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COURT OF APPEALS

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JOHN WESSEL, WILLIAM O'CONNOR, MICHELLE
CHERRY-SLACK, and MONTEL CHERRY-SLACK,

Appellate Division
Docket No. 98084

Albany Co. Index
No. 1967-04

Plaintiffs-Appellants,

-against-

THE NEW YORK STATE DEPARTMENT OF HEALTH
and the STATE OF NEW YORK,

Defendants-Respondents.

(title continued on next page)

BRIEF OF AMICUS CURIAE UNITED FAMILIES INTERNATIONAL

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Dated: April 12, 2006

In the Matter of the Application of
ELISSA KANE, LYNNE LEKAKIS, ROBERT BARNES,
and GEORGE JURGSATIS

Petitioners-Appellants,

For a Judgment Pursuant to Article 78
Of the Civil Practice Law and Rules

-against-

JOHN MARSOLAIS, Albany City Clerk,
and the NEW YORK STATE HEALTH DEPARTMENT,

Respondents-Respondents.

JASON SEYMOUR, JASON HUNGERFORD, SUSAN
MARTIN, KRISTINE SHAW, MARGOT CHIUTEN,
SHAWNA BLACK, JAMES PELTON, JASON
THORNTON, PATRICIA FLERY, ELIZABETH COHEN,
PATRICIA PUTLER, MARJORIE PARKER, SANDRA
FENTIMAN, ALICE KENLY, TODD HERON, RONALD
CAMPBELL, LISA BUSHLOW, NINA PANZER, TERESA
NIEDZIALEK, NANCY CHAPMAN, ANNE BELL,
ELISABETH LINDSAY, BRENDA MARSTON, SARAH
SIMPKINS, JOHN HOUSTON, DAVE HEBRON,
DEBORAH VOGLE, SILVIA GARCIA, CARLA CARICK,
LAURIE KOEHLER, LAWRENCE ROBERTS, OSCAR
ROSS HAARSTAD, KIM TRAHAN, CHRISTINA
KNICKERBOCKER, LEE WILLIAMS, BETH DIPASQUA,
NANCY GABRIEL, MARION DAGROSSA, JOSEPH
WHEELER, DAVID BIDDLE, SUZANNA SCHWARTZ,
MARY WHITE, RODNEY FAIRBANKS, BRENT
WANDEL, AMELIA SAUTER, LEAH HOUGHTALING,
MARTHA HARDESTY, JOANN EDWARDS, SARAH
B. JEFFERIS and TAMMY J. TRAVIS,

Plaintiffs-Appellants,

-against-

JULIE HOLCOMB as CITY CLERK of the CITY OF
ITHACA; CITY OF ITHACA

Appellate Division
Docket No. 98151

Albany Co. Index
No. 3473-04

Appellate Division
Docket No. 98204

Tompkins Co. Index
No. 04-0458

Defendants/Cross-Claimants-Respondents,

-and-

NEW YORK STATE DEPARTMENT OF HEALTH,

Defendant-Respondent.

DANIEL HERNANDEZ, NEVIN COHEN, LAUREN
ABRAMS, DONNA FREEMAN-TWEED, MICHAEL
ELSASSER, DOUGLAS ROBINSON, MARY JO KENNEDY
JO-ANN SHAIN, DANIEL REYES AND CURTIS
WOOLBRIGHT,

Plaintiffs-Appellants,

-against-

VICTOR L. ROBLES, in his official capacity as City Clerk
of the City of New York,

Defendant-Respondent.

Appellate Division
Docket No. 6598

New York County
Index No. 103434/04

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AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANTS-RESPONDENTS

INTRODUCTION

Society has compelling interests in preserving the union of a man and a woman as a core meaning of the vital social institution of marriage. For the law to replace that meaning with a radically different meaning, the union of any two persons, assures in time the loss of a number of invaluable social goods. Because of the very nature of social institutions -- and marriage is unquestionably a social institution --, it could not be otherwise.

This brief demonstrates the veracity of those three opening sentences. It does so by using generally accepted understandings of and knowledge regarding social institutions -- what constitutes them, how they affect individuals, how they provide social goods, how they interact with the law, and how the law has power both to sustain and to destroy (deinstitutionalize) them. This brief thus uses *public reason* for sustaining man/woman marriage¹; it meets the challenge of “delineat[ing] precisely how same-sex marriages threaten the institution of marriage in terms of public reasons and political values implicit in our public culture.”²

¹ E.g., John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997).

² Linda C. McClain, *Deliberative Democracy, Overlapping Consensus, and Same-Sex Marriage*, 66 FORDHAM L. REV. 1241, 1251 (1998).

