

Eliding in Washington and California

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For a number of years now, the “marriage issue” has been hotly contested in the courts of the United States, Canada, and South Africa. The 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?

Despite the intensity of the contest, all informed participants acknowledge that marriage is a vital social institution. That understanding has brought attention to social institutional studies, which in turn has led to a number of uncontroversial understandings of social institutions in general and the marriage institution in particular; which in turn has led to the social institutional argument for man/woman marriage. This argument is a sufficient response to all constitutional attacks leveled at the laws defining and sustaining man/woman marriage.

The judges who would mandate the redefinition of marriage, however, have elided the social institutional argument for man/woman marriage; that is, they have ignored or evaded it. Their modes of elision are now well documented in the scholarly literature and are repeating themselves case by case, but with each new case also managing to provide at least one original evasion of social institutional realities. This pattern is seen in the dissenting opinions in two recent appellate court cases addressing the marriage issue: The Washington Supreme Court’s Andersen v. King County and the California Court of Appeal’s In re Marriage Cases. Because those dissenting opinions are interesting, and engagement with them intellectually productive, this article critically examines both.

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I. THE SOCIAL INSTITUTIONAL ARGUMENT SUMMARIZED

To understand the courts’ evasion of the social institutional argument for man/woman marriage requires an understanding of the argument itself. As will be seen, the argument appears in varying degrees of elaboration in judicial opinions upholding man/woman marriage against constitutional attacks. An in-depth presentation of the argument was published in January 2006,¹ and a serious student of the marriage issue will engage that presentation. A concise but still fairly complete summary of the argument was also published in July 2006.² To aid the understanding of those who read this article, this section summarizes the social institutional argument for man/woman marriage.

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*. 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*. But the informed participants on both sides share at least this common ground: “Marriage is a vital social institution.”³ Indeed, with those six words begins the only American appellate decision to date to mandate the redefinition of marriage, Massachusetts’s *Goodridge v. Department of Public Health*.⁴

Serious students of social institutions rather uniformly acknowledge that each social institution, including marriage, is constituted by a unique web of shared public

1. See Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 DUKE J. CONST. L. & PUB. POL’Y 1, 7-28 (2006), available at http://www.manwomanmarriage.org/jrm/pdf/Duke_Journal_Article.pdf [hereinafter Stewart, *Judicial Elision*].

2. Monte Neil Stewart, *Eliding in New York*, 1 DUKE J. CONST. L. & PUB. POL’Y 221, 240 (2006), available at <http://www.manwomanmarriage.org/jrm/pdf/ElidingInNewYork.pdf> [hereinafter Stewart, *New York*]. See also Monte Neil Stewart, *Dworkin, Marriage, Meanings—and New Jersey*, RUTGERS J. L. & PUB. POL’Y 271 (2007), available at <http://marriagelawfoundation.org/mlf/publications/Dworkin%20Article.pdf> [hereinafter Stewart, *Dworkin*].

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

4. *Id.*

meanings.⁵ For important institutions, again including marriage, many of these meanings rise to the level of norms.⁶ Consequently, important social institutions affect individuals profoundly; institutional meanings teach, form, and transform individuals, providing identities, purposes, practices, and projects.⁷ 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.⁸

These 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 society that an institution’s constitutive meanings provide social goods. And it is those social goods that presumably led to the institution’s evolvment and that continue to give reason for its perpetuation.⁹

5. Stewart, *Judicial Elision*, *supra* note 1, at 7-9.

6. 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 COMMUNITARIAN THINKING: PERSONS, VIRTUES, INSTITUTIONS, AND COMMUNITIES* 170, 175 (Amitai Etzioni ed. 1995).

7. See Stewart, *Judicial Elision*, *supra* note 1, at 9-10. See also Sullivan, *supra* note 6, 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.

8. See, e.g., Gerald Torres & Katie Pace, *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).

9. 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,

A core meaning of the marriage institution has virtually always been *the union of a man and a woman*.¹⁰ 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.¹¹ 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).¹²
2. "[T]he most effective means humankind has developed so far to maximize the level of private welfare provided to the 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).¹³
3. The indispensable foundation for that child-rearing mode—that is, married mother/father child-rearing—that correlates (in ways not

supra note 6, at 19 (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 1, at 8-10.

10. W. BRADFORD WILCOX ET AL., WHY MARRIAGE MATTERS: TWENTY-SIX CONCLUSIONS FROM THE SOCIAL SCIENCES 15 (2d ed. 2005). See DAVID BLANKENHORN, THE FUTURE OF MARRIAGE 91 (2007):

In all or nearly all human societies, marriage is socially approved sexual intercourse between a woman and a man, 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.

11. Stewart, *Judicial Elision*, *supra* note 1, at 16-20.

12. 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 63, 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>.

13. See Stewart, *Judicial Elision*, *supra* note 1, at 17-18; See also Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 CAN. J. FAM. L. 11, 44-48 (2004), available at <http://manwomanmarriage.org/jrm/pdf/jrm.pdf> [hereinafter Stewart, *Redefinition*].

subject to reasonable dispute) with the optimal outcomes deemed crucial for a child's—and therefore society's—well being.¹⁴

4. Society's primary and most effective means of bridging the male-female divide.¹⁵
5. Society's only means of conferring and transforming the identity and status of a male into husband/father, and a female into wife/mother¹⁶—statuses and identities particularly beneficial to society.¹⁷
6. Social and official endorsement of that form of adult intimacy—married heterosexual intercourse—that society may rationally value

14. 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 significantly correlates with the optimal outcomes deemed crucial for a child's—and therefore society's—well being. See, e.g., THE WITHERSPOON INSTITUTE, MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES 21–36 (2006), available at <http://www.princetonprinciples.org/files/Marriage%20and%20the%20Public%20Good.pdf>; WILCOX, ET AL., *supra* note 10, at 23 (2005).

I turn now to 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. These are sometimes referred to as the “no differences” studies. The University of Virginia's Prof. Steven Nock in 2001 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. 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. 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 Prof. Nock's conclusion regarding the failure of the “no differences” studies. 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.”). None of the “no differences” studies published since Prof. Nock filed his affidavit in 2001 meet the good-science requirements.

15. 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 . . .”); BLANKENHORN, *supra* note 10, at 150-52.

16. See F.C. DeCoste, *The Halpern Transformation: Same-Sex Marriage, Civil Society, and the Limits of Liberal Law*, 41 ALBERTA L. REV. 619, 625-27 (2003).

17. See, e.g., DAVID POPENOE, LIFE WITHOUT FATHER 139–88 (1996); THE WITHERSPOON INSTITUTE, *supra* note 14, at 21–38.

above all other such forms. That rationality has been demonstrated in the scholarly literature¹⁸ and remains, to date, unrefuted.

Those are not all the social goods produced by the marriage institution, but for our purposes they are the relevant ones. They are relevant exactly because they are the social goods produced materially and even uniquely by the man/woman *meaning* and therefore the social goods that must disappear when that *meaning* is deinstitutionalized.¹⁹

The social institutional argument further demonstrates that, with its power to suppress social meanings, the law can radically change and even deinstitutionalize man/woman marriage.²⁰ It bears repeating that such deinstitutionalization necessarily means loss of the institution's social goods.²¹ Further, genderless marriage is a

18. Stewart, *Redefinition*, *supra* note 13, at 52-57; Maggie Gallagher, *Does Sex Make Babies? Marriage, Same-Sex Marriage and Legal Justifications for the Regulation of Intimacy in a Post-Lawrence World*, 23 QUINNIPIAC L. REV. 447, 451-72 (2004) [hereinafter Gallagher, *Does Sex Make Babies*].

19. In my judgment, a purely instrumental approach to social institutions is not warranted, but the very nature of constitutional analysis and litigation brings to bear a kind of pneumatic pressure to frame the practices of social institutions, including marriage, in that way. The best antidote may well be careful attention to what Sullivan illuminates:

American thinking has long been famous for its technical and instrumental bent. . . . American individualism . . . has long cohabited happily with a certain instrumental cast of mind.

...

From this perspective institutions have appeared as instruments for the efficient pursuit of individual and collective satisfaction. From the family to the law, institutions have been reduced to an instrumental status, as little more than arrangements for the mutual convenience of the parties involved. The values or preferences of actors have been analytically separated from the contexts in which their values have been formed. In American intellectual culture as in popular opinion, the dominant theme has been to free individuals from social constraint, to enhance agency. . . . While foregrounding agency, this approach has often minimized the significance of institutions as the necessary contexts for the development of individuals, as enabling and not only as constraining forms of life.

....

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. Individual agency and moral responsibility depend upon the cultivation of certain kinds of social relationships that can be sustained over time *only if institutionalized in customary and legal forms*.

[What are] the practical conditions necessary for the civic culture of democracy[?].

.. The most plausible account of how to sustain the character and customs necessary for a civic regime must give a central place to a noninstrumental conception of institutions.

Sullivan, *supra* note 6, at 170-71, 173-74 (emphasis added).

20. Stewart, *Judicial Elision*, *supra* note 1, at 11-13.

21. See *supra* note 19 and accompanying text.

radically different institution than man/woman marriage.²² This radical difference is evidenced by the large divergence in the nature of the two possible marriage institutions' respective social goods (in the case of genderless marriage, only promised social goods not yet delivered).²³ This large divergence should not 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.²⁴ Or to use popular contemporary terminology, the man/woman marriage institution will socially construct a people and a society different from the people and society socially constructed by the genderless marriage institution.²⁵ It could not be otherwise because the genderless marriage institution is radically different in what it aims for and in what it teaches.²⁶ 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.²⁷ Tellingly, 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 possible institutions of marriage, and this is so regardless of the observer's own sexual, political, or theoretical orientation or preference.²⁸

22. *Id.*

23. Stewart, *Judicial Elision*, *supra* note 1, at 20-24.

24. *Id.* at 20-21.

25. 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 2, at 240.

26. Stewart, *New York*, *supra* note 2, at 240.

27. *Id.* at 240-41.

28. See LADELLE MCWHORTER, BODIES AND PLEASURES: FOUCAULT AND THE POLITICS OF SEXUAL NORMALIZATION 125 (1999); JOSEPH RAZ, THE MORALITY OF FREEDOM 393 (1986); Angela Bolte, *Do Wedding Dresses Come in Lavender? The Prospects and Implications of Same-Sex Marriage*, 24 SOC. THEORY AND PRAC. 111, 114 (1998); Daniel Cere, *War of the Ring*, in DIVORCING MARRIAGE, *supra* note 12, at 11-18; Douglas Farrow, *Canada's Romantic Mistake*, in DIVORCING MARRIAGE, *supra* note 12, at 1-5; Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 U. ST. THOMAS L. J. 33, 53 (2004) [hereinafter Gallagher, *Reply*] ("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 QUINNIAC L. REV. 13, 15, 17-18 (1996); Katherine Young & Paul Nathanson, *The Future of an Experiment*, in DIVORCING MARRIAGE, *supra* note 12, at 48-56; E.J. Graff, *Relying 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).

As to genderless marriage being radically different in what it aims for and in what it teaches, to grasp well that reality requires a clear understanding of the “close personal relationship” model of marriage. This model—sometimes advanced as descriptive (what marriage *is*), sometimes as aspirational (what marriage *ought* to be)—posits a relationship stripped of any goal or end beyond the intrinsic emotional, psychological, or sexual satisfaction that the relationship brings to the two adults involved.²⁹ But it is just wrong, 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 it is *not* wrong in some American communities or in portions of that world created by Hollywood, it is wrong, on these grounds, across the Nation.³⁰ Although the contemporary social institution of marriage undoubtedly 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,”³¹ 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 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

29. For an excellent summary of the close personal relationship model of marriage, see COUNCIL ON FAMILY LAW, *supra* note 15, at 14–15.

