

THE STATE INTERESTS IN MARRIAGE

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INTRODUCTION

In contrast to the tradition of individual liberty in the United States, “[t]he ‘family tradition’ . . . has been such an obvious presupposition of our culture that it has not been well articulated, let alone explained or justified.”¹ Over the past three decades, challenges to the legal definition of marriage in various states have heightened the sense of “the two traditions of individualism and family life [being] on a collision course.”² As a result, state attorneys, judges, legal commentators, and others have been forced to attempt articulations of the state interests furthered by marriage laws that define marriage as the union of a man and a woman. These interests are separate from the individual interests of parties to a marriage because they focus on the societal rather than personal value of marriage.

Section I of this article will survey the court opinions in the cases deciding on the constitutionality of state definitions of marriage. It will note the courts’ responses to the proffered justifications of marriage laws offered by the states. It will also describe the courts’ responses to these articulations, noting whether the courts found the interests persuasive and what legal standard the interests were put forward to satisfy. This article will demonstrate that to the degree that courts have not comprehended the state interests in marriage, they have been more accepting of claims that it must be redefined to include same-sex couples. Thus, the core purpose of this article is to attempt a more exact articulation of, and arguments for, the state

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1. Bruce C. Hafen, *Puberty, Privacy, and Protection: The Risks of Children’s “Rights,”* 63 A.B.A. J. 1383, 1383 (1977).

2. *Id.* at 1384.

interests in marriage. Section II will draw on this description to offer alternative statements of, and justifications for, the state interests in marriage. It is hoped that the approach offered here can create a greater understanding of the exact social value and purpose of marriage and how that purpose justifies deference to the traditional definition of marriage.

I. MARRIAGE IN THE COURTS

Not all of the court decisions addressing the definition of marriage have addressed possible state interests in marriage. Some have so completely rejected the plaintiffs' constitutional claims that the question of whether the state could justify its marriage law never came up.³ On the other hand, some courts have found discrimination and ordered trials to allow the state to demonstrate a compelling interest in the marriage laws that would justify the discrimination.⁴ Nevertheless, many courts have addressed the state interests in marriage and this section will analyze current case law on the definition of marriage. A reading of these cases reveals four general interests that appear consistently: procreation, child rearing, tradition, and interstate uniformity. There is also a variety of interests that appear in only one case.

A. Procreation

The most common state interest discussed in same-sex marriage case law relates to procreation, either the interest in encouraging procreation for the sake of ensuring the continuation of society or the interest in responsible procreation. In one of the earliest opinions, arising from a challenge to Washington's marriage law, the court asserted, "The fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the

3. See *Baker v. Nelson*, 191 N.W.2d 185, 186-87 (Minn. 1972), *appeal dismissed for want of substantial federal question*, 409 U.S. 810 (1973) (male same-sex couple challenged state's refusal to issue them a marriage license); *Jones v. Hallahan*, 501 S.W.2d 588, 589-90 (Ky. 1973) (female same-sex couple challenged state's refusal to issue them a marriage license).

4. See *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (three same-sex couples challenged the state's definition of marriage); *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998) (male same-sex couple sought to compel the issuance of a marriage license to them).

propagation of the human race.”⁵ The court also said that the state’s failure to redefine marriage to include same-sex couples “is based upon the state’s recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children.”⁶ The court rejected the contention that the fact that some married couples do not have children defeats this interest, noting that “[t]hese . . . are exceptional situations.”⁷ It went on to say,

Further, it is apparent that no same-sex couple offers the possibility of the birth of children by their union. Thus, the refusal of the state to authorize same-sex marriage results from such impossibility of reproduction rather than from an invidious discrimination “on account of sex.” Therefore, the definition of marriage as the legal union of one man and one woman is permissible as applied to appellants . . . because it is founded upon the unique physical characteristics of the sexes and appellants are not being discriminated against because of their status as males per se.⁸

Similarly, the Ninth Circuit noted that “homosexual marriages never produce offspring.”⁹ In a dissent to the Supreme Court of Hawaii’s decision that marriage is a form of sex discrimination, Judge Heen stated his belief that the purpose of the marriage law is “to promote and protect propagation.”¹⁰

In the Vermont same-sex marriage case, the state argued that its marriage law protected the state’s interest in “furthering the link between procreation and child rearing.”¹¹ By “promoting a permanent commitment between couples who have children to ensure that their offspring are considered legitimate and receive ongoing parental support” and counteracting a message that fathers and mothers “are mere surplusage to the functions of procreation and child rearing,” the state can “send a public message that procreation

5. *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) (male same-sex couple challenged state’s refusal to issue them a marriage license).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Adams v. Howerton*, 673 F.2d 1036, 1043 (9th Cir. 1982) (male couple sought recognition of ceremonial marriage for immigration purposes).

10. *Baehr v. Lewin*, 852 P.2d 44, 73 n.8 (Haw. 1993) (Heen, J., dissenting).

11. *Baker v. Vermont*, 744 A.2d 864, 881 (Vt. 1999) (three same-sex couples sought marriage licenses; the court held that the benefits of marriage must be extended to same-sex couples).

and child rearing are intertwined."¹² The court dismissed this interest by saying that some opposite-sex couples do not have children and some same-sex couples do, so there is "no logical connection" between the marriage law and "the stated governmental goal."¹³ The court also asserted that the availability of assisted reproductive technology breaks the link between procreation and child rearing.¹⁴

The recent opinion of the trial court in the Massachusetts marriage litigation recognized procreation as a valid state interest that justified the state's marriage law. The court said, "Recognizing that procreation is marriage's central purpose, it is rational for the Legislature to limit marriage to opposite-sex couples who, theoretically, are capable of procreation."¹⁵ Responding to the same concern voiced by the Vermont Supreme Court, the Massachusetts opinion addressed the relevance of same-sex couple households with children. The court dismissed this concern noting that same-sex couples cannot have children on their own and are less likely to have children.¹⁶ Also, the court pointed out that, even with the availability of assisted reproductive technology, the majority of children are still born as a result of natural conception.¹⁷

However, the Massachusetts Supreme Judicial Court took a very different view of this interest. The court characterized the interest as "providing a 'favorable setting for procreation.'"¹⁸ Like Vermont, the court rejected this newly characterized interest because some married couples cannot or do not have children and some same-sex couples do.¹⁹ The court even accused the state of "singl[ing] out the one unbridgeable difference between same-sex and opposite-sex couples, and transform[ing] that difference into the essence of legal marriage."²⁰ The court did not, however, address any possible significance of the differences they did recognize. In dissent, Justice Cordy argued that the state interests in marriage are not irrational, noting that marriage has always been understood as the appropriate

12. *Id.* (citations omitted in original).

13. *Id.*

14. *Id.* at 882.

15. *Goodridge v. Dep't of Pub. Health*, No. 20011647A, 2002 WL 1299135, at *13 (Mass. Super. Ct. May 7, 2002) (rejecting claim of seven same-sex couples for marriage licenses).

16. *Id.*

17. *Id.* at *13 n.26.

18. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003) (holding common law marriage definition unconstitutional).

19. *Id.* at 961-62.