The brief does so in this fashion: Section I.A. sets forth general understandings from the study of social institutions, that is, understandings that apply to all social institutions, including marriage. Among these is the way society uses the law effectively to reinforce, to alter, or to dismantle a social institution. Section I.B. applies these understandings in the context of marriage, including the legal definition of marriage. This subsection describes the valuable social goods resulting from a core constitutive meaning of the marriage institution, the union of a man and a woman, and necessarily lost when the law suppresses that meaning and replaces it with another. This subsection also demonstrates the substantial differences between the marriage institution constituted at its core by the man/woman meaning (man/woman marriage) and the proposed new marriage institution constituted by the “any two persons” meaning (genderless marriage).

Section II demonstrates how the court decisions that have mandated genderless marriage — *Goodridge*³ in Massachusetts, *EGALE*⁴ in British Columbia, *Halpern*⁵ in Ontario, and others — have elided the social institutional realities of marriage, and how court decisions that have given those realities their due have rejected the argument that constitutional norms mandate the redefinition of marriage.

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

⁴ *EGALE v. Attorney General (Canada)*, 2003 BCCA 251, 225 DLR (4th) 472 (2003).

⁵ *Halpern v. Toronto (City)*, 225 DLR (4th) 528 (Ont. Ct. App. 2003).

Section III demonstrates the deficiencies inhering in two key non-judicial efforts to counter what this brief presents, the social institutional argument that the law, consistent with constitutional norms of equality, liberty, and dignity, may continue to sustain and nurture a social institution of betterment defined at its core as the union of a man and a woman and authoritatively called *marriage*.⁶

I.

MARRIAGE IS A VITAL SOCIAL INSTITUTION.

Marriage is a social institution,⁷ and thus shares with all other social institutions certain salient features. Or stated slightly differently, what can be said accurately about all social institutions can be said accurately of the institution of marriage.

⁶ A word regarding terminology: Rather than use the more common phrase *same-sex marriage*, this brief uses the phrase *genderless marriage* to refer to the form of civil marriage legally defined as the union of any two persons (that is, legally defined without any reference to gender). The phrase *same-sex marriage* is subtly misleading (as are its pop media equivalents, such as *gay marriage* and *homosexual marriage*); although the legal definition of civil marriage as the union of any two persons allows same-sex couples to marry, it of course also allows a woman and a man to marry, and everywhere the debate focuses on *one* legally recognized relationship known as *marriage*, not *two*. The phrase *same-sex marriage* thus conveys the sense (erroneous) of a legally recognized marriage separate or different from the marriage of a man and a woman. This brief refers to civil marriage defined as the union of a man and a woman as *man/woman marriage*.

Genderless is used instead of *non-gendered* and *man/woman* instead of *gendered* because, as a matter of contemporary language usage, to use the words *gendered* and *non-gendered* could be seen as an endorsement of certain versions of social constructionist thought. Because of the focus of this brief, neither endorsement nor rejection of those versions is a relevant task.

⁷ *E.g.* Williams v. North Carolina, 317 U.S. 287, 303 (1942) (“[T]he marriage relation [is] an institution more basic in our civilization than any other.”); *People ex rel. Troare v. McClelland*, 146 Misc. 545, 263 N.Y.S. 403 (N.Y. 1933) (Husbands and wives have a unity of interest within the “social institution of marriage.”); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (“Marriage is a vital social institution.”).

What follows, then, is an essential overview of the wealth of explanation and understandings provided by social institutional studies, including what constitutes social institutions, how they provide various social goods, how they educate, form, and transform individuals, how society (especially through the law) reinforces, alters, or destroys (deinstitutionalizes) these institutions, and how such changes affect individuals and society.

A. Understandings from Social Institutional Studies.

One of the most important understandings is this: Social institutions are constituted in large measure by shared public meanings. Although in pedestrian use the word “institution” may conjure up an image of an edifice constructed of steel, concrete, and glass, a social institution is not so constituted. Rather, it is “constituted by complex webs of social meaning.”⁸ John Searle explains this social reality using the example of another social institution, money:

[W]e can say, for example, in order that the concept “money” apply to the stuff in my pocket, it has to be the sort of thing that people think is money. If everybody stops believing it is money, it ceases to function as money, and eventually ceases to be money. . . . [I]n order that a type of thing should satisfy the definition, in order that it should fall under the concept of money, it must be believed to be, or used as, or regarded as, etc., satisfying the