30. BLANKENHORN, *supra* note 10, at 14 (the various articulations of the close personal relationship model of marriage are “radically insubstantial”).

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

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.³²

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.³³ But in this Nation, that model—as description—is so incomplete as to be fundamentally false and misleading. Because the contemporary man/woman marriage institution is so much more than what the close personal relationship model purports to describe, 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 now widely accepted.³⁴

The next social institutional reality that must not be ignored or otherwise elided is that a society can have, at any one time, only one social institution denominated *marriage*.³⁵ As a simple matter of reality, 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.”³⁶ It 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.”³⁷ 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. 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.³⁸ Thus, the social institutional argument refutes the “no-downside” argument advanced by genderless marriage proponents and seen in the famous tactic

32. COUNCIL ON FAMILY LAW, *supra* note 15, 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., BLANKENHORN, *supra* note 10, at 91-106; Gallagher, *Does Sex Make Babies*, *supra* note 18, at 451–71; Gallagher, *Reply*, *supra* note 28, at 43–51; Stewart, *Judicial Elision*, *supra* note 1, at 16–20; and Stewart, *Redefinition*, *supra* note 13, at 41-57.

33. E.g., Douglas Farrow, *Rights and Recognition*, in *DIVORCING MARRIAGE*, *supra* note 12, at 98-99.

34. See WILCOX ET AL., *supra* note 10, at 10-11.

35. Stewart, *Judicial Elision*, *supra* note 1, 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.”).

36. *Id.*

37. *Id.*

38. See *supra* note 19 and accompanying text.

of asking: “How will letting Jim and John marry . . . hurt Monte’s and Anne’s marriage?”³⁹

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.⁴⁰ 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.⁴¹ 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.⁴² Remember, 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.⁴³ 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. (By the way, money is one of our most important social institutions.)⁴⁴

39. Stewart, *Judicial Elision*, *supra* note 1, at 42.

40. Although legislatively created arrangements such as civil unions or domestic partnerships are sometimes called “marriage lite” or “counterfeit marriage,” and although such arrangements may adversely affect the vitality of a marriage institution (whether man/woman or genderless) and the strength of its norms, *see* Jonathan Rauch, *Dirge Straights: Why Outlawing Marriage for Gays Will Undermine Marriage for All*, WASHINGTON MONTHLY, April 1, 2004, at 20 (“Conservatives may argue that allowing gay marriage endangers matrimony for straights; in fact, creating alternatives to marriage, such as civil unions, is far more likely to undermine the institution of marriage.”); Lynn D. Wardle, *Counting the Costs of Civil Unions: Some Potential Detrimental Effects on Family Law*, 11 WIDENER J. PUB. L. 401, 440 (2002) (“Another general social effect of legalizing same-sex civil unions is the enhancement and increase in the devaluation of marriage.”), it must be remembered that such arrangements were created and intended and exist as something that is *not* marriage; indeed, in the realm of shared public meanings, that *not* may well loom as large as the arrangements’ numerous marriage-like features.

41. BEYOND SAME-SEX MARRIAGE: A NEW STRATEGIC VISION FOR ALL OUR FAMILIES & RELATIONSHIPS (2006) <http://www.beyondmarriage.org/>. For an article that does a good job placing this manifesto in its larger social/political/legal context, *see* Stanley Kurtz, *The Confession: Have same-sex marriage advocates said too much?*, NATIONAL REVIEW ONLINE, Oct. 31, 2006, <http://article.nationalreview.com/print/?q=ZDY4Y2U4MGJkODRIZTFhNjk2MjZhZTZIMGMjNmUzZWE=>.

42. *See* BLANKENHORN, *supra* note 10, at 128 (opponents of marriage “view gay marriage as one key step toward their larger goal, which is to knock the stuffing out of marriage as a social institution.”); Kurtz, *supra* note 41.

43. *See supra* note 19 and accompanying text.

44. John Searle notes the following:

[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. . . .

The social institutional realities that I have been summarizing further reveal phrases like *gay marriage* or *same-sex marriage* to be misleading.⁴⁵ These phrases get people thinking that a society will keep its old kind of marriage and just get a new and separate kind. But that is not so because of the social institutional realities just reviewed; a society can have one or the other but never at the same time both possible kinds of civil marriage.⁴⁶ And after a judicial decree of genderless marriage, made in the name of constitutional norms of equality, liberty, dignity, or autonomy, an American state will certainly *not* be “the happy home of many different marriage norm communities, each doing its own marriage thing, each equally valid before the law, and each equally secure in its own space.”⁴⁷ Rather, that state will have one marriage norm community (genderless marriage) officially sanctioned and officially protected; all other marriage norm communities will be officially constrained, officially disdained, and sharply curtailed.⁴⁸

Further, there are profound problems with the notion that supporters of the old marriage institution can, if they want, just huddle together in some linguistic, social, or religious enclave to preserve the old institution and its meanings.⁴⁹ Social institutional studies teach that the dominant society and its law, language, and meanings will, like an ocean and its waves, inevitably wear down and cause to disappear any island enclave of an opposing norm.⁵⁰ Moreover, to the extent that members of the enclave adopt the speech of the dominant society, the power to name and discern what once mattered to their forbears will be lost because it seems implausible or unintelligible to them.⁵¹

[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.

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

45. Stewart, *Judicial Elision*, *supra* note 1, at 25.

46. *Id.*

47. *Id.* at 48–49.

48. *Id.*

49. *Id.* at 46–49.

50. The early but not isolated example of the Massachusetts Catholic Charities adoption agency comes to mind. See Maggie Gallagher, *Banned in Boston*, *WEEKLY STANDARD*, May 15, 2006, at 20 [hereinafter Gallagher, *Banned in Boston*].

51. Stewart, *Judicial Elision*, *supra* note 1, at 47. See also Sullivan, *supra* note 6, at 176:

Living in institutions is thus always in part centered in language. It is a conversation, sometimes an argument about who and what we and our shared form of life are. This process is a moral and, implicitly, a political one, since institutional life is always making some forms of activity possible and others impossible, some kinds of life legitimate and others illegitimate. . . . Institutions provide the socially enacted metaphors of family, . . . church, and state through which individuals inescapably interpret situations and actions. This suggests the profound influence that institutional patterns as such exert on the thinking and aspiration as well as the behavior of individuals.

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.⁵² Some judges bent on replacing the former with the latter have asserted that the man/woman marriage institution is solely a legal (that is, post-political) construct. A New York appellate judge asserted as the first words of his dissenting opinion: “Civil marriage is an institution created by the state”⁵³ But 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 All this teaches that 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 deinstitutionalize 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

The preceding portion of this section constitutes a fair if sparse summary of the *content* of the social institutional argument for man/woman marriage. What follows are a few merited observations *about* the argument itself. The first is that the appellate courts that have mandated genderless marriage (in Massachusetts and Canada), and the dissenting judges in other jurisdictions who would do the same, have ignored or otherwise evaded the argument. These judicial elisions of the argument are now well demonstrated in the scholarly literature.⁵⁸ In contrast, the courts that have engaged the argument have rejected genderless marriage.⁵⁹

52. Seana Sugrue, *Soft Depotism and Same-Sex Marriage*, in *THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, AND MORALS* 172, 180-81, 186-91 (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.

53. *Hernandez v. Robles*, 805 N.Y.S.2d 354, 377 (N.Y. App. Div. 2005) (Saxe, J., dissenting). Soon after boldly asserting the “state-created” conclusion, however, and apparently not aware of the inconsistency, this dissenting judge actually supported rather powerfully the contrary conclusion, by invoking John Locke. *Id.* at 378. All this is described in detail in Stewart, *New York*, *supra* note 2, at 243-46.

54. RAZ, *supra* note 28, at 161; see DeCoste, *supra* note 16, at 635.

55. Stewart, *Redefinition*, *supra* note 13, at 84-85.

56. Stewart, *Judicial Elision*, *supra* note 1, at 36-37.

57. *Id.* at 52 n.137.

58. See generally Stewart, *Judicial Elision*, *supra* note 1; Stewart, *New York*, *supra* note 2.

59. E.g., *Lewis v. Harris*, 875 A.2d 259, 262 (N.J. Super. Ct. App. Div. 2005); *id.* at 274-78.

Second, the argument fully qualifies as Rawlsian “public reason”⁶⁰ and satisfies even Linda McClain’s high standard: “The requirements of public reason would... require the delineation of precisely how same-sex marriages threaten the institution of marriage in terms of public reasons and political values implicit in our public culture.”⁶¹ This achievement of the social institutional argument merits emphasis exactly because of what Margaret Somerville has accurately observed:

One strategy used by same-sex marriage advocates is to label all people who oppose same-sex marriage as doing so for religious or moral reasons in order to dismiss them and their arguments as irrelevant to public policy. [Further,] good secular reasons to oppose same-sex marriage are re-characterized as religious or as based on personal morality and, therefore, as not applicable at a societal level.⁶²

Indeed, no less a figure than Ronald Dworkin recently attempted to counter the social institutional argument for man/woman marriage (which he incorrectly called “the cultural argument against gay marriage” but correctly identified as the strongest such argument) by the single ploy of mischaracterizing it as a “religious” argument.⁶³ This he did despite the fact that “the argument patently emerges in a thorough-going way from modes of inquiry and analysis, and from sources, that are most decidedly not religious.”⁶⁴

Third, because the argument demonstrates that adoption of genderless marriage will necessarily de-institutionalize man/woman marriage and thereby cause the loss of its unique social goods, the argument effectively refutes the notion that the

(Parrillo, J., concurring); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 983–1005 (Mass. 2003) (Cordy, J., dissenting). Since the *Goodridge* decision in November 2003, every American appellate court decision addressing the marriage issue has upheld man/woman marriage against all constitutional challenges—although the New Jersey Supreme Court did so conditioned on legislative passage of a civil unions bill. In reverse chronological order, they are *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); *In re Marriage Cases*, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006); *Hernandez v. Robles*, 855 N.E. 2d 1 (N.Y. 2006); *Samuels v. N.Y. Dep’t of Pub. Health*, 881 N.Y.S.2d 136 (N.Y. App. Div. 2006); *Hernandez v. Robles*, 805 N.Y.S.2d 354 (N.Y. App. Div. 2005); *Lewis v. Harris*, 875 A.2d 259, 268–269 (N.J. Super. Ct. App. Div. 2005); *Morrison v. Sadler*, 821 N.E.2d 15, 23 (Ind. Ct. App. 2005).

60. See, e.g., John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 787–88 (1997).

61. Linda C. McClain, *Deliberative Democracy, Overlapping Consensus, and Same-Sex Marriage*, 66 *FORDHAM L. REV.* 1241, 1251 (1998).

62. Margaret Somerville, *What About the Children?*, in *DIVORCING MARRIAGE*, *supra* note 12, at 70–71. She goes on to note that these tactics “do not serve the best interests of either individuals or society in this debate.” *Id.* at 71.

