises from the insight that a society would hardly expend the vast energy needed to accomplish that “pervasive implementation” unless the resulting institution indeed served “certain basic needs of the society.” See also Stewart, *Judicial Elision*, *supra* note 8, at 8-10.

has nearly always been *the union of a man and a woman*.²⁶ This core man/woman meaning is powerful and even indispensable for the marriage institution's production of at least six of its valuable social goods.²⁷ The man/woman marriage institution is:

1. Society's best and probably only effective means to make real the right of a child to know and be brought up by his or her biological parents (with exceptions justified only in the best interests of the child, not those of any adult).²⁸
2. The most effective means humankind has developed to maximize the private welfare provided to children conceived by passionate, heterosexual coupling (with "private welfare" meaning not just the basic requirements like food and shelter but also education, play, work, discipline, love, and respect).²⁹
3. The indispensable foundation for that child-rearing mode – that is, married mother/father child-rearing – that correlates (in ways not subject to reasonable dispute) with the optimal outcomes deemed crucial for a child's – and therefore society's – well-being.³⁰

²⁶ E.g., WILCOX, ET AL., *supra* note 9, at 15.

²⁷ Stewart, *Judicial Elision*, *supra* note 8, at 16-20.

²⁸ See COMMISSION ON PARENTHOOD'S FUTURE (ELIZABETH MARQUARDT, PRINCIPAL INVESTIGATOR), THE REVOLUTION IN PARENTHOOD: THE EMERGING GLOBAL CLASH BETWEEN ADULT RIGHTS AND CHILDREN'S NEEDS 32 (2006) ("The legalization of same-sex marriage, while sometimes seen as a small change affecting just a few people, raises the startling prospect of fundamentally breaking the legal institution of marriage from any ties to biological parenthood."), available at http://www.marriagedebate.com/reg/pdf_secure.php?pdf=5; Margaret Somerville, *What About the Children?*, in DIVORCING MARRIAGE: UNVEILING THE DANGERS IN CANADA'S NEW SOCIAL EXPERIMENT 67 (Daniel Cere & Douglas Farrow eds. 2005) [hereinafter DIVORCING MARRIAGE]; Margaret Somerville, *It's all about the children: My apparently controversial position on same-sex marriage is that a child's right to know his or her biological parents should be protected*, THE OTTAWA CITIZEN, Sept. 29, 2006, available at <http://www.canada.com/ottawacitizen/news/opinion/story.html?id=fa4ce2b8-4618-4b5a-ba10-5e7b297296f8>.

²⁹ See Stewart, *Judicial Elision*, *supra* note 8, at 17–18; Stewart, *Judicial Redefinition*, *supra* note 8, at 44–48.

³⁰ Putting aside for the moment the scientific adequacy of studies regarding the mother/lesbian partner child-rearing mode, it is now uncontroversial that the married mother/father child-rearing mode

4. Society's primary and most effective means of bridging the male-female divide.³¹
5. Society's only means of conferring the identity and status of, and transforming a male into, husband/father, and a female into wife/mother,³² statuses and identities particularly beneficial to society.³³
6. Social and official endorsement of that form of adult intimacy—married heterosexual intercourse—that society may rationally value above all other such forms.³⁴

Those are not all the social goods produced by the marriage institution, but for purposes of adjudicating the marriage issue they are the relevant ones. They are relevant

significantly correlates with the optimal outcomes deemed crucial for a child's—and therefore society's—well-being. *E.g.*, THE WITHERSPOON INSTITUTE, MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES 21–43 (2006), *available at* <http://www.princetonprinciples.org/files/Marriage%20and%20the%20Public%20Good.pdf>; *see also* WILCOX, ET AL., *supra* note 9, at 12–32 (2005).

Section II,C,2,b, *infra*, addresses the adequacy of studies that attempt to compare the outcomes of the mother/lesbian partner child-rearing mode with the optimal outcomes of the married mother/father mode.

³¹ DAVID BLANKENHORN, THE FUTURE OF MARRIAGE 93 (2007) (“More than any other human relationship, marriage bridges the sexual divide in the human species.”); COUNCIL ON FAMILY LAW (DANIEL CERE, PRINCIPAL INVESTIGATOR), THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA 12-13 (2005), *available at* http://www.marriagedebate.com/pdf/future_of_family_law.pdf (stating that man/woman marriage “provides an evolving form of life that helps men and women negotiate the sex divide and forge an intimate community of life . . .”).

Whatever emotional intimacy exists between the spouses is largely founded on, and never completely detached from, erotic attraction and sexual union. From this fact flows another: marriage is the principle human institution through which women and men share a common life. Today in the United States, many people discussing marriage seem to believe that the principal sexual divide among humans is between gay and straight. But the principal sexual divide is between men and women. When it comes to sexual orientation, marriage as an institution is mute and insensible; it was never meant to address that issue. But when it comes to sexual embodiment, marriage is vocal and reactive; it was always meant to address that issue. Indeed, that is its *reason for being*. Marriage's affective dimensions are inextricably linked to its purpose of bridging the primary divide in our species.

BLANKENHORN, *supra*, at 105 (emphasis added).

³² *See* DeCoste, *Transformation*, *supra* note 8, at 625-27.

³³ *See, e.g.*, DAVID POPENOE, LIFE WITHOUT FATHER 139–88 (1996); THE WITHERSPOON INSTITUTE, *supra* note 30, at 21–38.

³⁴ Stewart, *Redefinition*, *supra* note 8, at 52-57; Gallagher, *Does Sex Make Babies?*, *supra* note 8.

exactly because they are the social goods produced materially and even uniquely by the man/woman *meaning* and that must therefore disappear when that *meaning* is de-institutionalized.³⁵

In contemporary America, the man/woman meaning has *not* been deinstitutionalized by broad social trends anywhere, and only Massachusetts has a legal mandate designed to perform that task. *The union of a man and a woman* continues as a widely shared, public, and core meaning constitutive of the marriage institution across the Nation. That is not to say that the man/woman meaning is universally shared; an alternate view of marriage (the “close personal relationship” model) makes that meaning quite dispensable, and that model’s description of what marriage now *is* – after a process of evolution – is not inaccurate in some American communities or in portions of that world created by Hollywood. But its description is inaccurate beyond those particular spheres, exactly because the man/woman meaning continues fully institutionalized as a widely shared public meaning across every state and therefore across the Nation.³⁶

With its power to suppress social meanings, however, the law can radically change and even deinstitutionalize man/woman marriage.³⁷ The consequence of such deinstitutionalization must necessarily be loss of the institution’s social goods. Further, genderless marriage is a radically different institution than man/woman marriage. (This

³⁵ What is important for our purposes is that all six social goods described in the text are the product of the institutionalized man/woman meaning and that, exactly because those goods do much to meet certain basic human and social needs, our society has a compelling interest in their perpetuation. In this light, deciding which of these vital social goods is most valuable or whether perpetuation of each, separate and alone, qualifies as a compelling governmental interest – although certainly an interesting intellectual endeavor – would seem to serve no large practical purpose relative to resolution of the marriage issue.

³⁶ See Stewart, *Washington and California*, *supra* note 8, at 508, 532-35; Stewart, *New York*, *supra* note 8, at 235-37; see also *infra* notes 158-176 and accompanying text.

³⁷ Stewart, *Judicial Elision*, *supra* note 8, at 11-13.

does not mean, of course, that there is no overlap in formative instruction between the two possible marriage institutions; the significance is in the divergence.) This significant divergence is seen in the nature of the two institutions' respective social goods (in the case of genderless marriage, only promised, not yet delivered).³⁸ Nor should this divergence be surprising: fundamentally different meanings, when magnified by institutional power and influence, do not produce the same social identities, aspirations, projects, or ways of behaving, and hence the same social goods.³⁹ Or to use popular contemporary terminology, the man/woman marriage institution will socially construct a people and hence a society different from the people and society socially constructed by the genderless marriage institution.⁴⁰ It could not be otherwise because the genderless marriage institution is radically different in what it aims for and in what it teaches.⁴¹ To say that the result will be otherwise is to say that the core meanings constitutive of powerful social institutions do not matter in the formation and transformation of individuals, and no rational and informed observer says that.⁴² Indeed, the observers of marriage who are both rigorous and well-informed regarding the realities of social institutions uniformly acknowledge the magnitude of the differences between the two

³⁸ *Id.* at 20-24.

³⁹ *Id.* at 20-21.

⁴⁰ See MARY DOUGLASS, HOW INSTITUTIONS THINK 108 (1986) ("First the people are tempted out of their niches by new possibilities of exercising or evading control. Then they make new kinds of institutions, and the institutions make new labels, and the label makes new kinds of people."); Stewart, *New York, supra* note 8, at 240.

⁴¹ *Id.*

⁴² *Id.* at 240-41.

possible institutions of marriage, and this is so regardless of the observer's own sexual, political, or theoretical orientation or preference.⁴³

Although the contemporary social institution of marriage in America has evolved in important ways over the centuries and undoubtedly now includes the ideal of “a partnership of equals with equal rights, who have mutually joined to form a new family unit, founded upon shared intimacy and mutual financial and emotional support,”⁴⁴ enduring aspects of the institution go far beyond that limited and limiting description of transformative meanings, and those enduring aspects are grounded in the man/woman meaning:

Conjugal marriage [i.e., man/woman marriage] has several characteristics. First, it is inherently normative. Conjugal marriage cannot celebrate an infinite array of sexual or intimate choices as equally desirable or valid. Instead, its very purpose lies in channeling the erotic and interpersonal impulses between men and women in a particular direction: one in which men and women commit to each other and to the children that their sexual unions commonly (and even at times unexpectedly) produce.

As an institution, conjugal marriage addresses the social problem that men and women are sexually attracted to each other and that, without

⁴³ See LADELLE MCWHORTER, BODIES AND PLEASURES: FOUCAULT AND THE POLITICS OF SEXUAL NORMALIZATION 125 (1999); JOSEPH RAZ, THE MORALITY OF FREEDOM 393 (1986); Angela Bolt, *Do Wedding Dresses Come in Lavender? The Prospects and Implications of Same-Sex Marriage*, 24 SOC. THEORY AND PRAC. 111, 114 (1998); BLANKENHORN, *supra* note 31, at 167; Devon W. Carbado, *Straight Out of the Closet*, 15 BERKELEY WOMEN'S L.J. 76, 95-96 (2000); Daniel Cere, *War of the Ring*, in DIVORCING MARRIAGE, *supra* note 28, at 11-18; Douglas Farrow, *Canada's Romantic Mistake*, in DIVORCING MARRIAGE, *supra* note 28, at 1-5; Gallagher, *Reply*, *supra* note 8, at 53 (“Many thoughtful supporters of same-sex marriage recognize that some profound shift in our whole understanding of the world is wrapped up in this legal re-engineering of the meaning of marriage.”); Andrew Sullivan, *Recognition of Same-Sex Marriage*, 16 QUINNIPIAC L. REV. 13, 15, 17-18 (1996); Katherine Young & Paul Nathanson, *The Future of an Experiment*, in DIVORCING MARRIAGE, *supra* note 28, at 48-56; JUDITH STACEY, IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE 126-28 (1996); E.J. Graff, *Retying the Knot*, 262 THE NATION 12 (June 24, 1996) (“The right wing gets it: Same-sex marriage is a breathtakingly subversive idea Marriage is an institution that towers on our social horizon, defining how we think about one another [S]ame-sex marriage . . . announces that marriage has changed shape.”); Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 9, 12-19 (1991).

⁴⁴ *Hernandez v. Robles*, 805 N.Y.S.2d 354, 381 (N.Y. App. Div. 2005) (Saxe, J., dissenting).

any outside guidance or social norms, these intense attractions can cause immense personal and social damage. . . . [Man/woman marriage] provides an evolving form of life that helps men and women negotiate the sex divide, forge an intimate community of life, and provide a stable social setting for their children. . . .

Another characteristic of conjugal marriage is that it is fundamentally child-centered, focused beyond the couple towards the next generation. Not every married couple has or wants children. But at its core marriage has always had something to do with societies' recognition of the fundamental importance of the sexual ecology of human life: humanity is male and female, men and woman often have sex, babies often result, and those babies, on average, seem to do better when their mother and father cooperate in their care. Conjugal marriage attempts to sustain enduring bonds between women and men in order to give a baby its mother and father, to bond them to one another and to the baby.⁴⁵

Regarding this last-mentioned marriage fact – the institutionalized objective and practice of bonding a man and a woman and the children that their sexual relation produces –, one judge said:

The institution of marriage provides the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other. The partners in a marriage are expected to engage in exclusive sexual relations, with children the probable result and paternity presumed. . . . Whereas the relationship between mother and child is demonstratively and predictably created and recognizable through the biological process of pregnancy and childbirth, there is no corresponding process for creating a relationship between father and child. Similarly, aside from an act of heterosexual intercourse nine months prior to childbirth, there is no process for creating a relationship between a man and a woman as the parents of a particular child. The institution of marriage fills this void by formally binding the husband-father to his wife and child, and imposing on him the responsibilities of fatherhood. . . . The alternative, a society without the institution of marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic.⁴⁶

⁴⁵ COUNCIL ON FAMILY LAW, *supra* note 31, at 12–13. For further descriptions of the meanings and purposes inhering in contemporary man/woman marriage—meanings beyond those few comprising the close personal relationship model—, *see, e.g.*, Gallagher, *Does Sex Make Babies?*, *supra* note 8, at 451–71; Gallagher, *Reply*, *supra* note 8, at 43–51; Stewart, *Judicial Elision*, *supra* note 8, at 16–20; and Stewart, *Redefinition*, *supra* note 8, at 41–57.

⁴⁶ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 995–96 (Mass. 2003) (Cordy, J., dissenting).

Or, as Maggie Gallagher has cogently observed:

[T]he justification for legal preferences for marriage for couples attracted to the opposite sex rests on three [factual] assertions: sex makes babies; society needs babies; and children need mothers and fathers. Marriage is about uniting these three dimensions of human social life: creating the conditions under which sex between men and women can make babies safely, in which the fundamental interests of children in the care and protection of their own mother and father will be protected, and so that women receive the protections they need to compensate for the high and gendered (*i.e.*, nonreciprocal) costs of childbearing.⁴⁷

Or, in David Blankenhorn's words:

In all or nearly all human societies, marriage is socially approved sexual intercourse between a man and a woman, conceived both as a personal relationship and as an institution, primarily such that any children resulting from the union are – and are understood by the society to be – emotionally, morally, practically, and legally affiliated with both of the parents.

That's what marriage is. It's a way of living rooted in the fundamental physiological and biochemical adaptations of our species, as developed over the course of our long prehistory. ... It is constantly evolving, reflecting the complexity and diversity of human cultures. It also reflects one idea that does not change: For every child, a mother *and* a father.⁴⁸

None of this is to assert that an institutionalized purpose is to mandate or even promote procreation; rather, it is to ameliorate the consequences of heterosexual coupling. The marriage institution in important part exists as a response to two essential realities of man/woman intercourse: its procreative power and its passion. And that institutional response's purpose is understood as the provision of adequate private welfare to children. (As used here, the phrase *private welfare* includes not just the

⁴⁷ Gallagher, *Does Sex Make Babies?*, *supra* note 8, at 451.

⁴⁸ BLANKENHORN, *supra* note 31, at 91 (emphasis in original). Blankenhorn notes that his definition of marriage “rests on a large and growing mountain of scholarly evidence. It incorporates widely shared conclusions about the meaning of marriage reached by the leading anthropologists, historians, and sociologists of the modern era.” *Id.*

provision of physical needs such as food, clothing, and shelter; it encompasses opportunities such as education, play, work, and discipline and intangibles such as love, respect, and security.) Man/woman intercourse, as an act of compelling passion often leading to child-bearing, has important implications for society. Societal interests are corroded when child-bearing occurs in a setting of inadequate private welfare and are advanced when it occurs in a setting of adequate private welfare. Passion-based procreation militates against the latter and is conducive of the former. That is because passion, not rationality, may well dictate the terms of the encounter. While rationality considers consequences nine months hence and thereafter, passion does not, to society's detriment. Thus, what is understood to be a fundamental and originating purpose of marriage: to confine procreative passion to a setting, a social institution actually, that will assure, to the largest practical extent, that passion's consequences (children) begin and continue life with adequate private welfare. Although the immediate objects of the protective aspects of this private welfare purpose are the child and the often vulnerable mother, society itself is rationally seen as the ultimate beneficiary.⁴⁹

Because the contemporary man/woman marriage institution advances, albeit imperfectly, this private welfare purpose, many tens of millions in this Nation continue to enjoy the significant incremental increase in child and adult happiness, health, and productivity associated with that institution, something that social science has measured and stated in conclusions that are by now rather uncontroversial.⁵⁰

⁴⁹ See Stewart, *Judicial Redefinition*, *supra* note 8, at 44-46; see also Morrison v. Sadler, 821 N.E.2d 15, 30-31 (Ind. App. 2005).

⁵⁰ See WILCOX ET AL., *supra* note 9.

A society can have, at any given time, only *one* social institution denominated *marriage*.⁵¹ That is because a society, as a simple matter of reality, cannot, at one and the same time, have as shared, core, constitutive meanings of the marriage institution *both* “the union of a man and a woman” *and* “the union of any two persons.” A society, as a simple matter of reality, cannot, at one and the same time, tell people, and especially children, that *marriage* means “the union of a man and a woman” *and* “the union of any two persons.” The one meaning necessarily displaces the other. Hence, every society must choose either to retain the old man/woman marriage institution or, by force of law, to suppress it and put in its place the radically different genderless marriage institution.⁵²

⁵¹ Stewart, *Judicial Elision*, *supra* note 8, at 24 (“Given the role of language and meaning in constituting and sustaining institutions, two ‘coexisting’ social institutions known society-wide as *marriage* amount to a factual impossibility.”).

⁵² For completeness, I need to say that a society really has three options: man/woman marriage, genderless marriage, or no normative marriage institution at all. See Stewart, *Washington and California*, *supra* note 8, at 510. Among elites worldwide, the third option has a large number of strong and effective advocates, and the Americans in their midst “came out of the closet” in July 2006 with the *Beyond Same-Sex Marriage* manifesto. BEYOND SAME-SEX MARRIAGE: A NEW STRATEGIC VISION FOR ALL OUR FAMILIES & RELATIONSHIPS (2006) at <http://www.beyondmarriage.org/>. (For two articles that do a good job placing this manifesto in its larger social/political/legal context, see Stanley Kurtz, *The Confession*, NATIONAL REVIEW ONLINE, Oct. 31, 2006, available at <http://article.nationalreview.com/print/?q=ZDY4Y2U4MGJkODRIZTFhNjk2MjZhZTZlMGMyNmUzZW E=>; Stanley Kurtz, *The Confession II*, NATIONAL REVIEW ONLINE, Nov. 1, 2006, available at <http://article.nationalreview.com/?q=MmRhNTdINDNkOGQxOGFhNDE3ODdlOGI4ODU5ZDljOGE=>.)

The contemporary American political reality, however, is that presently we have only the first two options. But it seems clear that many of the most influential advocates of the second option – genderless marriage – correctly and gladly see that option as leading quite certainly to the third option – no normative marriage institution at all. Kurtz, *The Confession*, *supra*; Kurtz, *The Confession II*, *supra*. It must be remembered that, when public meanings and norms are insufficiently *shared*, the social institution constituted by those meanings and norms disappears – as do the social goods uniquely and previously provided by that institution. When the disappearing social institution is marriage, what is left is a motley crew of lifestyles, and a lifestyle is to an institution what a plain sheet of paper is to a \$1,000 bill. And this analogy is apt because money is one of our most important social institutions:

[W]e can say, for example, in order that the concept “money” apply to the stuff in my pocket, it has to be the sort of thing that people think is money. If everybody stops believing it is money, it ceases to function as money, and eventually ceases to be money. . . . [I]n order that a type of thing should satisfy the definition, in order that it should fall under the concept of money, it must be believed to be, or used as, or regarded as, etc., satisfying the definition. . . . And what goes for money goes for elections, private property, wars, voting, promises, marriages, buying and selling, political offices, and so on.

But again, to suppress, by force of “constitutional” law no less, the shared public meanings constituting the old institution is to lose the valuable social goods flowing from those institutionalized meanings.

Another salient social institutional reality is this: man/woman marriage is a pre-political institution, while genderless marriage must of necessity be a post-political, law-constructed, and hence fragile institution.⁵³ Joseph Raz captures the reality well and accurately when he observes that the law’s role relative to man/woman marriage and other pre-political institutions is “to give them formal recognition, bring legal and administrative arrangements into line with them, facilitate their use by members of the community who wish to do so, and encourage the transmission of belief in their value to future generations.”⁵⁴ Thus, when a same-sex couple successfully asserts a “right to marry” they are necessarily imposing on the state *not* a correlative duty to allow them into the existing man/woman marriage institution – which the law is impotent to do,⁵⁵ although it is sufficiently potent to de-institutionalize man/woman marriage⁵⁶ – *but* a correlative duty to construct and maintain in all its fragility the radically different genderless marriage institution, in which every couple who claims to be married (whether same-sex or man/woman) must participate if the couple’s claim is to have legitimacy.⁵⁷

JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 32 (1995).

⁵³ Seana Sugrue, *Soft Despotism and Same-Sex Marriage*, in *THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, AND MORALS* 172, 180-81, 186-91 (Robert P. George & Jean B. Elshtain eds., 2006). Sugrue notes: “Being entirely a creation of the state, it [the genderless marriage institution] is an institution that needs to be coddled, and which demands cocooning to protect it. Its very fragility demands a culture in which it is protected.” *Id.* at 190.

⁵⁴ RAZ, *supra* note 43, at 161; *see* DeCoste, *Transformation*, *supra* note 8, at 635.

⁵⁵ Stewart, *Redefinition*, *supra* note 8, at 84-85.

⁵⁶ Stewart, *Judicial Elision*, *supra* note 8, at 36-37.

⁵⁷ *Id.* at 52 n.137.

Proponents of man/woman marriage have advanced other marriage facts,⁵⁸ but those just stated are central to any intellectually serious resolution of the marriage issue. The next subsection states the marriage facts foregrounded by the proponents of genderless marriage – and *as* they present them.

B. THE FACTUAL BASIS OF THE CASE FOR GENDERLESS MARRIAGE

Same-sex couples are just as capable as man/woman couples of forming and participating in loving, caring, committed, enduring, and intimate relationships and therefore of successfully entering into and continuing in marriage. Same-sex couples are likewise equally capable of being good parents. Moreover, committed same-sex couples—and the children they are raising—need, just as much as do the adults and children now privileged by marriage, the many psychological, legal, economic, and wider social benefits that marriage provides in our society.

Regarding the first point—the equal capacity of same-sex couples to form and participate in loving, caring, committed, enduring, and intimate relationships, including marriage—, it must be remembered that for all couples, same-sex and man/woman, “it is the exclusive and permanent commitment of the marriage partners to one another . . . that is the sine qua non of civil marriage.”⁵⁹ Or stated in slightly different words, for all couples, “[m]arriage as it is understood today, is . . . a partnership of two loving equals who choose to commit themselves to each other”⁶⁰ Marriage is thus accurately viewed as the “exclusive commitment of two individuals to each other [which] nurtures

⁵⁸ *See id.* at 4.

⁵⁹ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003).

⁶⁰ *Hernandez v. Robles*, 794 N.Y.S.2d 579, 609 (N.Y. Sup. Ct. 2005) *rev’d* 7 N.Y.3d 338 (N.Y. 2006).

love and mutual support . . .”⁶¹ and as “a unique expression of a private bond and profound love between a couple.”⁶²

It also must be remembered that marriage is more even than such a loving commitment between two adults; it is also a very public celebration of their commitment. “Civil marriage is at once a deeply personal commitment to another human being *and* a highly *public celebration* of the ideals of mutuality, companionship, intimacy, fidelity, and family.”⁶³ Same-sex couples are thus seeking “what their friends, relatives, co-workers and neighbors already enjoy—participation with the one person each loves in the central rite of passage in American family life”⁶⁴ and access to “society’s most significant public proclamation of commitment to another person for life . . .”⁶⁵

This blend of personal commitment and public celebration is the essence of modern marriage:

Marriage is, without dispute, one of the most significant forms of personal relationships. . . . Through the institution of marriage, individuals can publicly express their love and commitment to each other. Through this institution, society publicly recognizes expressions of love and commitment between individuals, granting them respect and legitimacy as a couple. This public recognition and sanction of marital relationships reflect society’s approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships.⁶⁶

Thus, “critical reflection upon the functions and purposes that society associates with civil marriage and the individual needs and goods that it promotes” point to these: “love

⁶¹ Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).

⁶² Brief for Plaintiffs-Appellants, Hernandez v. Robles, 7 N.Y.3d 338 (N.Y. 2006) (No. 86) at 21.

⁶³ Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 954 (Mass. 2003) (emphasis added).

⁶⁴ Brief of Appellants, Lewis v. Harris, 908 A.2d 196 (N.J. 2006) (A-68-05) at 3.

⁶⁵ Brief for Plaintiffs-Appellants, Hernandez v. Robles, 7 N.Y.3d 338 (N.Y. 2006) (No. 86) at 21.