20. *Id.* at 962.

context for procreation and child rearing because sexual intercourse between men and women can result in conception, but other sexual relationships cannot.²¹ He recognized that marriage has successfully advanced this interest throughout time and the relevant social science research comparing children raised by same-sex couples is small, methodologically flawed, and tentative.²² Thus, the state could rationally decide that it is not ready to redefine marriage. He noted that adoption does not defeat the state's interest because a child available for adoption has already lost the optimal family setting.²³ He also rejected the court's contention that the state's refusal to ban certain types of family forms means that it cannot favor one type,²⁴ observing that if marriage is limited to opposite-sex couples, marriage can continue to offer the message that procreation should take place in marriage.²⁵

Another recent decision on same-sex marriage arose in Arizona. In that case, the court described the state's argument as follows:

[The state] has a legitimate interest in encouraging procreation and child-rearing within the stable environment traditionally associated with marriage, and that limiting marriage to opposite-sex couples is rationally related to that interest. Essentially, the State asserts that by legally sanctioning a heterosexual relationship through marriage, thereby imposing both obligations and benefits on the couple and inserting the State in the relationship, the State communicates to parents and prospective parents that their long-term, committed relationships are uniquely important as a public concern.²⁶

The court accepted this argument. It also rejected the concerns regarding sterile opposite-sex couples and assisted reproduction because 1) the state cannot inquire into the procreative capacity of opposite-sex couples without implicating privacy concerns, 2) assisted reproduction and adoption make it unclear which couples will not have children, and 3) opposite-sex couples have a constitutional right to marry, which would be infringed if they were required to have

21. *Id.* at 995 (Cordy, J., dissenting).

22. *Id.* at 999 (Cordy, J., dissenting).

23. *Id.* at 1000 (Cordy, J., dissenting).

24. *Id.* at 1000-01 (Cordy, J., dissenting).

25. *Id.* at 1002 (Cordy, J., dissenting).

26. *Standhardt v. Superior Court*, 77 P.3d 451, 461 (Ariz. Ct. App. 2003) (rejecting claim of same-sex couple that federal constitutional right of privacy compels issuance of marriage licenses to same-sex couples).

children.²⁷ In response to the argument that same-sex couples have children, the court noted that same-sex couples cannot procreate and even when they have children “sanctioning same-sex marriages would do little to advance the State’s interest in ensuring responsible procreation within committed, long-term relationships.”²⁸

Although not discussed at length, existing case law clearly recognizes a state interest in procreation. However, the most recent appellate decisions have downplayed this interest because of the increasing prevalence of child raising by same-sex couples.

B. *Child Rearing*

A similar asserted state interest in marriage involves child rearing. This interest is usually advanced through the argument that children are better provided for in the setting of a male-female marriage, although the existing cases do not specify the exact bases on which child well-being is assessed. Responding to this interest, the Washington Court of Appeals stated,

Although, as appellants hasten to point out, married persons are not required to have children or even to engage in sexual relations, marriage is so clearly related to the public interest in affording a favorable environment for the growth of children that we are unable to say that there is not a rational basis upon which the state may limit the protection of its marriage laws to the legal union of one man and one woman.²⁹

In the Hawaii litigation, the state asserted at trial that it had a compelling interest in “promot[ing] the optimal development of children” because, “all things being equal, it is best for a child that it be raised in a single home by its parents, or at least by a married male and female.”³⁰ The court, however, held that the state had not presented enough evidence to establish this interest.³¹

In the Vermont case, the state had described an interest in “promoting child rearing in a setting that provides both male and

27. *Id.* at 462.

28. *Id.* at 463.

29. *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974).

30. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *3 (Haw. Cir. Ct. Dec. 3, 1996) (quoting defendant’s pre-trial memorandum).

31. *Id.* at *18.

female role models.”³² However, the court held that since Vermont already recognized parenting by same-sex couples, this could not really be a serious objective of the state’s law.³³ The dissent was even more pointed, charging the state with “outdated sex-role stereotyping.”³⁴

In the recent Massachusetts Supreme Judicial Court decision invalidating the state’s common law definition of marriage, the court noted the state’s argument that it had an interest in increasing the number of children who are raised by a mother and father—the optimal setting for child rearing.³⁵ The court, however, rejected this interest because it saw an inconsistency in the fact that the state already recognized same-sex couple households in its law (i.e., allowing for joint adoption by same-sex couples) and because the court believed that the children raised in these households would benefit if the couple was receiving marital benefits.³⁶

A final articulation of this interest was provided in the brief before the Indiana Court of Appeals in a case challenging the state’s definition of marriage. In the brief, the state asserted that “[t]raditional marriage and procreation of natural offspring supplies an environment for raising children that same-sex marriage cannot match.”³⁷ A decision in the case is still pending.

Like the procreation interest, courts have addressed the interest in child well-being as it relates to marriage but usually somewhat cursorily. The appellate decisions gave it short-shrift and again pointed to the existence of children being raised by same-sex couples.

C. *Tradition*

Another articulated state interest centers around the nature of marriage itself, specifically whether the historical or traditional definition should be accorded any deference. The Washington Court of Appeals opinion noted that “marriage as now defined is deeply rooted in our society.”³⁸ The Ninth Circuit held that same-sex marriage would “violate traditional and often prevailing societal

32. *Baker v. Vermont*, 744 A.2d 864, 884 (Vt. 1999) (citations omitted in original).

33. *Id.* at 884-85.

34. *Id.* at 909 (Johnson, J., concurring in part and dissenting in part).

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

36. *Id.* at 962-64.

37. Appellees’ Brief at 8, *Morrison v. Sadler*, No. 49A02-0305-CV-447 (Ind. Ct. App. 2003).

38. *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974).

mores.”³⁹ In the Vermont case, the state had argued that it had an interest in “protecting marriage from ‘destabilizing changes’”⁴⁰ and “preserving the existing marital structure.”⁴¹ The court rejected the state’s argument as “patently without substance”⁴² and the dissent analogized it to a U.S. Supreme Court case which rejected a “circular governmental justification.”⁴³

Variations of these interests have also been asserted in two pending cases. In New Jersey, the attorney general’s office has argued that the state definition of marriage has very little effect on same-sex couples’ ability to maintain their relationships. It went on to argue that “[t]he State’s interest in preserving the long-accepted definition of marriage, on the other hand, is substantial” because “[a] sea change of the sort sought by plaintiffs will necessarily disrupt long-settled expectations and deeply-held beliefs of the vast majority of New Jersey’s residents.”⁴⁴ The state of Indiana, in its brief to the Court of Appeals, argued that “[p]ermitting same-sex marriage would lead to ambiguity in the meaning of marriage by undermining the public purposes of marriage as related to children, biological parenting, and male-female equality.”⁴⁵ It remains to be seen how the court will respond to this argument.

Although the courts have dealt with the state interest in preserving the traditional definition of marriage, they have done so summarily. Thus, the cases do not provide much insight into whether the courts will consider this interest sufficiently relevant in upholding the validity of the traditional marriage definition.

D. *Interstate Uniformity*

A final interest asserted in a number of cases relates to the fact that, if a court were to redefine marriage, it would place the law of that state at odds with the laws of every other state. This could create difficulty for other states, which might be forced to recognize such

39. Adams v. Howerton, 673 F.2d 1036, 1043 (9th Cir. 1982).

40. Baker v. Vermont, 744 A.2d 864, 884 (Vt. 1999).

41. *Id.* at 910 (Johnson, J., concurring in part and dissenting in part) (citations omitted in original).

42. *Id.* at 885.

43. *Id.* at 910 (Johnson, J., concurring in part and dissenting in part) (internal citations omitted).