63. RONALD DWORKIN, *IS DEMOCRACY POSSIBLE HERE?* 86–89 (2006). See Stewart, *Dworkin*, *supra* note 2, at 292–98.

64. *Id.* at 293.

proponents of man/woman marriage have only one “real” motive: animus towards gay men and lesbians.⁶⁵

Fourth, because the argument demonstrates society’s (and hence the government’s) compelling interests in preserving the vital social institution of man/woman marriage, the argument is a sufficient response to all constitutional challenges leveled at the laws sustaining that institution, and that is so regardless of what standard of review the court applies.⁶⁶

II. TWO STATES’ GENDERLESS MARRIAGE LITIGATION

A. *The Washington Litigation*

A number of same-sex couples, some in Thurston County and some in King County, initiated civil actions to strike down on state (but not federal) constitutional grounds the Washington statute limiting marriage to the union of a man and a woman—the Defense of Marriage Act (“DOMA”).⁶⁷ The two trial courts ruled for the

65. See, e.g., *Goodridge*, 798 N.E.2d at 968 (“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.”); Editorial, *For Gay Marriage*, BOSTON GLOBE, July 8, 2003, at A18 (“For all the legal acrobatics offered by opponents, it is hard to see how anything other than an animus toward gays and lesbians prevents them from obtaining the same ‘benefits and protections’ enjoyed by heterosexual couples.”); GAY & LESBIAN ADVOCATES & DEFENDERS, IS DOMA DOOMED?: THE FEDERAL “DEFENSE OF MARRIAGE ACT” AND STATE ANTI-GAY, ANTI-MARRIAGE LAWS 13 (2001), available at <http://www.glad.org/rights/IsDOMADoomed.pdf> (“DOMA’s sheer breadth and its lack of any connection to a legitimate legislative end demonstrates that it can only be explained by anti-gay animus.”).

66. Stewart, *Judicial Elision*, *supra* note 1, at 27–28.

67. *Andersen v. King County*, 138 P.3d 963, 970 (Wash. 2006). The organizations supporting these types of state-court actions across the country are united in their resolve to avoid raising the definition-of-marriage issue, whether in state or federal court, as a *federal* constitutional claim. This resolve is based on the organizations’ judgment that for now and in the foreseeable future the federal courts, including the United States Supreme Court, will reject such a federal genderless marriage claim. Nevertheless, maverick attorneys and plaintiffs (not acting under the control of these organizations) have made the federal claim four times, losing twice in federal district court and once in federal bankruptcy court. *Bishop v. Oklahoma*, 447 F. Supp. 2d 1239 (N.D. Oklahoma 2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005); *Smelt v. Orange County*, 374 F. Supp. 2d 861, 880 (C. D. Cal. 2005); *In re Kandau*, 315 B.R. 123, 137–38 (Bankr. W.D. Wash. 2004). The losing attorney and plaintiffs in the California federal action refused to bow to organizational pressure and pursued an appeal to the Ninth Circuit Court of Appeals. But the organization Equality California moved to intervene before the Ninth Circuit and asked the court to dismiss the appeal on justiciability grounds. Opening Brief of Proposed Intervenor Equality California at 3, *Smelt*, No. 05-56040. The Ninth Circuit denied the intervention motion but ultimately ruled as the proposed intervenor desired by avoiding the federal constitutional issue and dismissing the case on grounds of justiciability. *Smelt v. County of Orange*, 447 F.3d 673, 685–86 (9th Cir. 2006).

respective plaintiffs, albeit on differing theories.⁶⁸ The Washington Supreme Court granted the State's request for direct review and consolidated the two cases.⁶⁹

In July 2006, the Washington Supreme Court, dividing 5-4 in *Andersen v. King County*,⁷⁰ upheld the man/woman marriage statute against all state constitutional challenges.⁷¹ Of the five justices in the majority, three joined the lead opinion authored by Justice Madsen ("the plurality opinion"), and two joined a concurring opinion authored by Justice J.M. Johnson ("the concurring opinion").⁷² Of the four justices in the minority, all joined a dissenting opinion authored by Justice Fairhurst ("the first Washington dissenting opinion"); Justice Bridge filed a separate dissenting opinion ("the second Washington dissenting opinion"); and Justice Chambers did likewise.⁷³

B. *The California Litigation*

The story of the California litigation is as convoluted as the Washington story is straight-forward. San Francisco's mayor Gavin Newsom ordered the county clerk to issue marriage licenses to same-sex couples, on his judgment that to withhold the licenses was unconstitutional.⁷⁴ The clerk complied, issuing some thousands of such licenses.⁷⁵ Meanwhile, two private entities initiated separate civil actions in an effort to stop the practice, but the trial court refused to grant an immediate stay.⁷⁶ Thereupon the Attorney General initiated an original writ petition in the California Supreme Court, which accepted jurisdiction in early March 2004.⁷⁷ Between that time and August 2004, the city of San Francisco and two groups of same-sex couples each filed separate civil actions challenging, again on state but not federal constitutional grounds,⁷⁸ the state laws providing for man/woman marriage, including the law enacted directly by the voters in 2000 commonly referred to as "Prop 22."⁷⁹ It reads: "Only marriage between a man and a woman is valid or recognized in California."⁸⁰

68. *Andersen*, 138 P.3d at 970.

69. *Id.*

70. *Id.* at 963.

71. *Id.* at 969.

72. *Id.* at 963.

73. *Id.*

74. *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 686 (Cal. Ct. App. 2006).

75. *Id.*

76. *Id.*

77. *Id.* at 686-87.

78. *Id.* at 687.

79. *Id.*

80. *Id.* at 692.

In August 2004, the Supreme Court in the original writ proceeding held, without deciding the constitutionality of the man/woman marriage statutes, that San Francisco was bound to comply with those laws unless and until they were judicially invalidated and that the approximately 4,000 same-sex marriages performed in San Francisco were void.⁸¹

Thereafter, another group of same-sex couples filed yet another civil action of the same kind filed by the first two groups.⁸² Those three actions, San Francisco's action, and the two actions initiated by the private entities seeking to uphold Prop 22 were "coordinated" before one San Francisco trial judge.⁸³ In April 2005, that trial judge held that the impugned man/woman marriage laws violated the state constitution.⁸⁴

Dividing 2-1 in *In re Marriage Cases*,⁸⁵ the Court of Appeal reversed, holding that those laws withstood constitutional challenge ("the majority opinion").⁸⁶ One justice in the majority filed a short concurring opinion.⁸⁷ The lone dissenter filed a lengthy dissenting opinion ("the California dissenting opinion").⁸⁸ Currently, the Court of Appeal's judgment has been appealed, and the California Supreme Court has accepted the appeal for resolution on the merits.⁸⁹

III. ELIDING IN WASHINGTON AND CALIFORNIA

At this stage in the history of the marriage issue (the stage that encompasses the preparation and issuance of the *Andersen* and *Marriage Cases* decisions), the judges called upon to resolve the issue have before them the social institutional argument for man/woman marriage. It is found in the opinions of prior cases addressing the issue.⁹⁰ It is found in the briefs of parties and amici.⁹¹ It is found in the law journals

81. *Lockyer v. City and County of San Francisco*, 95 P.3d 459, 464 (Cal. 2004).

82. *Marriage Cases*, 49 Cal. Rptr. 3d at 687.

83. *Id.*

84. *Id.* at 688.

85. *Id.* at 685.

86. *Id.* at 685-86.

87. *Marriage Cases*, 49 Cal. Rptr. 3d at 727-31 (Parrilli, J., concurring).

88. *Id.* at 730-64 (Kline, J., concurring and dissenting).

89. *In re Marriage Cases*, 2006 Cal. LEXIS 15270 (Cal. Dec. 20, 2006).

90. *See, e.g.*, *Hernandez v. Robles*, 855 N.E.2d 1, 7-8 (N.Y. 2006); *Hernandez v. Robles*, 805 N.Y.S.2d 354, 360 (N.Y. App. Div. 2005); *id.* at 375-76 (Catterson, J., concurring); *Lewis v. Harris*, 875 A.2d 259, 268-269 (N.J. Ct. App. 2005); *id.* at 275-78 (Parrillo, J., concurring).

91. *See, e.g.*, Brief Amicus Curiae of Marriage Law Foundation at 6-7, *Andersen v. King County*, 138 P.3d 963 (Wash. 2006) (No. 75934-1); Brief of Amicus Curiae Families Northwest at 2, *Andersen v. King County*, 138 P.3d 963 (Wash. 2006) (No. 75934-1); Amici Curiae Brief of United Families International & Family Leader Foundation in Support of Appellant at 3-4, *In re Marriage Cases*, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006) (No. A110449); Amici Curiae Brief of The Church of Jesus Christ of Latter-day Saints, et al. in Support of Appellant, *In re Marriage Cases* at 4, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006) (No. A110449).

and monographs.⁹² And it is often found in the opinion of a judge's colleague in the very case to be decided.⁹³

Regarding case law presentation of the argument, one example comes from the New Jersey intermediate appellate court decision in *Lewis v. Harris*.⁹⁴ That court upheld the state's man/woman marriage laws against all constitutional attacks.⁹⁵ Both the majority opinion and the concurring opinion addressed the social institutional nature of marriage, and the concurring opinion set out in fairly complete fashion the social institutional argument.⁹⁶ The concurring opinion notes that marriage is a social institution comprised by shared public meanings, and 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'".⁹⁷ The concurring opinion further notes that to eliminate the core constitutive man/woman meaning would be to render the institution "non-recognizable and unable to perform its vital function" and would "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."⁹⁸ The opinion continues by noting that "its opposite-sex feature makes [the marriage institution] meaningful and achieves important public purposes."⁹⁹ This includes the public and rational privileging of heterosexual intercourse in marriage and the advancement of marriage's "private welfare" purpose.¹⁰⁰ Thus, prior case law contains the social institutional argument in sufficient detail that no judge facing the question can easily ignore it.

Moreover, as in all the previous marriage cases, all judges on each side of the marriage issue in *Andersen* and *Marriage Cases* acknowledge that marriage is a vital social institution. For example, in *Marriage Cases* the majority opinion says that marriage is "a public institution... valued . . . for its public role in organizing

92. See, e.g., INSTITUTE FOR AMERICAN VALUES, MARRIAGE AND THE LAW: A STATEMENT OF PRINCIPLES 8-28 (2006); Gallagher, *Does Sex Make Babies*, *supra* note 18, at 451-71; Gallagher, *Reply*, *supra* note 28, at 43-51; Stewart, *Judicial Elision*, *supra* note 1, at 15-16; Stewart, *New York*, *supra* note 2, at 223-28, 231-59; Stewart, *Redefinition*, *supra* note 13, at 71-85.

93. See *Andersen v. King County*, 138 P.3d 963, 969, 982-84 (Wash. 2006); *id.* at 1002-09 (J.M. Johnson, J., concurring); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 995-96 (Mass. 2003) (Cordy, J., dissenting).

94. 875 A.2d 259 (N.J. Ct. App. 2005), *aff'd in part & modified in part*, *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

95. *Id.* at 262.

96. *Id.* at 268-69; *Id.* at 274-78 (Parrillo, J., concurring).

97. *Id.* at 276.

98. *Id.* at 277-78 (quoting Stewart, *Redefinition*, *supra* note 13, at 80-81).

99. *Id.* at 277.