⁶⁶ Halpern v. Toronto (City), [2003] 65 O.R.3d 161, 225 D.L.R. (4th) 529 at ¶x (Ont. C.A.).

and friendship, security for adults and their children, economic protection, and public affirmation of commitment.”⁶⁷

Because of their equal capacity for marriage, it is deeply hurtful to same-sex couples for the law to exclude them from marriage. That is so at the psychological level because the exclusion communicates to same-sex couples and to society generally that their most important relationships and their very self-identity are less worthy than the corresponding relationships and self-identity of participants in man/woman marriage.⁶⁸ Contrariwise, to allow same-sex couples to marry “can only enhance [their] sense of self-worth and dignity.”⁶⁹

The hurt extends into the legal and economic spheres because a multitude of laws provides to married people hundreds of procedural and substantive benefits.⁷⁰ In the absence of genderless marriage, such benefits are available to committed same-sex couples only through expensive private ordering (contracts) or, all too often, not at all.⁷¹ Deprivation of these legal and economic benefits creates constant difficulties for committed same-sex couples that their married counterparts cannot adequately fathom.⁷²

Committed same-sex couples are not the only ones who suffer from these kinds of deprivations. Many hundreds of thousands of children in the United States are currently

⁶⁷ LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 6 (2006).

⁶⁸ See Tobin A. Sparling, *All in the Family: Recognizing the Unifying Potential of Same-Sex Marriage*, 10 *LAW & SEXUALITY* 187 (2001).

⁶⁹ *Halpern v. Toronto (City)*, [2003] 65 O.R.3d 161, 225 D.L.R. (4th) 529 at ¶ 5 (Ont. C.A.).

⁷⁰ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 955 (Mass. 2003).

⁷¹ Gay & Lesbian Advocates and Defenders, *Protections and Responsibilities of Marriage*, available at <http://www.glad.org/rights/CT-protectionsbenefits.pdf>.

⁷² Lambda Legal Defense & Education Fund, *Why Marriage Equality Matters* (May 10, 2004), available at <http://www.lambdalegal.org/our-work/publications/facts-backgrounds/page.jsp?itemID=31988962>.

being raised by same-sex couples.⁷³ Many of those children are the product of one or the other partner's prior man/woman relationship, but some are the product of assisted reproductive technology (ART).⁷⁴ Further, an increasing number of jurisdictions are allowing same-sex couples to adopt.⁷⁵ The exclusionary nature of the man/woman meaning embedded in our marriage laws blocks all the children in homes headed by same-sex couples from the well-demonstrated psychological, legal, economic, health, and wider social benefits accruing to those children whose caregivers are married.⁷⁶

In this context, it must be remembered that committed same-sex couples, in general, are just as capable as married couples, in general, of being good parents.⁷⁷ The progressive adoption laws just mentioned manifest a political recognition of this fact. Moreover, a number of social science studies confirm “no differences” in outcomes between the mother/lesbian partner child-rearing mode and the married mother/father child-rearing mode.⁷⁸ Accordingly, even if one were to view marriage as principally a child-centered and child-rearing institution, the demonstrated child-rearing capacity of committed same-sex couples makes them equally worthy of marriage's benefits and responsibilities.

⁷³ See Liz Seaton, *The Debate Over the Denial of Marriage Rights and Benefits to Same-Sex Couples and their Children*, 4 MARGINS: MD. L.J. RACE, RELIGION, GENDER & CLASS 127, 136-137 (2004).

⁷⁴ See Madeline Marzano-Lesnevich & Galit Moskowitz, *In the Interest of Children of Same-Sex Couples*, 19 J. AM. ACAD. MATRIM. L. 268-269 (2005).

⁷⁵ See Eleanor Michael, Note, *Approaching Same-Sex Marriage: How Second-Parent Adoption Cases Can Help Courts Achieve the “Best Interests of the Same-Sex Family,”* 36 CONN. L. REV. 1439 (2004).

⁷⁶ See Lauren Schwartzreich, *Restructuring the Framework for Legal Analyses of Gay Parenting*, 21 HARV. BLACKLETTER L. J. 109 (2005); Michael S. Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 VA. J. SOC. POL'Y. & L. 291 (2001).

⁷⁷ William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America's Children*, 15 THE FUTURE OF CHILDREN 97 (Fall 2005).

⁷⁸ See American Civil Liberties Union, Press Release, *Maryland Psychologists, Social Workers, and Child Welfare Advocates Speak Out in Support of Marriage for Same-Sex Couples* (Nov. 30, 2006), available at <http://www.aclu.org/lgbt/relationships/27548prs20061130.html>.

Marriage has long been understood as exerting a “gentling” and “civilizing” influence on husbands. In comparison to them, unmarried men historically have tended to be both the greater source and the greater victims of a wide range of social pathologies. That pattern continues in contemporary America, and consequently wise public policy will seek to encourage men to marry, not block them from it. A not insubstantial portion of unmarried men in our Nation are gay, and the law blocks them from the only kind of marriage that can be truly meaningful to them—and therefore truly beneficial in the ways that man/woman marriage has proven to be beneficial for straight men. Marriage for gay men will be beneficial for them in ways redounding to the benefit of society generally.⁷⁹

Civil marriage is a legal construct; it is a creature of law,⁸⁰ which gives it efficacy and influence in our society. “[M]arriage draws its strength from the nature of the civil marriage contract itself and the recognition of that contract by the State.”⁸¹ As a legal construct, civil marriage, like all other legal constructs, must conform to constitutional norms of equality, liberty, autonomy, and human dignity.⁸² Also as a legal construct, civil marriage is fully amenable to the usual refining and improving mechanisms of the law, including both legislative and judicial action.⁸³ Indeed, marriage has always been an

⁷⁹ This is the rather famous “conservative case for gay marriage.” See Andrew Sullivan, *Here Comes the Groom: A Conservative Case for Gay Marriage*, NEW REPUBLIC 20 (Aug. 28, 1989); WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT (1996); Andrew Sullivan, *The Conservative Case for Gay Marriage*, TIME 76 (June 22, 2003).

⁸⁰ *Hernandez v. State*, 805 N.Y.S.2d 354, 377 (N.Y. App. Div. 2005) (Saxe, J., dissenting) (“Civil marriage is an institution created by the state . . .”).

⁸¹ *Andersen v. King County*, 138 P.3d 963, 1018 (Wash. 2006) (Fairhurst, J., dissenting).

⁸² See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

⁸³ See *id.*

evolving institution, in large measure through the operation of law.⁸⁴ Many of those law-mandated or law-sanctioned changes important in marriage's evolution logically support the next inevitable change in marriage law, the redefinition of marriage from the union of a man and a woman to the union of any two persons.⁸⁵ The most important such legal changes are those moving away from gender-based rights and roles towards legal equality of spouses;⁸⁶ away from "the procreation of children . . . as a central purpose of marriage, as . . . reflected in the common concept of consummation";⁸⁷ away from no legal protection (even penalties) for unwed, co-habiting couples and their offspring towards legal provision to them of a variety of rights and protections;⁸⁸ and away from the recognition of natural parenthood (that is, parenthood arising from biological ties) towards the recognition of legal parenthood (that is, parenthood as solely a status conferred by law, which may or may not consider biological ties).⁸⁹ Regarding the elimination of gender rights and roles in marriage, "[i]t is more difficult to argue that marriage requires two spouses of opposite gender, since there are no longer legally specified gender roles, and socially there is growing ambiguity about the roles of

⁸⁴ See, e.g., Nicholas Bala, *The Debates About Same-Sex Marriage in Canada and the United States: Controversy Over the Evolution of a Fundamental Social Institution*, 20 *BYU J. PUB. L.* 195, 228 (2006) ("Marriage is one of the oldest, most universal and important of social institutions. It has, however, dramatically changed over the course of recorded history, and today there is great variation around the world in the laws and mores of marriage in different countries.").

⁸⁵ *Id.* at 202-03.

⁸⁶ *Id.* at 201-02.

⁸⁷ *Id.* at 198.

⁸⁸ *Id.* at 199, 202, 203-09.

⁸⁹ BLANKENHORN, *supra* note 31, at 155-56. The Canadian parliamentary enactment mandating genderless marriage contains several provisions specifying "legal parent" and, in that way, replacing natural parenthood with legal parenthood. Civil Marriage Act, 2005 S.C., ch. 33, §§ 6(1), 10(1)-(3), 11, 12(1) (Can.), available at http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Parl=38&Ses=1&Mode=1&Pub=Bill&Doc=C-38_4&File=56#9.

‘husband’ and ‘wife.’”⁹⁰ Regarding both marriage-like legal arrangements governing unwed, co-habiting couples and the recognition of legal parenthood, those changes in the law lay “the ground work for a more flexible approach for the . . . recognition of same-sex relationships.”⁹¹

To a very great extent, religion is the source of the man/woman limitation in our society’s marriage laws; it is accurate to see as religious not only the arguments advanced in support of that legal limitation but also the very meaning of man/woman marriage itself. Thus, that law-sanctioned limitation of marriage to the union of a man and a woman “stems, in substantial part, from . . . animosity that is rooted in moral and religious objections”⁹² and from the intent both “to impose religious and moral restrictions on the state regulated civil institution of marriage . . . [and] to impose religious sensibilities or religiously-based moral codes on others’ most intimate life decisions.”⁹³ Moreover, that law-sanctioned limitation “reflects a *religious* viewpoint [but] *religious* doctrine should not govern state regulation of *civil* marriage.”⁹⁴ Religious marriages certainly may continue to conform to whatever doctrines the sponsoring religions proclaim,⁹⁵ but civil marriage must be untainted by the religiously based man/woman limitation because a civil marriage regime so tainted “reflects an impermissible State religious establishment.”⁹⁶

⁹⁰ Bala, *supra* note 84, at 202-03.

⁹¹ *Id.* at 209.

⁹² Andersen v. King County, 138 P.3d 963, 1032 (Wash. 2006) (Bridge, J., dissenting).

⁹³ *Id.* at 1034.

⁹⁴ *Id.* at 1035 (emphasis in original).

⁹⁵ *E.g.*, Brief of Amici Curiae Religious Organizations, New York Congregations and Clergy, and Other New York Faith-Based Communities in Support of Plaintiffs-Appellants, at 10-13, Samuels v. Dep’t of Pub. Health, 811 N.Y.S.2d 136 (N.Y. App. 2004) (No. 98084).

⁹⁶ Andersen v. King County, 138 P.3d 963, 1027-28 (Wash. 2006) (Bridge, J., dissenting).

Because same-sex couples in general, relative to man/woman couples in general, have equal capacity to participate in modern marriage and equal capacity to be good parents, the ongoing refusal to include them in civil marriage must be understood as resulting from a continuation of the historic social animus towards gay men and lesbians.⁹⁷ That historic animus cannot be gainsaid, and because of the absence of any rational, non-religious justification for excluding same-sex couples from marriage, that exclusion must be, as a matter of fact, the present fruit of that same (still pervasive and still powerful) animus.⁹⁸

C. RESPONSES – AND A CRITICAL EXAMINATION

1. The factuality of the narrow and broad marriage descriptions

a. *Is, ought, and the relationship between the two descriptions*

Rather clearly, the two competing packages of marriage facts provide much different descriptions of what marriage is in contemporary America. Before turning to the task of assessing factual accuracy, however, something needs to be said about *is* (as in, what marriage *is*) and *ought* (as in, what marriage *ought* to be). Finding the answer to “What is marriage?” is made more difficult by encounters with concepts of what marriage *ought* to be, palmed off as descriptions of what it *is*. With more or less

⁹⁷ See Barbara J. Cox, *Are Same-Sex Marriage Statutes the New Anti-Gay Initiatives?*, 2 NAT’L. J. OF SEX. ORIENT. L. 194 (1996), available at <http://www.ibiblio.org/gaylaw/issue4/cox3.html>.

⁹⁸ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003) (“The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual.”); see M. Isabel Medina, *Of Constitutional Amendments, Human Rights and Same-Sex Marriages*, 64 LA. L. REV. 459 (2004).

For a list created by several dozen thoughtful observers of twenty-three “positive consequences” of genderless marriage, see BLANKENHORN, *supra* note 31, at 203-205.

justification, each side accuses the other of such palming off.⁹⁹ Certainly the temptation to that intellectual sin is omni-present; each side fights this fight because of what it wants for our society or for a particular part of our society, because of how it believes things *ought* to be, and each side accurately sees its particular version of marriage as essential to achieving its vision of the good. It is for this reason that the examination of what marriage *is* cannot be strictly limited to this subsection, although most of the heavy lifting occurs here. The work of understanding the nature of marriage, including the critical task of discerning the true character of notions of what marriage ought to be regardless of how those notions are palmed off, must be done to some extent in relation to nearly every argument and counter-argument.

With that said about the *is/ought-to-be* problem, I turn now to the relationship between the two competing packages of marriage facts.

⁹⁹ Genderless marriage proponents accuse their opponents (uniformly) of seeking a return to a 1950's version of marriage and family, of trying to enshrine the Ozzie and Harriet model as the only legally and socially acceptable model of marriage and family. Indeed, the Ozzie and Harriet charge is ubiquitous. *See, e.g.,* Chris Graham, *Marriage amendment - a lose-lose-lose situation?*, AUGUSTA FREE PRESS (Oct. 30, 2006), available at <http://www.law.ucla.edu/williamsinstitute/press/MarriageAmendmentALoseLoseLoseSituation.html> (quoting Stephanie Coontz as saying, "There's a certain magical thinking that if you pass these laws you can make everything go back to some 'Ozzie and Harriet' version of family life that really wasn't very accurate in the first place."); Vanessa Ho & Mike Lewis, *Anger, Disappointment--and Hope*, SEATTLE POST-INTELLIGENCER A15 (July 27, 2006) ("King Council Councilman Larry Gossett said the majority opinion [in the Washington marriage case] was 1950s 'Ozzie and Harriet' thinking-that the straight, two-parent, lifelong marriage producing only biological children is the norm or that it should be.").

Interestingly, it has been observed that:

The gay/lesbian rights movement has skillfully and often successfully deployed what may fairly be called the "atypical couples tactic." This tactic uses as the public face of the genderless marriage campaign a number of carefully selected same-sex couples virtually indistinguishable (except for gender) from Ozzie and Harriet Nelson or Clair and Heathcliff Huxtable and then points relentlessly to those couples as the "answer" to what the genderless marriage campaign is all about. The phrase "atypical couples tactic" is fair because such couples constitute a quite small portion of the gay and lesbian community and because the movement, and especially its most active litigating components—Lambda Legal Defense and Education Fund and Gay and Lesbian Advocates and Defenders (GLAD)—[are] indeed being consciously tactical

Stewart & Duncan, *supra* note 6, at 586.

In the two previous subsections, the perceptive reader saw a rather stark divergence on a fundamental question of fact: What *is* marriage? I suggest, however, that the *very* perceptive reader saw not so much divergence as a broad delimitation or description encompassing most but not all of a very much smaller one. The man/woman marriage proponents' broad description encompasses a wide range of marriage-produced social goods; the genderless marriage proponents' much more narrow description, far fewer. And the same holds true relative to marriage's purposes, practices, formative (of individuals) powers, and interactions with other social institutions: the broad description encompasses much, while the narrow description excludes much.

The genderless marriage proponents' narrow description is premised on the "close personal relationship" model or theory of marriage.¹⁰⁰ Influential British sociologist Andrew Giddens did much to focus scholarly and popular attention on this theory,¹⁰¹ which

focuses primarily on the nature of relationships between two people (or what is called "dyadic" relationships). For close relationship theorists, marriage becomes a subcategory of this core concept; marriage is simply one kind of close personal relationship. The structures of the discipline tend to strip marriage of the features that reflect its status and importance as a social institution.¹⁰²

Consequently, "marriage is seen primarily as a private relationship between two people, the primary purpose of which is to satisfy the adults who enter it. Marriage is about the couple. If children arise from the union, that may be nice, but marriage and children are

¹⁰⁰ See Stewart, *Washington and California*, *supra* note 8, at 508-09, 527-31.

¹⁰¹ See, e.g., ANDREW GIDDENS, *THE TRANSFORMATION OF INTIMACY: SEXUALITY, LOVE AND EROTICISM IN MODERN SOCIETIES* (1992).

¹⁰² COUNCIL ON FAMILY LAW, *supra* note 31, at 14.

not really connected.”¹⁰³ Giddens believes that we are in fact moving from “a marriage culture to a culture that celebrates ‘pure relationship,’”¹⁰⁴ with that term being understood as a relationship “that has been stripped of any goal beyond the intrinsic emotional, psychological, or sexual satisfaction which the relationship currently brings to the [two adult] individuals involved.”¹⁰⁵ Under this model, marriage’s social goods are “love and friendship, security for adults and their children, economic protection, and public affirmation of commitment.”¹⁰⁶

The man/woman marriage proponents’ broad description *encompasses most but not all of what the close personal relationship model describes*. It encompasses, for example, the social goods of “love and friendship, security for adults and their children, economic protection, and public affirmation of commitment”¹⁰⁷ and the ideal of “a partnership of equals with equal rights, who have mutually joined to form a new family unit, founded upon shared intimacy and mutual financial and emotional support.”¹⁰⁸ As seen above, however, the broad description encompasses much more; the institutionalized man/woman meaning is seen as the source of *additional* social goods, including provision of the most effective (or only) means of supporting a child’s right to know and be reared by his or her mother and father (with exceptions only in the best interests of the child, not any adult), of maximizing the private welfare provided to the children conceived by passionate man/woman coupling, of sustaining the optimal child-rearing mode (married

¹⁰³

Id.

¹⁰⁴ *Id.* at 15.

¹⁰⁵ *Id.*

¹⁰⁶ MCCLAIN, *supra* note 67, at 6.

¹⁰⁷ *Id.*

¹⁰⁸ Hernandez v. Robles, 805 N.Y.S.2d 354, 381 (N.Y. App. Div. 2005) (Saxe, J., dissenting).

mother/father), of bridging the male/female divide, and of furnishing the status and identity of *husband* or *wife*.

Acceptance of the broad description requires rejection of two salient aspects of the close personal relationship model. First, it requires rejection of the notion that as a matter of fact marriage is *only*, is *no more than*, what that narrow model describes. In the marriage debate, genderless marriage proponents rarely if ever own expressly that notion of “no more than,” but the notion is *always* implicit in their arguments. This phenomenon of an always implicit “no more than” notion is important and merits close examination, something that follows shortly.¹⁰⁹ Second, the broad description also requires rejection of the notion that children – generativity, procreation, child-bearing, and child-rearing – are not “the sine qua non of civil marriage”¹¹⁰ and that “marriage and children are not really connected.”¹¹¹ That rejection is required because, as seen above, the broad description of marriage reveals marriage as primarily a child-protective and child-centered institution, with most of the institution’s social goods pertaining to the quality of child-rearing. At the same time, the narrow, or close personal relationship, model describes an adult-centered arrangement. That adult-centered feature is clear; a genderless marriage proponent, Johns Hopkins University’s Andrew Cherlin, traces the history of that model—“an intimate partnership entered into for its own sake, which lasts only as long as both partners are satisfied with the rewards (mostly intimacy and love) that they get

¹⁰⁹ See *infra* notes 119-157 and accompanying text.

¹¹⁰ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003) (“While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.”).

¹¹¹ COUNCIL ON FAMILY LAW, *supra* note 31, at 14.

from it”¹¹²—and reports both how the “pure relationship is not tied . . . to the desire to raise children”¹¹³ and how scholarly “attempts to incorporate children into the pure relationship are unconvincing.”¹¹⁴

This just-described understanding of the relationship between the broad and narrow descriptions of marriage, accurate as that understanding is, in itself provides no guidance to which description of contemporary American marriage is most accurate as a matter of fact. But the understanding offers a good vantage point for assessing the fact question, and because “What is marriage?” is indeed a question of fact, the evidence comes next.

b. The weight of the evidence

Before critically examining any response from either side of the marriage issue, one distinction seems merited. A response may fall into one of three categories: direct engagement, indirect engagement, or silence (a refusal to engage). The last, silence, needs no further explanation. A response in the form of direct engagement expressly identifies the marriage fact that it seeks to counter and then proceeds with the effort. A response in the form of indirect engagement does not expressly acknowledge a marriage fact put forth by the other side but, on reflection, is seen as a contradiction to it.

Genderless marriage proponents either agree with or are silent regarding a number of understandings, emerging from social science and social institutional studies,

¹¹² Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848, 853 (2004).

¹¹³ *Id.*

¹¹⁴ *Id.* at 858.

regarding man/woman marriage.¹¹⁵ In the briefs, opinions, and scholarly pieces where genderless marriage proponents engage the marriage facts, one does not find any denial that marriage is a vital social institution;¹¹⁶ that marriage, like all social institutions, is constituted by widely shared social meanings; that these often normative institutional meanings teach, form, and transform individuals, providing identities, purposes, practices, and projects; and that, in this way, these meanings provide valuable social goods. Likewise, one does not find in those sources any denial that, across time and cultures, a core meaning constitutive of the marriage institution has nearly always been and still is *the union of a man and a woman*.¹¹⁷ Nor is there a denial that the social institution premised on and constituted by that meaning promotes a number of social goods (beyond those provided by marriage as described in the close personal relationship model) pertaining to a child's right to know and be brought up by his or her biological

¹¹⁵ In the socio-politico-legal contest over an issue as consequential and divisive as the marriage issue, with its large torrent of scholarly and polemic literature, it is always risky, if not downright foolish, to say that certain of one side's assertions have been met with no response but only silence. Yet that is what I say. I am emboldened to do so because I am dealing with only a portion of the torrent – the briefs and judicial opinions in, and the scholarly pieces on, the cases addressing the marriage issue. As noted, I am not dealing with all marriage facts but only those foregrounded by each side of the issue – in just those briefs, judicial opinions, and scholarly pieces. It seems fair to limit my search for responses to the same sources.

¹¹⁶ The judges who have either mandated genderless marriage or would if they had enough votes uniformly acknowledge this reality. Stewart, *Judicial Redefinition*, *supra* note 8, at 75 (“Marriage is a vital social institution.” So begins *Goodridge*. The opinions in that case go on to refer to *institution* in the context of marriage over 80 times. *Halpern*'s references exceed 40; *EGALE*'s, 35.”); Stewart, *New York*, *supra* note 8, at 231 (a New York dissenting opinion arguing for genderless marriage “uses the word *institution* in connection with marriage twenty-one times”); Stewart, *Washington and California*, *supra* note 8, at 517 (“[A]ll judges on each side of the marriage issue in *Andersen and Marriage Cases* acknowledge that marriage is a vital social institution.”). In making his case for genderless marriage, Ronald Dworkin acknowledges: “The institution of marriage is unique; it is a distinct mode of association and commitment that carries centuries and volumes of social and personal meaning.” RONALD DWORKIN, *IS DEMOCRACY POSSIBLE HERE?* 86 (2006).

¹¹⁷ A quite sizable (in light of the uncertain importance of the question) amount of debate has ensued over whether a small or a quite small portion of one percent of all humans on earth since pre-history lived in a culture without man/woman marriage or in a culture with an institutionalized and marriage-like arrangement for same-sex couples. See, e.g., BLANKENHORN, *supra* note 31, at 105-20; ESKRIDGE, *supra* note 79, at 15-50; Peter Lubin & Dwight Duncan, *Follow the Footnote, or the Advocate as Historian of Same-Sex Marriage*, 47 CATH. U. L. REV. 1271(1998).

parents; provision of private welfare to children conceived by passionate, heterosexual coupling; a bridge over the male-female divide; and the identity and status of *husband* or *wife*. Consequently, there is also no express denial of a significant divergence in the nature of the two possible marriage institutions' social goods.¹¹⁸ Thus, genderless marriage proponents leave uncontested nearly all the key social institutional realities undergirding the social institutional argument for man/woman marriage – and expressly accept the most fundamental one, that marriage is a vital social institution.¹¹⁹

This reality of silence, of leaving uncontested, key social institutional realities leads to the promised close examination of a phenomenon identified earlier and relating to the notion that as a matter of fact contemporary American marriage is *only*, is *no* more than, what that the narrow description depicts. The phenomenon is that genderless marriage proponents rarely if ever own expressly that notion but invariably have it implicit in their arguments. This phenomenon of an always implicit “no more than” notion is important and merits close examination, for two reasons. First, the notion itself goes to the heart of the factuality of the narrow and broad descriptions; if the “no more than” notion is factually accurate, it must follow that what the broad description depicts

¹¹⁸ That divergence is examined in some depth in Stewart, *Judicial Elision*, *supra* note 8, at 20-24.

¹¹⁹ Note 116 *supra* demonstrates genderless marriage proponents' express acceptance of marriage's institutionality. In this context, something that David Blankenhorn recently wrote merits examination: “In today's discussion of marriage in the United States, by far the biggest problem is the widespread refusal to respect or even acknowledge the *institutionality* of marriage. It's as if we have forgotten what a social institution is.” BLANKENHORN, *supra* note 31, at 97 (emphasis in original). This statement is inaccurate in one respect; as seen, genderless marriage proponents expressly acknowledge that marriage is a vital social institution. Blankenhorn's statement is accurate, however, with respect to the many additional social institutional realities just summarized in the text and forming the foundation of the social institutional argument for man/woman marriage; genderless marriage proponents do uniformly “refus[e] to respect or even acknowledge” those realities. Rather clearly, they so refuse exactly because to acknowledge those realities is to lose their constitutional case certainly and their public policy (legislative) case very probably. *See, e.g.*, Stewart, *Judicial Elision*, *supra* note 8, at 28-77; Stewart & Duncan, *supra* note 6, at 589-95 (describing the real “price tag” facing a society that deinstitutionalizes man/woman marriage).

beyond the narrow description's depiction is false as a matter of fact. On the other hand, if the "no more than" notion is erroneous as a matter of fact, that error would be established exactly by validation of the broad description's *additional* depictions. Second, if – as I have just asserted – an aspect of the phenomenon is that the "no more than" notion is always or nearly always implicit and therefore not expressly stated *and* defended, that aspect is also important. It is important because it constitutes probative evidence, it seems to me, about how defensible the "no more than" notion really is.