44. Defendants’ Brief at 30, Lewis v. Harris, No. MER-L-15-03, 2003 WL 23191114 (N.J. Super. Ct. Nov. 5, 2003).

45. Appellees’ Brief at 26, Morrison v. Sadler, No. 49A02-0305-CV-447 (Ind. Ct. App. 2003).

marriages under an expansive reading of the Full Faith and Credit Clause.⁴⁶ It might also create difficulties for the home state's interest in ensuring that the marriages of its citizens are respected in other states. The Ninth Circuit observed, in support of its decision not to treat a commitment ceremony between two men as a marriage, that same-sex marriages "are not recognized in most, if in any, of the states."⁴⁷ In the Hawaii trial, the state had articulated a compelling interest in "securing or assuring recognition of Hawaii marriages in other jurisdictions."⁴⁸ As with the other state interests asserted in that case, the trial court held that there was not enough evidence to support this.⁴⁹ The State of Vermont had articulated the interest as "maintaining uniformity with marriage laws from other states,"⁵⁰ yet, the Vermont Supreme Court rejected this interest because Vermont law was already not uniform with other states in various ways.⁵¹ In the pending New Jersey litigation, the state has similarly argued that its marriage law is justified by its interest in "preserving uniformity among the States with respect to the definition of marriage," since marriage has not been redefined in any other state.⁵²

This asserted interest has not been considered overwhelming, despite being raised in a number of cases. Perhaps the idiosyncratic nature of the states in which claims for interstate recognition of same-sex marriage have been brought or the fact that these claims have not been fully litigated has contributed to this treatment.

E. *Other Interests*

In the course of litigation, especially in the Hawaii and Vermont cases, several other state interests have been asserted to support the states' marriage laws. Although they are not as commonly raised as those described above, they do provide an indication of the kinds of concerns implicated in state regulation of marriage.

In a case arising in Washington, D.C., one judge speculated that the marriage law could be supported by an interest in "detering

46. U.S. CONST. art. IV, § 1.

47. *Adams v. Howerton*, 673 F.2d 1036, 1043 (9th Cir. 1982).

48. *Baehr v. Miiike*, No. 91-1394, 1996 WL 694235, at *3 (Haw. Cir. Ct. Dec. 3, 1996).

49. *Id.* at *16.

50. *Baker v. Vermont*, 744 A.2d 864, 884 (Vt. 1999).

51. *Id.* at 885.

52. Defendants' Brief at 31, *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114 (N.J. Super. Ct. Nov. 5, 2003).

homosexual lifestyles" because same-sex marriages, "if deemed legitimate, could influence the sexual orientation and behavior of children."⁵³ He also suggested that the validity of this interest depends on whether homosexuality is an inherent personal characteristic.⁵⁴

Two additional interests were mentioned in the Hawaii case. First, the state argued that it had a compelling interest in "protecting the State's public fisc from the reasonably foreseeable effects of State approval of same-sex marriage."⁵⁵ Second, the state asserted an interest in "protecting civil liberties, including the reasonably foreseeable effects of State approval of same-sex marriages, on its citizens."⁵⁶ Presumably, this second interest relates to concerns that religious groups might be compelled to perform marriages for same-sex couples in contravention of their strongly held beliefs. In both instances, though, the court held that the state had not presented sufficient evidence that these interests justified the current marriage law.⁵⁷

The Vermont litigation presented three other interests: first, an interest in "minimizing the legal complications of surrogacy contracts and sperm donors",⁵⁸ second, an interest in "'bridging differences' between the sexes",⁵⁹ and third, an interest in "discouraging marriages of convenience for tax, housing or other benefits."⁶⁰ The court dismissed all three as "decidedly uncertain."⁶¹ The dissent, who also felt the marriage law was unconstitutional but would have issued marriage licenses to same-sex couples rather than merely offering benefits, said the first was not a real state interest, since the state did not discourage assisted reproduction; the second was just "outdated sex-role stereotyping"; and the third was not related to the current definition of marriage since opposite-sex couples can also marry for convenience.⁶²

53. *Dean v. District of Columbia*, 653 A.2d 307, 355 (D.C. 1995) (Ferren, J., concurring and dissenting).

54. *Id.*

55. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *3 (Haw. Cir. Ct. Dec. 3, 1996) (quoting defendant's first amended pre-trial statement).

56. *Id.* (quoting defendant's first amended pre-trial statement).

57. *Id.* at *16, 21.

58. *Baker v. Vermont*, 744 A.2d 864, 884 (Vt. 1999).

59. *Id.*

60. *Id.*

61. *Id.* at 884.

62. *Id.* at 909-11 (Johnson, J., concurring in part and dissenting in part).

The Indiana litigation has raised another potential state interest in marriage: “[T]he traditional family fosters a sense of voluntary duty reflected in the husband-wife marital commitment and their unquestioning devotion to their natural children.”⁶³ This interest has been accepted as valid by the trial court but has not yet been addressed on appeal.⁶⁴

The recent Massachusetts decision included an asserted interest in preserving state resources.⁶⁵ The court dismissed this proposed interest because same-sex couples are as deserving of state benefits as others and marriage does not require dependency between spouses.⁶⁶

F. *Additional Considerations*

It is important to note that, in each of the cases in which the validity of an asserted state interest was gauged, the standard of review used by the court was, at least nominally, rational basis.⁶⁷ In the one case where heightened scrutiny was applied (Hawaii), the court held that, in every instance, the state had not met its burden of proving the interest asserted was related to the marriage law.⁶⁸ It is not clear how other courts would assess the state interests if they employed a heightened level of scrutiny, although there is some indication that marriage might survive intermediate scrutiny. Specifically, in a case assessing a sex discrimination claim, the U.S. Supreme Court employed a heightened level of scrutiny, but nevertheless upheld a law that clearly recognized sex differences in parenting.⁶⁹ This might provide a clue as to how the state interests in marriage might be assessed if a court were to consider marriage as implicating a suspect or quasi-suspect classification.

It is also interesting that the courts’ assessments of the interests have not taken issue with the importance of the asserted interest, but only with the fit between the interest and the challenged marriage

63. Appellees’ Brief at 22, *Morrison v. Sadler*, No. 49A02-0305-CV-447 (Ind. Ct. App. 2003).

64. *Morrison v. Sadler*, No. 49D13-0211-PL-001946, 2003 WL 23119998, *7 (Ind. Super. Ct. May 7, 2003).

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

66. *Id.* at 964.

67. *See, e.g., Schweiker v. Wilson*, 450 U.S. 221, 230 (1981) (“At the minimum level, this Court consistently has required that legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives.”).

68. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *19-21 (Haw. Cir. Ct. Dec. 3, 1996).

69. *See Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001) (upholding a statute that makes sex-based distinctions between mothers and fathers for purposes of United States citizenship).

law. For instance, the Vermont court did not say that the state had no interest in procreation or child rearing,⁷⁰ only that some other state law or policy defeated the claim that opposite-sex marriage laws are necessary to the promotion of the interests.⁷¹ A notable exception was Justice Johnson's dissent in that case, where she suggested that any state interest premised on a recognition of sex differences would be stereotypical.⁷²

Thus, in the previously decided cases, the courts did not substantially critique the interest asserted by the state. It is not clear, for example, whether the courts accept promoting responsible procreation or lessening conflicts with other states' laws as valid state interests. Obviously, these questions may arise in future litigation if challenges to state marriage laws begin to allege that the state has no business pursuing these kinds of interests. Indeed, these kinds of challenges may be implicit in a claim for same-sex marriage based on a right of privacy.⁷³

II. STATE INTERESTS IN MARRIAGE

Of course, future litigation will not be limited to the previously articulated state interests in marriage. As challenges to state marriage laws continue to mount, a larger number of states will have to articulate their own marriage policies. Using the previous survey of asserted state interests, this section will attempt to offer alternative articulations of the state interests in marriage between a man and a woman. These interests are organized around three general themes, with a fourth subsection highlighting some additional considerations.

A. *Child Well-Being*

The most common state interest articulated in support of marriage relates to children. In some cases, the interest is related to procreation (marriage is necessary to ensure that children are brought into the

70. *Baker v. Vermont*, 744 A.2d 864, 881 (Vt. 1999).

71. *Id.*

72. *Id.* at 910 (Johnson, J., concurring in part and dissenting in part).