100. *Id.* at 275-78.

fundamental aspects of our society,”¹⁰¹ and “is more than a ‘law,’ of course; it is a social institution of profound significance”¹⁰² The concurring opinion says that “the institution (marriage) and emerging institution (same-sex partnerships) are distinct.”¹⁰³ It further notes that the impugned statutes “define marriage . . . in a way which recognizes [a key] function of the [marriage] institution,” that is, expressing “the principle that men and women who *may*, without planning or intending to do so, give life to a child should raise that child in a bonded, cooperative, and enduring relationship.”¹⁰⁴ Nor does the dissenting opinion deny the importance of the marriage institution. In its unvarying heated rhetoric, the dissenting opinion says: “Offering homosexual couples the opportunity to become domestic partners does not eradicate the stain of their exclusion from the institution of civil marriage our society venerates so highly and makes readily available to everybody else.”¹⁰⁵ All opinions acknowledge the importance of marriage as a valuable social institution.

The same acknowledgement is seen repeatedly in *Andersen*. For example, the plurality opinion speaks of “the State’s historical commitment to the institution of marriage between a man and woman.”¹⁰⁶ The concurring opinion notes: “The unique and binary biological nature of marriage and its exclusive link with procreation and responsible child rearing has defined the institution at common law and in statutory codes and express constitutional provisions of many states.”¹⁰⁷ The first dissenting opinion, quoting the *Goodridge* plurality, says that marriage “is a ‘social institution of the highest importance.’”¹⁰⁸ The second dissenting opinion asserts that the impugned statute “relies on the notion that the institution of marriage needs to be defended from gays and lesbians”¹⁰⁹ The opinions recognize the social institutional value of marriage—but differ in their ability to grasp fully the realities of the marriage institution.

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. This is seen in the *Andersen* and *Marriage*

101. *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 715 (Cal. Ct. App. 2006).

102. *Id.* at 723.

103. *Id.* at 728 (Parrilli, J., concurring) (emphasis in original).

104. *Id.*

105. *Id.* at 759-60 (Kline, J., concurring and dissenting).

106. *Andersen v King County*, 138 P.3d 963, 982 (Wash. 2006).

107. *Id.* at 991 (J.M. Johnson, J., concurring).

108. *Id.* at 1013 (Fairhurst, J., dissenting).

109. *Id.* at 1030 (Bridge, J., dissenting).

Cases dissenting opinions, and a critical examination of the phenomenon in those opinions is what follows.

A. *The “No Downside” Elision*

No argument is more pervasive in the two cases’ dissenting opinions than the “no downside” argument. It is simply that allowing same-sex couples to marry will hurt no one else or nothing else, including marriage in our society.¹¹⁰ The argument sometimes comes with refinements. One is that allowing same-sex couples to marry will not only result in no harm to but will actually benefit marriage in our society.¹¹¹ Another is that man/woman marriage proponents have not (or cannot) demonstrate (or adequately or persuasively demonstrate) that allowing same-sex couples to marry will harm marriage or any societal interest served by the institution.¹¹²

The *Andersen* and *Marriage Cases* dissenting opinions presented the “no downside” argument in various manners. The first Washington dissenting opinion states that, after redefinition, “opposite-sex couples would continue to marry, procreate, and parent, if they so choose, and continue to further the interests identified by the State. This fact alone underscores the lack of a rational relationship between [the impugned statute] and those identified [societal] interests.”¹¹³ This dissent continues: “The State has failed to articulate how the exclusion of same-sex couples from the right to marry is rationally related to any legitimate interests.”¹¹⁴ The second Washington dissent asserts that the man/woman marriage statute “does nothing to fortify or preserve heterosexual marriage.”¹¹⁵

The California dissenting opinion asserts:

The nuanced argument [is] that the state’s primary interest in recognizing and regulating marriage is . . . steering procreation into marriage, [and] focuses on the protection of children resulting from potentially unplanned natural procreation [This argument] 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.”¹¹⁶

110. See *id.* at 1026 (Fairhurst, J., dissenting); *Marriage Cases*, 49 Cal. Rptr. 3d at 748-49 (Kline, J., concurring and dissenting).

111. See *Andersen*, 138 P.3d at 1018-19 (Fairhurst, J., dissenting).

112. See *Marriage Cases*, 49 Cal. Rptr. 3d at 763-64 (Kline, J., concurring and dissenting).

113. *Andersen*, 138 P.3d at 1026 (Fairhurst, J., dissenting).

114. *Id.* at 1018.

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

116. *Marriage Cases*, 49 Cal. Rptr. 3d at 748-49 (Kline, J., concurring and dissenting).

This dissent also asserts that

the state *has not even claimed*, let alone shown, that same-sex marriage conflicts with any legitimate interest it has in preserving and strengthening the institution of marriage. . . . Neither the rights or interests of opposite-sex couples nor those of their children are in any conceivable way advanced by banning same-sex marriage, though the ban substantially impairs the rights of same-sex couples and their children.”¹¹⁷

And, quoting the *Goodridge* plurality, the California dissent asserts that the same-sex couple plaintiffs

‘seek only to be married, not to undermine the institution of civil marriage Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities.’¹¹⁸

The dissenting opinions’ “no downside” argument is a breathtaking evasion of a number of uncontroversial social institutional realities. First, to make the “no downside” argument is to deny (almost always implicitly) that the shared public meanings at the core of important social institutions *matter*. This denial may be grounded in the notion that institutions are constituted by something, anything, other than a complex web of shared public meanings. But judicial acceptance of that notion seems extraordinarily unlikely given the scholarly consensus that shared public meanings are indeed the constituent stuff of social institutions.¹¹⁹ In the context of the marriage issue, the more likely notion underpinning judicial denial is that an institution denominated *marriage* in our society will be essentially the same whether its core meaning is *the union of a man and a woman* or *the union of any two persons*. Stated differently, the man/woman meaning and the any-two-persons meaning will produce essentially the same social goods.

But that notion does not stand up well to critical examination. Although there may well be some overlap in formative instruction between the two alternative marriage institutions, the significance is in the divergence. And what diverges in a large way are the social goods produced (or, in the case of genderless marriage, promised to be produced) by the two different meanings. As a first example (and as already noted), man/woman marriage makes meaningful a child’s right to know and be reared by his or her biological parents (with exceptions being justified only in the

117. *Id.* at 763-64 (emphasis in original).

118. *Id.* at 763 (quoting *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 965 (Mass. 2003)).

119. *See supra* note 5-8 and accompanying text.

best interests of the child, not those of any adult), hereafter referred to in shorthand as *the child's bonding right*.¹²⁰ Governmental selection of genderless marriage in the place of man/woman marriage, and especially a constitutional mandate for such, further withdraws official recognition and protection of the child's bonding right.¹²¹ A core part of the argument for genderless marriage is that same-sex couples have the power to bring donor-conceived children into their family and that both the same-sex couples and these donor-conceived children are entitled to the benefits of civil marriage.¹²² In this way genderless marriage is not just neutral towards the child's bonding right but actually undercuts it, while, in contrast, man/woman marriage has always provided powerful institutional support to that right. Margaret Somerville explains the radical difference, in this context, between the two institutions:

[A]ccepting same-sex marriage necessarily means accepting that the societal institution of marriage is intended primarily for the benefit of the partners to the marriage, and only secondarily for the children born into it. And it means abolishing the norm that children—whatever their sexual orientation later proves to be—have a prima facie right to know and be reared within their own biological family by their mother and father. Carefully restricted, governed, and justified exceptions to this norm, such as adoption, are essential. But abolishing the norm would have a far-reaching impact.¹²³

The Commission on Parenthood's Future states: "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."¹²⁴ If genderless marriage breaks the tie between the marriage institution and biological parenthood, the social institutional support of the child's bonding right is lost.¹²⁵

120. See *supra* note 12 and accompanying text.

121. I say "further" because American governments' *laissez-faire* allowance of anonymous donor conception began and continues the erosion of the child's right. As explained in the text, recognition of genderless marriage (especially as a constitutional mandate) would appear to render the right a complete nullity. All this is treated in depth in COMMISSION ON PARENTHOOD'S FUTURE, *supra* note 12, at 15-31.

122. *E.g., Andersen*, 138 P.3d at 1018-19 (Fairhurst, J., dissenting) ("Rather than furthering legitimate interests, denial of the right to marry will certainly harm children of same-sex couples, couples to whom the State has given its blessing to . . . 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.").

123. Margaret Somerville, *What About the Children?*, in *DIVORCING MARRIAGE*, *supra* note 12, at 67.

124. COMMISSION ON PARENTHOOD'S FUTURE, *supra* note 12, at 32.

125. See BLANKENHORN, *supra* note 10, at 199.

Changing a public meaning is a collective event; the meaning changes for *everyone*. If the

Another example in the context of divergent social goods pertains to the bridge over the male/female divide. The man/woman marriage institution ascribes a high value to that endeavor and provides a host of supports for its accomplishment. With a core meaning of “the union of any two persons,” the genderless marriage institution quite simply does neither.¹²⁶

The last example given here is the preparation for, conferral of, and sustenance in the status of *husband* or *wife*. As F.C. DeCoste explains:

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.¹²⁷

DeCoste then notes, accurately, that the courts mandating genderless marriage have first declared marriage to be, as a matter of fact, nothing other than a close personal relationship.¹²⁸ (As shown below, the Washington and California dissenting opinions do the same.) Speaking specifically of the *Halpern* decision from Ontario¹²⁹ (although this applies with equal validity to the other decisions reaching the same conclusion), he observes:

In the place of men and women, the Court offers as the subjects of marriage what it terms “conjugal couples,” which are, in its view, either “same-sex” or “opposite-sex.” In the place of marriage as the bestowal of status, the Court construes marriage as the expression and recognition of “love and commitment.”¹³⁰

He then observes:

child’s current right to her two natural parents goes down completely, as the proponents of the new rights claim insist that it must, then that right as a societal promise will no longer pertain to any child.

126. Stewart, *Judicial Elision*, *supra* note 1, at 22-23.

127. DeCoste, *supra* note 16, at 625.

128. *Id.* at 627.

129. *Halpern v. Toronto (City)*, [2003] 65 O.R. 3d 161, 225 D.L.R. (4th) 529 (Can.).

130. DeCoste, *supra* note 16, at 627 (emphasis added).

[T]he effect is plain: marriage [once it becomes genderless marriage] no longer has anything at all to do with the bestowal of a status which makes possible relations which, in the absence of the status, are unavailable in our lifeworld. Instead, marriage now has to do with the recognition and endorsement of *pre-existing* dispositions and relations. So viewed, marriage adds nothing to human possibility and is, as a result, de-institutionalized.¹³¹

Therefore, the rather clear institutional realities are that shared public meanings are the constituent stuff of social institutions, including marriage, and that the man/woman meaning at the core of the marriage institution produces important social goods much different than those promised by the genderless marriage institution. In short, institutional meanings matter. And all this reflects institutional realities that the Washington and California dissenting opinions seem ill-justified in evading.

Nor is it possible to see good judicial work in another of those opinions' elisions essential to sustenance of the "no downside" argument. This particular elided reality is that society can have, at any one time, only one social institution denominated *marriage*.¹³² As already noted, 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."¹³³ The one meaning necessarily displaces the other. The dissenting opinions' elision of this reality is seen in their repeated references to "same-sex marriage."¹³⁴ But *no* law anywhere in the world defines marriage as "the union of two persons of the same sex." The *only* two legal models are "the union of a man and a woman" and "the union of any two persons," and the fight in the Washington and California cases was over constitutional allowance of the first model versus constitutional mandate of the second.¹³⁵ Thus, this statement in the second Washington dissenting opinion is at best disingenuous: "The DOMA does nothing to fortify or preserve heterosexual marriage."¹³⁶ The DOMA is the legislative selection of "heterosexual marriage" (man/woman marriage) over the displacing alternative (genderless marriage). Because the two are mutually exclusive as a simple matter of legal and social institutional fact, the DOMA does about everything legislatively possible "to fortify or preserve heterosexual marriage." The contrary assertion from the second Washington dissenting opinion—and the treatment seen in all the

131. *Id.* (emphasis added).