Linda McClain's recent book, *The Place of Families: Fostering Capacity, Equality, and Responsibility*,¹²⁰ provides a helpful and fair way to examine the phenomenon, for several reasons. First, McClain is an experienced family law scholar.¹²¹ Second, she is a consistent advocate for genderless marriage.¹²² Third, her book aims to be a rather thorough-going engagement with contemporary American marriage.¹²³ Fourth, the book is relatively recent, having published in the latter part of 2006, meaning that it published *after* the broad description of marriage – and the social institutional argument for man/woman marriage arising from that description – had been brought to a rather high level of elaboration, sophistication, and clarity.¹²⁴ It must be remembered, however, that I use *The Place of Families* to examine a prevalent *method* of argument, not the factual validity of the book's premises and assertions. Don Browning does well that latter task (and finds the

¹²⁰ MCCLAIN, *supra* note 67.

¹²¹ Her curriculum vitae is available at http://law.hofstra.edu/pdf/ftfac_mcclain_vitae.pdf.

¹²² See, e.g., Linda C. McClain, *Intimate Affiliation and Democracy: Beyond Marriage?* 32 HOFSTRA L. REV. 379, 383 (2003); Linda McClain, *Toleration, Autonomy, and Governmental Promotion of Good Lives: Beyond "Empty" Toleration to Toleration as Respect*, 59 OHIO ST. L.J. 19, 26-27 (1998); Linda McClain, *Deliberative Democracy, Overlapping Consensus, and Same-Sex Marriage* 66 FORDHAM L. REV. 1241, 1249-52 (1998).

¹²³ See MCCLAIN, *supra* note 67, 4-11.

¹²⁴ E.g., Stewart, *Judicial Elision*, *supra* note 8 (published and provided to Prof. McClain in January/February 2006).

book wanting),¹²⁵ and later on this article examines those premises and assertions to the extent (which is large) that they are part of the package of marriage facts foregrounded by genderless marriage proponents. But for now the focus is on a particular phenomenon – a method of argument – well exemplified by *The Place of Families*.

In *The Place of Families*, the “framework” of which is “informed by key liberal and feminist principles,”¹²⁶ McClain advocates for genderless marriage,¹²⁷ among other things. Given the book’s level of engagement with contemporary American marriage, it is unsurprising that it throughout provides descriptions of the marriage institution’s purposes, processes, and social goods.¹²⁸ Yet *every* time the book does so, the description is the narrow description and coincides quite nicely with the close personal relationship model.¹²⁹ Moreover, the description is always presented as an *is*, not an *ought to be*; unquestionably, the reader is to understand that the book’s description, which gives due regard to the “evolving paradigm,”¹³⁰ fully accounts for contemporary American marriage. But perhaps most telling is this: never once in many scores of pages considering the marriage institution’s purposes, processes, and social goods does McClain expressly state that her descriptions are complete; never once does she expressly

¹²⁵ Don Browning, *Linda McClain’s “The Place of Families” and Contemporary Family Law: A Critique from Critical Familism*, 56 EMORY L.J. 1384 (2007). For McClain’s response to Browning, see Linda C. McClain, *The “Male Problematic” and the Problems of Family Law: A Response to Don Browning’s “Critical Familism*, 56 EMORY L.J. 1407 (2007).

¹²⁶ MCCLAIN, *supra* note 67, at 4; *see also id.* at 9 (“the liberal feminist account offered in this book”).

¹²⁷ *Id.* at 155-90.

¹²⁸ *See id.* at 164, 174-89, 217-19.

¹²⁹ *See supra* note 128. Although *The Place of Families* speaks at length regarding the education and socialization of children, specifically with respect to development of virtues important for functioning in the modern liberal democratic state, MCCLAIN, *supra* note 67, at 50-84, tellingly the book never links that socializing function to marriage or even to the married mother/father child-rearing mode; rather, the book links it to “families,” and for McClain that means all family forms, no matter how diverse or exotic. It is almost as if the presence of marriage in some of these “families” is a coincidence.

¹³⁰ *Id.* at 6.

assert that the contemporary American marriage institution is no more than what is captured by the book's descriptions. Although the "no more than" notion is never explicit, it is always present. And because the notion is never explicit, although always present, it is never defended.

Moreover, McClain has continued on this same path even after Don Browning criticized the book (to use McClain's own formulation of the criticism) for "fail[ing] to offer an adequate account of *the full range of goods* that are relevant to family life" and for "fail[ing] to give sufficient weight to ... the importance of marriage in securing" key goods.¹³¹ McClain's self-defense is instructive: "*The Place of Families* proposes an approach to family law that is attentive to the goods of family life, including the goods of marriage."¹³² I submit that this language conveys, and is intended to convey, the understanding that the book attends to *all* the relevant goods of family life, including *all* the relevant goods of marriage. But the book neither does that nor acknowledges that it attends to only *some* of the goods of family life, including *some* of the goods of marriage. Although McClain's subsequent defense of the book speaks of the book's attention to three goods, even that defense continues to ignore, as if they do not exist, the goods and purposes of contemporary American marriage duly noted by the broad description but left out of the narrow description.¹³³ And tellingly, the broad description encompasses the three goods that McClain does present: (1) provision of "care to dependent members" of the family, (2) support for "the political order by cultivating important virtues," and (3)

¹³¹ McClain, *supra* note 125, at 1418 (emphasis added).

¹³² *Id.*

¹³³ *See id.* at 1418-24.

provision to adults of “‘the chance to realize the goods of intimate association’ such as ‘love, intimacy, mutuality, interdependence, and friendship.’”¹³⁴

The Place of Families reinforces the “no more than” notion by resort to the tactic of false dichotomy or, if you will, false choice. Here is an example: “Is the core purpose of marriage, for example, procreation or to support intimate commitments?”¹³⁵ The essential and initial fallacy here is the use of *the* in “the core purpose.” I submit that responsible marriage scholarship does not speak in such terms;¹³⁶ the marriage institution is too rich, too much a complex web of social meanings, to speak meaningfully or accurately of one, and only one, “core purpose.”¹³⁷ But that initial fallacy nicely sets up the false choice – you can have marriage as a form of life that supports “intimate commitments” or you can have marriage as a form of life that is all about “procreation.” Which do you choose? This false dichotomy, of course, requires the reader to see as mutually exclusive and thoroughly hostile *inter se* the genderless marriage proponents’ description of marriage and that proffered by proponents of man/woman marriage. But reflection validates what was demonstrated a moment ago – that the broad description of marriage encompasses most but not all of what the close personal relationship model describes.¹³⁸ Thus, the marriage institution has always had something important to do with, and continues to have something important to do with, *both* “procreation” and “intimate associations.”¹³⁹

¹³⁴ *Id.* at 1419 (footnote omitted).

¹³⁵ MCCLAIN, *supra* note 67, at 21.

¹³⁶ See Stewart, *Redefinition*, *supra* note 8, at 44-45.

¹³⁷ *Id.*

¹³⁸ See *supra* notes 107-108 and accompanying text.

¹³⁹ See, e.g., BLANKENHORN, *supra* note 31, at 175:

Another and closely related example of McClain’s resort to false dichotomy centers on the phrase *sine qua non*. The phrase means “[a]n essential element or condition.”¹⁴⁰ In *Goodridge*, the plurality opinion asserts: “While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the *sine qua non* of civil marriage.”¹⁴¹ *The Place of Families* elaborates on the “commitment” portion of that assertion,¹⁴² arguing that, because of the equal “moral capacity of lesbians and gay men to form intimate relationships,”¹⁴³ that is, to partake of the essence of marriage, same-sex couples are as worthy and entitled to marriage as man/woman couples.¹⁴⁴ The book then asks: “Is procreation the essence of

Across history and cultures, marriage is socially approved sexual intercourse between a woman and a man. Marriage is in part a private relationship, but it is also, and fundamentally, a social institution, with rules and forms that create public meaning intended to solve important problems and meet basic needs. The core problem that marriage aims to solve is sexual embodiment – the species’ division into male and female – and its primary consequence, sexual reproduction. The core need that marriage aims to meet is the child’s need to be emotionally, morally, practically, and legally affiliated with the woman and the man whose sexual union brought the child into the world. That is not *all* that marriage is or does, but nearly everywhere on the planet, that is *fundamentally* what marriage is and does.

... It is *not* true that marriage is only incidentally connected to sex, or to children, or to bridging the male-female divide. Most of all, it is *not* true that marriage in essence is [only] an expression of love, a private relationship of commitment between consenting adults.

Put somewhat differently, in the United States today, there are two competing and quite different conceptions of what marriage is. One view says that marriage at its core is a pro-child social institution. The other says that marriage at its core is a post-institutional private relationship. The latter view certainly has many advocates, but the former view is, well, correct.

(Emphasis in original.)

¹⁴⁰ American Heritage Dictionary, *sine qua non*, n., available at <http://www.bartleby.com/61/36/S0423600.html>.

¹⁴¹ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003).

¹⁴² MCCLAIN, *supra* note 67, at 155-66.

¹⁴³ *Id.* at 156.

¹⁴⁴ *Id.* at 155-66.

marriage?”¹⁴⁵ For present purposes, what is important is not the answer to that question but the method of its presentation. McClain, like the *Goodridge* plurality opinion, creates a stark choice. Even though the phrase *sine qua non* itself allows for the possibility of multiple essential elements or conditions (note the use of *an* rather than *the* in the definition), McClain and the plurality opinion will have none of that. Their picture is of a one-dimensional institution that partakes of nothing other than its singular essence or, at most, that encompasses no more than that singular essence and, perhaps, a few tangential and unimportant notions in erratic orbit around that essence. McClain’s and the plurality opinion’s unstated and therefore unsubstantiated premise is that the rich, complex web of meanings constituting the contemporary American marriage institution provides, and can provide, only one “essence.” Thus, the essence of marriage is either “the commitment of the marriage partners” or “procreation.” Take your pick, but you must choose one or the other for they are mutually exclusive. But, of course, all this is a false dichotomy. The sensible response to its deployment is to note the uncontroversial: that the marriage institution has always had something important to do with, and continues to have something important to do with, *both* “procreation” and “intimate associations” or “commitment.”¹⁴⁶

Here is yet another example of McClain’s resort to false dichotomy. “A fundamental disagreement exists between opponents and proponents of same-sex marriage as to whether the best way to support the institution of marriage is to ‘protect’ traditional marriage from any change ... or to understand marriage as an ‘evolving

¹⁴⁵ *Id.* at 165.

¹⁴⁶ *See supra* note 139.

paradigm’”¹⁴⁷ So, which camp are you in – the one that says that marriage does not and must not change or the one that sees marriage as a social institution that does indeed change? But something is missing here. It is allowance to choose the understanding that marriage has over the centuries both changed in important ways and not changed in important ways. As I demonstrate later, that understanding is almost certainly correct.¹⁴⁸ But what is important here is McClain’s tactic: Either marriage changes or it does not. It clearly does. Therefore, change equals (inevitably means) genderless marriage. But that tactic, of course, is indefensible exactly because it fails to negate, or even attempt to negate, the understanding that, although marriage has changed and is changing in some important ways, the man/woman meaning has never changed. A substantiated and effectively defended view is that marriage “is constantly evolving, reflecting the complexity and diversity of human cultures. It also reflects one idea that does not change. For every child, a mother *and* a father.”¹⁴⁹ Ignoring this view is central to McClain’s false choice tactic.

McClain’s tactic, especially her no-doubt conscious omission of that substantiated view from her list of choices, amounts to an enthymeme, an “informal method of reasoning typical of rhetorical discourse.”¹⁵⁰ The enthymeme implies but does not state either a major or a minor premise,¹⁵¹ leaving the reader’s mind, acting almost automatically, to fill in (and thereby accept) the omitted premise – and also relieving the

¹⁴⁷ MCCLAIN, *supra* note 67, at 156.

¹⁴⁸ See *infra* notes 178-186 and accompanying text.

¹⁴⁹ BLANKENHORN, *supra* note 48, at 92.

¹⁵⁰ GIDEON BURTON, THE FOREST OF RHETORIC, *available at* <http://rhetoric.byu.edu/Figures/E/enthymeme.htm>.

¹⁵¹ *Id.*

speaker of the burden of stating something that, for whatever reason, she would rather not state plainly, something like “the reality of past changes in the marriage institution is compatible only with the change to genderless marriage.”

McClain’s method of always implying but never expressly stating the “no more than” notion embedded in the narrow description, of resorting to false dichotomies, and of employing enthymeme all operate to obscure an important reality. That reality is that the broad description encompasses much of the narrow description and nearly all of what in the narrow description has wide public support, including the social goods of “love and friendship, security for adults and their children, economic protection, and public affirmation of commitment”¹⁵² and the ideal of “a partnership of equals with equal rights, who have mutually joined to form a new family unit, founded upon shared intimacy and mutual financial and emotional support.”¹⁵³ Consequently, the question arises as to why an able family law scholar, as McClain surely is, engages in such an approach to the facts of the marriage institution. I proffer one suggestion. It is that the narrow description, with its (implicit) claim to completeness and therefore factual accuracy, must be a part of genderless marriage proponents’ arguments because, as will be seen, the narrow description is *essential* to the success of those arguments – essential in the sense that, without it, the genderless marriage arguments in the courts simply do not work.¹⁵⁴ And, I further suggest, McClain knows this.¹⁵⁵ In any event, the failure of

¹⁵² MCCLAIN, *supra* note 67, at 6.

¹⁵³ *Hernandez v. Robles*, 805 N.Y.S.2d 354, 381 (N.Y. App. Div. 2005) (Saxe, J., dissenting).

¹⁵⁴ *See Stewart, Washington and California*, *supra* note 8, at 508-09, 527-31.

¹⁵⁵ An additional possible explanation relates to the stakes in the genderless marriage contest for adherents of “key liberal and feminist principles.” MCCLAIN, *supra* note 67, at 4. One of those principles is

The Place of Families to express, let alone defend, the “no more than” notion implicit in the narrow description, and the book’s resort to false dichotomy and enthymeme, renders the book (in the most positive light possible) an unhelpful guide relative to the factuality of the narrow and broad descriptions of contemporary American marriage. But that failure must be more than that; it in itself is a strong indicator of the paucity or weakness of evidence supportive of the “no more than” notion because, were such evidence stronger, McClain’s evident diligence would have brought it forth. Further, these particular troubling features of *The Place of Families* render quite unsurprising another of the book’s features: it never acknowledges and therefore never directly engages the social institutional argument for man/woman marriage.¹⁵⁶ In this respect, the book is of a kind with the work product of all other genderless marriage proponents.¹⁵⁷

that there are no inherent or essential differences between men and woman that matter (or should matter) in the eyes of the law. Stewart, *Redefinition*, *supra* note 8, at 86-95.

[That principle’s] adoption in a genderless marriage case both officially validates the [principle] and gives the [principle] the widest and deepest possible social and legal impact. That impact is the widest and deepest possible because it seems politically impossible to have in our societies a more radical and extreme application of the [principle’s] legal conclusion than in a case mandating genderless marriage. All less extreme applications must then necessarily follow. In that fashion, the social/legal agenda of what almost certainly constitutes a minority faction is implemented.

Id. at 95.

¹⁵⁶ Don Browning recently noted the book’s failure to engage the social institutional argument for man/woman marriage, in these terms:

[McClain’s] characterization of the link between marriage and fatherhood ... does not fit my views. ... Rather than emphasizing the gate-keeping role of the woman, my argument puts weight on the *channeling power of marriage as a public institution*. Marriage as an institution integrates men into the *care* of their children through the channeling power of public expectations, legal sanctions, institutional signaling, and, historically, the religious ideas of sacrament and covenant. The affections of the wife are certainly a factor, but it is not this alone that integrates men. ... It is the institutional patterning and reinforcement plus emerging emotional attachments with spouse and child that integrate men into responsible fatherhood. ... McClain ... miss[es] the institutional argument.

Browning, *supra* note 125, at 1395 (emphasis in original; footnotes omitted). For McClain’s response to Browning, see McClain, *supra* note 125.

In a more recent law journal article, McClain does acknowledge the social institutional argument, albeit

Genderless marriage proponents are silent regarding other scholarly endeavors. Those are recent, sophisticated demographic analyses and other forms of analysis showing the predominating nature of the institutionalized man/woman meaning across the United States. Regarding demographic studies, a key one for these purposes is the latest in a series by Ron Lesthaeghe and his colleagues addressing what they call the Second

in a constricted way, but then, quite simply, does not engage it. Linda McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channelling Function of Family Law*, 28 CARDOZO L. REV. 101, 137-39. She acknowledges the argument by referencing Judge Parillo's use of it in his concurring opinion in *Lewis v. Harris*, 875 A.2d 259, 274-78 (N.J. Super. Ct. App. Div. 2005). Her non-engagement with the social institutional argument comes in the form of a recitation of Judge Collester's dissenting opinion in the same case, *id.* at 278-90, as an adequate (and her only) rebuttal. Yet that dissenting opinion has been accurately labeled a "startling judicial performance."

It is startling exactly because the dissenting opinion assiduously refused to acknowledge or even allude to the social institutional argument when that argument was very much on the table. Both the majority opinion and the concurring opinion addressed the social institutional nature of marriage, and the concurring opinion sets out in fairly complete fashion the social institutional argument. Thus, the concurring opinion notes that marriage is a social institution comprised by shared public meanings, that those meanings extend beyond the constricted "close personal relationship" model of marriage (which "strips the social institution 'of any goal or end beyond the intrinsic emotional, psychological, or sexual satisfaction which the relationship brings to the individuals involved'"), that to eliminate the core constitutive meaning of the union of a man and a woman would be to render the institution "non-recognizable and unable to perform its vital function" and would be to "seriously compromise[, if not entirely destabilize[] . . . the durability and viability of this fundamental social institution," that the law "has a purpose and a power to preserve or change public meanings and thus a purpose and a power to preserve or change social institutions," and that "its opposite-sex feature makes it [the marriage institution] meaningful and achieves important public purposes," including the public and rational privileging of heterosexual intercourse in marriage and the advancement of marriage's "private welfare" purpose. Yet from the dissenting opinion not a word about the social institutional argument, not a word about what was certainly a central pillar of the majority's reasoning.

Stewart, *Judicial Elision*, *supra* note 8, at 31-32 (footnote omitted).

¹⁵⁷ See Stewart, *Washington and California*, *supra* note 8, at 518:

The rather startling historical fact is that, despite acknowledging marriage as a vital social institution and having the social institutional argument before them, judges wishing to mandate the redefinition of marriage do not *engage* that argument. To date, not one Canadian or American judge seeing a constitutional right to genderless marriage has done so, despite the fact that the social institutional argument has been before them at a rather high level of elaboration, sophistication, and clarity. Rather, what they do is evade the argument and, in the process, simply ignore a number of social institutional realities.

Demographic Transition (“SDT”). While earlier studies focused on Europe,¹⁵⁸ this study focuses on the United States.¹⁵⁹ The SDT is “characterized by substantial postponement of both marriage and parenthood, and by an increase in the share of births to unmarried couples.”¹⁶⁰ This “postponing or eschewing parenthood altogether [occurs] because of more pressing competing goals such as prolonging education, achieving more stable income positions, increased consumerism associated with self-expressive orientations, finding a suitable companion and realizing a more fulfilled partnership, keeping an open future, and the like.”¹⁶¹ The SDT is further “identified [not just] by the postponement indicators of both marriage and parenthood . . . [but also by] the higher incidence of abortion, the nonconventional household types based on cohabitation, and low overall fertility levels.”¹⁶² Finally, the SDT, in part, is an “expression of secular and anti-authoritarian sentiments of better-educated men and women who [hold] an egalitarian world view, place[] greater emphasis on . . . self-actualization [and] individualistic and expressive orientations . . . and . . . [have] stronger ‘postmaterialist’ political orientations.”¹⁶³ Understood in these terms, the SDT seems to describe rather unequivocally a shift towards acceptance of the close personal relationship model of marriage.

¹⁵⁸ See, e.g., Johan Surkyn & Ron Lesthaeghe, *Value Orientations and the Second Demographic Transition (SDT) in Northern, Western and Southern Europe: An Update*, DEMOGRAPHIC RESEARCH, Apr. 17, 2004, at 45, 52, 67-69, 73-74 available at <http://www.demographic.research.org/special/3/3> [hereinafter Surkyn & Lesthaeghe, *Value Orientations*]; Ron Lesthaeghe & K. Neels, *From the First to a Second Demographic Transition: An Interpretation of the Spatial Continuity of Demographic Innovation in France, Belgium and Switzerland*, 18 EUROPEAN J. POPULATION 325 (2002).

¹⁵⁹ Ron Lesthaeghe & Lisa Neidert, *The Second Demographic Transition in the United States: Exception or Textbook Example?*, 32 POPULATION & DEVELOPMENT REV. 669 (2006).

¹⁶⁰ *Id.* at 669.

¹⁶¹ *Id.*

¹⁶² *Id.* at 681.

¹⁶³ *Id.* at 669.

Even though Lesthaeghe's recent American study was rather clearly intended to magnify the SDT in the United States,¹⁶⁴ that study largely validates what was said earlier: In this country, it is erroneous as a matter of fact to assert that the close personal relationship model is *now*—after a process of evolution—*all* that marriage *is*. Although such an assertion is *not* wrong in some American communities, it is wrong generally speaking across the nation.¹⁶⁵ Indeed, a principal burden of the recent American study is to identify where the SDT is and is not emerging, not just at the state level but at the county level.¹⁶⁶ With respect to four key indicators of the SDT—postponement of marriage, postponement of fertility, never married, and low fertility rates—one state qualifies as a rather extreme outlier, Massachusetts.¹⁶⁷ Other states trending in that direction include New Jersey, New York, Connecticut, Rhode Island, and California.¹⁶⁸ But in *no* state has the trend achieved demographic dominance,¹⁶⁹ a rather telling point in light of Lesthaeghe's evident desire to counter a claim of “American demographic exceptionalism” by magnifying the advancement of SDT in this nation.¹⁷⁰

¹⁶⁴ See *infra* note 170 and accompanying text.

¹⁶⁵ *Id.* at 679 (“A sizable [but not majority] portion of the US non-Hispanic white population displays all the typical characteristics of the second demographic transition, whereas another major [a majority] segment shows few signs of this new demographic pattern.”).

¹⁶⁶ *Id.* at 671-684.

¹⁶⁷ *Id.* at 673-79.

¹⁶⁸ *Id.*

¹⁶⁹ By *demographic dominance*, I mean majority acceptance and implementation of the cluster of ideas and practices comprising the SDT and, therefore, the close personal relationship model of marriage.

¹⁷⁰ It was (to use Lesthaeghe's labels) “social historian and conservative commentator” Allan C. Carlson who advanced the exceptionalism claim. See Allan C. Carlson, *The Fertility Gap: Recrafting American Population*, FAMILY POLICY LECTURES, FAMILY RESEARCH COUNCIL 1 (December 14, 2005), available at <http://www.frc.org/get.cfm?i=PL03G01>; see also Nicholas Eberstadt, *Born in the USA: America's Demographic Exceptionalism*, THE AMERICAN INTEREST ONLINE (May-June 2007), available at (for subscribers) <http://www.the-american-interest.com/ai2/article.cfm?Id=272&Mid=13>, also available at (for all) http://www.aei.org/publications/filter.all,pubID.25988/pub_detail.asp. It is Lesthaeghe (a Belgian), not Carlson, however, who frames the question as: “Is the US population immune to the [SDT] features as a result of higher spiritual values and social conservatism?” Lesthaeghe asserts “that many of its [the United States'] features [but, apparently, not most] come closer to being textbook examples of the second demographic transition than to ‘demographic exceptionalism.’” Lesthaeghe & Neidert, *supra* note 159, at 671-72. To come to even that

Both recent political and marriage practices are further proof that *the union of a man and woman* continues as a strongly *shared* public meaning among the complex of other meanings constitutive of the contemporary institution. One such proof is the simple political fact that forty states and the federal government, within just the past decade or so, have enacted “defense of marriage” acts and/or constitutional amendments expressing that shared meaning and declining to deviate from it in cases of foreign genderless marriages.¹⁷¹ It bears repeating that these laws are very recent social expressions, not the vestiges of “long-accepted assumptions that . . . have eroded.”¹⁷² And in the area of marriage practices, there are these interrelated realities:

[I]nstitutions are not worn out by continued use, but each use of the institution is in a sense a renewal of that institution. Cars and shirts wear out as we use them but constant use renews and strengthens institutions such as marriage [I]n terms of the continued collective intentionality of the users, each use of the institution is a renewed expression of the commitment of the users to the institution.¹⁷³

In 2004, nearly 4.5 million Americans made such an intentional renewed expression of their commitment to the man/woman marriage institution by marrying and thereby

conclusion, however, it is necessary to “refer often to ethnic distinctions in the United States since large parts of the Hispanic population are still in the process of completing their first demographic transition and therefore statistically distort the picture for most of the other segments of the population.” *Id.* at 672. The total picture – the one that includes rather than excludes “large parts of the Hispanic population” – is presumably less congenial to the “strong SDT in the USA” hypothesis and is therefore very largely absent from this study: “[T]he lion’s share of the analysis is devoted to the description of American spatial patterns of fertility and household formation among *non-Hispanic whites* and to the detection of their correlates.” *Id.* at 671 (emphasis added).