73. See, e.g., *Lawrence v. Texas*, 123 S. Ct. 2472, 2477-78 (2003) (invalidating a Texas sodomy law under a theory of privacy); *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965); *Mapp v. Ohio*, 367 U.S. 643, 656 (1961).

world),⁷⁴ while other cases focus on child rearing (the need of children for a mother and father).⁷⁵ Some link the two.⁷⁶

The most exact statement of the relevant state interest inextricably links the two concepts. In this articulation, marriage advances the state's interest in ensuring the birth of children in the setting most likely to ensure their well-being and protection. It is based on three realities: 1) only men and women can procreate without third-party intervention, 2) children are benefited by being raised by a mother and father, and 3) marriage ensures a legal bond between a child's mother and father to protect the child *and* her parents.

The first reality is related to the interest articulated by the U.S. Supreme Court when it said, "[m]arriage and procreation are fundamental to the very existence and survival of the race."⁷⁷ Stated a different way, "only societies that reproduce survive."⁷⁸ Likewise, "[o]ur law and culture have always understood marriage as the primary vehicle for the creation of a family."⁷⁹ In spite of technological changes and shifting sexual mores, it is still the case that the only way for conception to occur, absent third-party intervention, is in a relationship between a man and a woman. This is true even when the parties do not intend their relationship to result in the conception of a child. The most recently reported data indicates that "49% of pregnancies in 1994 were unintended."⁸⁰ In contrast, a sexual relationship between same-sex partners cannot result in conception. In these settings, only the intervention of a third party makes procreation or adoption possible.⁸¹ Even then, the child born to one of

74. *See supra* Part I.A.

75. *See supra* Part I.B.

76. *See, e.g.,* Standhardt v. Superior Court, 77 P.3d 451, 461 (Ariz. Ct. App. 2003) ("[The State] has a legitimate interest in encouraging procreation and child-rearing within the stable environment traditionally associated with marriage."); Baker v. Vermont, 744 A.2d 864, 881 (Vt. 1999) (addressing the State's interest in "furthering the link between procreation and child rearing" (citations omitted in original)); Singer v. Hara, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) ("[O]ur society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children.").

77. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

78. Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773, 789 (2002).

79. William C. Duncan, *Whither Marriage in the Law?*, 15 REGENT U. L. REV. 119, 127 (2002).

80. John Santelli et al., *The Measurement and Meaning of Unintended Pregnancy*, 35 PERSP. ON SEXUAL & REPRODUCT. HEALTH 94, 94 (2003).

81. *See generally* Emily Doskow, *The Second Parent Trap: Parenting for Same-Sex Couples in a Brave New World*, 20 J. JUV. L. 1 (1999).

the partners will almost always be biologically related to only that partner. Thus, with same-sex relationships, procreation can never be "unintended." In addition, a child resulting from the conscious decision of a same-sex couple to bear a child by means of assisted reproduction will be, by design, robbed of a relationship with one biological parent. If instead, the couple makes the decision to adopt, then the child, likewise, will be denied a relationship with either a mother or a father. Even when one female partner conceives the child and another carries the child to term, there still must be a male participant in ensuring the egg is fertilized. Thus, as regards the state's interest in procreation, same- and opposite-sex couples are in very different positions. The state has an interest in all opposite-sex couples because all are theoretically capable of procreation. With same-sex couples, no state interest in procreation is raised by their relationship unless some outside intervening circumstance creates a procreative capacity. This is why removing "the element of gender from marriage would automatically remove the link between marriage and procreation."⁸²

The second reality supporting the state interest in marriage is that, all things being equal, children benefit from being raised by a mother and father who are legally obligated to support one another. The interest in stable settings for child rearing is reflected in a recent U.S. Supreme Court decision regarding immigration preferences for the children of U.S. citizens, where the Court noted a government interest

[in] ensur[ing] that the child and the citizen parent have some demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States.⁸³

As Professor Eric Andersen has noted, if all of the various family forms are not "equally successful in accomplishing the family's important care giving, teaching, and socializing functions, then society has an interest in preferring and encouraging those that work best."⁸⁴ This interest is vindicated by social science research which demonstrates that "[c]hildren raised outside of intact marriages are at

82. Duncan, *supra* note 79, at 125.

83. Tuan Anh Nguyen v. INS, 533 U.S. 53, 64-65 (2001).

84. Eric G. Andersen, *Children, Parents, and Nonparents: Protected Interests and Legal Standards*, 1998 BYU L. REV. 935, 946 (1998).

greater risk for a large number of serious personal and social problems.”⁸⁵ This is not just a matter of numbers (i.e., one adult bad, two adults good). Research indicates that the presence or absence of marriage is important to child well-being, per se. Thus, children raised in households headed by cohabiting couples suffer by comparison to their peers in married couple households in terms of the risks of poverty, abuse, instability, poor academic performance, and behavioral problems.⁸⁶ It is also not just a matter of the legal formality of marriage. Professor Andersen noted that “men and women are not fungible in relation to child rearing. They have distinct contributions to make.”⁸⁷ Similarly, a recent article, generally supporting parenting by same-sex couples, suggests that certain child outcomes “do not seem to differentiate directly by parental sexual orientation, but indirectly, by way of parental gender.”⁸⁸ That article specifically noted that “[r]elative to their counterparts with heterosexual parents, the adolescent and young adult girls raised by lesbian mothers appear to have been more sexually adventurous and less chaste.”⁸⁹ Assuming the authors’ suggestion that the relevant variable in this outcome is likely to be parental gender, other research seems to have predicted this finding. For instance, a recent study indicated that the absence of a father is associated with early sexual behavior of girls even when accounting for other factors, such as stress and poverty.⁹⁰ Another report concurred, saying that “[d]aughters whose fathers gave them little time and attention were more likely to seek out early sexual attention from male peers.”⁹¹ Significant research surveys demonstrate that a father contributes

85. Gallagher, *supra* note 78, at 782.

86. For a review of the research see William C. Duncan, *The Social Good of Marriage and Legal Responses to Non-Marital Cohabitation*, OR. L. REV. (forthcoming).

87. Andersen, *supra* 84, at 998.

88. Judith Stacey & Timothy J. Biblarz, (*How*) *Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 176 (2001).

89. *Id.* at 171.

90. Bruce J. Ellis et al., *Does Father Absence Place Daughters at Special Risk for Early Sexual Activity and Teenage Pregnancy?*, 74 CHILD DEV. 801 (2003).

91. Stephanie Weiland Bowling & Robert J. Werner-Wilson, *Father-Daughter Relationships and Adolescent Female Sexuality: Paternal Qualities Associated with Responsible Sexual Behavior*, 3 J. HIV/AIDS PREVENTION & EDUC. FOR ADOLESCENTS & CHILD. 5, 13 (2000). *See also* J. Roland Fleck et al., *Father Psychological Absence and Heterosexual Behavior, Personal Adjustment and Sex-Typing in Adolescent Girls*, 60 ADOLESCENCE 847, 852 (Winter 1980); Allan Gerson, *Promiscuity as a Function of the Father-Daughter Relationship*, 34 PSYCHOL. REP. 1013, 1014 (1974).

substantially to a child's well-being.⁹² Although there is much less research on motherless homes (probably due to their much lower prevalence), there is no reason to believe that mothers make no similarly unique contributions to child well-being.⁹³