132. Stewart, *Judicial Elision*, *supra* note 1, 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.").

133. *See supra* note 36 and accompanying text.

134. The first Washington dissenting opinion uses the phrase 24 times; the second Washington dissenting opinion, 15 times; and the California dissenting opinion, 35 times.

135. *See Andersen v. King County*, 138 P. 3d 963, 968 (Wash. 2006); *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 684 (Cal. Ct. App. 2006).

136. *Andersen*, 138 P.3d at 1037 (Bridge, J., dissenting).

dissenting opinions of “same-sex marriage” as an addition to, not a replacement of, man/woman marriage—really must be adjudged a rather dismal judicial performance.

Another elision seems to be at work in and essential to the dissenting opinions’ “no downside” argument. It is the evasion of constitutional law’s power to effect profound institutional change. As seen in British Columbia,¹³⁷ Ontario,¹³⁸ and Massachusetts,¹³⁹ constitutional law is indeed sufficiently potent to suppress man/woman marriage and replace it with genderless marriage. And that suppression is exactly what happens in any polity where the judiciary, in the name of constitutional norms, mandates the legal redefinition of marriage. If the dissenting judges had their way, that is exactly what would happen in Washington and California. But the man/woman meaning to date has materially and even uniquely provided a number of valuable social goods; to use constitutional law to suppress that meaning, to strip it of its social institutional force, would result in the loss of those goods.¹⁴⁰ It could not be otherwise.

Among the dissenting opinions, only the California dissenting opinion makes any effort to counter the understanding that suppression of the institutionalized man/woman meaning will result in a very large “downside” indeed. Yet that effort itself is premised on a rather startling misunderstanding of social institutions. The California dissenting opinion says that the same-sex couples/plaintiffs in the consolidated cases before the court were seeking “only to be married, not to undermine the institution of civil marriage.”¹⁴¹ This statement’s quite clear message is that the intentions of a handful of people can insulate a vast social institution constituted by its public meanings from change resulting from a profound alteration in those meanings. But the 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. Social institutional studies teach:

137. *EGALE v. Canada (Attorney General)*, [2003] 15 B.C.L.R. 406, 228 D.L.R. (4th) 416; *EGALE v. Attorney General (Canada)*, [2003] 13 B.C.L.R. (4th) 1, 225 D.L.R. (4th) 472.

138. *Halpern v. Toronto (City)*, [2003] 65 O.R. 3d 161, 225 D.L.R. (4th) 529 (Can.).

139. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 966-67 (Mass. 2003).

140. *See infra* Part I. For an anecdote that reveals the effect of constitutional law on institutional norms see Stewart, *Judicial Elision*, *supra* note 1, at 8, where I describe an interesting friendship between an American speed skater and a Soviet speed skater during the 1960 Olympic Games. Throughout the games, the two skaters spent a fair amount of time together and became friends. The Soviet skater visited the American dorms one day, and began trying on the athletes’ shoes. Particularly pleased after trying on one pair of brown loafers, she walked out with the shoes still on her feet, never to return them. (The Americans never could bring themselves to ask for the shoes’ return.) American constitutional law reinforced one institutionalized understanding of *property*; Soviet constitutional law, quite a different one.

141. *Marriage Cases*, 49 Cal. Rptr. 3d at 763 (Kline, J., dissenting).

An individual may withdraw his deposit from a bank, or break the law, or the rules [of] a game, without causing the change or collapse of the institutions concerned. Such an action would not be possible for all individuals acting as a collective [without causing that change or collapse]. Conversely, there 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.¹⁴²

So, quite certainly, the dissenting opinions in their pervasive deployment of the “no downside” argument ignore a number of social institutional realities. Yet it is exactly those realities that expose the deep error of the “no downside” argument—and the deficiency of the judicial performance that advances it.

B. *The “Child Welfare” Elision*

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. 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),¹⁴³ 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.¹⁴⁴ For this reason, man/woman marriage is often understood (and accurately so) to be primarily a child-centered and child-protective institution.¹⁴⁵ Government efforts to preserve that institution are thus rightly perceived as a child-welfare endeavor. 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

142. Erik Lagerspetz, *On the Existence of Institutions*, in *ON THE NATURE OF SOCIAL AND INSTITUTIONAL REALITY* 70, 82 (Erik Lagerspetz et al. eds., 2001) (emphasis added).

143. See *supra* note 12 and accompanying text.

144. See *supra* note 13 and accompanying text.

145. COUNCIL ON FAMILY LAW, *supra* note 15, at 13 (“[Man/woman] marriage is . . . fundamentally child-centered, focused beyond the couple towards the next generation 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.”).

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, it appears that government is trying to maximize, and understandably so, the well-being of all children, both those now among us and those of future generations.

The Washington and California dissenting opinions engage in a rather interesting exercise relative to these two different government endeavors. They ignore the institutionally protective nature of the first endeavor, which seeks to preserve the man/woman meaning, and characterize it as nothing other than an irrational and mean-spirited disregard for children being raised by same-sex couples.¹⁴⁶ They allude to the second endeavor to suggest an ethos of government-assured equality of circumstances for all children.¹⁴⁷ The point of this 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. Thus, the first Washington 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.¹⁴⁸

The second Washington dissenting opinion says that “[r]ather than protecting children, the [impugned man/woman marriage statute] harms them.”¹⁴⁹ The California 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 institutional context, proceeding instead as if the social institutional argument for man/woman marriage did not exist.¹⁵⁰ 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

146. See *Andersen v. King County*, 138 P. 3d 963, 1018-19 (Wash. 2006) (Fairhurst, J., dissenting); *Id.* at 1037 (Bridge, J., dissenting); *Marriage Cases*, 49 Cal. Rptr. 3d at 749 (Kline, J., dissenting).

147. See cases cited *supra* note 146.

148. *Andersen*, 138 P.3d at 1018-19 (Fairhurst, J., dissenting) (emphasis omitted).

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

150. *Marriage Cases*, 49 Cal. Rptr. 3d at 748-49 (Kline, J., concurring and dissenting).

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.¹⁵¹

This last quote, in rather stark fashion, demonstrates what the dissenting opinions 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 deinstitutionalize 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 children 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, although the law’s power is certainly sufficient to deinstitutionalize it. And they ignore the 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.

The next three subsections elaborate on this last point. The first subsection shows the nexus in the legal (constitutional) sphere between genderless marriage and the close personal relationship model of marriage. As explained earlier, this model generally posits marriage as “a relationship stripped of any goal or end beyond the intrinsic emotional, psychological, or sexual satisfaction that the relationship brings to the two adults involved.”¹⁵² The second shows an additional nexus between the two in the broader social sphere. The third considers the fit between the close personal relationship model and humankind’s child-bearing and child-rearing endeavors.

1. The Nexus Between Genderless Marriage and the Close Personal Relationship Model: The Legal (Constitutional) Sphere

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*.¹⁵³ The literature

151. *Id.* at 749.

152. Stewart, *New York*, *supra* note 2, at 232-33.

153. See, e.g., *Andersen*, 138 P. 3d at 1023-24 (Fairhurst, J., dissenting); *id.* at 1035 n.11 (Bridge, J., dissenting); *Marriage Cases*, 49 Cal. Rptr. 3d at 737; *Goodridge v. Dep’t of Health*, 798

fully demonstrates that reliance prior to *Anderson* and *Marriage Cases*.¹⁵⁴ That reliance is also present in those two recent cases' dissenting opinions. Thus, the first Washington dissenting opinion speaks of marriage as being all about the exercise of one's "broad right to marry *the person of one's choice*."¹⁵⁵ It then goes on to favorably quote the *Goodridge* plurality "that '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'"¹⁵⁶—a description that demonstrates the preeminence of adult desires over child interests in the genderless marriage context. The second dissenting opinion also focuses on adult desires: "A marriage is frequently distinguished from other social relationships by the presence of romantic love and sexual attraction."¹⁵⁷

The California dissenting opinion is more clever in getting to the same constricted view of the purpose of marriage.¹⁵⁸ Unlike earlier opinions calling for genderless marriage, this opinion does 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 begins 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,"¹⁵⁹ with those attributes being intimacy, association, "a harmony in living," and "a bilateral loyalty,"¹⁶⁰ but not generativity. Then the opinion silently sheds the link to the *right* to marry and begins

N.E. 2d 941, 961 (Mass. 2003).

154. Stewart, *Redefinition*, *supra* note 13, at 95-99; Stewart, *New York*, *supra* note 2, at 232-37.

155. *Andersen*, 138 P.3d at 1022 (Fairhurst, J., dissenting) (emphasis in original).

156. *Id.* at 1023 (quoting *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003)). The Washington plurality opinion counters this shriveled take on what marriage is and is all about: "Contrary to the view expressed in Justice Fairhurst's dissent, the right to marry is not grounded in the State's interest in promoting loving, committed relationships. While desirable, nowhere in any marriage statute of this state has the legislature expressed this goal." *Id.* at 979 n.12.

157. *Id.* at 1035 n. 11 (Bridge, J., dissenting).

158. Interestingly, the California majority opinion says that "our task as an appellate court is not to decide who has the most compelling vision of what marriage is, or what it should be." *Marriage Cases*, 49 Cal. Rptr. 3d at 685. But despite its disclaimer, the majority indeed proceeds on an understanding of what marriage "is"—and wholly appropriately. Thus, the majority accurately understands that marriage is "a public institution . . . valued . . . for its public role in organizing fundamental aspects of our society," *Id.* at 715. The opinion also notes that "[m]arriage is more than a 'law,' of course; it is a social institution of profound significance . . ." *Id.* at 723. And the concurring opinion also acknowledges the child-centered and child-protective nature of the marriage institution. *Id.* at 728 (Parrilli, J., concurring) ("[M]arriage has historically stood for the principle that men and women who *may*, without planning or intending to do so, give life to a child should raise that child in a bonded, cooperative, and enduring relationship. . . . [T]o define marriage . . . in a way which recognizes that function of the institution is hardly irrational.") (emphasis in original).

159. *Id.* at 737 (Kline, J., concurring and dissenting).

160. *Id.*

speaking of “the attributes of marriage that are constitutionally significant.”¹⁶¹ Finally, it elevates those attributes to a high status indeed: “the constitutionally significant attributes of marriage identified by the [United States] Supreme Court”¹⁶² That is how we get to the California dissenting opinion’s ultimate take on all the many attributes and practices inhering *in fact* in our society’s man/woman marriage institution and extending far beyond the shriveled description provided by the close personal relationship model. It is that they are irrelevant.¹⁶³

Although the California dissenting opinion’s take on the “constitutionally significant attributes” of the *right* to marry is almost surely wrong, I do not pursue that issue here. I pursue the much easier target afforded—the opinion’s magician-like act of declaring that a court, in resolving *all* aspects of the marriage issue, must deem constitutionally irrelevant the many factual meanings and practices of the man/woman marriage institution beyond those few encompassed by the close personal relationship model. That implicit declaration of *complete* irrelevancy is clearly wrong, even if the opinion’s take on the “constitutionally significant” or relevant attributes of the right to marry is not. The error is illuminated by an examination of an elision common in the popular debate, a shift from the macro to the micro. That examination follows.