¹⁷¹ William C. Duncan, *Marriage Amendments and the Reader in Bad Faith*, 7 FLA. COASTAL L. REV. 234, 234–35 nn.2 & 3 (2005) (collecting citations to statutes and amendments defining marriage as the union of a man and a woman).

¹⁷² *Hernandez v. Robles*, 805 N.Y.S.2d 354, 381 (N.Y. App. 2005) (Saxe, J., dissenting).

¹⁷³ SEARLE, *supra* note 52, at 57.

becoming a husband or a wife.¹⁷⁴ Over their lifetime, a substantial majority of Americans choose to enter man/woman marriage,¹⁷⁵ and a substantial majority of American births are legitimate.¹⁷⁶

Although all this evidence supports the factual accuracy of the broad description advanced by man/woman marriage proponents, neither that evidence nor those proponents deny the presence in contemporary America of a number of trends diminishing the force and influence of the man/woman marriage institution.

Of course close relationship theorists are not operating in a vacuum. Close relationship theory reflects real trends in society that are making marriage less connected to its classic purposes as a social institution. For example, while marriage remains a wealth-generating institution, other institutions of society (such as the market and government) have taken over large parts of the economic and social insurance functions marriage once had. While marriage remains a socially preferred context for sexual intercourse, the sexual revolution (including the growth in social acceptance for couples living together) has reduced the stigma for those who have sex outside of marriage. While marriage continues to have considerable connection to children in the public mind, large increases in unmarried childbearing have increased social acceptance of unwed parents and their children. In addition, high rates of divorce and the personal longings for a soul mate are changing the way young people think about marriage.¹⁷⁷

¹⁷⁴ The number of people who married in the United States in 2004 was 4,558,000. Subtracting the people who married in Massachusetts (83,098), the number would be 4,474,902. BRADY E. HAMILTON ET AL., CTDS. FOR DISEASE CONTROL & PREVENTION, BIRTHS, MARRIAGES, DIVORCES, AND DEATHS: PROVISIONAL DATA FOR 2004, 53 National Vital Statistics Reports No. 21, at 1, 6 (June 28, 2005), available at http://www.cdc.gov/nchs/data/nvsr/nvsr53/nvsr53_21.pdf.

¹⁷⁵ The National Marriage Project report for 2005 states, “For the generation of 1995, assuming a continuation of then current marriage rates, several demographers projected that 88 percent of women and 82 percent of men would ever marry.” National Marriage Project, *The State of Our Unions 2005*, at 16–17 (2005), <http://marriage.rutgers.edu>.

¹⁷⁶ The births to married women in 2004 were 64.3 percent of all births. BRADY E. HAMILTON ET AL., CTDS. FOR DISEASE CONTROL & PREVENTION, BIRTHS: PRELIMINARY DATA FOR 2004, 54 National Vital Statistics Reports No. 8, at 3 (Dec. 29, 2005).

For the key statistics (and a discussion of them) tracking the strength of the American marriage institution since 1970, see BLANKENHORN, *supra* note 31, at 217-22.

¹⁷⁷ COUNCIL ON FAMILY LAW, *supra* note 31, at 14-15.

But the question of fact is “What is marriage?”—not “What will it be in twenty years?” or “Where do we guess current trends are taking marriage?” Regarding the relevant question of fact, the evidence quite strongly supports the conclusion that the man/woman meaning and hence the man/woman marriage institution have not been deinstitutionalized but continue powerful in forming and transforming individuals comprising the major portion of our Nation’s population in ways productive of valuable and even unique social goods and in fulfillment of marriage’s “classic purposes as a social institution.”¹⁷⁸ Or, in short, the evidence quite strongly supports the factual accuracy of the broad description of marriage advanced by man/woman marriage proponents.

It seems fair to say that the evidence advanced by genderless marriage proponents in support of the factual accuracy of their narrow description consists of robust (to say the least) descriptions of changes in marriage (“the evolving marriage paradigm”); references both to the absence of government requirements relative to procreation by married couples and to the lack in a portion of all married couples of procreative conduct or intentions; bald assertions; and a disguised argument of legal irrelevancy. Evaluation of each of these four proofs suggests that they (singly or together) do not diminish the strength of the conclusion that the evidence supports the factual accuracy of the broad description.

It seems both fair and helpful to me to position the “evolving marriage” response in the context of the present debate on “What is marriage?” Four features of that debate are particularly important. First, thoughtful and informed observers uniformly

¹⁷⁸ *Id.* at 14.

acknowledge that marriage is not a static institution but rather one that has evolved over the centuries in a number of ways, some dramatic.¹⁷⁹ They further uniformly acknowledge that a number of recent changes in society have facilitated the emergence of the close personal relationship (whether formalized by a marriage or not) as a way of living embraced by a not insignificant minority of the general population and that legal changes in the institution itself have rendered more plausible some arguments for the legal redefinition of marriage – the most important being the move away from gender-based rights towards legal equality of spouses.¹⁸⁰ Second, the notion that something inherent (and static) in marriage precludes legal redefinition is *not* a part of the debate.¹⁸¹ Third, the notion that something inherent in the recent legal changes *compels* legal redefinition is *not* a part of the debate—at least for the large majority of mainstream participants; members of that large majority do not (or do not publicly) embrace the radical social constructionist conclusions that there are no differences between men and women that matter (or should matter) in the eyes of the law; that the prior legal changes in marriage reflect and enshrine that first conclusion (rather than any number of competing, alternative explanations for those prior changes); and that, therefore, there is no defensible basis under equality jurisprudence for defining civil marriage as a man/woman relationship rather than a person/person relationship.¹⁸² Fourth, the

¹⁷⁹ E.g., BLANKENHORN, *supra* note 31, at 91 (marriage “is constantly evolving, reflecting the complexity and diversity of human cultures.”); MCCLAIN, *supra* note 67, at 21 (“The long history of the institution of marriage offers an evolving, rather than a static, answer to the question, ‘What is marriage for?’”) (emphasis in original).

¹⁸⁰ E.g., MCCLAIN, *supra* note 67 at 22-23; COUNCIL ON FAMILY LAW, *supra* note 31, at 14-15; Bala, *supra* note 84, at 201-09; *see also* Stewart, *Judicial Redefinition*, *supra* note 8, at 86-95.

¹⁸¹ Stewart, *Judicial Elision*, *supra* note 8, at 4; *see also* Stewart, *Dworkin*, *supra* note 8, at 302 n. 121.

¹⁸² Stewart, *Redefinition*, *supra* note 8, at 86-95.

fundamental factual issue remains this: Is the man/woman meaning still institutionalized in the sense that it continues as a widely shared public meaning of marriage and that consequently it still produces an array of valuable social goods?

Once the “evolving marriage” response is positioned in the context of the “What is marriage?” debate, certain of the response’s weaknesses emerge. Preeminent is that the response’s recitation of the uncontested facts of institutional change is simply not helpful; those so reciting have no good answer to the question “So what?”¹⁸³ The vital question in the debate is the on-going institutionalized nature, or not, of the man/woman meaning. Recitation of other changes in the marriage institution may lead one up to that question but does nothing to answer it.¹⁸⁴ That the no-fault divorce laws of the 1970’s suppressed *permanence* as an institutionalized meaning, with unforeseen and very painful

¹⁸³ The answer often implied and sometimes given expressly—“Because the changes show that genderless marriage is inevitable”—does not qualify as a good answer, for several reasons. (See BLANKENHORN, *supra* note 31, at 235-40, for a collection of examples of the inevitably argument.) First, that answer presupposes that a judge’s constitutional duty is to perceive social trends and then get well out in front of them (or, more accurately, refashion constitutional jurisprudence so as to get it well out in front of them). But no serious student of constitutional law publicly champions such a formulation of the judicial duty, although a few judges have given hints of being of such a mindset. For example, when New York’s highest court upheld man/woman marriage against constitutional attack, Chief Justice Kaye in dissent said: “I am confident that future generations will look back on today’s decision as an unfortunate misstep.” *Hernandez v. Robles*, 7 N.Y.3d 338, 396 (N.Y. 2006) (Kaye, C.J., dissenting). Second, the claim of inevitability—a claim founded on a confidently made reading of where social currents in history will certainly carry the marriage institution—as an intellectual proposition is dubious; it would seem to be worthy of about the same level of respect due to another message of inevitability clearly to be perceived in powerful social currents revealed by history, the message preached by Karl Marx. If nothing else, the course of Marxism should teach us to be amply humble when setting forth, as an intellectual proposition, the inevitability of something as radical as the deinstitutionalization of a nearly universal social institution and its replacement by the institution of genderless marriage. (Maggie Gallagher strongly counters the inevitability argument in Gallagher, *Reply*, *supra* note 8, at 68-69, and in Joshua K. Baker & Maggie Gallagher, *Not Inevitable*, National Review Online, Dec. 1, 2004, http://www.nationalreview.com/comment/baker_gallagher200412010836.asp. Third, a particularly toxic aspect of the inevitability argument in the judicial arena is its proclivity to become a self-fulfilling prophecy. Each judge who acts on the basis of the argument supplies further “evidence” of the inevitability of genderless marriage. And in this context it merits recalling that, but for *EGALE* and *Halpern*, there would be no genderless marriage in Canada today, and but for *Goodridge*, there would be no genderless marriage anywhere in the United States today. See Stewart, *Judicial Elision*, *supra* note 8, at 59.

¹⁸⁴ See *id.* at 61-70.

personal and social consequences, may well be true,¹⁸⁵ but that says nothing about the on-going institutionalized status of the man/woman meaning. The same can be said of legal changes pertaining to gender equality in marriage, qualifications for adoptive parent status, disparate treatment of illegitimate children, and on and on. The same can even be said, albeit more guardedly, of social changes pertaining to rates of unmarried cohabitation, out-of-wedlock births, pursuit of the close personal relationship model and on and on; although those social changes affect the force of the man/woman marriage institution and move it closer to the deinstitutionalization precipice, mere recitation of those changes does not answer “How much closer?” That is important because no

¹⁸⁵ *Id.* at 62-63:

Prior to the mid-1970's, a core meaning of marriage was permanence. That particular institutional meaning succeeded, to a degree that now looks remarkable, in teaching and forming individuals, in molding their identities, and in restraining antithetical impulses in a way that led to a relatively low rate of divorce and separation. Among the resulting social goods were a relatively high level of family stability and a relatively high and concomitant level of childhood well-being (emotional, psychological, and financial). In a surge of "reform" between the mid-1960's and the mid-1970's, however, American and Canadian legislatures adopted legislation providing for no-fault divorce. In this way and at this time, it seems fair to say, the law's authoritative voice at least for a while effectively minimized permanence as a constitutive meaning of the marriage institution. In the light of social institutional studies, what in fact then happened was unsurprising: In the ensuing years divorce skyrocketed and the number of children of divorce rose to many millions. The further results, now extraordinarily well documented, have been substantial injury to the physical, psychological, emotional, and financial well-being both of those made children of divorce by that "divorce revolution" and of their mothers. On the correlation/causation debate relative to enactment of no-fault divorce laws and the divorce revolution, *see, e.g.*, Paul A. Nakonezny et al., *The Effect of No-Fault Divorce Law on the Divorce Rate Across the 50 States and Its Relation to Income, Education, and Religiosity*, 57 J. MARRIAGE & FAM. 477 (1995); Norval D. Glenn, *A Reconsideration of the Effect of No-Fault Divorce on Divorce Rates*, 59 J. MARRIAGE & FAM. 1023 (1997); Joseph Lee Rodgers et al., *The Effect of No-Fault Divorce Legislation on Divorce Rates: A Response to a Reconsideration*, 59 J. MARRIAGE & FAM. 1026 (1997); Norval D. Glenn, *Further Discussion of the Effects of No-Fault Divorce on Divorce Rates*, 61 J. MARRIAGE & FAM. 800 (1999); Joseph Lee Rodgers et al., *Did No-Fault Divorce Legislation Matter? Definitely Yes and Sometimes No*, 61 J. MARRIAGE & FAM. 803 (1999).

On the ill-effects of the divorce revolution, *see, e.g.*, ELIZABETH MARQUARDT, *BETWEEN TWO WORLDS: THE INNER LIVES OF CHILDREN OF DIVORCE* (2005); JUDITH S. WALLERSTEIN, JULIA M. LEWIS, SANDRA BLAKESLEE, *THE UNEXPECTED LEGACY OF DIVORCE: A TWENTY-FIVE YEAR LANDMARK STUDY* (2000); LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* (2000); BARBARA DAFOE WHITEHEAD, *THE DIVORCE CULTURE: RETHINKING OUR COMMITMENTS TO MARRIAGE AND FAMILY* (1996).

responsible observer is saying that man/woman marriage is already over the precipice's brink¹⁸⁶ – although of course in Massachusetts it is unquestionably on that brink because four judicial votes positioned it there. The “evolving marriage” response is unhelpful because it fails to engage directly the factual conclusion that, in contemporary America, man/woman marriage remains institutionalized, with the man/woman meaning remaining a predominating shared public meaning productive of valuable social goods. Because of that failure to engage, the response simply does not undermine the factual accuracy of the broad description of marriage.¹⁸⁷

¹⁸⁶ Stephanie Coontz of Evergreen State College asserts that marriage in America has been deinstitutionalized, that is, that no public meanings (formerly) constitutive of the institution are now shared sufficiently widely to have institutional force. Exchange with author, Marriage Debates Conference, Williams Institute, University of California, Los Angeles (April 21-22, 2006); *see also* BLANKENHORN, *supra* note 31, at 239 (“she reports further researches telling her that marriage has already changed, deeply and irreversibly, from a structured social institution to a private relationship”). Because of the across-the-spectrum criticism of Coontz’s scholarship, engagement with her assertion is perhaps not needful at this juncture. Compare Alan Wolfe, *The Malleable Estate: Is marriage more joyful than ever?*, SLATE, <http://slate.msn.com/id/2118816/> (May 17, 2005) (reviewing STEPHANIE COONTZ, *MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY, OR HOW LOVE CONQUERED MARRIAGE* (2005)) (the book “is not a scholarly monograph”; “As in all of Coontz’s work, ideology is never far beneath the surface in this one”; “Coontz cannot let go of the idea that her side is all virtue and that of her opponents all vice”; “her approach to history . . . will not allow her to assign autonomy to real individuals”; “she has little or nothing to offer those Americans who view marriage as the most important social institution in their lives”), with BLANKENHORN, *supra* note 31, at 235-40 (“I’ve noticed over time that nearly every sentence that Stephanie Coontz writes contains at least one piece of confusion”; she “has made a career out of arguing that her own philosophical preferences and the laws of historical inevitability are one and the same”; “Throughout her books and articles, whatever idea Coontz does not like – whatever idea she believes that History has ruled out of bounds—is likened to a cancelled television series, especially *Leave It To Beaver* . . . and . . . *Ozzie and Harriet*”; she is devoted “to defending the upswing in divorce and unwed childbearing, or at least castigating anyone who speaks against either of these trends”). Although Blankenhorn does not name Coontz when making this statement, it applies with particular force to her: “Scholars who trot out one or several ambiguous cases to suggest that marriage in human affairs has no coherent meaning—that it does not exist as a definable cross-cultural institution—are engaging in an unserious activity.” *Id.* at 110.

¹⁸⁷ See Stewart, *New York*, *supra* note 8, at 241-42:

For the “evolving marriage institution” counter to carry the day for genderless marriage, it must do one of two things. Either it must show that the “evolution” has removed the constitutive meaning of “the union of a man and a woman” from the contemporary marriage institution so that the law’s task is simply to “adjust accordingly,” or it must demonstrate that the change not yet (and maybe never to be) chosen or “evolved” by society is so wise that a court ought to impose it on society by no less than the force of “constitutional” law.

Genderless marriage proponents also advance the facts that government requires of man/woman couples neither proof before marriage of procreative capacity and intention nor actual procreation after marriage and that a substantial minority of married couples do not bear children. These facts, it is argued, show that the child-bearing and child-rearing features of the broad description of contemporary American marriage are either false or are of such minimal importance as to leave the narrow description the much more factually accurate description. “While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.”¹⁸⁸

These facts regarding governmental requirements and actual conduct relative to marital procreation are true—but not probative. They are not probative because of three other and interrelated marriage facts that are equally accurate. First, marriage is society’s mechanism to regulate and ameliorate the consequences of passionate and procreative heterosexual intercourse (children);¹⁸⁹ “the silly view of marriage as a mechanism *mandating* procreation”¹⁹⁰ is just that, silly. By normalizing and privileging marriage as the situs for man/woman coupling and thereby seeking to channel all heterosexual intercourse there, society seeks to assure that when man/woman sex does make babies, those children receive from birth onward the maximum and optimal private welfare. And even in our contraceptive culture, passionate heterosexual intercourse makes lots of

The courts invoking the “evolving marriage paradigm” have made neither showing. *E.g., id.* at 242, 247.

¹⁸⁸ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003).

¹⁸⁹ *See Stewart, Judicial Redefinition*, *supra* note 8, at 44-52.

¹⁹⁰ *Id.* at 62 (emphasis added).

unintended babies.¹⁹¹ “Almost a third of all [American] births between 1990 and 1995 were unintended. . . . Almost four in ten women aged 40-44 had had at least one unplanned birth. . . . The typical woman who uses contraceptives continuously will experience almost two unintended pregnancies.”¹⁹² So what society and its marriage laws in important part are aiming for is not that all married sex be procreative but that all man/woman sex occur in marriage, as a protection for when such sex *is* procreative—a protection for the baby, the often vulnerable mother, and society generally.¹⁹³

¹⁹¹ *Id.* at 50-52; Gallagher, *Does Sex Make Babies?*, *supra* note 8, at 454-56.

¹⁹² *Id.* (emphasis removed).

¹⁹³ In a very recent article, Linda McClain argues that certain legal and cultural changes in American society have eliminated, as a legal and social project, the channeling of sex into marriage. Linda McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channelling Function of Family Law*, 28 *CARDOZO L. REV.* 101 (2007). She focuses particularly on these changes:

- “changing social practices,” *id.* at 103, such as more frequent engagement in and social acceptance of pre-marital intercourse, *id.* at 107, a willingness and desire to have a child without marriage or a partner, *id.* at 109-11, 133, which “separate[s] marriage from parenthood,” *id.* at 118, financial independence of women due to increased female market participation, *id.* at 108, and expectations regarding economic security prior to marriage, *id.* at 114-15;
- “legislative change and judicial rulings,” *id.* at 103, such as the decrease in the “ability to use criminal law” to reinforce the institutions of marriage and parenthood by punishing “fornication, sodomy, cohabitation, adultery, bigamy, and contraception...[and in the disallowance of] legal disadvantages attaching to illegitimacy,” *id.* at 121;
- “technological developments in the area of reproduction,” *id.* at 103, which show that “marriage is no longer the exclusive site for procreation and childrearing and procreation is not its ‘essence,’” *id.* at 129, and the law does not bar nor even dissuade “nonmarital forms of procreation,” *id.* at 128, for heterosexual or homosexual individuals or couples, *id.* at 141;
- “changes in the family law toward a more functional definition of family,” *id.* at 103, including “recognition of *de facto* parents,” *id.* at 140, “recognition of a myriad of other relationships” beyond “adoption, step-parenting,” and the man/woman model, *id.* at 139, and others that have moved “family law ... beyond marriage in significant ways,” *id.* at 150.

McClain overstates her case. Although the changes she identifies have reduced marriage's institutional power to channel sex, at best her announcement of the death of that power, like the announcement of Mark Twain's death, is “greatly exaggerated.” RON POWERS, *MARK TWAIN: A LIFE* 585 (2005). In large measure, the history of human societies' channeling projects has a pendulum quality; diminution or abandonment of the project has nearly always been followed by a societal movement back towards effective channeling. See WILL AND ARIEL DURANT, *THE LESSONS OF HISTORY* 50 (1968) (“Puritanism and paganism – the repression and the expression of the senses and desires – alternate in mutual reaction in history. . . . In our time the strength of the state has united with the several forces listed above to relax faith and morals, and to allow paganism to resume its natural sway. Probably our excesses will bring another reaction . . .”). The swing of the pendulum back towards effective channeling occurs, it is believed, because of the high social costs associated with diminution or abandonment of channeling. *Id.*

Second, although it is true to say that government does not require of man/woman couples proof of procreative capacity and intent before receipt of a marriage license and procreative conduct thereafter, it is almost certainly false to say that this policy emerges from a particular government-endorsed social reality – that the contemporary American marriage institution is nothing more than what the close personal relationship model describes and that therefore the broad description is erroneous when describing child-bearing and child-rearing meanings, purposes, practices, and social goods. The “don’t-ask, don’t-require” policy almost certainly emerges from something else:

[O]ur societies have a long-standing sensibility against personalized governmental inquiries into marital procreative intentions and capacities Certainly the development of American common law and constitutional law suggests that the aversion to public and certainly governmental inquiries into an individual’s marital procreative intentions and capacities qualifies as a social norm of some antiquity. . . . [T]he norm has always been reinforced by certain pragmatic (and interrelated) considerations. These include sensible suspicion of the candour of responses regarding procreative intentions, equally sensible suspicion when it comes to responses about procreative capacities, the scientific (ie, medical) difficulty or impossibility of securing evidence of such capacities, and the costs associated with that endeavour if attempted.

....

The role of this social norm relative to man/woman marriage can be seen in this: Regulation of marriage, such as marriage licensure, stops short of any inquiry into procreative intentions and capacities. . . . It is troubling that the [the genderless marriage proponents have] identified a supposed societal lack of interest in procreation as the cause of the absence from the marriage laws of a procreation requirement, rather than identifying the much more plausible and robust explanation readily

at 35-36 (“No man, however brilliant or well-informed, can come in one lifetime to such fullness of understanding as to safely judge and dismiss . . . the wisdom of [lessons learned] in the laboratory of history. A youth boiling with hormones will wonder why he should not give full freedom to his sexual desires; and if he is unchecked by custom, morals, or laws, he may ruin his life before he . . . understand[s] that sex is a river of fire that must be banked and cooled by a hundred restraints if it is not to consume in chaos both the individual and the group.”).

available: a strong social norm against government inquiry into marital procreative intentions and capacities.¹⁹⁴

Third, it is clear that the social institution of marriage as it existed for centuries, even millennia, did encompass—and quite centrally—child-bearing and child-rearing meanings, purposes, practices, and social goods. “It is hardly surprising that civil marriage developed historically as a means to regulate heterosexual conduct and to promote child rearing, because . . . the link between heterosexual sex and procreation [was] very strong indeed.”¹⁹⁵ Yet during the centuries that laws did regulate entry into and continuance in the historic child-centered institution, the same (as today) “don’t ask, don’t require” governmental policy prevailed.¹⁹⁶ The policy’s existence *then* was certainly *not* probative of the absence or lack of importance of the institution’s child-bearing and child-rearing meanings, purposes, practices, and social goods. Nor is it now. That is especially true in light of both “the link between heterosexual sex and procreation . . . [continuing] strong indeed” and a deep societal aversion to governmental intrusion into marital reproductive capacities and intentions.

At this stage in the debate, an intellectually honest genderless marriage proponent may concede (if only *arguendo*) the factual accuracy of the broad description of contemporary American marriage¹⁹⁷ but then proceed to assert: Our society should

¹⁹⁴ Stewart, *Redefinition*, *supra* note 8, at 58-59.

¹⁹⁵ Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 961 n. 23 (Mass. 2003).

¹⁹⁶ The only exceptions would have arisen not from the marriage institution itself but from the then-existing social institution of government and its purposes—including pre-eminently production of heirs for dynastic perpetuation. The case of Henry VIII and his wives comes to mind, as does that of Napoleon and Josephine.

¹⁹⁷ “At this stage in the debate,” genderless marriage proponents’ only two options as a practical matter are either that concession or silence. That is simply because of the impossibility as a matter of fact of

nevertheless allow same-sex couples to enter into marriage because to do so will benefit them (and any children they raise) socially, psychologically, and economically and will not harm the institution and its child-bearing and child-rearing meanings, purposes, practices, and social goods; man/woman couples will still marry at the same rate and still do just as well raising their children. This is the ubiquitous “no-downside” argument, and it has serious factual defects of its own. But because of the importance of the argument, and because it does not engage directly the contest between the broad and narrow descriptions of contemporary marriage, I treat it separately later on.¹⁹⁸

Another approach used to defeat the broad description, primarily by appellate judges favorable to genderless marriage, is the bald assertion that contemporary American marriage is the close personal relationship—and no more. Among many possibilities,¹⁹⁹ here are several examples: From Massachusetts, “While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.”²⁰⁰ From New York:

sustaining the case for the completeness and therefore fundamental accuracy of the narrow description of contemporary American marriage.