Both of these concerns are related to the third reality, the potential for marriage to provide legal protections for vulnerable family members. Specifically, marriage ensures that children born to that relationship will have legally enforceable ties to their biological parents and that mothers will have legally enforceable obligations from the father. As Maggie Gallagher has noted, "The first essential public purpose of marriage, then, is to encourage the people who make the baby to stick together and take care of each other and the baby together, as a family unit."⁹⁴ The state has an interest in ensuring that children are provided for because, at the very least, the state will have to provide for them if the parents do not. The state also has an interest in ensuring that other vulnerable family members, especially mothers, are not exploited in matters of childbirth and child rearing. Thus, the law imposes a duty of support on parents and privileges marital childbearing. This preference derives from the intention to ensure that the people responsible for creating a child take the attendant responsibility of caring for that child. Indeed the U.S. Supreme Court has recently noted an "important government objective[]" in "assuring that a biological parent-child relationship exists."⁹⁵ This policy is evident in laws that create a presumption that the husband of a child's mother is the child's father.⁹⁶ In the ideal circumstance of marital childbearing, there is a ready-made legal obligation of support by two people. Appropriately, these people are the child's parents. Similarly, the law imposes on a man an obligation to support his wife's children so as to prevent the possibility that a mother will have to raise her child alone.⁹⁷ This reflects a concern that men might take advantage of women sexually and then abandon them when children come along, leaving the mother in the difficult

92. See Suzanne Le Menestrel, *What Do Fathers Contribute to Children's Well-Being?*, CHILD TRENDS RES. BRIEF (Child Trends, Washington, D.C.), May 1999; Deborah J. Johnson, *Father Presence Matters*, NAT'L CENTER ON FATHERS & FAMILIES BRIEF (1997).

93. See Linda Musun-Miller, *Effects of Maternal Presence on Sibling Behavior*, 12 J. APPLIED DEVELOPMENTAL PSYCHOL. 145 (1991) (noting a difference in sibling interaction depending on whether the mother was absent).

94. Gallagher, *supra* note 78, at 788.

95. Tuan Anh Nguyen v. INS, 533 U.S. 53, 62 (2001).

96. See, e.g., ALA. CODE § 26-17-5(a) (2003); IOWA CODE § 252A.3 (2003).

97. See, e.g., MICH. COMP. LAWS § 722.3 (2003); MISS. CODE ANN. § 93-5-23 (2004).

circumstance of having to provide for the children unassisted. In marriage, a man is legally obligated to provide for the children he fathers, making exploitation less likely. Of course, some unmarried fathers are identified and made to provide some financial support for their children.⁹⁸ This duty, though, never rises to that owed by a mother's husband. Additionally, without marriage, a paternity determination is not guaranteed. Paternity determinations are merely a safety net to remove some, but not all, of the uncertainty that is avoided by marital childbearing.

The vulnerabilities inherent in the sexual relationship between men and women are not similarly intrinsic in the relationship of same-sex couples. In these relationships, there is no procreation without intention. This is true because any sexual conduct in the relationship will never result in a child with inherent vulnerabilities or a mother "surprised" to be expecting a child. In order for a child to be introduced into such a relationship, the parties have to adopt or employ assisted reproductive technology, no matter how simple, and will never be faced with an unexpected pregnancy. Thus, it is not unreasonable to assume that a greater degree of planning and self-protection normally takes place when children are brought into same-sex couple households.

The obvious objection to these interests as a reason to resist redefining marriage is that there is not a perfect fit between the child-centered interests and the realities of procreation and child-rearing practices. Specifically, courts and critics have raised three particular objections. First, some married couples cannot or do not have children. Second, some same-sex couples do raise children. Third, the advent of assisted reproductive technology, the removal of some restrictions on sexual behavior, and the availability of adoption have already severed the link between marriage and procreation.

The fact that some opposite-sex marriages are childless, whether or not by choice, does not defeat the state interest in promoting marriage as the appropriate context for procreation and child rearing. First, it is rational for the state to believe that intrusive tests for fertility would violate constitutional privacy protections.⁹⁹ Second, as Maggie Gallagher has pointed out, monogamous married spouses

98. *See, e.g.*, OHIO REV. CODE ANN. § 3103.031 (West 2003); GA. CODE ANN. § 19-7-24 (2002).

99. *See* *Griswold v. Connecticut*, 381 U.S. 479 (1965).

without children are not creating fatherless or motherless homes for other children.¹⁰⁰

As already discussed, same-sex couple households with children are in a fundamentally different posture than married couples with children. The need for third-party intervention to make procreation possible in these households introduces an element of intentionality and reduces concerns with the vulnerability of children and parents. Also, the fact that such homes are motherless or fatherless by design makes them incapable of providing the ideal setting for child rearing. In addition, the state may be concerned that the recognition of such relationships may create difficulties for persons involved in procreation but not part of the household. This is demonstrated by a handful of cases in which courts have recognized three or more individuals with some legal parental status, arising out of the context of same-sex couples having children through assisted reproduction.¹⁰¹

The acceptance of non-marital sexual behavior and assisted reproductive technology does not, as a legal matter, establish a preference for either. The state can rationally decide, for privacy reasons, not to directly regulate these matters without endorsing either as the equivalent of marriage. With regard to adoption, commentators have noted the historical commitment of family law "to shape the adoptive family according to the nuclear family model"¹⁰² by "fashion[ing] adoption in imitation of procreation"¹⁰³ or "design[ing] adoptive families in imitation of biology."¹⁰⁴ Even where single persons or unmarried couples may adopt, there is still no reason to believe the law is expressing a preference for motherless or fatherless households as much as trying to cope with the consequences of other kinds of family breakdown. To assume, as the Massachusetts Supreme Judicial Court and the Vermont Supreme Court seem to, that legal tolerance of adoptions by same-sex couples equates to a state preference for such adoptions is not logical, and, particularly in regards to the courts' holding that this tolerance

100. See Gallagher, *supra* note 78, at 788.

101. See LaChappelle v. Mitten, 607 N.W.2d 151 (Minn. Ct. App. 2000); Tripp v. Hinckley, 736 N.Y.S.2d 506 (N.Y. App. Div. 2002); TT v. HH, 701 N.Y.S.2d 611 (N.Y. App. Div. Fam. Ct. 1999).

102. Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527, 606 (2001).

103. *Id.* at 605-06.

104. ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING 48 (1993).

somehow has implications for the constitutionality of a related statute, is not justified by any kind of legal principle.¹⁰⁵

In sum, marriage benefits children by increasing the possibility that they will be raised by their biological parents, receive the unique contributions of a mother and father, and be provided with a legal tie to those responsible for bringing them into the world. The current definition of marriage is closely tailored to advancing this interest because it recognizes the reality of male-female procreation and asserts the ideal of childrearing by a mother and father.

B. *Complementarity*

A similar interest relates to the complementary differences between men and women. This interest can be articulated as follows: marriage is necessary to bridge the differences between the sexes on a footing of equality for both. In the context of a challenge to Virginia's provision of single sex public colleges, the U.S. Supreme Court has noted: "Physical differences between men and women, however, are enduring: '[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.'"¹⁰⁶ Certainly if the inclusion of both men and women makes an educational institution unique, it would similarly contribute to the unique nature of a more fundamental social institution.

Two aspects of this distinctive nature of opposite-sex unions have already been discussed—the uniquely procreative nature of the male-female union and the fact that fathers and mothers contribute differently, yet still irreplaceably, to their children's well-being. As already discussed, the state clearly has an interest in ensuring for children the benefits of being raised by a mother and father and recognizing the fact that male-female relationships are inherently different from others in procreative capacity.