Genderless marriage proponents often deploy the language of autonomous individuality; the California dissenting opinion does so, speaking at length of what it calls the “protection of personhood provided by autonomy privacy.”¹⁶⁴ The proponents’ discourse focuses solely on individuals *qua* individuals, or couples *qua* couples, with no reference to their social context or to institutional realities. An example of this is the effective political tactic employed by genderless marriage proponents whereby the proponent asks, “How can letting me and my [same-sex] partner marry in any way hurt your marriage?” Or, “How is Jim and John marrying going to have any effect on the relationship between you and your husband?” By its very language, this question forces the issue into the micro framework: it requires that the marriage issue be decided on the basis of benefits and harms to specific individuals or couples, as in “me and my partner” or “you and your husband.” And by that same language, the question precludes consideration of the marriage issue in the macro framework as provided by social institutional studies.¹⁶⁵

161. *Id.* at 740.

162. *Id.* at 748.

163. 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.

164. *Marriage Cases*, 49 Cal. Rptr. 3d at 733-41 (Kline, J., concurring and dissenting).

165. It is precisely because of this “forcing” mechanism that the question is so often an effective political tactic. After all, not many lay people are prepared to respond by saying, “Well, if Jim and John marry, that means that our society will have changed a core constitutive meaning of the vital social institution of marriage from the union of a man and a woman to the union of any two persons. With that radical change, the old institution will disappear and therefore, necessarily, its

Nor can the macro-to-micro shift be justified by the assertion that the constitutional rights at play—whether of equality, liberty, or “autonomy privacy,”—are individual rights and therefore the legal analysis must operate at the micro level. Although the relevant equality, liberty, and privacy rights are indeed individual (or personal) rights, the social institutional argument is not advanced to counter abstract notions of equality, liberty, privacy, or dignity, but rather to give 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. 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.¹⁶⁶ The constitutional jurisprudence of both Washington and California does that.¹⁶⁷ 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. The macro-to-micro shift is a mechanism to obscure that understanding and thereby preclude that fair measurement.

In this light, something important becomes clear. The California dissenting opinion, without any express justification for doing so, but rather by sleight-of-hand as it were, 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. After all, for the dissenting opinion, those many attributes, meanings, norms, practices, and social goods are not among “the constitutionally significant attributes of marriage identified by the [United States] Supreme Court”¹⁶⁸ and therefore must be irrelevant to all aspects of the marriage issue. But clearly they are profoundly relevant to society’s (and hence government’s) interests in sustaining and perpetuating the man/woman marriage institution. The dissenting opinion fails badly when it refuses to give those important societal interests their due—as if they did not

invaluable social goods will disappear. Those social goods have meant a great deal to my forebears and their society and to me and my society and I want my posterity to have those social goods down through their generations, because I don’t think they can have a good society without them.”

166. 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).

167. See, e.g., *Born v. Thompson*, 117 P.3d 1098, 1101-02 (Wash. 2005); *Loder v. City of Glendale*, 927 P.2d 1200, 1212-14, 1223 (Cal. 1997); *Marriage Cases*, 49 Cal. Rptr. 3d at 723-24; *Andersen v. King County*, 138 P.3d 963, 969 (Wash. 2006).

168. *Marriage Cases*, 49 Cal. Rptr. 3d at 747-48 (Kline, J., concurring and dissenting).

exist.¹⁶⁹ They do exist, of course, and a rational constitutional jurisprudence will consider them.

The previous paragraphs have provided a long but necessary demonstration of how, in the legal (constitutional) sphere, the very logic of genderless marriage is grounded in the close personal relationship model of marriage. This nexus in the legal sphere is demonstrated forcefully by the fact that *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*—or, as seen in the California dissent, as the only legally relevant description.¹⁷⁰ A strong correlation suggests another nexus in the broader social sphere.

169. 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 *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 Prop 22. See, e.g., Appellants' Opening Brief at *4, *8, *City & County of San Francisco v. State*, 128 Cal. App. 4th 1030 (2005) (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. *Marriage Cases*, 49 Cal. Rptr. 3d at 688-91. 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.

170. See *supra* note 153 and accompanying text. As of 1 March 2007, the only post-*Andersen* and *Marriage Cases* appellate decision on the marriage issue is that of the New Jersey Supreme Court in *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006). There, the three dissenting justices, who would have mandated genderless marriage, also relied on the close personal relationship model as their descriptive take on marriage. *Id.* at 226, 228 (Poritz, C.J., concurring and dissenting) (describing marriage as a matter of "commitments" and "the liberty to choose ... to commit to another person").

2. The Nexus Between Genderless Marriage and the Close Personal Relationship Model: The Broader Social Sphere

A recently concluded and sophisticated study supports the following conclusion: within a state, the generalized political support for genderless marriage (including that support's judicial manifestation¹⁷¹) strongly correlates with the population's level of acceptance of the close personal relationship model. The study is the latest in a series by Ron Lesthaeghe and his colleagues addressing what they call the Second Demographic Transition ("SDT"). While earlier studies focused on Europe,¹⁷² this study focuses on the United States.¹⁷³

The SDT is "characterized by substantial postponement of both marriage and parenthood, and by an increase in the share of births to unmarried couples."¹⁷⁴ 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

171. The judicial redefinition of marriage is a political act, no less so than legislative redefinition. As Edward Schiappa notes, "Definitions put into practice a special sort of social knowledge—a shared understanding among people about themselves, the objects of their world, and how they ought to use language." EDWARD SCHIAPPA, *DEFINING REALITY: DEFINITIONS AND THE POLITICS OF MEANING* 3 (2003). He continues:

If we look hard enough, all definitions serve some sort of interests. . . . Defining what is or is not part of our shared reality is a profoundly political act. The establishment of authoritative definitions by law or custom requires a political *process* involving persuasion or force that generates political *results* by advancing some views and interests and not others.

Id. at 69–70 (citation omitted). Kitzinger and Wilkinson apply the reality articulated by Schiappa to the marriage context:

Marriage is a lynchpin of social organization: its laws and customs interface with almost every sphere of social interaction. Its foundational role in defining structures of social institution and citizenship means that definitional authority over what 'counts' as marriage, and who is allowed access to it, has always been intensely political.

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).

172. 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 <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);

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

174. *Id.* at 669.

open future, and the like.”¹⁷⁵ 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.”¹⁷⁶ 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.”¹⁷⁷ Understood in these terms, the SDT seems to describe rather unequivocally a shift towards acceptance of the close personal relationship model of marriage and of all intimate, dyadic, adult relationships.

Lesthaeghe’s recent American study largely validates what was said earlier: In the United States, 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.¹⁷⁸ 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.¹⁷⁹ 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.¹⁸⁰ Other states strongly trending in that direction include New Jersey, New York, Connecticut, Rhode Island, and California.¹⁸¹ Finally, this recent study also connects genderless marriage with at least some aspects of the SDT: “The most ‘tolerant’ states with respect to both cohabitation and same-sex cohabitation are Vermont and California, followed by Massachusetts, Washington, New York”¹⁸²

Lesthaeghe’s recent American study holds particular interest for those who follow closely both the campaign to have carefully selected state courts mandate genderless marriage and the developing picture of the correlation between acceptance of the close personal relationship model and more generalized political support for the redefinition of marriage. Maggie Gallagher’s keen insights regarding that study’s findings are instructive:

175. *Id.*

176. *Id.* at 681.

177. *Id.* at 669.

178. *Id.* at 679 (“A sizable portion of the US non-Hispanic white population displays all the typical characteristics of the second demographic transition, whereas another major segment shows few signs of this new demographic pattern.”).

179. *Id.* at 671-684.

180. *Id.* at 673-79.

181. *Id.*

182. *Id.* at 674. *See also id.* at 675, Figure 2.

[I]t probably wasn't an accident that states in the middle of disconnecting marriage from generativity culturally speaking were viewed by gay marriage advocates as the "most receptive" to gay marriage

. . . . What states are leading indicators of SDT, as measured by postponement of marriage and children? California, Connecticut, New Jersey, New York, Rhode Island and (the most extreme outlier of all) Massachusetts.

.... Except for Rhode Island, they are among the first states gay marriage advocates chose to pursue court-created gay marriage. What instinct led them to suppose that legal elites would be particularly open to the argument?

.....

. . . . I do think it is fair to say these two trends [i.e., SDT and support for genderless marriage] go hand in hand in this sense: Cultures deeply committed to "generativity"—to the importance of men and women getting married and having children as a social norm—tend to find the idea of gay marriage deeply disturbing, if not incomprehensible. Conversely, societies in the midst of devaluing the norms that sustain the generative family (in the name of attractive alternative values such as increasing expressive individualism and moral autonomy) will find gay marriage a natural fit, an idea that both expresses and reinforces their deepest moral preferences.¹⁸³

In sum, a particular correlation seems quite clear; it is the correlation, within American states, between the generalized political support for genderless marriage (including that support's judicial manifestation) and the population's level of acceptance of the close personal relationship model.¹⁸⁴ In practice, that means that the more childless a polity, the more it supports genderless marriage.¹⁸⁵ Thus, San Francisco is far and away this Nation's most childless large city;¹⁸⁶ Massachusetts, one of the Nation's two most childless states.¹⁸⁷

183. Maggie Gallagher, *A Response to Lesthaeghe and Neidert*, MARRIAGEDEBATE.COM November 30, 2006, available at <http://www.marriedebate.com/mblog.php>.

184. David Blankenhorn identifies the same phenomenon at the international level:

The weakest support for marriage as an institution is in those countries with same-sex marriage. Countries with same-sex civil unions show more support, and countries with only regional recognition show still more support. By significant margins, the most support for marriage is in countries without same-sex unions.

BLANKENHORN, *supra* note 10, at 231.

185. See Surkyn & Lesthaeghe, *supra* note 172, 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 173, 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.

186. 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

Regarding this and the prior subsection's inquiries into the legal and broader social links between the close personal relationship model and genderless marriage, those inquiries are not an end in themselves but a means to evaluate judicial use of the "child welfare" elision. The next subsection continues that evaluation.

3. The Irony of Judicial Use of the "Child Welfare" Elision

In evaluating judicial use of the "child welfare" elision, one more observation is helpful. It also goes to the adult-centered and adult-serving nature (at the expense of children's needs and interests) of the close personal relationship model and comes from one not a proponent of privileging man/woman marriage. 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 from it"¹⁸⁸—and notes both how the "pure relationship is not tied . . . to the desire to raise children"¹⁸⁹ and how scholarly "attempts to incorporate children into the pure relationship are unconvincing."¹⁹⁰

What Cherlin observes, and what the earlier portions of this section teach, suggest something important about the quality of the judicial performance seen in the dissenting opinions' "child welfare" elision. Those opinions ignore 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, they disparage that institutionalized meaning as an expression of animus and as a tool of harm to children being raised by same-sex couples. At the same time, they would mandate, through the awesome power of constitutional law, state creation and perpetuation of the genderless marriage

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&_ts=181677557593 (last visited Jan. 23, 2007).

187. 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).

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

189. *Id.*

190. *Id.* at 858.

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 of such a judicial performance is, in my view, both inescapable and tragic.