The evidence shows overwhelmingly – I believe beyond any reasonable doubt – that marriage as a human institution is intrinsically connected to bearing and raising children.

To argue otherwise is to argue like a lawyer looking for a loophole; it is not intellectually or morally serious, at least insofar as we actually care about the institution we are discussing.

BLANKENHORN, *supra* note 31, at 153.

¹⁹⁸ *Infra* section II(C)(2)(a).

¹⁹⁹ For collections of these bald assertions, see Stewart, *Judicial Redefinition*, *supra* note 8, at 97-98;

Stewart, *New York*, *supra* note 8, at 232, 247; Stewart, *Washington and California*, *supra* note 8, at 528-29.

²⁰⁰ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003);

It is fair to say that both the law and the population generally now view marriage, at least in the abstract ideal, as a partnership of equals with equal rights, who have mutually joined to form a new family unit, founded upon shared intimacy and mutual financial and emotional support. . . . [T]he gender of the two partners to a marriage is no longer critical to its definition.²⁰¹

Again from New York: “Only since the mid-twentieth century has the institution of marriage come to be understood as a relationship between two equal partners, founded upon shared intimacy and mutual financial and emotional support.”²⁰²

When viewed in their respective contexts, all these kinds of assertions share two features. First, the description of marriage is intended as complete, not partial. In other words, these are judicial adoptions of the close personal relationship model of marriage as a complete and therefore accurate description of the contemporary American marriage institution. Second, all these assertions are bald in that they are made without reference to any supporting authority and are presented in true *ipse dixit* fashion. This suggests to me the phenomenon mentioned at the outset of this article—that of the key players in the constitutional adjudication (lawyers, judges, and constitutional law scholars) not knowing very much about marriage but thinking they do, just as all of us do because marriage is such a pervasive social institutional that nearly all of us have experienced it personally in one or multiple ways. In any event, facts are stubborn things, and bald assertions (even those coming from American appellate judges) hardly qualify as evidence probative of the view that the contemporary American marriage institution encompasses no more than a close personal relationship.

²⁰¹ Hernandez v. Robles, 805 N.Y.S.2d 354, 381 (N.Y. App. Div. 2005) (Saxe, J., dissenting).

²⁰² Hernandez v. Robles, 855 N.E.2d 1, 26 (N.Y. 2006) (Kaye, C.J., dissenting).

Apparently recognizing two interrelated realities—that for the genderless marriage case to prevail in the courts the narrow description of marriage must also prevail but that the broad description as a matter of factual accuracy is much stronger—a genderless marriage proponent in the judiciary recently devised an interesting strategy. That strategy is to characterize as *legally irrelevant* all the many social realities of the marriage institution beyond those encompassed by the narrow description. In a recent California Court of Appeal case upholding man/woman marriage against constitutional attack, the dissenting opinion, unlike earlier opinions calling for genderless marriage, did not fall into the rather glaring factual error of simply asserting that marriage in our society is nothing more than a close personal relationship between two adults. Rather, it began with the task of identifying from the United States Supreme Court’s marriage cases “the attributes of marriage that account for the fundamentality of the right to marry,”²⁰³ with those attributes being intimacy, association, “a harmony in living,” and “a bilateral loyalty,”²⁰⁴ but nothing to do with child-bearing and child-rearing. Then the opinion silently sheds the link to the *right* to marry and begins speaking of “the attributes of marriage that are constitutionally significant.”²⁰⁵ Finally, it elevates those attributes to a high status indeed: “the constitutionally significant attributes of marriage identified by the [United States] Supreme Court”²⁰⁶ Those honored attributes just happen to be the stuff of the close personal relationship model of marriage – love, intimacy, “bilateral loyalty” (commitment), and public celebration. All other attributes of the marriage institution are simply ignored; they are, after all, not among

²⁰³ *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 737 (Cal. App. 2006) (Kline, J., concurring and dissenting).

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 740.

²⁰⁶ *Id.* at 748.

“the constitutionally significant attributes of marriage.” In this way, all those other attributes of marriage—principally the institution’s child-bearing and child-rearing meanings, purposes, practices, and social goods—are not really declared “unfactual” but rather become simply irrelevant.²⁰⁷

This strategy has two fatal defects. First, its list of “the constitutionally significant attributes of marriage identified by the [United States] Supreme Court,”²⁰⁸ although coinciding nicely with the close personal relationship model, is much too short; the bright folks on the United States Supreme Court have much more accurately described marriage than the California dissenting opinion would have one believe.²⁰⁹ Second, fundamental principles of constitutional jurisprudence make the supposedly “irrelevant” attributes of the

²⁰⁷ The mind behind this opinion seems to grasp firmly that a judge’s power over facts—they being stubborn things—is much constrained, unlike her power to determine relevancy and irrelevancy. Linda McClain makes a bit of a move toward the same strategy in her recent book, *The Place of Families*. MCCLAIN, *supra* note 67, at 21-22.

²⁰⁸ *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 748 (Cal. App. 2006) (Kline, J., concurring and dissenting).

²⁰⁹ See, e.g., *Lehr v. Robertson*, 463 U.S. 248, 257-58 (1983) (“The institution of marriage has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of our democratic society . . . and as part of their general overarching concern for serving the best interests of children, state laws almost universally express an appropriate preference for the formal family”); *Quillion v. Walcott*, 434 U.S. 246, 256 (1978) (“legal custody of children is, of course, a central aspect of the marital relationship, and even a father whose marriage has been broken apart will have borne full responsibility for the rearing of his children during the period of the marriage,” with his marriage thus reflecting his “commitment to the welfare of the child.”); *Zablocki v. Redhail*, 434 U.S. 374, 397 (1978) (Powell, J., concurring) (“On several occasions, the Court has acknowledged the importance of the marriage relationship to the maintenance of values essential to organized society.”); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 843-44 (1977) (“The basic foundation of the family in our society [is] the marriage relationship [and] . . . its importance has been strongly emphasized in our cases Thus the importance of the familial relationship, to the individuals involved and to the society, stems from . . . the role it plays in “promot(ing) a way of life” through the instruction of children”); *Poe v. Ullman*, 367 U.S. 497, 546 (1961) (J. Douglas, dissenting: “The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.”); *Williams v. North Carolina*, 317 U.S. 287, 298 (1942) (“The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of [the] commanding problems”).

marriage institution highly relevant. I focus on the second defect, leaving the first to its footnote.

In subjecting man/woman woman marriage to constitutional scrutiny, a beginning point is that the relevant equality, liberty, and privacy rights are individual (or personal) rights. But the broad description of marriage is not advanced to counter abstract notions of equality, liberty, privacy, or dignity. Rather, that description, with its factual accuracy, gives a clear understanding of the scope and power of the societal (and hence governmental) interests at stake in the decision to preserve or jettison the social institution of man/woman marriage.²¹⁰ That understanding matters very much—unless a court is prepared to hold that genderless marriage is an imperative of some absolute right, whether of equality or liberty or whatever. At some point any rational constitutional jurisprudence must, to retain its rationality, give important societal interests their due.²¹¹ The constitutional jurisprudence of the United States Supreme Court does that.²¹² Certainly rational constitutional jurisprudence requires, even demands, a clear-eyed understanding and fair measurement of the societal interests at stake in each case invoking personal constitutional rights. That is what the social institutional argument provides in the marriage cases, as seen more fully below.²¹³ The strategy deployed by the

²¹⁰ The constitutional equation seeks to value and appropriately accommodate both individual rights and societal (governmental) interests, a task particularly crucial relative to marriage and family:

As family law scholars observe, there are two sometimes conflicting vantage points from which to regard families: one looks at the individual's interest in family life, the other at society's interest in the family (and in marriage) as social institutions.

McCLAIN, *supra* note 67, at 22. See Hafen, *supra* note 10, at 469.

²¹¹ See Stephen E. Gottlieb, *The Paradox of Balancing Significant Interests*, 45 HASTINGS L.J. 825, 828, 866 (1994); Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 3–4 (1943).

²¹² See, e.g., *Gutter v. Bollinger*, 539 U.S. 306 (2003) (although classifications based on race and ethnic origins are suspect and subjected to strict scrutiny, governmental interests in attaining a diverse student body at the university level are compelling and therefore university's "affirmative action" program is constitutional).

²¹³ *Infra* section II(C)(2)(c).

California dissenting opinion, however, obscures that understanding and thereby precludes that fair measurement.²¹⁴

In sum, regarding the question of fact “What is marriage?,” the evidence quite decidedly favors the broad description. Much but not all of the narrow description—the close personal relationship model of marriage—is factually accurate and to that extent is encompassed by the broad description. But the narrow description’s insistence that it is a complete description—and that the additional descriptions found in the broad delimitation portray things of the past and not important features of the contemporary American marriage institution—renders that narrow description profoundly misleading and a quicksand foundation for

²¹⁴ The California dissenting opinion rather clearly refuses to consider the full nature of the marriage institution. It refuses to acknowledge (and criticizes the majority opinion for acknowledging) the many attributes, meanings, norms, practices, and social goods inhering in the man/woman marriage institution and extending beyond what the close personal relationship model allows. See Stewart, *Washington and California*, *supra* note 8, at 530-31 (“The dissenting opinion fails badly when it refuses to give those important societal interests their due—as if they did not exist. They do exist, of course, and a rational constitutional jurisprudence will consider them.”).

Some may attempt to excuse or justify the California dissenting opinion’s bad performance in this context by saying it was invited by the California Attorney General’s performance at all levels in that state’s marriage cases. The (now former) Attorney General did not present to the California courts any data, including the uncontroversial, underscoring man/woman marriage’s valuable social goods, their link to the man/woman meaning, or even marriage’s institutional nature and the implications of that nature. A number of observers have stated that the (now former) Attorney General was both personally and politically conflicted relative to his “defense” of the man/woman marriage laws. See, e.g., Appellants’ Opening Brief at *4, *8, *City & County of San Francisco v. State*, *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 688-91 (Cal. App. 2006) (No. A106760) (revealing Attorney General’s personal beliefs regarding Prop. 22); William Duncan, *Is That All You Got?*, NATIONAL REVIEW ONLINE, Feb. 17, 2006, <http://www.nationalreview.com/comment/duncan200602170819.asp> (questioning Attorney General’s ability to vigorously advocate the State’s case); Pam Smith, *Pushing for Air Time*, THE RECORDER (San Francisco), May 30, 2006.

It is uncertain what that asserted conflict may mean relative to the notion that the California Attorney General may concede “constitutional facts,” *D’Amico v. Bd. of Med. Exam’rs*, 520 P.2d 10, 19-21 (Cal. 1974), or whether that notion may encompass Attorney General refusals to advance conclusions generally accepted in the relevant discipline(s).

Consideration of this issue matters. Through the Court of Appeal proceeding, the California marriage cases included private parties intent on genuinely defending man/woman marriage, but the Court of Appeal dismissed those parties for lack of standing. *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 688-91 (Cal. App. 2006). So the (new) Attorney General will be the only party and party-lawyer before the California Supreme Court with the role of speaking in favor of man/woman marriage. That fact may or may not implicate another prudential concept in California litigation: “the necessity to insure that questions imbued with the public interest not be decided by means or procedures ill-calculated to provide adequate representation of that interest.” *D’Amico*, 520 P.2d at 20.

constitutional analysis and adjudication. The probative evidence sustains the accuracy of those additional descriptions—those that encompass the institution’s meanings, purposes, practices, and social goods pertaining to child-bearing and child-rearing, to the statuses, identities, and projects of *wife* and *husband*, to negotiation of the male/female divide, and to rational valuation of various forms of intimate, adult conduct and relations. That is not to say that those particular meanings, purposes, and practices are universally shared, only that they are shared sufficiently widely in every state and across the Nation that they continue to be institutionalized and therefore productive in fact of valuable social goods.

As to the relevancy for constitutional analysis and adjudication of that fact of continuing institutionalization, the next subsection considers the matter. Before going there, however, it bears repeating that the work of understanding the nature of marriage must be done to some extent in relation to nearly every argument and counter-argument.

2. Social institutional realities

a. The “no-downside” argument, or “What’s the harm?”

Resolution of the continuing institutionalized status of the man/woman meaning, as a question of fact, permits a thorough response to the “no-downside” argument. As noted earlier, that argument concedes (or, more often, ignores) the factual accuracy of the broad description of contemporary American marriage but then proceeds to assert something very much like this: Our society should nevertheless allow same-sex couples to enter into marriage because to do so will benefit them (and any children they raise) socially, psychologically, and economically and will not harm the institution and its child-bearing and child-rearing meanings, purposes, practices, and social goods;

man/woman couples will still marry at the same rate and still do just as well raising their children.²¹⁵ “The argument’s conclusion is that it is irrational not to ‘open’ marriage to same-sex couples where there is no downside and such substantial upside.”²¹⁶

Social institutional realities point to a very different conclusion. Social institutions are constituted by a complex web of interrelated and widely shared public meanings.²¹⁷ Because institutionalized, these meanings are norms that guide social relationships and define social purposes and practices. In this way, important social institutions affect individuals profoundly; institutional meanings teach, form, and transform individuals and do so by providing identities, purposes, practices, and projects. It is by teaching, forming, and transforming individuals across the society that an institution’s constitutive meanings provide the institution’s unique package of social goods.

Across time and cultures, a core meaning constitutive of the marriage institution has nearly always been *the union of a man and a woman*, and, as shown earlier, that meaning continues institutionalized across the United States. This core man/woman meaning is powerful and even indispensable for the marriage institution’s production of a number of its valuable social goods. Those include effective protection of the right of a child to know and be brought up by his or her biological parents (with exceptions justified only in the best interests of the child, not those of any adult); optimal provision of private welfare to children conceived by passionate, heterosexual coupling; an

²¹⁵ The appearances of the “no-downside” argument in judicial opinions are collected at Stewart, *Redefinition*, *supra* note 8, at 35-36; Stewart, *Washington and California*, *supra* note 8, at 519-25.

²¹⁶ Stewart, *Redefinition*, *supra* note 8, at 36.

²¹⁷ This and the following four paragraphs summarize the text accompanying notes 20-57 *supra* and therefore are presented without further footnotes.

effective way over the male-female divide; and the source of the identity and status of *husband* and *wife*. If *the union of a man and a woman* ceases to be a core constitutive meaning of marriage, that institution will cease to provide these particular social goods (and others not listed here but described earlier). And if that meaning is replaced by *the union of any two persons*, a number of those social goods, regardless of their source, will become contraband.

With its power to suppress social meanings (including *the union of a man and a woman*), the law can indeed deinstitutionalize man/woman marriage and bring about the loss of the institution's unique social goods. Further, genderless marriage is a radically different institution than man/woman marriage, as just seen in the large divergence in the two institutions' respective social goods. That divergence merely reflects the reality that fundamentally different meanings, when magnified by institutional power and influence, do not produce the same social identities, aspirations, projects, or ways of behaving, and hence the same social goods.

A final and crucial reality is that a society can have, at any one time, only one social institution denominated *marriage*. A society cannot, at one and the same time, have as shared, core, constitutive meanings of the marriage institution *both* "the union of a man and a woman" *and* "the union of any two persons." The one meaning necessarily displaces the other. Hence, every society must choose either to retain the old man/woman marriage institution or, by force of law, to suppress it and put in its place the radically different genderless marriage institution.

Relative to the no-downside argument, the import of these social institutional realities is clear. For same-sex couples to marry, the state must choose and implement genderless

marriage, and that means suppressing man/woman marriage. To suppress man/woman marriage is first to diminish and then to lose that (former) institution's valuable and unique social goods. To say, therefore, that such a change has no downside is to be very wrong indeed. Of course, a mindset much attracted to the close personal relationship model of marriage will naturally denigrate the value of those social goods, most of which, after all, are child-centered and child-protective and not much concerned with the "individualization" of adult personal life, including adult desires and self-identity. But society's interests in those endangered social goods are compelling ones, implicating as they do the quality of the society's practices of self-perpetuation. The nearly universal reality of the man/woman marriage institution – that is, its presence in nearly all cultures across nearly all times since pre-history – qualifies as strong evidence strongly probative of that conclusion of compelling societal interests.

As noted earlier, genderless marriage proponents either acknowledge the validity of or are silent regarding each of the social institutional realities that, rationally combined, comprise the social institutional argument for man/woman marriage and that so thoroughly falsify the no-downside argument. Accordingly, none of those proponents—not in the academy, the judiciary, the legal profession, or elsewhere—has directly engaged the social institutional argument. That is not to say that those proponents have used no means to blunt the force of that argument. We have already seen one—the assertion that the close personal relationship model completely and accurately describes the contemporary American marriage institution. If that assertion were true, then our marriage institution would provide no social goods beyond "love and friendship, security for adults and their children, economic protection, and public

affirmation of commitment.”²¹⁸ That in turn would mean that nothing would (could) be lost by redefining marriage so as to allow same-sex couples to marry.²¹⁹ And all that would operate to verify the no-downside argument and to falsify the social institutional argument. It is no doubt exactly because of these large implications of the narrow description of marriage that *every* American appellate court judge favoring genderless marriage has to date adopted, as complete and otherwise factually accurate, that narrow description.²²⁰ Likewise, it is exactly because of those large implications that the most important of all marriage facts is the continuing institutionalization, or not, of the man/woman meaning and its social goods pertaining to child-bearing and child-rearing, to the status and identity of *husband* or *wife*, and to social valuation of various forms of intimate, adult conduct and relations.

The remainder of this section addresses in turn the other means used by genderless marriage advocates to blunt the force of the social institutional argument for man/woman marriage.

²¹⁸ McCLAIN, *supra* note 67, at 6.

²¹⁹ See Stewart, *Washington and California*, *supra* note 8, at 509 (“Some thoughtful proponents of man/woman marriage acknowledge that if the close personal relationship model is all that marriage now *is*, then genderless marriage may rightly prevail as a matter of constitutional norms and simple social justice.”)

²²⁰ The citations are collected at *id.* at 527-28.

In the legal (constitutional) sphere, the very logic of genderless marriage is grounded in the close personal relationship model of marriage. Indeed, at this stage in the court battles, the nexus between genderless marriage and the close personal relationship model cannot be gainsaid. *Every* appellate court that has mandated, and *every* dissenting judge who would mandate, genderless marriage has relied on that model as a sufficient and accurate description of what marriage *is*.

Id. at 527.

b. The optimal child-rearing mode

An earlier section provided this carefully worded description of one of the social goods resulting from the continuing institutionalization of the man/woman meaning: “The indispensable foundation for that child-rearing mode—that is, married mother/father child-rearing—that correlates (in ways not subject to reasonable dispute) with the optimal outcomes deemed crucial for a child’s—and therefore society’s—well being.”²²¹ Genderless marriage proponents present evidence that the outcomes for same-sex couple child-rearing are just as good as those for married mother/father child-rearing.²²² The evidence is introduced to show that the social good just carefully described is *not* the product of the institutionalized man/woman meaning but of other factors—primarily two caring adults in a committed, loving relationship serving as parents to the child; that to redefine marriage will thus not result in loss of this important social good; and that, indeed, to redefine marriage will maximize this social good by sustaining the relationship of the many same-sex couples engaged in child-rearing. (Another purpose is to affirm the equal capacity of gay men and lesbians to perform a socially valued task, child-rearing, as part of a larger politico-social project to enhance social acceptance and self-regard.)

The proffered evidence, however, is swimming upstream against an ever-stronger current of social science findings and is doing so unaided by conclusions from studies meeting usual standards for scientific validity. Regarding that ever-stronger current, rigorous social science studies over the past three or so decades have ever more firmly

²²¹ See *supra* note 30 and accompanying text.

²²² See *supra* notes 77-78 and accompanying text.

established that family form matters and that the family form with the significantly optimal outcomes for children is married mother and father in a low-conflict marriage.²²³ The measured outcomes encompass physical, mental, and emotional health and development; academic performance and levels of attainment; and avoidance of crime and other forms of self- and other-destructive behavior such as drug abuse and high-risk sexual conduct.²²⁴ Those studies compared married mother/father child-rearing with virtually all other long-present (and therefore adequately studied) modes, including unmarried mother/father, married parent/step-parent, cohabiting parent, single mother, and single father.²²⁵ This accumulating evidence has troubled many in the academy whose worldview prefers to see not just all people as being created equal but also all family forms, and this discomfort has caused them to downplay in various ways the continually mounting evidence of the superiority of man/woman marriage—but with all those ways being unsuccessful to date.²²⁶

²²³ See, e.g., THE WITHERSPOON INSTITUTE, *supra* note 30, at 21-43; ELIZABETH MARQUARDT, FAMILY STRUCTURE AND CHILDREN'S EDUCATIONAL OUTCOMES (2005); WILCOX, ET AL., *supra* note 9; Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, 15 THE FUTURE OF CHILDREN 75 (Fall 2005); see also LORRAINE BLACKMAN ET AL., CONSEQUENCES OF MARRIAGE FOR AFRICAN AMERICANS: A COMPREHENSIVE LITERATURE REVIEW 4-5 (2005); William C. Duncan, *The Social Good of Marriage and Legal Responses to Non-Marital Cohabitation*, 82 OR. L. REV. 1001 (2004).

²²⁴ See *supra* note 223 and accompanying text.

²²⁵ See *supra* note 223 and accompanying text.

²²⁶ See Norval Glenn and Thomas Sylvester, *The Denial: Downplaying the Consequences of Family Structure for Children*, INSTITUTE FOR AMERICAN VALUES (2005), available at <http://www.familyscholarslibrary.org/content/readingrooms/denial>.

Although the correlations showing married mother/father child-rearing as the optimal mode are uncontroversial (except presently relative to same-sex couple child-rearing), inferences regarding causation and reasons are not; that is because of the difficulties of controlling for a rather long list of possible variables besides just the basic structure of the respective modes. Thus the understanding that the correlations established between various child-rearing modes and favorable outcomes (for two examples, high academic achievement and low crime) show the married mother/father mode as optimal and therefore that policy makers rationally can, with due caution, infer causation and, in turn, rationally privilege man/woman marriage.

Another difficulty for the factual claim that same-sex couples have equal child-rearing success is the lack of support from studies meeting usual standards for scientific validity. Another is the paucity of studies of any kind relative to child-rearing by two gay men; most of the studies of same-sex couple child-rearing attempt to show something about the outcomes of the mother/lesbian partner child-rearing mode. All these studies are sometimes referred to as the “no differences” studies, because they aim to support the notion that same-sex couple child-rearing outcomes do not fall below the optimal outcomes of the married mother/father mode. In 2001, the University of Virginia’s Steven Nock filed an affidavit setting forth what would be required of such a study before its conclusions could be considered scientifically valid (“the good-science requirements”). He concluded that none of the “no-differences” studies met those requirements.²²⁷ The good-science requirements undoubtedly state the minimum for accepted social science methodology in this context. Indeed, the leading, qualified genderless marriage proponents have acknowledged the validity both of the good-science requirements and of Professor Nock’s conclusion regarding the failure of the “no differences” studies.²²⁸ None of the “no differences” studies published since Professor Nock filed his affidavit in 2001 meet the good-science requirements.²²⁹

These difficulties with the “no differences” studies have not prevented, however, a number of professional organizations from formally opining that there are indeed no

²²⁷ Affidavit of Steven Lowell Nock, *Halpern v. Attorney General*, Ontario Superior Court of Justice, Court File No. 684/00, available at http://www.marriagewatch.org/Law/cases/Canada/ontario/halpern/aff_nock.pdf.

²²⁸ Judith Stacey & Timothy J. Biblarz, (*How*) *Does the Sexual Orientation of Parents Matter?*, 66 AM. SOCIOLOGICAL REV. 159, 166 (2001); William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America’s Children*, 15 THE FUTURE OF CHILDREN 97, 104 (2005) (“We do not know how the normative child in a same-sex family compares with other children. . . . Those who say the evidence falls short of showing that same-sex parenting is equivalent to opposite-sex parenting (or better, or worse) are . . . right.”).

²²⁹ See Declaration of Professor Alan J. Hawkins at 8-9 (March 15, 2007), *Varnum v. Brien*, Iowa District Court for Polk County, Case No. CV 5965, available at http://manwomanmarriage.org/jrm/pdf/Alan_Hawkins.pdf.

differences in outcomes between the married mother/father child-rearing mode and the same-sex couple child-rearing mode. These organizations include the American Academy of Pediatrics,²³⁰ the American Psychiatric Association,²³¹ the American Psychological Association,²³² and the American Academy of Child and Adolescent Psychiatry.²³³ As to these endorsements serving as evidence, the difficulty is that the formal opinions are no better than the social science studies on which they are based, and that is so whether the endorsing organization is the American Psychological Association or the Harper Valley PTA.