In addition to these factors, the nature of the opposite-sex marriage provides two significant additional benefits to society which justify its preservation. First, marriage provides an institution where men and women are valued equally. As currently understood, there can be no marriage without both sexes. Neither sex can be excluded without impairing the institution. This equality is not compelled by

105. See *supra* notes 121-18 and accompanying text.

106. *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)) (alterations in original).

lawsuits, as has been the case with the integration of sex-segregated private clubs,¹⁰⁷ but is intrinsic to the nature of the institution. Because the very nature of marriage requires equal participation by men and women, it sends a powerful message about the importance of each sex to society's fundamental unit. Related to this reality of sex equality in marriage is the message that the law of marriage conveys about the relative worth of men and woman, particularly in their roles as fathers and mothers. Redefining marriage to include same-sex couples is a legal endorsement of the fungibility of men and women, mothers and fathers. In other words, when the state says that "any two persons" are equivalent to a mother and father, it is also saying that a mother or a father makes no unique contribution to child well-being. In the United States there are 16,473,000 children living in mother-only homes and 3,297,000 children in father-only homes.¹⁰⁸ In the face of these numbers, it is eminently reasonable for the state to shrink from sending a legal message that men (fathers) are not essential to marriage or that women (mothers) can be dispensed with without consequences. Marriage advances these state interests by acknowledging that a marriage cannot exist without both a man and a woman.

C. *Social Order/Family Integrity*

The next relevant state interest is related to the others. It is that marriage provides the next generation the training and attributes necessary to sustain a liberal democracy.¹⁰⁹ The link between marriage and social order has been noted by the U.S. Supreme Court in an oft-cited statement,

Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for

107. See *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

108. Jason Fields, *Children's Living Arrangements and Characteristics: March 2002*, CURRENT POPULATION REP. (U.S. Census Bureau, Washington, D.C.), June 2003, at 2.

109. See Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1833 (1995) ("As Justice Powell explains, parents help to instill the virtues of mature reflection and public spiritedness required of citizens if our liberal democracy is to succeed.").

it is the foundation of the family and of society, without which there would be neither civilization nor progress.¹¹⁰

However, if marriage is to have any social value in contributing to the maintenance of good citizenship, the social meaning of marriage must be distinct and secure. As Professor Hafen notes, “the contribution of family life to the conditions that develop and sustain long-term personal fulfillment and autonomy depends (among many other important factors) upon maintaining the family as a legally defined and structurally significant entity.”¹¹¹ This may be what Justice O’Connor had in mind in her concurring opinion in *Lawrence v. Texas*, where she suggested that “preserving the traditional institution of marriage” is a “legitimate state interest.”¹¹²

There are three ways in which a redefinition of marriage would threaten the institutional integrity of marriage and therefore deprive it of, or dilute, its function in contributing to social order. First, the claims for same-sex marriage require a fundamental alteration in the legal meaning of marriage. As Professor Scott FitzGibbon has noted, those who marry “form a relationship which embraces obligation as a fundamental component.”¹¹³ The arguments for redefining marriage, however, are centered on notions of autonomy (individual choice) and equality (treating all couples equally). Even the social engineering argument that allowing same-sex couples to marry will make the parties in those relationships better citizens¹¹⁴ is based on a concern with the benefit of the individuals in the relationship, which would theoretically extend to society at large. Marriage, however, is not fundamentally about choice or equality. In our culture, persons may choose to marry, and may even choose to leave a marriage, but in doing so, they incur obligations beyond what they have chosen. They incur obligations of support and fidelity, which are operative even when they no longer subjectively desire to fulfill them. Marriage requires people to take responsibility for things they did not plan—most dramatically, the experience of parenthood. All couples, married or cohabiting, will have unexpected contingencies arise in the life of their relationship. We *hope* that couples will feel some obligation to help out when they arise in cohabiting relationships.

110. *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

111. Bruce C. Hafen, *The Family as an Entity*, 22 U.C. DAVIS L. REV. 865, 867 (1989).

112. *Lawrence v. Texas*, 123 S. Ct. 2472, 2487-88 (2003) (O’Connor, J., concurring).

113. Scott FitzGibbon, *Marriage and the Good of Obligation*, 47 AM. J. JURIS. 41 (2002).

114. See Andrew Sullivan, *The Conservative Case for Gay Marriage*, TIME, June 30, 2003, at 76.

However, we *expect* that they will do so when the relationship is a marriage. The most important contingency in a relationship where sexual intimacy is involved (as already discussed) is procreation. Intent may play some role in a married couple's procreative experience, but it is not conclusive. With same-sex couples, the aspect of intent is always involved in procreation, so there will be no need for the state to require that these couples take responsibility for something they did not plan. Thus, the role of obligation in a married relationship is inherently different than it is in a same-sex relationship.

Second, the redefinition of marriage would change the nature of marriage as a natural entity afforded legal recognition. Professor Hafen has noted that the formal law creates an "exterior legal structure" in which the family governs itself according to customary law.¹¹⁵ Family thus serves as a "mediating institution" standing between the state and the individual, or public and private life, and allowing value transmission and character development to take place away from the coercive power of the state.¹¹⁶ As Justice Powell has noted,

This affirmative process of teaching, guiding, and inspiring by precept and example is essential to the growth of young people into mature, socially responsible citizens. We have believed in this country that this process, in large part, is beyond the competence of impersonal political institutions. Indeed, affirmative sponsorship of particular ethical, religious, or political beliefs is something we expect the State not to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice. Thus, "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include *preparation for obligations the state can neither supply nor hinder.*"¹¹⁷

The law does not create families, it creates a structure in which family life can be legally recognized and protected. Redefining marriage by court decree would change this orientation. It would

115. Bruce C. Hafen, *Law, Custom, and Mediating Structures: The Family as a Community of Memory*, in *LAW AND THE ORDERING OF OUR LIFE TOGETHER* 82, 101 (Richard John Neuhaus ed., 1989).

116. *Id.* at 98-100.

117. *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (plurality opinion) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)) (alteration in original).

shift the legal posture of the state from recognizing a naturally recurring relationship (the joining of men and women in a relationship open to creating new life) to creating the institution (any two people whom the law chooses to recognize). The state would become the creator of families and thus turn the family into a mechanism for imposing state values on individuals. This understanding is implicit in the recent Ontario Court of Appeals decision redefining marriage:

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. This can only enhance an individual's sense of self-worth and dignity.¹¹⁸

Similarly, the Hawaii Supreme Court called marriage "a state-conferred legal partnership status."¹¹⁹ In the recent Massachusetts case, the court portrays "civil marriage" as a "wholly secular institution" created by the government.¹²⁰ This sleight of hand is meant to chasten those whose disagreement with the court on the underlying issue stems from deeply-held religious convictions since, of course, the government creates the licensing scheme by which marriages are given legal recognition. It is wholly unbelievable, however, to assert that civil marriage has no relation to the naturally recurring institution of male-female couplings, which predates the concept of civil marriage.

Obviously the traditional meaning of marriage, rooted in natural relationships, can be easily thrown away if marriage is just something the state creates to bestow dignity on its citizens or encourage responsible individual behavior. However, there is a caution: "[T]he formal law stops at the family threshold not merely because it *should not* regulate intimate relations, but because it *cannot* regulate them

118. Halpern v. Canada, 65 O.R.3d. 161, 167-68 (Ct. App. Ontario 2003). This might be the first judicial endorsement of marriage as a self-esteem builder.