C. *The “Law as Giver of Institutional Life” Elision*

Judicial mischaracterization of the nature of the man/woman marriage institution in our society does not stop with advocacy of the close personal relationship model as a fair and adequate description of that nature. Rather clearly for the purpose of making the marriage institution appear a fit object of judicial alteration, some judges assert that it is the law that creates, that originates, and that gives life to the institution.¹⁹¹ We see this approach in the Washington dissenting opinions. The first Washington dissenting opinion asserts that “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.”¹⁹² The second Washington dissenting opinion asserts: “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.”¹⁹³ Neither the Washington nor the California dissenting opinions acknowledge the pre-political nature of the marriage institution. Nor do they acknowledge the general consensus that what the law does relative to fundamental social institutions such as marriage 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.”¹⁹⁴ Rather, as viewed in the dissenting opinions, marriage is wholly a legal construct; it is something that the law gives to people; it is something that, without the law, people would not have in any living or meaningful way; and it is therefore a fit object of legal (judicial) alteration, no matter how radical.

Man/woman marriage, however, is a virtually “universal human institution” found “at least since the beginning of recorded history, in all the flourishing varieties of human cultures documented by anthropologists” “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.”¹⁹⁵ And although that reality should cause one to pause before positing

191. *Hernandez v. Robles*, 805 N.Y.S.2d 354, 377 (N.Y. App. Div. 2005) (Saxe, J., dissenting).

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

193. *Id.* at 1034 (Bridge, J., dissenting).

194. RAZ, *supra* note 28, at 161.

195. WILCOX ET AL., *supra* note 10, at 15.

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marriage as wholly a legal construct or the product of a state attempt at social engineering, there is more. What follows here is a simple summary of the history of the Western marriage experience:

[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.¹⁹⁶

Or, to be short and to paraphrase Richard Garnett, marriage law no more “creates” the marriage institution than the Rule Against Perpetuities “creates” dirt.¹⁹⁷

Now this is not to suggest 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 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 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. Because the supposed “religious”/“civil” distinction relative to marriage is very much at the heart of the second Washington dissenting opinion, I address it next.

D. *The “Religious Argument” Mischaracterization*

The second Washington dissenting opinion repeatedly characterizes “religion” as the fountain of the man/woman “limitation” in the impugned marriage laws. This opinion portrays the majority as permitting “the religious and moral strains of the [impugned man/woman marriage law] to justify the State’s intrusion”,¹⁹⁸ says that “ban gay civil marriage because some . . . religions disfavor it, reflects an

196. F.C. DeCoste, *Courting Leviathan: Limited Government and Social Freedom in Reference Re Same-Sex Marriage* 42 ALBERTA L. REV. 1099, 1112-13 (2005) (citations omitted).

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

198. *Andersen*, 138 P.3d at 1027 (Bridge, J., dissenting).

impermissible State religious establishment”;¹⁹⁹ asserts that the impugned man/woman marriage law “stems, in substantial part, from . . . animosity that is rooted in moral and religious objections”²⁰⁰ 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”;²⁰¹ proclaims that the impugned man/woman marriage law “reflects a *religious* viewpoint [and that] *religious* doctrine should not govern state regulation of *civil* marriage”;²⁰² and otherwise perceives a wide gulf between “the secular nature of *civil* marriage” and the supposedly “religious” man/woman marriage institution.²⁰³

It seems fair to say that the second Washington dissenting opinion casts as “religious” not only the arguments advanced in support of man/woman marriage but the very meaning of marriage itself. But in light of the nature of the social institutional argument for man/woman marriage (which the justices had before them), the dissenting opinion’s “religious characterization” is startling. After all, the social institutional argument patently emerges in a thorough-going way from modes of inquiry and analysis, and from sources that are most decidedly not religious. It merits repeating that the argument itself fully qualifies as Rawlsian “public reason.”²⁰⁴ Nevertheless, the dissenting opinion indeed casts man/woman marriage and the good secular arguments for it as “religious.”

Plainly, however, the social institutional argument for man/woman marriage is not a “religious” argument. That is not to say that religion, like the law, does not interact with the marriage institution. What Raz said of the law’s relationship with the marriage institution can be said quite accurately of religion’s relationship with it: Religion gives marriage formal recognition, brings religious arrangements into line with marriage, facilitates marriage’s use by members of the religious community who wish to do so, and encourages the transmission of belief in marriage’s value to future generations.²⁰⁵ Moreover, like the law (and usually with the law’s sanction), religion “performs” or “solemnizes” marriages; it does weddings. So what we have is both the law and religion, each in its own (albeit related) way, interacting with, supporting, and sustaining the *same* pervasive and influential social institution—man/woman marriage.

The singularity of the marriage institution is an important point because of the efforts of genderless marriage proponents, including the author of the second Washington dissenting opinion, who speak as if “civil marriage” and “religious

199. *Id.* at 1027–28.

200. *Id.* at 1032.

201. *Id.* at 1034.

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

203. *Id.* at 1033–35.

204. *See, e.g.,* Rawls, *supra* note 60, at 765.

205. RAZ, *supra* note 28, at 161.

marriage” were two different creatures or two different social institutions. But they are not. As already noted, across millennia and cultures (regardless of the nature, role, presence or absence of “religion” or positive law in the society) man/woman marriage is a “universal human institution.”²⁰⁶ This reality speaks much about the singularity of the institution in all societies, including ours. Although the marriage institution interacts with other social institutions—the law, private property, religion—and thereby takes from each a certain hue,²⁰⁷ social institutional studies see marriage as meaningfully distinct from those other institutions.²⁰⁸ Thus, after stating a standard definition of *institution*—“An organized system of social relationships (roles, 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.²⁰⁹ In light of these uncontroversial understandings, to characterize man/woman marriage and all arguments for it as “religious” makes no more sense than to characterize them as the products of the ideology of capitalists, anarchists, or Utopists.

This understanding that law and religion interact with the *same* marriage institution is important for two reasons besides the imperative of factual accuracy. The first reason pertains to the fact just noted that both law (the justice of the peace) and religion (priest, rabbi, etc.) perform weddings. Although a wedding is not a marriage, confusion seems prevalent among genderless marriage proponents who speak of the right to a public celebration of a couple’s mutual love and commitment.²¹⁰ Reflection reveals such a “right” to be more truly understood as an incident of institutional meanings and practices. If such a “right” were conceived as a free-standing civil right and made the basis for replacing the man/woman marriage institution with the genderless marriage institution, we would have the ultimate example of the tail wagging the dog—to its death.²¹¹ The second reason pertains to

206. WILCOX, ET AL., *supra* note 10, at 15.

207. 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.” Kitzinger & Wilkinson, *supra* note 171, at 132. “[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 6, at 173.

208. See, e.g., RAZ, *supra* note 28, at 161-62, 393; SEARLE, *supra* note 44, at 32.

209. CLAYTON, *supra* note 6, at 19.

210. See, e.g., Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 955 (Mass. 2003) (Marshall, C.J.); see also BLANKENHORN, *supra* note 10, at 140-44.

211. See *In re Marriage Cases*, 49 Cal. Rptr. 3d 695, 717 (Cal. Ct. App. 2006). The court stated:

Although there are expressive aspects to it, entering a marriage is obviously something

the now widely accepted understanding that for the law to go where the large portion of American religions and religious cannot go—genderless marriage—is to bring the law into pervasive conflict with religion in ways sure to result in a quite massive loss of religious liberties, as understood for some centuries in this Nation.²¹²

In mischaracterizing both the man/woman marriage institution and the good secular arguments in favor of it (such as the social institutional argument) as fundamentally religious in origin and impulse, the second Washington dissenting opinion is treading a well-worn path. Keen observer that she is, Canada's Margaret Somerville identified it rather early on:

One strategy used by same-sex marriage advocates is to label all people who oppose same-sex marriage as doing so for religious or moral reasons in order to dismiss them and their arguments as irrelevant to public policy. [Further,] [g]ood secular reasons to oppose same-sex marriage are re-characterized as religious or as based on personal morality and, therefore, as not applicable at a societal level.²¹³

That the dissenting opinion elects to tread this path of mischaracterization is, at the very least, disappointing.²¹⁴

E. *The Racial Analogy and Institutional Realities*

The Washington and California dissenting opinions deployed repeatedly the argument of the racial analogy,²¹⁵ also known as the argument of the *Perez/Loving* analogy.²¹⁶ The argument of the *Perez/Loving* analogy, in its simplest form, goes like this: Because it is unconstitutional (as unequal and unfair) to prevent a black from marrying a white, it is likewise unconstitutional to prevent a man from marrying a

much more than a communicative act. If the state has legitimate reasons for limiting marriage to opposite-sex couples, then the unavailability for same-sex couples of this one form of expressing commitment—when all other expressions remain available—does not rise to the level of a constitutional violation.

Id.

212. See Gallagher, *Banned in Boston*, *supra* note 50, at 20.

213. Somerville, *What About the Children?*, in *DIVORCING MARRIAGE*, *supra* note 12, at 70–71. She goes on to note that these tactics “do not serve the best interests of either individuals or society in this debate.” *Id.* at 71.

214. See BLANKENHORN, *supra* note 10, at 159 (the idea that man/woman marriage “is a religious idea . . . is about as intellectually weak as an idea can be.”).

215. *Marriage Cases*, 49 Cal. Rptr. 3d at 737-762 (Kline, J., concurring and dissenting); *Andersen v. King County*, 138 P. 3d 963, 1020-28 (Wash. 2006) (Fairhurst, J., dissenting).

216. In 1948, the California Supreme Court, in *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948), led the way for the nation by holding that statutory prohibitions of interracial marriages violated constitutional protections of equality. Then, in 1967, the United States Supreme Court, in *Loving v. Virginia*, 388 U.S. 1 (1967), held the same.

man or a woman from marrying a woman. But in deploying that argument, the dissenting opinions proceeded without regard to certain social institutional realities implicated by their use of the *Perez/Loving* analogy. Previously, other appellate decisions either mandating genderless marriage or dissenting from a refusal to do so proceeded likewise, and the scholarly literature has addressed both the implicated social institutional realities²¹⁷ and the judicial evasion of them.²¹⁸ What follows summarizes in unvarnished fashion that literature's conclusions and applies them to the Washington and California dissenting opinions.

Because marriage is a vital social institution, it performs an important educative and socializing function. The marriage institution shapes and guides individuals' identities, perceptions, aspirations, and conduct, including what individuals believe to be important and what they strive to achieve. But precisely

because marriage has a powerful educative role in our society—a power reinforced by the supporting law's authoritative voice—the marriage institution is a tempting target for those seeking to advance the sociopolitical purposes of an ideology unrelated to marriage. If those so seeking can appropriate the institution and bend it to their purposes, they have gone far in assuring the triumph of their agenda.²¹⁹

The success of any such appropriative strategy bodes ill for the targeted institution. As William M. Sullivan explains:

[Institutionalized] “practices,” or shared, purposive activities . . . are not instruments toward other goals but . . . [have] ends [that] 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. . . . [W]hen such roles are turned into nothing more than means to others ends, something essential to the identity of parent, citizen and so forth is lost. That something is the focus on goods intrinsic to the practices themselves.

....

When in times of major social change such as the present short-term results reward those who regard institutions only as means toward extrinsic goals, as instruments to be used and discarded, then the hegemony of individualist and instrumental understandings can generate a self-fulfilling prophecy.²²⁰

217. BLANKENHORN, *supra* note 10, at 172-79; Monte Neil Stewart & William C. Duncan, *Marriage and the Betrayal of Perez and Loving*, 2005 BYU L. REV. 555, 555 (2005).