Regarding the problematic nature of the “no differences” studies and therefore of the associations’ endorsements, an understanding of those problems was no doubt at play in the only American appellate court decision to date to mandate genderless marriage, Massachusetts’ *Goodridge* decision.²³⁴ Although the “no differences” claim was fully briefed,²³⁵ the four justices supporting that mandate said not one word regarding the claim, while the three justices opposing the mandate said something that merits rather complete quotation:

Conspicuously absent from the court's opinion today is any acknowledgment that the attempts at scientific study of the ramifications of raising children in same-sex couple households are themselves in their infancy and have so far produced inconclusive and conflicting results. . . . [S]tudies to date reveal that there are still some observable differences

²³⁰ American Academy of Pediatrics, *Coparent of Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 339 (Feb. 2002), available at <http://aappolicy.aappublications.org/cgi/reprint/pediatrics;109/2/339.pdf>.

²³¹ American Psychiatric Association, *Adoption and Co-Parenting of Children by Same-Sex Couples Position Statement*, APA Document Reference No. 200214 (Nov. 2002), available at <http://www.aclu.org/getequal/ffm/section1/1c7apa.pdf>.

²³² AMERICAN PSYCHOLOGICAL ASSOCIATION, RESOLUTION ON SEXUAL ORIENTATION, PARENTS AND CHILDREN (July 2004), available at <http://www.apa.org/pi/lgbc/policy/parentschildren.pdf>.

²³³ AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY, GAY, LESBIAN AND BISEXUAL PARENTS POLICY STATEMENT (June 1999), available at <http://www.aacap.org/page.ww?section=Policy+Statements&name=Gay%2C+Lesbian+and+Bisexual+Parents+Policy+Statement>.

²³⁴ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

²³⁵ *Id.* at 979-80 (Sosman, J., dissenting).

between children raised by opposite-sex couples and children raised by same-sex couples. . . . Interpretation of the data gathered by those studies then becomes clouded by the personal and political beliefs of the investigators, both as to whether the differences identified are positive or negative, and as to the untested explanations of what might account for those differences. (This is hardly the first time in history that the ostensible steel of the scientific method has melted and buckled under the intense heat of political and religious passions.) Even in the absence of bias or political agenda behind the various studies of children raised by same-sex couples, the most neutral and strict application of scientific principles to this field would be constrained by the limited period of observation that has been available. Gay and lesbian couples living together openly, and official recognition of them as their children's sole parents, comprise a very recent phenomenon, and the recency of that phenomenon has not yet permitted any study of how those children fare as adults and at best minimal study of how they fare during their adolescent years. The Legislature can rationally view the state of the scientific evidence as unsettled on the critical question it now faces: are families headed by same-sex parents equally successful in rearing children from infancy to adulthood as families headed by parents of opposite sexes? Our belief that children raised by same-sex couples *should* fare the same as children raised in traditional families is just that: a passionately held but utterly untested belief. The Legislature is not required to share that belief but may . . . wish to see the proof before making a fundamental alteration to [the marriage] institution.²³⁶

The factual/legal analysis appearing in that quote remains today, almost four years later, the best to be found anywhere regarding this aspect of the debate. That strong analysis effectively blunts the effort made with the “no-differences” claim to counter this marriage fact: The optimal outcomes associated with married mother/father child-rearing are very valuable social goods indeed and are indeed connected with the man/woman meaning constitutive of our contemporary marriage institution.

c. The “big differences” and the “law’s power” marriage facts

As seen earlier, a key marriage fact put forth by proponents of man/woman

²³⁶ *Id.*

marriage is that the proposed new genderless marriage institution differs significantly, consequentially, and even radically from the old institution.²³⁷ Also as seen earlier, the proponents base this assertion on two proofs. One focuses on the understanding that an institution defined at its core as the union of a man and a woman (with all that limitation implies and entails regarding purposes, identities, and activities) will intend and sustain social understandings, practices, goods, and social selves in large measure not intended or sustained by an institution defined at its core as the union of any two persons.²³⁸ The other proof focuses particularly on social goods and includes the demonstration that the genderless marriage institution cannot provide a number of social goods now well and uniquely provided by man/woman marriage and, indeed, will effectively preclude some of them.²³⁹

With respect to these two proofs, genderless marriage proponents offer little or nothing in the way of direct engagement, although their presentations of the narrow description of contemporary marriage and of the “no differences” claim regarding child-rearing are a form of indirect engagement. The absence of direct engagement may result from the fact that observers of marriage who are both rigorous and well-informed regarding the realities of social institutions (including some genderless marriage proponents) uniformly acknowledge the magnitude of the differences between the two possible institutions of marriage.²⁴⁰

Genderless marriage proponents have, however, linked the “large differences”

²³⁷ See *supra* notes 38-43 and accompanying text.

²³⁸ See Stewart, *Judicial Elision*, *supra* note 8, at 15-24.

²³⁹ *Id.* at 20-24.

²⁴⁰ See *supra* note 43 and accompanying text.

fact question with another one, the law's power to suppress the man/woman meaning—as a widely shared public meaning—and thus the law's power to deinstitutionalize man/woman marriage. That linkage is seen rather starkly in the two Canadian and one American appellate court opinions mandating genderless marriage.²⁴¹ Those opinions' authors had before them the “large differences” fact.²⁴² Moreover, the three courts did acknowledge the large change the courts' mandates would effect in the public meaning of marriage. For example, the opinion in British Columbia's *EGALE* case stated that “the relief requested, if granted, would constitute a profound change to the meaning of marriage, and would be viewed as such by a significant portion of the Canadian public, whether or not it supported the change.”²⁴³ But juxtaposed with these assessments of “profound” and “significant” change of meaning are assertions that the genderless marriage decisions do not and will not change the institution of marriage. Thus, the

²⁴¹ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Halpern v. Toronto (City)*, [2003] OJ No. 2268, [2003] 225 D.L.R. (4th) 529 (Ontario Court of Appeal); *EGALE v. Attorney General (Canada)*, [2003] 13 B.C.L.R. (4th) 1, [2003] 225 D.L.R. (4th) 472 (British Columbia Court of Appeal). The Quebec Court of Appeal also mandated genderless marriage but did so on something akin to collateral estoppel/issue preclusion grounds. *Hendricks v. Quebec (Attorney General)*, [2004] 238 D.L.R. (4th) 577.

²⁴² Thus, the Ontario Court of Appeal in *Halpern* had the benefit of a “large differences” argument from the Attorney General of Canada, which the court summarized like this:

Changing the definition of marriage to incorporate same-sex couples would profoundly change the very essence of a fundamental societal institution. The AGC points to no-fault divorce as an example of how changing one of the essential features of marriage, its permanence, had the unintended result of destabilizing the institution with unexpectedly high divorce rates. This, it is said, has had a destabilizing effect on the family, with adverse effects on men, women and children. Tampering with another of the core features, its opposite-sex nature, may also have unexpected and unintended results.

225 D.L.R. (4th) 529 at para. 133. And the *Goodridge* majority in Massachusetts had the benefit of Justice Cordy's detailed treatment in his dissenting opinion of the social institutional argument and its “large difference” component. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 995-97 (Mass. 2003) (Cordy, J., dissenting).

²⁴³ 2003 BCCA 251 at ¶ 78. The lower court in the *Halpern* case expressed the same view, [2002] OJ 2714, 215 D.L.R. (4th) 223 (Ont. Civ. Ct.) at ¶¶ 97-98, and the *Goodridge* plurality opinion stated: “Certainly our decision today marks a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries.” 798 N.E.2d at 965.

Goodridge plurality opinion asserts that its redefining mandate “does not disturb the fundamental value of marriage in our society.”²⁴⁴ And *EGALE* and Ontario’s *Halpern* manifest a similar view.²⁴⁵

A troubling inconsistency plagues the courts’ performances in this area. The *EGALE*, *Halpern*, and *Goodridge* courts all proceeded with a full awareness of the social institutional nature of marriage.²⁴⁶ As noted, they also repeatedly acknowledged the large change the courts’ mandates must effect in the public meaning of marriage. And those cases’ opinions mandating genderless marriage never denied the uncontroversial fact that marriage, like all social institutions, is constituted by widely shared public meanings.²⁴⁷ All this means that those opinions’ assertions of “no change” in the institution of marriage must be seen as flatly contradicted by uncontroversial social institutional realities.

After all, social institutions are constituted by—are nothing other than, if you will—shared public meanings. To change those meanings is to change the institution, including the quantity and quality of its social goods. To change those meanings radically [from *the union of a man and a woman* to *the union of any two persons*] is to deinstitutionalize the old institution and to replace it with a new one.²⁴⁸

In short, the opinions’ factual assertion of no institutional change has no basis and is

²⁴⁴ *Id.*

²⁴⁵ See *Halpern v. Toronto (City)*, [2003] OJ No. 2268, [2003] 225 D.L.R. (4th) 529 (Ontario Court of Appeal) at ¶ 134.

²⁴⁶ Indeed, the plurality opinion in *Goodridge* begins: “Marriage is a vital social institution.” 798 N.E. 2d at 948. The opinions in that case then go on to refer to *institution* in the context of marriage over 80 times. The *Halpern* decision has more than 40 such references; the decision in *EGALE*, more than 35.

²⁴⁷ See BLANKENHORN, *supra* note 31, at 139 (as to the importance of “marriage’s public meaning . . . for people interested in institutions and social change, public meaning is everything. All the rest flows from it.”).

²⁴⁸ Stewart, *Judicial Elision*, *supra* note 8, at 35.

simply devoid of probative support.²⁴⁹

Turning to the fact question of the law's power to effect large institutional change, we see the *EGALE*, *Halpern*, and *Goodridge* courts acknowledging the law's strong "educative," or "expressive," function and, indeed, making that function a lynchpin of many arguments. For example, the *Goodridge* plurality opinion speaks of an unchanged definition giving a "stamp of approval" to stereotypes.²⁵⁰ And *Halpern* repeatedly speaks of the definition of man/woman marriage "perpetuating" "views" about the capacities of same-sex couples.²⁵¹ Yet the acknowledged educative function of law seems to reinforce the lessons of social institutional studies regarding civil institutions as webs of significance; law has a purpose and a power to preserve or change public meanings and thus a purpose and a power to preserve or change social institutions.²⁵² More directly to the present context, the social institution of marriage is not at all immune, but rather is open, to fundamental change resulting from a profound change in the law's definition of marriage. The three cases manifest a quick readiness to acknowledge law's educative and hence society-changing power when some preferred value is being advanced, while

²⁴⁹ *Halpern* and *Goodridge* advance one bit of evidence to support their "no change" conclusion. The *Goodridge* plurality opinion presents as proof of "no change" the intentions of the same-sex couples then before the court: "Here, the plaintiffs seek only to be married, not to undermine the institution of civil marriage," 798 N.E.2d at 965, and: "That same-sex couples are willing to [enter civil marriage] . . . is a testament to the enduring place of marriage in our laws and in the human spirit." *Id.* *Halpern* takes the same tack: "The Couples are not seeking to abolish the institution of marriage; they are seeking access to it." 225 D.L.R. (4th) 529 at ¶ 129. But the probative value of such intentions is not at all apparent; it seems nonsensical that the intentions of a handful of people could insulate a vast social institution constituted by its public meanings from change resulting from a profound alteration in those meanings. The uncontroversial social reality is that the intentions and conduct of an individual or even a small group of individuals can neither prevent nor effect institutional change. "[T]here are acts which are possible only for all individuals, but not for any single individual. Changing, creating, maintaining or destroying institutions are examples of this." Eerik Lagerspetz, *On the Existence of Institutions*, in ON THE NATURE OF SOCIAL AND INSTITUTIONAL REALITY 70, 82 (Eerik Lagerspetz et al. eds., 2001).

²⁵⁰ 798 N.E.2d at 962.

²⁵¹ *E.g.*, 225 D.L.R. (4th) 529 at ¶ 94.

²⁵² *See Lewis v. Harris*, 875 A.2d 259, 278 (N.J. Super. Ct. App. Div.) (Parrillo, J., concurring).

manifesting a stubborn refusal to acknowledge that same power when its use places the goods of man/woman marriage at risk. Yet the law is not both potent and impotent in the very same endeavor.²⁵³ The three cases' fundamental inconsistency of approach to the law's institution-changing power cannot qualify as a defensible intellectual performance.

d. Child welfare

Its proponents advance as a marriage fact that the man/woman marriage institution is best for children. As seen, they support this fact with references to the institution's child-centered and child-protective nature as seen in a number of its unique social goods. Genderless marriage proponents advance as a marriage fact that their model will be best for children. They support this fact with references to the increased health, wealth, and achievement enjoyed by children in married households and to the not insignificant number of children in the United States being raised by same-sex couples and therefore presently outside married households. These referenced facts are proffered as probative of the proposition that government will advance child welfare (socially, psychologically, and economically) by giving those children and their two adult caregivers access to the marriage institution.

This particular battle of marriage facts is particularly hard fought because child welfare is probably the ultimate emotional and moral high ground, and the side that captures it may well prevail on the marriage issue. In any event, the following paragraphs show a disturbing deficiency in the genderless marriage proponents' approach

²⁵³ For a strong rejection of the "impotent law" argument by a leading scholar on historical and contemporary marriage in America, see Nancy F. Cott, *The Power of Government in Marriage*, 11 THE GOOD SOCIETY 88 (2002).

to the question of child welfare. That demonstration begins with some social institutional realities already validated earlier in this article, goes on to describe government's two different child-welfare endeavors, and then shows the genderless marriage proponents' evasion both of one of those endeavors and also of some difficulties relative to child welfare inhering in their own close personal relationship model of marriage.

A number of the social goods materially or uniquely provided by the institutionalized man/woman meaning—and rather certainly to be lost when that meaning is de-institutionalized—focus on the welfare of children.²⁵⁴ Thus, that institutionalized meaning is society's best and probably only effective means to make real the right of a child to know and be brought up by his or her biological parents (with exceptions justified only in the best interests of the child, not those of any adult); the most effective means humankind has developed to maximize the private welfare provided to children conceived by passionate, heterosexual coupling; and the indispensable foundation for that child-rearing mode—that is, married mother/father child-rearing—that correlates (in ways not subject to reasonable dispute) with the optimal outcomes deemed crucial for a child's well being. For this reason, man/woman marriage is often understood (and accurately so) to be primarily a child-centered and child-protective institution. Government efforts to preserve that institution are thus rightly perceived as a child-welfare endeavor. In contemporary America, government preserves that institution in important part by using the law to validate the core, constitutive man/woman meaning and thereby perpetuate the social goods associated with that meaning.

²⁵⁴ This paragraph is a summary of portions of Section II,A and therefore is presented without footnotes.

But government also engages in another child-welfare endeavor—providing public assistance of some form or another (protective laws, access to resources, material resources themselves, etc.) to individual children or their caretakers.

Reflection suggests that these two different governmental child-welfare endeavors are just that, different. The former entails the protection, sustenance, and perpetuation of a social institution because that institution is good for children generally through the generations; the latter, the present provision to each child, regardless of his or her circumstances, of those resources that society deems minimally due to every child. By engaging in both endeavors simultaneously, government is trying to maximize, and understandably so, the well-being of all children, both those now among us and those of future generations.

Genderless marriage proponents, however, ignore the institutionally protective nature of the first endeavor, which seeks to preserve the man/woman meaning; indeed, those proponents characterize the endeavor as nothing other than an irrational and mean-spirited disregard for children being raised by same-sex couples. They allude to the second endeavor to suggest an ethos of government-assured equality of circumstances for all children. The point of their exercise is to persuade society that, for the sake of the children, it must suppress the man/woman marriage institution and enshrine in its place genderless marriage.

The phenomenon just described looms particularly large in the opinions of American appellate judges favoring genderless marriage.²⁵⁵ In Massachusetts' *Goodridge* case, the Commonwealth had pled for the preservation of man/woman marriage by pointing to one of its valuable social goods, man/woman marriage providing the optimal child-rearing

²⁵⁵ Citations and quotations may be found at Stewart, *Judicial Elision*, *supra* note 8, at 37-38; Stewart, *New York*, *supra* note 8, at 251-53; and Stewart, *Washington and California*, *supra* note 8, at 525-36.

mode. As seen earlier, the plurality opinion studiously avoided taking issue with the reality of that social good. What it did rather was shift the asserted State interest from protecting the optimal child-rearing mode (man/woman marriage) to "[p]rotecting the welfare of children,"²⁵⁶ and, on that shifted basis, argue that limiting marriage to opposite-sex couples does not promote the present welfare of all children, is contrary to the Commonwealth's policy and practice of helping children whatever their family situation, and "penalize[s] children by depriving them of State benefits because the State disapproves of their parents' sexual orientation."²⁵⁷ As a further example, a recent Washington Supreme Court dissenting opinion says:

Rather than furthering legitimate interests, denial of the right [of same-sex couples] to marry will certainly harm children of same-sex couples, couples to whom the State has given its blessing to adopt or beget children through artificial means, but upon whom the State has turned its back once those children are integrated into their families. It is those children who actually do and will continue to suffer by denying their parents the right to marry [The impugned man/woman marriage statute] degrades the [child-welfare] interests asserted by the State rather than furthers them.²⁵⁸

Another dissenting opinion in the same case says that "[r]ather than protecting children, the [impugned man/woman marriage statute] harms them."²⁵⁹ A recent California Court of Appeal dissenting opinion starts to make a fair statement of the ameliorative function of the man/woman marriage institution—to maximize the private welfare provided to children resulting from passionate, heterosexual coupling—but severs it completely from its social

²⁵⁶ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 962 (Mass. 2003).

²⁵⁷ *Id.* at 962-64.

²⁵⁸ *Andersen v. King County*, 138 P.3d 963, 1018-19 (Wash. 2006) (Fairhurst, J., dissenting) (emphasis omitted).

²⁵⁹ *Id.* at 1037 (Bridge, J., dissenting).

institutional context, proceeding instead as if the social institutional argument for man/woman marriage did not exist.²⁶⁰ Thus:

This [ameliorative function] argument not only ignores the children of lesbians and gay men, but fails to explain how excluding same-sex couples from marriage encourages opposite-sex couples to marry or otherwise enhances the interests of their children. Under no reasonably conceivable facts would the care received by accidentally conceived children be improved in any way by denying the right to marry to same-sex couples. All the restriction accomplishes is to deprive the children of same-sex unions the greater stability enjoyed by the children of married couples.²⁶¹

All these judicial opinions well demonstrate what genderless marriage proponents must and do ignore in the “child welfare” context in order to achieve their objective. They ignore this reality: to mandate genderless marriage and thereby de-institutionalize man/woman marriage is to thwart quite completely the first of the two government child-welfare endeavors—protection, sustenance, and perpetuation of a social institution demonstrably good for the vast majority of our children, now and through the generations. Indeed, they ignore the very essence of that first and important government child-welfare endeavor. They further ignore that the law is impotent to usher same-sex couples and their children into the child-centered and child-protective social institution of man/woman marriage,²⁶² although the law’s power is certainly sufficient to de-institutionalize it.²⁶³ Also ignored is the closely related reality that to legally redefine marriage, especially in the name of “constitutional” law, is to create a radically different social institution with no track record relative to child-rearing and

²⁶⁰ *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 748-49 (Cal. App. 2006) (Kline, J., concurring and dissenting).

²⁶¹ *Id.* at 749.

²⁶² See Stewart, *Redefinition*, *supra* note 8, at 83-85.

²⁶³ See *supra* notes 241-253 and accompanying text and *infra* notes 353-357 and accompanying text.

then to usher into that institution all the children of all married couples, both same-sex and man/woman.²⁶⁴ This last point merits further examination.

There are substantial reasons to believe that genderless marriage, by the very nature of its core constitutive meanings, is an adult-centered, adult-promoting institution unlikely to sustain those practices most beneficial to children. Genderless marriage is premised on, and infused with the ideology of, the close personal relationship model. As seen earlier, that connection is certain in the legal/constitutional sphere, with *every* American appellate court judge favoring genderless marriage making that connection. Also as seen earlier, that connection is evident in the larger social/cultural sphere; Lesthaeghe’s work on the SDT, for example, shows a strong correlation between a population’s level of acceptance of the close personal relationship model and generalized political support (including that support’s judicial manifestation) for genderless marriage.²⁶⁵ Yet the close personal relationship model is preeminently about adult desires and interests. To repeat Cherlin’s conclusions: that model is

²⁶⁴ See Stewart, *Redefinition*, *supra* note 8, at 85; Stewart, *Judicial Elision*, *supra* note 8, at 46-49, 52 n. 137.

[Genderless marriage proponents] are insisting that constitutional doctrine compels (or public policy makes wise) the polity-wide adoption of the genderless marriage institution. Consequently, the genderless marriage norm will be mandated in and reinforced by texts, mandated in and reinforced by schools, and mandated in and reinforced by many other parts of the public square and, furthermore, will be voluntarily published by the media and other institutions. One marriage norm community will be officially sanctioned and protected; all other marriage norm communities will be officially constrained, will be officially disdained and sharply curtailed.

Id. at 48-49.

[A]s things now stand in Canada and Massachusetts, a man and a woman desiring to avoid complicity with the new institutional regime could fulfill that desire—but only by openly participating in a decidedly exclusive marriage ceremony sanctioned only by a decidedly exclusive norm community (in other words, by openly foregoing civilly sanctioned genderless marriage by means of a consciously political act). The price for doing so includes forfeiting the benefits of civil marriage and being officially labeled as bigoted (or at least “discriminatory”)—that is, as hostile to the constitutional ideal of equality.

Id. at 52 n. 137.

²⁶⁵ See Stewart, *Washington and California*, *supra* note 8, at 532-35.

of “an intimate partnership entered into for its own sake, which lasts only as long as both partners are satisfied with the rewards (mostly intimacy and love) that they get from it,”²⁶⁶ the “pure relationship is not tied . . . to the desire to raise children,”²⁶⁷ and scholarly “attempts to incorporate children into the pure relationship are unconvincing.”²⁶⁸ And Lesthaeghe’s work shows that the more childless a polity, the more it supports the close personal relationship model and therefore genderless marriage.²⁶⁹ Thus, San Francisco is far and away this Nation’s most childless large city;²⁷⁰ Massachusetts, one of the Nation’s two most childless states.²⁷¹

All this suggests something important about the quality of genderless marriage proponents’ “child welfare” argument. That argument ignores the institutionally protective nature of a vital government child-welfare endeavor, and when that endeavor, as rationally it must, calls for continuing legal support for—rather than legal suppression of—the man/woman meaning at the core of the child-centered and child-protective marriage institution, the argument disparages that institutionalized meaning as an

²⁶⁶ Cherlin, *supra* note 112, at 853.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 858.

²⁶⁹ See Surkyn & Lesthaeghe, *supra* note 158, at 52, 73 (identifying the link between non-conformist attitudes—including acceptance of the close personal relationship model of marriage and genderless marriage—and childlessness). See also Lesthaeghe & Neidert, *supra* note 159, at 677-79. By “childless” polity, I mean one where, relative to comparable polities (i.e., all large American cities or all American states), the portion of the total population younger than 18 years of age is low and/or the fertility rate is low.

²⁷⁰ I considered childlessness data (proportion of population under 18 years of age) from the twenty most populous cities in the United States. San Francisco is a clear outlier in the data, with 15.11% of its population under age 18, while the average among the 20 cities is 26.33%, and the next lowest city after San Francisco having 24.1% of its population below the age of 18. U.S. Census Bureau, Data gathered from 2005 American Community Survey, http://factfinder.census.gov/servlet/ADPGeoSearchByListServlet?ds_name=ACS_2005_EST_G00_&_lang=en&_t_s=181677557593 (last visited Jan. 23, 2007).

²⁷¹ See United States Census Bureau, Table 1: Total Fertility Rates per Woman by State for 2000 and Ratio of Estimates to Projections of Births: 2001 to 2003, Population and Household Economic Topics, www.census.gov/population/projections/MethTab1.xls (last visited Jan. 23, 2007, which lists Massachusetts as having one of the five lowest fertility rates in the United States. Among those five states, Massachusetts is the second most childless state. See United States Census Bureau, Demographic Profiles, United States Census 2000, <http://censtats.census.gov/cgi-bin/pct/pctProfile.pl> (last visited Jan. 23, 2007) (I compared childlessness statistics from the District of Columbia, Maine, Massachusetts, Rhode Island, and Vermont).

expression of animus and as a tool of harm to children being raised by same-sex couples. At the same time, that argument would have government create and perpetuate the genderless marriage institution, which is legally and socially premised on a model of marriage ill-suited for—indeed, inimical to—successful fulfillment of humankind’s child-bearing and child-rearing endeavors. The irony inhering in such an argument is, in my view, both inescapable and tragic.

3. Religion, law, and the singularity of the marriage institution

Competing marriage facts are also at the center of another important part of the debate over the marriage issue. Those facts go to the singularity, or not, of the marriage institution.

Genderless marriage proponents state that civil marriage and religious marriage are two separate and distinct phenomena in our society,²⁷² that the state (law) created civil marriage,²⁷³ that religion is the source of the man/woman meaning found in civil marriage,²⁷⁴ that for civil marriage to enshrine that meaning is to violate Establishment

²⁷² E.g., Brief of Amici Curiae Religious Organizations, New York Congregations and Clergy, and Other New York Faith-Based Communities in Support of Plaintiffs-Appellants, at 10-13, *Samuels v. Dep’t of Pub. Health*, 811 N.Y.S.2d 136 (N.Y. App. 2004) (No. 98084). See DeCoste, *Leviathan*, *supra* note 8, at 1102-03.