119. Baehr v. Lewin, 852 P.2d 44, 58 (Haw. 1993).

120. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 954 (Mass. 2003).

without impairing their very existence.”¹²¹ As Professor Roberto Unger has noted,

If the normative order is construed as a set of tools with which to satisfy the power interests of the rulers, it will lack any claim to allegiance save the terror by which it is imposed. Moreover, it will fail to satisfy the need of rulers and the governed alike to justify the structure of society by relating it to an image of social and cosmic order.¹²²

Finally, the redefinition of marriage would severely undercut the notion of family privacy. In a marriage, parentage is generally assumed, even when there may be reason to suspect that the husband is not the father.¹²³ This enhances the family privacy necessary to allow the family to function free from the heavy hand of the law. The notion of family privacy does not have the same relevance for same-sex unions as for married couples. In order for a parent-child relationship to be established with the non-biological parent-partner of a child, there must be some legal intervention. This is true whether the intervention is an adoption decree, birth certificate modification, or a finding that the partner is a “psychological” or “de facto” parent. It is probably safe to assume that no husband has ever had to be declared a “psychological parent” of his wife’s child. The law must also intervene in these relationships to determine the relevant rights and responsibilities of third parties involved in bringing the child into the world, whether surrogates or sperm donors. If the legal principles necessary to sustain the fiction of parentage in same-sex couple relationships were applied to marriages, the notion of family privacy would begin to disappear. In a prominent Massachusetts case allowing joint custody for the partner of a child’s biological mother, the court ruled that a “de facto” parent “performs a share of caretaking functions at least as great as the legal parent.”¹²⁴ It would certainly mark a monumental shift in the current posture of the law regarding divisions of responsibility within the family to impose this requirement on all married couples.

121. Bruce C. Hafen, *Custom, Law, and the American Family*, THIS WORLD, Summer 1987, at 28, 38.

122. ROBERTO MANGABEIRA UNGER, *LAW IN MODERN SOCIETY* 65 (1976).

123. See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

124. *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 891 (Mass. 1999).

Of course, some will object that marriage has been changing over time. Thus, what is one more change?¹²⁵ The Massachusetts decision portrayed marriage as “an evolving paradigm.”¹²⁶ The most immediate response is that, despite any other changes regarding the property ownership of spouses, motivations for marriage, etc., one element of marriage has remained constant—the recognition of marriage as the union of a man and a woman. This “time-tested” reality is not undercut, as the Hawaii court and some commentators have argued,¹²⁷ by the correct decision that the race of spouses is not intrinsic to the institution’s legal meaning. This comparison is invalid for a number of reasons. First, anti-miscegenation laws did not deal with the validity of a legal definition of marriage. The statute challenged in *Loving v. Virginia* imposed legal liabilities for a “white person [who] intermarr[ied] with a colored person.”¹²⁸ Although Virginia law claimed to consider such marriages “void,” that determination was clearly undercut by treating the marriage as valid for purposes of criminal punishment.¹²⁹ Indeed, it was only because the state considered a marriage to have taken place that it decided to prosecute the interracial couple. Thus, it was the very real nature of the marriage at issue that brought on the prosecution that resulted in the *Loving* decision. The U.S. Supreme Court did not address the Virginia court’s determination that the marriage at issue was not a marriage, only its determination that it was a prohibited marriage under the statute. Second, the Virginia statute added to the definition of marriage an extrinsic requirement meant to “promote racial segregation and ‘white supremacy.’”¹³⁰ Finally, the sex difference recognized in marriage is far different from the racial differences imposed by anti-miscegenation laws. As Maggie Gallagher has pointed out, it is one thing for a child to say that she has a mother and father of different races and quite another for her to say that she has no mother or no father.¹³¹

125. See, e.g., E.J. GRAFF, WHAT IS MARRIAGE FOR? (1999).

126. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 967 (Mass. 2003).

127. See *Baehr v. Lewin*, 852 P.2d 44, 67-68 (Haw. 1993).

128. 388 U.S. 1, 4 (1967) (quoting VA. CODE ANN. § 20-59, *repealed by* *Loving v. Virginia*).

129. *Id.* at 4-7.

130. *Id.* at 7.

131. See Gallagher, *supra* note 78, at 788.

D. *Other Possible Interests*

There are also some additional state interests that are advanced by resisting the effort to redefine marriage. These are grouped separately from the others because they are more appropriately termed as prudential, rather than principled, concerns.

1. *Conscientious Objectors*

In the Hawaii litigation, the state advanced a concern for “protecting civil liberties, including the reasonably foreseeable effects of State approval of same-sex marriages, on its citizens.”¹³² The court did not address this concern or assess its weight so the exact nature of the state’s concern is not clear. Yet it is possible that the state was worried about the difficult position that might be created for citizens who will have strong, conscientious objections to the redefinition of marriage when the state takes that radical step. An analogous situation has arisen in cases where landlords with religious objections to renting their properties to unmarried couples raise religious liberty concerns.¹³³ While legislation to redefine marriage, to include same-sex couples, might include a section attempting to address these kinds of concerns with a religious or conscience exemption, judicial opinions on the definition of marriage are less likely to include such an exemption. Furthermore, the validity of any such judicial comment, which would most likely be mere dicta, is questionable. Already, substantive positions on family regulation in various states have run up against individual objections to those policies. For instance, in California, the American Civil Liberties Union has sued a religiously affiliated placement agency for allegedly favoring married couples over same-sex couples in adoptive placements.¹³⁴ Similarly, there have been complaints filed with the Vermont Human Rights Commission regarding individuals and private businesses who treat same-sex couple “civil unions” differently than marriages.¹³⁵ Certainly, it is not inappropriate for a state to take into consideration

132. Baehr v. Miiike, No. 91-1394, 1996 WL 694235, at *3 (Haw. Cir. Ct. Dec. 3, 1996).

133. See Swanner v. Anchorage Equal Rights Comm’n, 874 P.2d 274 (Alaska 1994); Smith v. Fair Employment & Hous. Comm’n, 913 P.2d 909 (Cal. 1996); Prince George’s County v. Greenbelt Homes, Inc., 431 A.2d 745 (Md. Ct. Spec. App. 1981).

134. See David Haldane, *Adoption Agency Denies it Rejected Lesbian Couple*, L.A. TIMES, June 11, 2003, at B5.

135. See William C. Duncan, *The Many Questions of Civil Unions: An Introduction to a Symposium Addressing the Impact of Civil Unions*, 11 WIDENER J. PUB. L. 361, 375-76 (2002).

the good faith objection of many of its citizens to treating same-sex unions as equivalent to marriage.

2. *Public Education*

A similar concern is with the challenge that redefining marriage might pose for public school curriculum. It seems clear that if the state were to redefine marriage, any discussion of that status in public schools, such as in health classes, would have to reflect the new law and thus treat same-sex unions and opposite-sex unions as fundamentally the same. It is also clear that to do so would bring the objection of many parents, teachers, and students who strongly disagree with this message.¹³⁶ The state may rationally decide that it would rather have the relative merits of various family forms left to individual families and other private organizations. Nevertheless, a decision to redefine marriage would foreclose that option by putting the weight of the public school system behind the normative message that male-female marriages and same-sex unions are fundamentally the same.

3. *Interstate Conflict*

In some of the cases noted above, states raised concerns related to interstate recognition of the marriages entered into in their states.¹³⁷ In Hawaii, the state expressed concern with how Hawaiian marriages would be treated by other states.¹³⁸ In Vermont and New Jersey, the expressed interest was maintaining uniformity among the states.¹³⁹ An alternative formulation of this interest is the prevention of interstate conflicts regarding marriage recognition. It is clear that if one state were to redefine marriage to include same-sex couples, other states would eventually be asked to recognize marriages contracted in the same-sex marriage jurisdiction for some purpose. These claims would be based on either the traditional rule that a marriage valid where contracted is valid everywhere or an expansive reading of the

136. *Cf. Brown v. Hot, Sexy & Safer Prod., Inc.*, 68 F.3d 525 (1st Cir. 1995) (parents sued public school for exposing children to sexually explicit "safe sex" presentation at school).

137. *See supra* Part I.D.

138. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *3 (Haw. Cir. Ct. Dec. 3, 1996).

139. *Baker v. Vermont*, 744 A.2d 864, 884 (Vt. 1999); Defendants' Brief at 31, *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114 (N.J. Super. Ct. Nov. 5, 2003).