218. Stewart, *New York*, *supra* note 2, at 254.

219. Stewart & Duncan, *supra* note 217, at 557.

220. Sullivan, *supra* note 6, at 174-75, 178.

In the American past, two social movements temporarily succeeded in using marriage as a means to achieve “extrinsic ends”: the white supremacist movement and the eugenics movement.²²¹ Central to the white supremacists’ project was the alteration of the core meaning of marriage from the union of a man and a woman to the union of a man and a woman of the same “race.”²²² After all, the common law contained no racial restrictions relative to marriage; in very large measure, such restrictions were imposed by statute and rather late in our history, that is, at the end of the nineteenth century and early in the twentieth.²²³ Those statutes prohibiting blacks and other non-whites from marrying whites were an ugly feature grafted onto the marriage institution—the very logic of which makes the graft a foreign object. The voice of those laws, however, greatly magnified by social institutional power, subtly but effectively inculcated throughout society the core dogma of white supremacy. The courts that gave us the *Perez* and *Loving* decisions apprehended the white supremacists’ marriage project for what it was and rightly used constitutional equality norms to dismantle it.²²⁴ In the process, those courts restored to marriage the integrity of its institutional purposes and logic—a historic accomplishment.²²⁵

Substantial but not conclusive evidence supports the understanding that a primary goal of the gay/lesbian rights movement’s genderless marriage project, like that of the white supremacists, is to appropriate the institution and change it to achieve sociopolitical purposes unrelated to marriage.²²⁶ Again, that change entails

221. Stewart & Duncan, *supra* note 217, at 557, 567–70.

222. *Id.*

223. See Barbara K. Kopytoff & A. Leon Higginbotham, Jr., *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 1968 (1989) (stating that before the 20th century, anti-miscegenation laws were less pervasive—the institution of slavery maintained white supremacy). Few states in the union employed the power of anti-miscegenation laws in earlier times to maintain racial superiority. See also Kieth E. Sealing, *Blood Will Tell: Scientific Racism and the Legal Prohibitions Against Miscegenation*, 5 MICH. J. RACE & L. 559, 609 n.2 (2000) (noting that Virginia and Maryland did have anti-miscegenation laws from the 17th century up until *Loving*).

224. Stewart & Duncan, *supra* note 217, at 570–75.

225. *Id.* at 575.

226. *Id.* at 581–88. Regarding use of the argument of the *Perez/Loving* analogy to equate man/woman marriage proponents with white supremacists and other racists, experience teaches that such use elicits little outcry and little negative emotional response (publicly displayed), whereas the equation of genderless marriage proponents’ tactics with white supremacists’ tactics elicits just the opposite. In light of that reality, Stewart & Duncan began their detailed examination of the validity of that latter equation with this:

The foregoing is the unvarnished suggestion that we mean to address in some detail to see how it holds up. Before giving the roadmap to that endeavor, however, we need to say a word about a volatile subject: discussion of the gay/lesbian rights movement in a context that also encompasses the white supremacist movement. We ask that the reader in good faith (the only one we are writing for) not jump to the conclusion that we are equating Bill Eskridge with Bull Connor or the Lambda Legal Defense and Education Fund with the

an alteration in a core, constitutive meaning—from the union of a man and a woman to the union of any two persons. Granted that the respective objectives of the old and the new marriage projects are very different, still the projects in their appropriative strategy are of a kind.²²⁷

Thus, because *Perez* and *Loving* refused to allow the marriage institution to be appropriated for nonmarriage ends, to use those two cases to advance just such an appropriative project is to betray them. In other words, the *Perez/Loving* argument advances a superficial analogy that masks a deep disanalogy. That disanalogy is between the intention of *Perez* and *Loving* to protect marriage from appropriation for nonmarriage purposes and the intention of the present marriage project to make such an appropriation. Thus, those who deploy the *Perez/Loving* argument, whether advocates or judges, are misleading people, including perhaps themselves.²²⁸

Klu Klux Klan; if she does so, we are not apt to be given a thoughtful read. What we are doing is considering whether those two movements have employed an essentially similar strategy relative to marriage. If so, that is something worth knowing, and knowing it may lead to other things worth knowing. That those two movements have profoundly different objectives goes without saying. Whether that difference justifies the present use of the older movement's strategy (if that is so) also seems to us worth some thoughtful analysis. So with apologies to any who may take offense at our choice to investigate these matters, we will go forward.

Id. at 559.

After the ensuing examination, these words:

We believe that the work of the prior sections rather strongly validates this conclusion: The means successfully employed by the white supremacist movement to advance its essentially *nonmarriage* agenda—altering the core meaning of marriage—is of a kind with the means being employed by the gay/lesbian rights movement to advance its essentially *nonmarriage* agenda. Now, it does not necessarily follow, in abstract logic, that the means, because of a kind, are unjustified in both cases. Some advocates of redefinition may well argue that the contemporary movement's objectives are laudable and justify the means, while the discredited objectives of the older movement did not; in other words, that the ends here and now justify the means, whereas the ends then and there did not. But what is called for, it seems to us, is that this “the ends justify the means” argument engage, not elide, two realities: one, redefinition as indeed a means to implement a broader and nonmarriage agenda and, two, redefinition as a profoundly consequential alteration—indeed, a dismantling—of the vital social institution of man/woman marriage. The second may be seen as the “price tag” hanging on the first.

Id. at 588-89 (footnotes omitted).

227. See BLANKENHORN, *supra* note 10, at 179 (“The only accurate analogy is between the advocates of anti-miscegenation laws and the advocates of same-sex marriage, since each group wants to recreate marriage in the name of a social goal that is fundamentally unconnected to marriage.”).

228. *Id.* at 558.

Nor is this betrayal cured by an appeal to *Perez's* and *Loving's* vindication of constitutional equality norms—that is, by the argument that whereas the white supremacist marriage project fostered inequality by the *exclusiveness* of the antimiscegenation laws, the new marriage project fosters equality by the *inclusiveness* of its different redefinition of marriage. This, of course, is an argument that the ends justify the means, but the argument steadfastly ignores certain social institutional realities regarding those means. As already seen, one such reality is that an institution constituted by the core meaning of “the union of any two persons” is not a *modification* of the marriage institution but a radically different *alternative* to it.²²⁹ And, as also already seen, another reality is that the new institution, backed by the force of constitutional law, will in a short time displace and, in that fashion, destroy (deinstitutionalize) the old institution. For it is clear that society cannot simultaneously tell the people (and especially the children) that marriage, in its core meaning, is the union of any two persons and that marriage, in its core meaning, is the union of a man and a woman.²³⁰ The final institutional reality is that when the man/woman marriage institution goes, its array of valuable and unique social goods goes also.²³¹

Thus, the pressing question with respect to the dissenting opinions' use of the argument from the *Perez/Loving* analogy is whether an “equality” enshrined at such a cost to human development and social welfare is indeed the equality vindicated by *Perez* and *Loving* or otherwise demanded by our constitutional norms. The dissenting opinions provide no answer because they elide rather than engage the social institutional realities relative to marriage. The correct answer is clearly “no.”²³²

As with the *Perez/Loving* analogy, so with the other elisions of the social institutional argument analyzed above (“no downside,” “child welfare,” “law as giver of institutional life,” and religious mischaracterization)—the dissenting opinions in the recent Washington and California cases have no answer for social institutional realities and therefore attempt to evade them. This persistent elision of these realities—when the realities are clearly before the judges—cannot qualify as a minimally adequate judicial performance.

IV. CONCLUSION: THE ENABLING POWER OF WILLFUL BLINDNESS

Both the standards of professionalism governing lawyers and the standards of serious intellectual discourse, it seems to me, prohibit a charge against judges of willful blindness—unless (1) the charge is clearly accurate as a matter of fact, (2) much more than the usual level of public interest is at stake, *and* (3) but for bold prosecution of the charge, serious injustice will remain unchallenged and perhaps will

229. See *supra* section I.

230. *Id.*

231. *Id.*

232. See Stewart & Duncan, *supra* note 217, at 588–95.

be perpetuated. I submit that the judicial performance in the Washington and California dissenting opinions satisfies all those conditions.

The case for clear factual accuracy was made near the beginning of this article's section III, with its demonstration that, by the time of the preparation of the *Andersen* and *Marriage Cases* opinions, the judges had before them (in more than a few not easily avoided sources) the social institutional argument at a rather high level of elaboration and sophistication. That case will not be repeated here, but there is this additional telling point: Although genderless marriage proponents—both scholars in their writings and judges in their decisions—have often elided the social institutional argument, none has ever engaged and successfully countered it. It is true that the argument remains unrefuted.

As to the level of public interest at stake, a handful of social institutional realities indicate that the stakes are very high indeed—the loss or the perpetuation of the valuable social goods resulting materially and even uniquely from the man/woman meaning constitutive and at the core of the marriage institution. 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.²³³ 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 case is also clear relative to the “serious injustice” condition—and it is that case that illuminates what may be fairly called the *enabling power* of the willful blindness seen in the dissenting opinions. Their very act of ignoring or otherwise evading the social institutional argument for man/woman marriage enabled those opinions to rather freely conclude that society has no rational basis for perpetuating the man/woman meaning in marriage;²³⁴ that there is no harm, no “downside,” in replacing that meaning by force of law with *the union of any two persons*; that child welfare is only promoted by such a radical redefinition of marriage; that nothing but religious doctrine sustains the man/woman “limitation”; and that the struggle for genderless marriage is truly equivalent to the struggle culminating in *Perez* and *Loving*. The willful blindness toward the social institutional argument for man/woman marriage also enabled those dissenting opinions to rather freely commit an act of profound injustice—to label more or less explicitly, and certainly falsely, a number of people as hateful, mean-spirited, prejudiced, bigoted, invidiously discriminatory, and filled with animus towards gay men, lesbians, and even the children being raised by same-sex couples.²³⁵ The people so labelled include the

233. See Cherlin, *supra* note 188, at 853.

234. *Andersen v. King County*, 138 P.3d 963, 1018-19 (Wash. 2006) (Fairhurst, J., dissenting); *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 758-64 (Cal. Ct. App. 2006) (Kline, J., concurring and dissenting).

235. See, e.g., *Andersen*, 138 P.3d at 1019 (Fairhurst, J., dissenting) (“I conclude that [the

citizens and the legislators who voted for the impugned man/woman marriage laws and the judges in these and other cases who upheld such laws against constitutional challenge. That injustice certainly merits the harsh but just charge of willful blindness against the Washington and California dissenting opinions—and all that charge entails with respect to performance of the judicial role.

impugned man/woman marriage statute] was motivated solely by animus toward homosexuals.”); *id.* at 1022 (“Rather than learning from the embarrassments of history, the plurality instead repeats the same transgressions.”); *id.* at 1025 (accusing the plurality of using “[h]istorical ignorance and discrimination ... as an excuse for the continued denial of the fundamental right to marry ...”); *id.* at 1030 (Bridge, J., dissenting) (“[T]oday’s decision validates a legislative enactment largely born of animus and ignorance ...”); *id.* at 1034 (“[T]here is ample evidence in the legislative history that the [impugned statute’s] supporters were motivated by animus, an undisguised desire to discriminate against gays and lesbians.”); *Marriage Cases*, 49 Cal. Rptr. 3d at 763-64 (Kline, J., concurring and dissenting) (applying *Romer* animus analysis to the impugned statutes).