²⁷³ E.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003) (“We begin by considering the nature of civil marriage itself. Simply put, the government creates civil marriage. . . . [C]ivil marriage is . . . precisely what its name implies: a wholly secular institution.”); *Hernandez v. Robles*, 805 N.Y.S.2d 354, 377 (N.Y. App. 2005) (Saxe, J., dissenting) (“Civil marriage is an institution created by the state . . .”); *Andersen v. King County*, 138 P.3d 963, 1018 (Wash. 2006) (Fairhurst, J., dissenting) (“the exclusionary language [that is, the man/woman meaning] . . . does not lend the institution of marriage its power. Rather, marriage draws its strength from the nature of the civil marriage contract itself and the recognition of that contract by the State.”); *id.* at 1034 (Bridge, J., dissenting) (“Civil marriage is a state-conferred legal status, the existence of which gives rise to benefits and burdens reserved exclusively to the citizens engaged in the marital relationship.”). See Stewart, *Washington and California*, *supra* note 8, at 536-37; Stewart, *New York*, *supra* note 8, at 243-46; DeCoste, *Leviathan*, *supra* note 8, at 1102-04.

²⁷⁴ See the citations and quotes collected at Stewart, *Washington and California*, *supra* note 8, at 538.

Clause jurisprudence and sensibilities,²⁷⁵ and that after civil marriage is purged of that religiously based meaning, religious marriage can continue to exist in its own properly limited sphere.²⁷⁶

One of the more troubling facts for the validity of these assertions negating the singularity of our society's marriage institution is this: man/woman marriage is an ancient and nearly universal human social institution.²⁷⁷ Man/woman marriage is a "universal human institution" found "at least since the beginning of recorded history, in all the flourishing varieties of human cultures documented by anthropologists" and is "across societies . . . a publicly acknowledged and supported sexual union that creates kinship obligations and resource pooling between men, women, and the children that their sexual union may produce."²⁷⁸ As to its antiquity, it is almost certainly pre-political, that is, it existed as a way of living and of ordering human relations before (and probably long before) institutions of government and positive law emerged.²⁷⁹ For this reason, John Locke viewed "conjugal society" (his term for marriage and family) as one of those "forms of

²⁷⁵ *E.g.*, *Andersen v. King County*, 138 P.3d 963, 1027-28, 1035 (Wash. 2006) ((Bridge, J., dissenting) (to "ban gay civil marriage because some . . . religions disfavor it, reflects an impermissible State religious establishment" and the impugned man/woman marriage law "reflects a *religious* viewpoint [and that] *religious* doctrine should not govern state regulation of *civil* marriage") (emphasis in original).

²⁷⁶ *E.g.*, Brief of Amici Curiae Religious Organizations, New York Congregations and Clergy, and Other New York Faith-Based Communities in Support of Plaintiffs-Appellants, at 10-13, *Samuels v. Dep't of Pub. Health*, 811 N.Y.S.2d 136 (N.Y. App. 2004) (No. 98084).

²⁷⁷ Regarding the marriage institution's antiquity, see, *e.g.*, BLANKENHORN, *supra* note 31, at 9 ("As an institution, marriage has been around for at least five thousand years . . ."); regarding its universality, see, *e.g.*, *id.* at 105-106:

The evidence that marriage as defined here is a universal human institution is overwhelming. In fact, especially in light of the vastness of the human historical record and the variety of human sexual experience, the power and prevalence of this one sexual institution across time and cultures is so noteworthy, and so empirically incontrovertible, that I am tempted simply to say "all human societies." Tempted, but not finally persuaded. . . . At issue are a very few hard cases and close calls.

²⁷⁸ WILCOX ET AL., *supra* note 9, at 15.

²⁷⁹ *E.g.*, BLANKENHORN, *supra* note 31, at 11-120.

social order the existence of which are independent of the state” and used the term “pre-political social order.”²⁸⁰ Accordingly, “Locke’s political philosophy . . . stipulate[ed] clearly that rights and responsibilities, including those pertaining to conjugal society, are not created by the state”²⁸¹ but are “[n]ormative institutions . . . exist[ing] because they are compelling forms of social order that advance basic human goods.”²⁸²

Certainly at different times in the development of different societies, other social institutions such as government (law), religion, and private property interacted with the marriage institution. As to the nature of the law’s interaction with the marriage institution, what Joseph Raz perceived about the law’s interaction with pre-political institutions generally almost certainly applies to marriage:

Perfectionist political action may be taken in support of social institutions which enjoy unanimous support in the community, in order to give them formal recognition, bring legal and administrative arrangements into line with them, facilitate their use by members of the community who wish to do so, and encourage the transmission of belief in their value to future generations. In many countries this is the significance of the legal recognition of monogamous marriage and prohibition of polygamy.²⁸³

²⁸⁰ Sugrue, *supra* note 53, at 172, 176. Locke defined conjugal society as follows:
[Conjugal society] is made by a voluntary compact between man and woman; and though it consist[s] chiefly in such a communion and right in one another’s bodies, as is necessary to its chief end, procreation; yet it draws with it mutual support, and assistance, and a communion of interest too, as necessary not only to unite their care and affection; but also necessary to their common offspring, who have a right to be nourished and maintained by them, till they are able to provide for themselves.

JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 47 (R. Cox ed., Harlan Davidson, Inc. 1982) (1690).

²⁸¹ Sugrue, *supra* note 53, at 176.

²⁸² *Id.*

²⁸³ RAZ, *supra* note 43, at 161; *see* DeCoste, *Transformation*, *supra* note 8, at 635.

And although there is debate about when the law (whether secular or ecclesiastical) began interacting with the marriage institution,²⁸⁴ this simple summary of the history of the Western marriage experience illuminates the marriage institution's pre-political nature:

[T]he facts are these: (a) prior to the thirteenth century, when the Church finally managed to take control of it, marriage was an entirely social practice; (b) marriage only became a sacrament in 1439; and c) the Catholic Church only began requiring the attendance of a priest for a valid marriage in 1563, after the Reformation. The state came to marriage even later than did the Church. Indeed, it was not until 1753, with the passage of Lord Hardwicke's *Marriage Act*, that the British state became a significant player in the joining together of men and women as husbands and wives.²⁸⁵

Or, to be short and to paraphrase Richard Garnett, marriage law no more “creates” the marriage institution than the Rule Against Perpetuities “creates” dirt.²⁸⁶

Moreover, although the marriage institution interacts with other social institutions—the law, private property, religion—and thereby takes from each a certain hue,²⁸⁷ social institutional studies see marriage as meaningfully distinct from those other institutions.²⁸⁸ Thus, after stating a standard definition of *institution*—“An organized system of social relationships (roles,

²⁸⁴ See, e.g., BLANKENHORN, *supra* note 31, at 123-24.

²⁸⁵ DeCoste, *Leviathan*, *supra* note 8, at 1112-13 (2005) (citations omitted).

²⁸⁶ Richard W. Garnett, *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 114 n.29 (2000).

²⁸⁷ It really is a commonplace that marriage is both a meaningfully distinct social institution and one that interacts with other important institutions. “Marriage is a lynchpin of social organization: its laws and customs interface with almost every sphere of social interaction.” Celia Kitzinger & Sue Wilkinson, *The Re-Branding of Marriage: Why We Got Married Instead of Registering a Civil Partnership*, 14 FEMINISM & PSYCHOLOGY 127, 132 (2004). “[T]he realm of civil society is itself deeply interconnected with market and state, both through the market processes that sustain the lives of families, organizations, and associations of all kinds and by the state in the form of law, regulation, and direct subsidy.” Sullivan, *supra* note 22, at 173.

²⁸⁸ See, e.g., RAZ, *supra* note 43, at 161-62, 393; SEARLE, *supra* note 52, at 32. In David Blankenhorn's words:

No one denies that property and social status (and many other big realities as well) affect all spheres of human social life, from education to medicine to, yes, marriage. *But what affects something is different from the thing itself.* For almost all of humanity, marriage has always and in all places been “really” about the male-female sexual bond and the children that result from that bond.

BLANKENHORN, *supra* note 31, at 55 (emphasis added).

positions, norms) that is pervasively implemented in society and that serves certain basic needs of society”—Clayton identifies “at least five basic institutions”: education, economics (which in our society would encompass private property, money, and markets), government (encompassing the law), family (encompassing man/woman marriage), and religion.²⁸⁹

The import of these realities for the “law as giver of institutional life” proffer is clear. That proffer says that “civil marriage” is wholly a legal construct; that marriage, as experienced in our society, is something that the law gives to people; and that, therefore, marriage is something that, without the law, people would not have in any living or meaningful way. But that proffer cannot be taken seriously except by those who (for whatever reason) rather willfully ignore the man/woman marriage institution’s pre-political origins and development and the law’s actual role relative to the institution—not “creator” but “facilitator.” As to genderless marriage proponents’ reason for eliding those realities, it is probably linked to a strategy to make marriage appear to be a more fit object of legal (judicial) alteration, no matter how radical.

I do not say that the laws promulgated to sustain the man/woman marriage institution are not subject to judicial review for constitutional infirmities. Of course they are; they fully satisfy the state-action requirement for the application of constitutional norms of equality, liberty, and so forth. The important point rather is that

a judge bent on imposing genderless marriage is fooling others and perhaps herself when she portrays marriage as merely the product of statutory enactments, like the Social Security program; when she casts the man/woman “limitation” in marriage as a legal construct rather than as a constituent meaning at the core of a deep and rich social institution serving as the repository—not of some recent legislative judgment—but of millennia of

²⁸⁹ CLAYTON, *supra* note 22, at 19.

human experience; and when she speaks of “civil” marriage as something apart and separate from “religious” and all other widely shared and practiced conceptions of the marriage institution.²⁹⁰

Just as man/woman marriage’s antiquity is a troublesome problem for the “law as giver of institutional life” view, so the institution’s universality does much to falsify the notion that religion is the source of the man/woman meaning. Exactly because that meaning is found across nearly all societies since pre-history, “religion” can be its source only if religion has been omni-present in all societies since pre-history *and* has universally preached that meaning *and* with that preaching was not merely reinforcing an already existing social reality but initiating it. I am aware of no secular authorities sustaining those three requisites. Indeed, the literature rather consistently rebuts all three.²⁹¹ That being so, there is perhaps no need to belabor the difficulties plaguing the “religious source” view, other than to refer to the Soviet experience (obviously chosen because of the official atheism imposed on the society).

[T]he hope of the early Soviet Communists was to weaken family ties and marital institutions, which they perceived to be exploitive instruments by which the ruling class maintained its economic and political power. Either spouse [during the 1920’s] was able to escape their marriage by a single *ex parte* application at a registrar’s office. In the alternative, it was not necessary to enter into a formal marriage, since Soviet *de facto* cohabitation was also recognized. However, subsequent Soviet legislation

²⁹⁰ Stewart, *Washington and California*, *supra* note 8, at 537.

²⁹¹ See, e.g., BLANKENHORN, *supra* note 31, at 159-61.

in the 1930's] found it necessary to restore state supervision over marriage and to put formidable obstacles in the way of divorce.²⁹²

We know enough about Soviet history during the 1930's to have some confidence that the return to legal support for the man/woman marriage institution was not the work of the Patriarch of Moscow or the chief rabbi of Minsk.

In sum, the probative evidence rather thoroughly falsifies those marriage facts that reject the singularity of our society's marriage institution; chief among those falsified facts are the notions, first, that the law is the creator of a separate institution called "civil marriage" rather than a facilitator of a single and meaningfully distinct marriage institution and, second, that religion is the source and sole perpetuator of the man/woman meaning constitutive of that institution.

²⁹² Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM. L. Q. 269, 288 (1997). *See also* Inga Markovits, *Family Traits*, 88 MICH. L. REV. 1734, 1743-49 (1990) (reviewing MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW AND FAMILY IN THE UNITED STATES* (1989)).

Marxist theory had always been critical of the hierarchical structure of capitalist family life and had accused the bourgeoisie of "reduc[ing] the family relation to a mere money relation." Engels had compared the position of wives to that of the proletariat (with husbands in the role of the capitalists) and had listed as "the first premise for the emancipation of women . . . the reintroduction of the entire female sex into public industry . . ." Marxists foretold that in a future communist society men and women would be free and equal producers, that the "economic foundations of monogamy . . . will disappear," that marriage, liberated of all property concerns, would be based only on mutual love and thus would be moral only as long as that love persisted, and that society would enable women to join men in the production process by taking over such former family tasks as household duties and the care and education of children. According to this ideological blueprint, early Soviet family legislation introduced the legal equality of the spouses, permitted unilateral divorce, put informal "de facto" marriages on the same legal footing as formally registered marriages, abolished illegitimacy, and--while still providing for family support obligations--structured these obligations in a way that demonstrated the belief that family members would have to fill in only temporarily for a state that soon would be economically able to care for all of its members.

Id. at 1743-44.

III.

THE FACTS OF MARRIAGE AND THE STANDARD OF REVIEW

The most contentious legal question relative to the marriage issue has been the standard of review—whether rational basis, strict scrutiny, or some intermediate standard—and many have posited that if the judges would just adopt and apply strict scrutiny, or even any heightened standard of review, then the courts’ rulings would mandate genderless marriage. Although Gerald Gunther’s smart reference to strict scrutiny as “strict in theory and fatal in fact”²⁹³ continues true as a general proposition,²⁹⁴ I suggest in this section that a judge, although applying that standard, will nevertheless sustain man/woman marriage against all constitutional attacks—if she accepts the factual accuracy of the broad description of marriage and the social institutional argument emerging from that description. At the same time, I suggest that a judge, although applying the rational basis test, will nevertheless declare man/woman marriage unconstitutional—if he accepts the factual accuracy of the narrow description of marriage and the close personal relationship ideology from which that description emerges. (This last suggestion is not exceedingly brave; a number of American appellate judges have already done just that, as seen in a later paragraph.)

The rational basis standard of review requires a judge to sustain an impugned law (or other form of state action) against constitutional challenge if there is any conceivable

²⁹³ Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection* 86 HARV. L. REV. 1, 8 (1972).

²⁹⁴ See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); but see *Adarand Constructors v. Peña*, 515 U.S. 200, 237 (1995) (“Finally, we wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’”).

basis which might support it, and “empirical support is not even necessary.”²⁹⁵ Moreover, “[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.”²⁹⁶ Under heightened scrutiny, a state seeking “to defend a statute . . . must carry the burden of showing an exceedingly persuasive justification” and can meet this burden “only by showing at least that the classification serves important governmental objectives and that the . . . means employed are substantially related to the achievement of those objectives.”²⁹⁷ Under strict scrutiny, the government has the burden of proving that the impugned state laws “are narrowly tailored measures that further compelling governmental interests.”²⁹⁸ The “narrowly tailored” notion is also expressed in terms of “over-inclusive” and “under-inclusive.”²⁹⁹

The man/woman meaning in marriage, the social goods that meaning provides, and the susceptibility to loss of both the meaning and the goods—as described by the broad delimitation of contemporary American marriage and analyzed by the social institutional argument—satisfies strict scrutiny review. The social goods, especially those pertaining to child-bearing and child-rearing and enhancing child welfare, qualify as compelling societal (and hence governmental) interests; “a society without the institution of [man/woman] marriage, in which heterosexual intercourse, procreation, and child care

²⁹⁵ Tuan Anh Nguyen v. I.N.S., 533 U.S. 53, 75 (2001) (O’Connor, J., dissenting).

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 74-75 (internal quotation marks and citations omitted).

²⁹⁸ Johnson v. California, 543 U.S. 499, 505 (2005).

²⁹⁹ See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 578 (1993) (Blackmun, J., concurring) (“A State may no more create an underinclusive statute, one that fails truly to promote its purported compelling interest, than it may create an overinclusive statute, one that encompasses more protected conduct [or burdens more people] than necessary to achieve its goal.”).

are largely disconnected processes, would be chaotic.”³⁰⁰ The compelling nature of the societal interests are not diminished by the fact, and it is a fact, that the growth of the close personal relationship ideology and the concomitant increase in unmarried co-habitation and births out of wedlock have rendered the marriage institution less effective than formerly in furthering those interests. The compelling nature of the interests are not diminished by that fact because, as the resource becomes more scarce, it becomes correspondingly more essential to society’s well-being. The resource of which I speak includes children grown to adulthood blessed with significant incremental increases in educational attainments and in physical, mental, and emotional health³⁰¹ and with a complete sense of who they are and from whom they came³⁰² and not hampered by the consequences of significant incremental increases in criminal conduct and other forms of self-and other-destructive behavior.³⁰³ It also includes adults secure as *husband* or *wife*,³⁰⁴ with all the significant incremental increases in health, happiness, and productivity associated with those statuses.³⁰⁵

³⁰⁰ Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 996 (Mass. 2003) (Cordy, J., dissenting).

³⁰¹ See *supra* notes 223-225 and accompanying text.

³⁰² See *supra* note 28.

³⁰³ See *supra* notes 223-225 and accompanying text.

³⁰⁴ See DeCoste, *Transformation*, *supra* note 8, at 625-27.

³⁰⁵ Here is Blankenhorn’s summary:

Scholarly research does show that participating in the institution of marriage – being subject to its rules and incentives and being guided by its public meaning – adds stability and longevity to a relationship. After all, that’s one of the main purposes of the institution. More generally, a large and growing body of social science research finds that, compared with similarly situated unmarried persons, married people are happier and healthier, live longer, are more fulfilled sexually, earn more and accumulate more wealth. Of course, some of the differences between the two groups are attributable to what scholars call “selection effects” At the same time, the key finding in study after study is that *marriage itself* – the lived reality of being married – contributes significantly both to the relationship’s stability and to the spouses’ health, happiness, and prospects for economic success.

Nor do notions of “over-inclusive” and “under-inclusive” lead to a conclusion of unconstitutionality. That is because society, if it is to have a normative marriage institution, has *only* two choices. Either it will choose genderless marriage or it will choose man/woman marriage. To choose genderless marriage is to cause the loss of the man/woman meaning and therefore the loss of its valuable social goods. Man/woman marriage is neither over-inclusive nor under-inclusive because it *must be only what it is*—the source of institutional power to the man/woman meaning—to sustain society’s compelling interests in the perpetuation of that meaning’s social goods.

Through twenty cases,³⁰⁶ only three American appellate judges have concluded that the constitutionality of man/woman marriage should be decided under the strict scrutiny standard—and in holding for unconstitutionality all of them ignored the broad description of marriage and the social institutional argument.³⁰⁷ And only two American appellate judges have argued for a heightened (but less rigorous than strict) scrutiny—and although both of them ignored the broad description of marriage and the social institutional argument, one said that man/woman marriage could continue if civil unions were provided,³⁰⁸ while the other insisted on genderless marriage.³⁰⁹ All the remaining American appellate judges to address the issue have either held that rational basis review

BLANKENHORN, *supra* note 31, at 145 (emphasis in original). *See generally* WILCOX ET AL., *supra* note 9; LINDA WAITE AND MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* (2000).

³⁰⁶ *See supra* note 7 and accompanying text.

³⁰⁷ *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *id.* at 68 (Burns, J., concurring).

³⁰⁸ *Baker v. Vermont*, 744 A.2d 864, 889 (Vt. 1999) (Dooley, J., concurring).

³⁰⁹ *Id.* at 897 (Johnson, J., concurring & dissenting).

was appropriate,³¹⁰ said that such review could be employed because man/woman marriage was unconstitutional under even that lenient standard,³¹¹ or did not address standard of review.³¹²

I provide this history, in part, to show that no American appellate judge has yet subjected man/woman marriage to strict scrutiny while being honest with the broad description of contemporary American marriage and the social institutional argument. I also provide this history to show that a judge who accepts that the close personal relationship model is a complete and therefore a factually accurate description of contemporary American marriage can strike down the man/woman meaning and still pass the blush test. That is just what happened with those judges who said that rational basis review could be employed because man/woman marriage was unconstitutional under

³¹⁰ Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972); Jones v. Hallahan, 501 S.W.2d 588 (Ky. App. 1973); Singer v. Hara, 522 P.2d 1187 (Wash. App. 1974), *review denied*, 84 Wash.2d 1008 (1974); Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1980); DeSanto v. Barnsley, 476 A.2d 952 (Penn. Super. 1984); Dean v. District of Columbia, 653 A.2d 307 (D.C. App. 1995); *id.* at 361 (Terry, J., concurring); *id.* at 362 (Steadman, J., concurring); Standhardt v. Superior Court, 77 P.3d 451 (Ariz. App. 2003); Goodridge v. Dep't. of Pub. Health, 798 N.E.2d 941, 974 (Mass. 2003) (Spina, J., dissenting); *id.* at 978 (Sosman, J., dissenting); *id.* at 983 (Cordy, J., dissenting); Morrison v. Sadler, 821 N.E.2d 15 (Ind. App. 2005); *id.* at 35 (Friedlander, J., concurring); Lewis v. Harris, 875 A.2d 259 (N.J. App. 2005); *id.* at 274 (Collester, J., concurring); Hernandez v. Robles, 805 N.Y.S.2d 354 (N.Y. App. 2005); *id.* at 364 (Catterson, J., concurring); *id.* at 377 (Saxe, J., dissenting); Samuels v. N.Y. Dep't. of Pub. Health, 811 N.Y.S.2d 136 (N.Y. App. 2006); Seymour v. Holcomb, 811 N.Y.S.2d 134 (N.Y. App. 2006); Kane v. Marsolais, 808 N.Y.S.2d 136 (N.Y. App. 2006); Hernandez v. Robles, 7 N.Y.3d 338 (N.Y. 2006); *id.* at 366 (Grafteo, J., concurring); *id.* at 380 (Kaye, C.J., dissenting); Andersen v. King County, 138 P.3d 963 (Wash. 2006); *id.* at 991 (Alexander, J., concurring); *id.* at 991 (J. Johnson, J., concurring); *id.* at 1027 (Bridge, J., dissenting); *id.* at 1040 (Chambers, J., dissenting); *id.* at 1012 (Fairhurst, J., dissenting); *In re Marriage Cases*, 49 Cal. Rptr. 3d 675 (Cal. App. 2006); *id.* at 727 (Parilli, J., concurring).

³¹¹ Goodridge v. Dep't. of Pub. Health, 798 N.E.2d 941 (Mass. 2003); *id.* at 970 (Greaney, J., concurring); Lewis v. Harris, 875 A.2d 259, 278 (N.J. App. 2005) (Collester, J., dissenting); Hernandez v. Robles, 805 N.Y.S.2d 354, 377 (N.Y. App. 2005) (Saxe, J., dissenting); Andersen v. King County, 138 P.3d 963, 1027 (Wash. 2006) (Bridge, J., dissenting); *id.* at 1040 (Chambers, J., dissenting); *id.* at 1012 (Fairhurst, J., dissenting); *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 731 (Cal. App. 2006) (Kline, J., dissenting); Lewis v. Harris, 908 A.2d 196 (N.J. 2006).

³¹² Baker v. Vermont, 744 A.2d 864 (Vt. 1999); Lewis v. Harris, 908 A.2d 196 (N.J. 2006).

even that lenient standard.³¹³ And both those showings, together with the earlier demonstration of the man/woman meaning's constitutionality even when subjected to strict scrutiny, lead quite certainly it seems to me to the conclusion that it is choice of marriage facts, not choice of a standard of review, that ultimately determines man/woman marriage's fate in the courts. The correlative conclusion is that, as long as the man/woman meaning is institutionalized as a core, constitutive meaning of the American marriage institution and continues productive of its social goods of significant incremental increases in both child and adult health, happiness, and achievement, man/woman marriage will be in harmony with American constitutional norms of equality and liberty.

IV.

MAN/WOMAN MARRIAGE AND A CRITICAL MORALITY

A. THE DIVERSITIES OF CRITICAL MORALITY

The perceptive reader will have noticed, and the thoughtful reader will have found some significance in, the use of the indefinite article *a* before the term *critical morality* in this section's title. It is used in recognition of Julius Cohen's observation: "Granted this state of affairs, it would seem less misleading to refer to *a* critical morality, than to critical morality in general. Notwithstanding the excesses of advocacy, the concept is pluralistic, not monistic."³¹⁴ The "state of affairs" to which Cohen refers includes two phenomenon. One is a strong and continuing felt need in some quarters to avoid use of

³¹³ See *supra* note 311 and accompanying text.

³¹⁴ Julius Cohen, *Critiquing the Legal Order in the Name of "Critical Morality,"* 16 CARDOZO L. REV. 1599, 1621 (1995) (emphasis added).

conventional (majoritarian or consensus) morality in critiquing or justifying legal acts and instead to use for those purposes critical morality, that is, “a social morality distilled and tamed by a special kind of reasoning that places intellectual restraints on [conventional morality’s] primitive source materials” and that consists of “a fairly determinate, comprehensive, univocal set of criteria that a reflective mind could not fail to discern.”³¹⁵ The other phenomenon is the existence of numerous profoundly differing “views of what these critical criteria are, [or] how they are to be found or discerned.”³¹⁶ Thus, we see “in practice, . . . a striking fragmentation of perspectives by legal functionaries concerning the substantive content and procedures of critical morality.”³¹⁷

Despite that fragmentation, it seems to me that engagement with certain conclusions of (some forms of) critical morality cannot rightly be avoided. The moral conclusions I have in mind are very much premised on the marriage facts sifted and validated by the earlier sections of this article. Indeed, those earlier sections’ work of validating and invalidating marriage facts does much to bring into rather sharp focus the moral equations leading to those conclusions. I focus here on three moral conclusions.