Full Faith and Credit Clause.¹⁴⁰ Vermont's civil union status has been popular with non-residents who have flocked to the state to take advantage of the new law.¹⁴¹ This situation has led to a number of legal challenges in which same-sex couples seek recognition of the civil union in their home states.¹⁴² It is safe to guess that this situation will be greatly magnified if Massachusetts does extend the status of marriage rather than civil unions. At this point, thirty-seven states have enacted laws providing that they will not recognize same-sex marriages contracted in other states.¹⁴³ In addition, federal law provides that states cannot be forced to do so and defines marriage as a male-female union for purposes of federal law.¹⁴⁴ Each of these laws would likely become the subject of a challenge if Massachusetts redefines marriage. Couples could either go to Massachusetts to marry then return home seeking recognition, or marry in Massachusetts only to later move to another state and seek recognition of the Massachusetts marriage or some incidents of it.

140. U.S. CONST. art. IV, § 1.

141. See Duncan, *supra* 135, at 371-72.

142. See Rosengarten v. Downes, 802 A.2d 170 (Conn. App. Ct. 2002) (seeking recognition for purposes of dissolution judgment); Burns v. Burns, 560 S.E.2d 47 (Ga. Ct. App. 2002) (seeking recognition for purposes of visitation order); Langan v. St. Vincent's Hosp., 765 N.Y.S.2d 411 (N.Y. Sup. Ct. 2003) (seeking recognition for purposes of wrongful death action).

143. See ALA. CODE § 30-1-19 (2003); ALASKA STAT. § 25.05.011 (Michie 2002); ARIZ. REV. STAT. ANN. § 25-101 (West 2000); ARK. CODE ANN. §§ 9-11-107, -109, -208 (Michie 2002); CAL. FAM. CODE § 308.5 (Deering Supp. 2004); COLO. REV. STAT. § 14-2-104 (West Supp. 2003); DEL. CODE ANN. tit. 13, § 101 (1999); FLA. STAT. ANN. § 741.212 (West Supp. 2004); GA. CODE ANN. § 19-3-3.1 (1999); HAW. REV. STAT. ANN. § 572-3 (Michie 1999); IDAHO CODE § 32-209 (Michie 1996); 750 ILL. COMP. STAT. ANN. 5/212 (West 1999); IND. CODE ANN. § 31-11-1-1 (West 1997); IOWA CODE ANN. §§ 595.2, .20 (West 2001); KAN. STAT. ANN. § 23-101 (1999); KY. REV. STAT. ANN. § 402.045 (Michie 1999); LA. CIV. CODE ANN. art. 3520 (West Supp. 2004); ME. REV. STAT. ANN. tit. 19-A, § 701 (West 1998); MICH. COMP. LAWS ANN. §§ 551.1, .271-.272 (West Supp. 2003); MINN. STAT. ANN. § 517.01 (West Supp. 2004); MISS. CODE ANN. § 93-1-1 (1999); MO. ANN. STAT. § 451.022 (West 2003); MONT. CODE ANN. § 40-1-401 (2003); NEB. CONST. art. 1 § 29; NEV. CONST. art. 1 § 21.; N.C. GEN. STAT. § 51-1.2 (2003); N.D. CENT. CODE § 14-03-08 (Supp. 2003); OKLA. STAT. ANN. tit. 43, § 3.1 (West 2001); 23 PA. CONS. STAT. ANN. § 1704 (West 2001); S.C. CODE ANN. § 20-1-15 (Law. Co-op. 2003); S.D. CODIFIED LAWS § 25-1-38 (Michie Supp. 2003); TENN. CODE ANN. § 36-3-113 (2001); TEX. FAM. CODE ANN. § 2.001 (Vernon 1998); UTAH CODE ANN. § 30-1-2 (Supp. 2003); VA. CODE ANN. § 20-45.2 (Michie 2000); WASH. REV. CODE ANN. § 26.04.020 (West Supp. 2004); W. VA. CODE ANN. § 48-2-603 (Michie 2001).

144. 28 U.S.C.A. § 1738C (West Supp. 2003); 1 U.S.C.A. § 7 (West 1998).

CONCLUSION

It has been argued that same-sex couples want to marry “for the same mix of reasons” as any other couples.¹⁴⁵ Even if this were true, it ignores the more important policy question of the *social*, rather than personal, goods that traditional marriage law is intended to advance. As Wendell Berry notes,

If they had only themselves to consider, lovers would not need to marry, but they must think of others and of other things. They say their vows to the community as much as to one another, and the community gathers around them to hear and to wish them well, on their behalf *and on its own*.¹⁴⁶

This article has reviewed some of the articulations of marriage’s social goods as they have arisen in past litigation and attempted to offer some new articulations of these interests. It has argued that the state interests in encouraging responsible procreation, such as ensuring child well-being by promoting the ideal of child-rearing by a mother and father, preserving social order and the transmission of crucial social values across generations, as well as other concerns, necessitate a finding that the current understanding of marriage is constitutionally sound.

It should be no surprise that where courts seem unable to understand the state interests in marriage, they have been more likely to accept its redefinition. Nowhere is the fundamental lack of understanding of marriage’s nature and purpose more clear than in the alternative formulation of the state’s interests in marriage offered by the Massachusetts Supreme Judicial Court in its recent decision. The court noted four purposes of marriage laws: 1) encouraging stable relationships over transient ones; 2) providing for orderly property distribution; 3) decreasing the state’s obligation to provide for the needy; and 4) providing a way to track “important epidemiological and demographic data.”¹⁴⁷ In a later advisory opinion (issued in response to the State Senate President’s query about whether a “civil union” status would satisfy the court), the

145. Evan Wolfson, *All Together Now*, in MARRIAGE AND SAME-SEX UNIONS: A DEBATE 4, 5 (Lynn D. Wardle et al. eds., 2003).

146. WENDELL BERRY, *SEX, ECONOMY, FREEDOM AND COMMUNITY* 137-38 (1993) (emphasis added).

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

Massachusetts Supreme Judicial Court characterized marriage as a “wholly secular and dynamic legal institution.”¹⁴⁸ The court then reiterated its belief that the purpose of marriage is the encouragement of “stable adult relationships for the good of the individual and of the community, especially its children.”¹⁴⁹ This is not exactly a picture of a robust social institution. The court seems to see marriage as something like a tax deduction for charitable giving. So many other kinds of relationships perform similar functions. Many friendships last for decades. Children take care of their elderly parents. Grandmothers raise their grandchildren. Churches provide charity so government welfare is not needed. None of these functions seem to be specific to marriage.

It is not clear whether these were chosen solely because they are gender neutral, but they hardly seem to get at the essence of marriage. Indeed, the court empties marriage of any social meaning other than the respect of adult choices. The court goes so far as to say that any other approach “suggests that the marriage restriction is rooted in persistent prejudices against persons who are, or who are believed to be, homosexual.”¹⁵⁰

However, a lack of understanding of the social good of marriage is no reason to abandon the institution or to appropriate its legal structure so as to advance the cause of securing approbation of other relationships. It is not too much to encourage courts to exercise humility before weighing the value of society’s core social institution and finding it wanting. With so much at stake for current and future generations, deference to the accumulated wisdom of humanity is the least that courts and policymakers can provide.

148. Opinions of the Justices to the Senate, 802 N.E.2d 565, 569 (Mass. 2004).

149. *Id.* A later offhand comment reveals what may be the court’s real basis for its decision, its belief that the current marriage law or a non-marital status for same-sex couples would “have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits.” *Id.* at 570. In other words, the court seems more concerned about removing any normative judgment from marriage law.

150. *Goodridge*, 798 N.E.2d at 968.