³¹⁵ *Id.* at 1599.

³¹⁶ *Id.*

³¹⁷ *Id.* at 1617. See also Ernest Nagel, *The Enforcement of Morals*, in *ETHICS AND PUBLIC POLICY* 265, 271 (Tom L. Beauchamp ed., 1975):

It is plain, however, that many systems of critical morality have been developed, and that their conceptions of what is to men's best interests do not always agree. There is certainly no consensus even among deeply reflective men as to which system of critical morality is the most adequate one, so that legal paternalists are likely to differ among themselves

B. THREE MORAL CONCLUSIONS

First, because of the overwhelming portion of all persons for whom man/woman marriage can be a meaningful option,³¹⁸ because of the very large portion of all persons for whom it is an actual experience (as spouse or child or both),³¹⁹ and because of the substantial and rational uncertainty regarding the genderless marriage institution's performance in this area,³²⁰ man/woman marriage is rationally seen as providing a greater quantum of human health, happiness, achievement, and prosperity. Second, as between the welfare of children *qua* children now and through the generations (a welfare best served by man/woman marriage) and the dignity of gay men and lesbians (a dignity believed to be best served by genderless marriage), the welfare of children, as the most vulnerable and least powerful members of our society, should prevail. Third, because of the absence of a constitutional case for genderless marriage, those tens of millions who entered the man/woman marriage institution in good faith and in fidelity to its core meanings may morally and rightfully expect to continue in that institution and not, by

³¹⁸ The most responsible studies identify 95+% of the adult population as heterosexual. *See, e.g.*, NATIONAL OPINION RESEARCH CENTER, SUMMARY OF THE NATIONAL HEALTH AND SOCIAL LIFE SURVEY, available at <http://cloud9.norc.uchicago.edu/faqs/sex> (regarding “the rate of homosexuality in the population . . . the study reported to be 1.3% for women within the past year, and 4.1% since 18 years [of age]; for men, 2.7% within the past year, and 4.9% since 18 years; in all, much lower than the Kinsey report of 10%”); J. Gordon Muir, *Homosexuals and the 10% Fallacy*, WALL ST. J. A14 (March 31, 1993) (in reporting the findings of “continuing survey conducted by the U.S. Census Bureau since 1988 for the National Center for Health Statistics of the Centers for Disease Control,” lists the heterosexual population at 94%+, and points out the flaws in the studies reporting 10% or more); EDWARD O. LAUMANN, ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY IN THE UNITED STATES 289-97 (1994); ANTHONY PIETROPINTO & JACQUELINE SIMENAUER, BEYOND THE MALE MYTH 59 (1977) (1.3% of men homosexual); John O.G. Billy et al., *The sexual behavior of men in the United States*, 25 FAMILY PLANNING PERSPECTIVES 52 (1993) (“Only 2% of sexually active men aged 20-39 have had any same-gender sexual activity during the last ten years, and only 1% reported being exclusively homosexual during this interval.”). *See also* A. Dean Byrd and Stony Olsen, *Homosexuality: Innate and Immutable?*, 14 REGENT U. L. REV. 383, 413 (2001) (discussing different statistics regarding percentage of population that is homosexual).

³¹⁹ *See supra* note 175.

³²⁰ *See supra* notes 227-229.

force of law and against their will, be forced out of that institution and, further, forced to choose between a legally and socially validated marriage in the genderless marriage institution or no participation in any marriage institution.

What follows is an evaluation of how well a critical morality sustains each of the three moral conclusions.

1. “Greater good”: an application of utilitarianism

The first conclusion is that man/woman marriage is rationally seen as providing (compared to genderless marriage) a greater quantum of human health, happiness, achievement, and prosperity. The conclusion’s foundations in the validated marriage facts are these: Our society can have the man/woman marriage institution or it can have the genderless marriage institution; it cannot have both.³²¹ The man/woman marriage institution provides good things to the children reared in that institution by their mother and father.³²² Those good things include significant incremental increases in health, happiness, and achievement, when compared with all other adequately studied child-rearing modes.³²³ The children reared by married mother/father are not all the children in our society but are a substantial majority.³²⁴ Moreover, husbands and wives, when secure in those statuses, also enjoy significant incremental increases in health, happiness, and prosperity.³²⁵ Adults enjoying those statuses are not all the adults in our society, but a substantial majority of men will be husbands sometime during their lives, and the same

³²¹ See *supra* notes 51-52 and accompanying text.

³²² See *supra* notes 28-30, 223-225 and accompanying text.

³²³ *Id.*

³²⁴ At any given time, about 60% of American children are living with their own married mother and father. See BLANKENHORN, *supra* note 31, at 218, 220-21. The percentage of American children who have lived with their own married parents at any time between birth and age 18 would of course be higher.

³²⁵ See *supra* note 305.

is true for women as wives.³²⁶ Because man/woman marriage is institutionalized—in that its core meanings are widely shared and a large portion of the population participates in it—its social goods affect society generally; although experienced initially at the individual or personal level, those goods, when multiplied through the tens of millions of participant lives, redound to society’s benefit.

We cannot say now with much basis that the displacing genderless marriage institution will be able to match, and will in fact match, the optimal outcomes in child and adult well-being associated with man/woman marriage³²⁷—even though genderless marriage will encompass not just (some unknown portion of all) same-sex couples and the children they rear but also all man/woman couples who want their marriage socially and legally validated and the children of those couples.³²⁸ We are certain, however, that the genderless marriage institution, once the revolution is complete, will preclude the institutionalized identities and statuses of *husband* and *wife* and will assure the elimination of a child’s right (as opposed to fortunate accident) to know and be raised by his or her biological parents (with exceptions only in the best interests of the child, not any adult).³²⁹ We can also be quite certain that the genderless marriage institution,

³²⁶ See *supra* note 175.

³²⁷ See *supra* notes 223-229 and accompanying text.

³²⁸ See *infra* notes 353-357 and accompanying text.

³²⁹ See Stewart, *Judicial Elision*, *supra* note 8, at 21-24. Regarding loss of what is known as the child’s *bonding right*, Blankenhorn notes:

[S]ame-sex marriage would require us in both law and culture to deny the double origin of the child. I can hardly imagine a more serious violation. It would require us to change or ignore our basic human rights documents, which announce clearly, and for vitally important reasons, that every child has a birthright to her own two natural parents. It would require us, legally and formally, to withdraw marriage’s greatest promise to the child – the promise that insofar as society can make it possible, I will be loved and raised by the mother and father who made me. When I say, “Every child deserves a mother and a father,” I am saying something that almost everyone in the world has always assumed

because premised on the close personal relationship ideology, will further erode the meaning of *permanence* in marriage; after all, that ideology teaches that the “intimate partnership [is] entered into for its own sake . . . [and] lasts only as long as both partners are satisfied with the rewards (mostly intimacy and love) that they get from it.”³³⁰ Our actual experience with the fruits of the divorce revolution teaches that such further erosion of permanence in marriage will diminish human health, happiness, and prosperity.³³¹

All these validated marriage facts square with the first conclusion’s core notion of man/woman marriage providing a greater quantum of human health, happiness, achievement, and prosperity. And relative to a critical morality, that notion of course both reflects the approach of classic utilitarianism and satisfies its ultimate moral test: “the greatest happiness of [or good for] the greatest number.”³³² That is important. Although utilitarianism is only one (robust) form of critical morality among several (equally robust) competitors³³³ and has been the object of strong criticism,³³⁴ genderless marriage proponents are in no position to counter the first conclusion by resort to a criticism of utilitarianism generally; that is because their own (moral) arguments are in very large measure utilitarian. I am unaware of an important genderless marriage proponent who has not advanced some essentially utilitarian argument in support of the

to be true, and that many people today, I think most people, still believe to be true. But a society that embraces same-sex marriage can no longer collectively embrace this norm and must take specific steps to retract it. One can believe in same-sex marriage. One can believe that every child deserves a mother and a father. One cannot believe both.

BLANKENHORN, *supra* note 31, at 201.

³³⁰ Cherlin, *supra* note 112, at 853.

³³¹ *See supra* note 185.

³³² JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT 3 (J.H. Burns & H.L.A. Hart eds., new authoritative ed. 1988).

³³³ Cohen, *supra* note 314, at 1605-19.

³³⁴ *See, e.g., id.*

radical redefinition of marriage. Nearly all advance the “no downside” argument: Our society should allow same-sex couples to enter into marriage because to do so will benefit them (and any children they raise) socially, psychologically, and economically and will not harm the institution and its child-bearing and child-rearing meanings, purposes, practices, and social goods; man/woman couples will still marry at the same rate and still do just as well raising their children.³³⁵ And that is pure Bentham.³³⁶ The same is true of the “conservative case for gay marriage”; it differs only in its focus on single gay men rather than already existing households headed by same-sex couples and the children therein.³³⁷ The same is true of genderless marriage proponents’ “child welfare” argument.³³⁸ The same is even true of Ronald Dworkin’s recently advanced “institutionally added value” argument for “gay marriage”³³⁹—despite his distaste for some forms and applications of utilitarianism.³⁴⁰

In sum, the first conclusion – as the product both of validated marriage facts and of a serious critical morality accepted as such by all in the debate – rather forcefully sustains the morality of society’s choice to perpetuate the man/woman marriage institution.

³³⁵ See *supra* note 215.

³³⁶ See JEREMY BENTHAM, *THEORY OF LEGISLATION* 3-4 (R. Hildreth trans., Ballantyne Press 4th ed. 1882); JEREMY BENTHAM, *A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 125-27 (Wilfrid Harrison ed., 1948).

³³⁷ See *supra* note 79.

³³⁸ See *supra* section II(C)(2)(d).

³³⁹ See DWORKIN, *supra* note 116, at 86 (2006); Stewart, *Dworkin*, *supra* note 8, at 302-05.

³⁴⁰ See, e.g., RONALD DWORKIN, *SOVEREIGN VIRTUE* 62-64, 328-30 (2000).

2. Protecting the most vulnerable

The second conclusion is that, as between the welfare of children *qua* children now and through the generations (a welfare best served by man/woman marriage) and the dignity of gay men and lesbians (a dignity believed to be best served by genderless marriage), the welfare of children, as the most vulnerable and least powerful members of our society, should prevail. The validated marriage facts summarized in connection with the first conclusion also apply in large measure to this second conclusion. There is also this: Genderless marriage proponents say that having the right to marry, whether exercised or not, will enhance the social acceptance and therefore the economic and psychological well-being of gay men and lesbians and the children they raise.³⁴¹ Having that right will augment the human dignity of all gay men and lesbians.³⁴² With that right, they will be—will feel that they are and will be seen as being—full and equal members of our society.³⁴³ To allow same-sex couples to marry “can only enhance [their] sense of self-worth and dignity.”³⁴⁴

In this way, the marriage facts set up “goods in conflict” and “rights claims in conflict,” to use David Blankenhorn’s phrases.³⁴⁵ A utilitarianism-based critical morality would undoubtedly present itself as adequate to resolve the conflict, that is, to identify which policy

³⁴¹ See *supra* section II(B); see also Kathleen E. Hull, *The Cultural Power of Law and the Cultural Enactment of Legality: The Case of Same-Sex Marriage*, 28 LAW & SOC. INQUIRY 629, 635, 638 (2003); Lisa K. Parshall, *Redefining Due Process Analysis: Justice Anthony M. Kennedy and the Concept of Emergent Rights*, 69 ALB. L. REV. 237, 268 (2005); Jeffrey A. Dodge, *Same-Sex Marriage and Divorce: A Proposal for Child Custody Mediation*, 44 FAM. CT. REV. 87, 91 (2006); Ryan Nishimoto, Book Note, 23 B.C. THIRD WORLD L.J. 379 (2003); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 963 (Mass. 2003).

³⁴² See *supra* section II(B); see also Ariel Y. Graff, *Free Exercise and Hybrid Rights: An Alternative Perspective on the Constitutionality of Same-Sex Marriage Bans*, 29 HAWAII L. REV. 23, 36-37 (2006); Rosie Harding, *Dogs are “Registered”, People Shouldn’t Be’: Legal Consciousness and Lesbian and Gay Rights*, 15 SOCIAL LEGAL STUDIES 511, 528-30 (2006).

³⁴³ See *supra* section II(B); see also Harding, *supra* note 342, at 529-30.

³⁴⁴ *Halpern v. Toronto (City)*, [2003] 65 O.R.3d 161, 225 D.L.R. (4th) 529 at ¶1x (Ont. C.A.).

³⁴⁵ BLANKENHORN, *supra* note 31, at 171, 183.

will lead to the greater good,³⁴⁶ although the task would require some slogging through the muddy field of gay/lesbian demographics.³⁴⁷ Without disputing utilitarianism's claims in this context, however, I am much more interested in examining another critical morality's application to the second conclusion. Robert E. Goodin is the principal voice for a moral philosophy centrally concerned with what individuals, institutions, and particularly the state owe to the vulnerable.³⁴⁸ He argues that our primary moral obligation is to care for the vulnerable, particularly children.³⁴⁹ Children qualify for that special solicitude exactly because of the nature and extent of their vulnerability, viewed in terms of their dependence, their need for physical, emotional, and social sustenance and moral guidance, and their political powerlessness.³⁵⁰ Although genderless marriage advocates

³⁴⁶ As one of three reasons for choosing the welfare of children over the dignity interests of gay men and lesbians, Blankenhorn invokes "the principle of the greatest good for the greatest number" and works through its application. *Id.* at 198-99.

³⁴⁷ See *supra* note 318.

³⁴⁸ See generally ROBERT E. GOODIN, *PROTECTING THE VULNERABLE: A REANALYSIS OF OUR SOCIAL RESPONSIBILITIES* (1985). For a quite good summary of Goodin's argument, see Jeffrey Abramson, *Book Review*, 97 *ETHICS* 659 (1987) (reviewing GOODIN, *supra*).

³⁴⁹ See GOODIN, *supra* note 348, at 28-41, 79-83.

³⁵⁰ See *id.* at 33:

Consider carefully the plight of the infant. "Is there anything," Rousseau . . . asks, "so weak and wretched as a child, anything so utterly at the mercy of those about it, so dependent on their pity, their care, and their affection?" Indeed, biologists remark that the most salient feature of the human infant is its severe and protracted vulnerability. . . . [T]hose special responsibilities [imposed by society in favor of children] flow fundamentally from the child's special vulnerabilities."

See also Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (quoting Declaration of the Rights of the Child, G.A. Res. 1386, at 19, U.N. GAOR, 14th Sess., Supp. No. 16, 841st plen. mtg., U.N. Doc. A/4354 (1959)) ("the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."); *Bellotti v. Baird*, 443 U.S. 622, 633-34 (1979) (plurality opinion):

The Court long has recognized that the status of minors under the law is unique in many respects. . . . "[C]hildren have a very special place in life which law should reflect." . . . The unique role in our society of the family, the institution by which "we inculcate and pass down many of our most cherished values, moral and cultural," . . . requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children. We have recognized . . . the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.

do point to the diminished political and broader social opportunities experienced by gay men and lesbians, particularly when arguing for a strict scrutiny standard of review,³⁵¹ no one seriously equates their situation to the vulnerability and powerlessness inherent in childhood. Thus, Blankenhorn seems to have it right:

[W]hen we are forced to make hard choices between competing interests, we should seek first and foremost to protect the interests of those who are less able to protect themselves. In this case [of competing interests arising from mutually exclusive marriage institutions], that means children.³⁵²

Accordingly, what was said of the first conclusion can be said with equal validity regarding the second conclusion: the second conclusion – as the product both of validated marriage facts and of a serious critical morality – rather forcefully sustains the morality of society’s choice to perpetuate the man/woman marriage institution.

3. Vindicating justifiable expectation interests

The third conclusion is that, because of the absence of a constitutional case for genderless marriage, those tens of millions who entered the man/woman marriage institution in good faith and in fidelity to its core meanings may morally and rightfully expect to continue in that institution and not, by force of law and against their will, be forced out of that institution and, further, forced to choose between either a legally and socially validated marriage in the genderless marriage institution or no participation in any marriage institution at all. Along with the validated marriage facts summarized in connection with the first conclusion, two further marriage facts bear on this third

This understanding of the “peculiar vulnerability of children” no doubt accounts in large measure for the ever more “central moral goal of family law: protection of children.” Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1116 (1999).

³⁵¹ See, e.g., *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 713 (Ct. App. 2006).

³⁵² BLANKENHORN, *supra* note 31, at 198.

conclusion. One has to do with the deficiencies, as a matter of fact, of genderless marriage proponents' "enclave" argument. That argument holds that those in our society who do not agree with the teachings and formative influences of the genderless marriage institution and the interests genderless marriage advances can simply retreat to an enclave, whether it be a linguistic, social, and/or religious enclave. In their own enclave, such persons would be free to do their own marriage thing unaffected by the new social institution. As I have noted elsewhere,³⁵³ there are problems with the notion that resourceful people could still find ways to communicate to the next generations of children the unique goods of man/woman marriage and its value, primarily by establishing a sort of linguistic enclave in the heart of a community that has no comprehension of what matters to them. To the degree that members of the enclave were to adopt the speech of the community, they would lose the power to name and, in large part, the power to discern what once mattered to their forbears. To that degree, their forbears' ways would seem implausible to them, and probably even unintelligible. The bare possibility that people could, with considerable difficulty and sacrifice, maintain the meanings for their children of man/woman marriage is therefore just that—a bare possibility.³⁵⁴

³⁵³ Stewart, *Judicial Elision*, *supra* note 8, at 46-49.

³⁵⁴ *See id.* The possibility becomes even less substantial upon realization that [t]o change the core meaning of marriage from the union of a man and a woman . . . to the union of any two persons [will result in] . . . the new meaning [being] mandated in texts, in schools, and in many other parts of the public square and voluntarily published by the media and other institutions, with society, especially its children, thereby losing the ability to discern the meanings of the old institution.

Stewart, *Redefinition*, *supra* note 8, at 111.

Thus, any picture of Massachusetts or any state going the same route is misleading that portrays the state as the happy home of many different marriage norm communities, each doing its own marriage thing, each equally valid before the law, each equally secure in its own space. As a matter of legal and social fact, that state will mandate by force of law one and only one marriage institution and one and only one marriage norm, and that is genderless marriage. The genderless marriage norm will be mandated in and reinforced by texts, mandated in and reinforced by schools, and mandated in and reinforced by many other parts of the public square and, furthermore, will be voluntarily published by the media and other institutions. One marriage norm community will be officially sanctioned and protected; all other marriage norm communities will be officially constrained, will be officially disdained and sharply curtailed.³⁵⁵

The other – and related – marriage fact bearing on the third conclusion is that to redefine marriage is to redefine it for everyone, not just same-sex couples. Consequently,

[r]edefinition and no act of their own removes [already married man/woman couples] from the institution they voluntarily entered (man/woman marriage) into a markedly different one. To the extent that institutions are constituted by social meaning, and to the extent that the law dictates the social meaning of civil marriage, to redefine marriage as the union of any two persons is not to pull gay men and lesbians into marriage as our societies now know it but to pull married man/woman couples into what the media calls imprecisely “gay marriage” and this article calls genderless marriage.³⁵⁶

Moreover, in a state where genderless marriage is the law, and especially where it is deemed constitutionally mandated,

³⁵⁵ See Stewart, *Judicial Elision*, *supra* note 8, at 48-49.

³⁵⁶ Stewart, *Redefinition*, *supra* note 8, at 85.

a man and a woman desiring to avoid complicity with the new institutional regime could fulfill that desire—but only by openly participating in a decidedly exclusive marriage ceremony sanctioned only by a decidedly exclusive norm community (in other words, by openly foregoing civilly sanctioned genderless marriage by means of a consciously political act). The price for doing so includes forfeiting the benefits of civil marriage and being officially labeled as bigoted (or at least “discriminatory”)—that is, as hostile to the constitutional ideal of equality.³⁵⁷

Before moving on to the moral equation regarding the third conclusion, one aspect of its formulation merits attention. That is the reference to “the absence of a constitutional case for genderless marriage.” If there were a good constitutional case for genderless marriage, the equation would be different. After making what it (erroneously) deemed such a case, the *Goodridge* plurality opinion noted:

The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual. “The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”³⁵⁸

But because of the on-going absence of a sustainable argument for the “unconstitutionality” of man/woman marriage, talk of constitutional intolerance for the unconstitutional adds nothing to the moral analysis.

Turning to the moral equation, a concept illuminating the third conclusion pertains to the moral dimension of a person’s expectation interests. Serious thinkers have posited the moral obligation “to keep a promise . . . in terms of general principles arising

³⁵⁷ Stewart, *Judicial Elision*, *supra* note 8, at 48 n. 137.

³⁵⁸ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003) (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

from the interests that others have in being able to rely on expectations about what we are going to do” and that these general principles “are more general than the concept of a promise: they apply to some situations in which expectations have been created without promises having been given”³⁵⁹ Moreover,

[t]here are a number of reasons why promises give rise to legal and *moral* obligations. Reliance on promises by others is a familiar justification in law and in philosophy for the obligation to keep one's promises. Social practices also clearly provide moral force to promises [As to the morality of promise-keeping or breaking promises] . . . [t]hat determination depends upon *expectations* and established conventions involving promises.³⁶⁰

Although a person's expectation interests generally arise from contracts made in the market, important ones also arise from the unique marriage “contract”³⁶¹—unique both because it in itself (and not just the modes of its making and enforcement) is so thoroughly institutionalized and because government involvement is so pervasive, at both its entry and (especially) its exit points.³⁶² Further, the value of the expectation interest of those already in the man/woman marriage institution is great and cannot be fairly denigrated. A sense of its value emerges from recent work in the philosophy of agency and identity.

In order to act human beings must have some understanding of the world and their place in it, an understanding most often implicit in their inherited attitudes and assumptions. Personal identity is thus not a given but an achievement, a process of self-development worked out with others within inherited cultural repertoires. . . . [T]hese repertoires [are] centered on

³⁵⁹ See T.M. Scanlon, *Thickness and Theory*, 100 J. PHIL. 275, 283 (2003); see also Richard R.W. Brooks, *The Efficient Performance Hypothesis*, 116 YALE L.J. 568, 587 (2006) (“Almost everyone who has anything to say about the subject agrees that, as a general matter, people have a moral obligation to keep their promises.”).

³⁶⁰ *Id.* at 595 (emphasis added).

³⁶¹ GOODIN, *supra* note 348, at 72 (“The received view of marriage is insistently contractual.”).

³⁶² *E.g.*, *id.* at 73-75.

practices,” or shared, purposive activities that are not instruments toward other goals but whose ends lie principally within their own performance. . . . [T]he typical social roles of parent, teacher, athlete, or citizen derive their significance and value from the goods realized in the practices constitutive of playing these roles well. Persons who master these roles become virtuous in the sense that they perform well important functions of their lives. . . . Institutions . . . are normative patterns that define purposes and practices, patterns embedded in and sanctioned by customs and law. They . . . provid[e] the standards in terms of which each individual takes stock of his or her own life.³⁶³

F.C. DeCoste applies these general concepts to the man/woman marriage institution:

Social practices are only intelligible in terms of their “point,” and any given practice can only (continue to) exist if its practitioners or participants are seized of some “sense” of the overall point of the “form of life” which the practice brings into the world. Marriage is a social practice that in life and subsequently, in law, has a point that constitutes it as a distinct practice. The point of marriage is the bestowal of a certain status on those who choose and are otherwise capable of entering into it and the creation of relations between them. The status bestowed by marriage is that of “wife” and “husband,” and the relation between husband and wife is the form of life that marriage alone creates and of which it alone is the practice.³⁶⁴

The “marriage” of which DeCoste speaks, of course, is man/woman marriage, and it indeed is the sole source of the statuses, identities, practices, and form of life that he identifies. For government to perpetuate man/woman marriage is therefore to vindicate that valuable and widely held expectation interest and, to that extent, to act morally under a serious form of critical morality.³⁶⁵

³⁶³ Sullivan, *supra* note 22, at 174-75.

³⁶⁴ DeCoste, *Transformation*, *supra* note 8, at 625.

³⁶⁵ To downplay the expectation interest by saying that the ordinary man/woman couple does not understand the thickness of the form of life they have chosen seems to me both factually inaccurate and condescending. To downplay the expectation interest by saying that the ordinary man/woman couple does not understand what adoption of genderless marriage will do to that interest – destroy it, in time – amounts to a callous exploitation of a particular phenomenon. I am thinking of a phenomenon very much akin to that of the frog contentedly swimming in the pot of lukewarm water inexorably on its way to a boil.

V. CONCLUSION

It bears repeating in conclusion that the facts come first. The constitutional and moral arguments advanced by genderless marriage proponents fail not so much because of flaws of logic or of coherence in the elements of the arguments themselves; they fail mostly because those arguments are premised on a quicksand foundation—the factually inaccurate narrow (or close personal relationship) description of contemporary American marriage. The successful constitutional and moral arguments advanced in support of man/woman marriage succeed because they are ultimately premised on the factually accurate broad (or institutional) description of a complex whole—the marriage institution—that, albeit imperfectly but nevertheless, guides individual activity, sustains identity, gives sense and purpose to the lives of its participants, and thereby produces valuable social goods.