⁸ Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 DUKE J. CONST. L. & PUB. POL’Y 1, 8-9 (2006) (available at <http://www.law.duke.edu/journals/DJCLPP/index.php?action=showitem&id=24>) (hereafter Stewart, *Genderless Marriage*); Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 CANADIAN J. FAM. L. 11, 83 (2004) (available at <http://www.manwomanmarriage.org/jrm/pdf/jrm.pdf>) (hereafter Stewart, *Judicial Redefinition*). See generally Mary Campbell, HOW INSTITUTIONS THINK (1986).

definition. . . . And what goes for money goes for elections, private property, wars, voting, promises, *marriages*, buying and selling, political offices, and so on.⁹

The shared meanings that constitute a social institution interact and are interdependent; each meaning affects and is dependent on all the others. “An institution is a *web of interrelated norms* — formal and informal — governing social relationships.”¹⁰

Social institutions shape and guide individuals’ identities, perceptions, aspirations, and conduct. An institution “supplies to the people who participate in it what they should aim for, dictates what is acceptable or effective for them to do, and teaches how they must relate to other members of the institution and to those on the outside.”¹¹ This profound influence ought not to be underestimated; institutions “shape[] what those who participate in [them] think of themselves and of one another, what they believe to be important, and what they strive to achieve.”¹² Thus,

an institution guides and sustains individual identity in the same way as a family, forming individuals by enabling or disabling certain ways of behaving and relating to others, so that each individual’s possibilities depend

⁹ John R. Searle, *THE CONSTRUCTION OF SOCIAL REALITY* 32 (1995) (emphasis added).

¹⁰ Victor Nee & Paul Ingram, *Embeddedness and Beyond: Institutions, Exchange, and Social Structure*, in *THE NEW INSTITUTIONALISM IN SOCIOLOGY* 19 (Mary C. Brinton & Victor Nee eds., 1998).

¹¹ Stewart, *Genderless Marriage*, *supra* note 8, at 9-10; Stewart, *Judicial Redefinition*, *supra* note 8, at 111.

¹² *Id.*

on the opportunities opened up within the institution to which the person belongs.¹³

But inasmuch as human societies create and sustain social institutions, a society can change its social institutions. “Institutions can be changed in the sense that they will necessarily change if sufficiently many individuals try to change them.”¹⁴ And because social institutions are constituted by shared public meanings, they are necessarily changed when those meanings are changed and/or no longer sufficiently shared. Indeed, that is the only way a social institution can be changed.

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.¹⁵

Just as social institutions can be changed by alteration of the constitutive shared public meanings, so they can be renewed and strengthened by use consistent with those shared public meanings.

¹³ Helen Reece, *DIVORCING RESPONSIBLY* 185 (2003).

¹⁴ Eerik Lagerspetz, *THE OPPOSITE MIRRORS: AN ESSAY ON THE CONVENTIONALIST THEORY OF INSTITUTIONS* 28 (1995).

¹⁵ Eerik Lagerspetz, *On the Existence of Institutions*, in *ON THE NATURE OF SOCIAL AND INSTITUTIONAL REALITY* 70, 82 (Eerik Lagerspetz et al. eds., 2001). See Joseph Raz, *THE MORALITY OF FREEDOM* 162 (1986) (“Supporting valuable forms of life is a social rather than an individual matter. Monogamy, assuming that it is the only morally valuable form of marriage, cannot be practised by an individual. It requires a culture which recognizes it, and which supports it through the public’s attitude and through its formal institutions.”).

[A]s several social theorists have pointed out, institutions are not worn out by continued use, but each use of the institution is in a sense a renewal of that institution. Cars and shirts wear out as we use them but constant use renews and strengthens institutions such as marriage, property, and universities. . . . [I]n terms of the continued collective intentionality of the users, each use of the institution is a renewed expression of the commitment of the users to the institution.¹⁶

And just as social institutions can be changed or reinforced, social institutions can be entirely dismantled.

The secret of understanding the continued existence of institutional facts is simply that the individuals directly involved and a sufficient number of members of the relevant community must continue to recognize and accept the existence of such facts. . . . The moment, for example, that all or most of the members of a society refuse to acknowledge [the social institution of] property rights, as in a revolution or other upheaval, property rights cease to exist in that society.¹⁷

B. The Law's Powerful Role Relative to Social Institutions.

Society can use the law effectively to reinforce, to alter, or to dismantle a social institution. This is because the law has an expressive or educative function that is magnified by its authoritative voice.¹⁸ And in actual practice, the law's authoritative voice is used to reinforce, to alter, or to dismantle the shared public

¹⁶ Searle, *supra* note 9, at 57.

¹⁷ *Id.* at 117.

¹⁸ *E.g.*, Maggie Gallagher, (*How*) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman, 2 U.ST.THOMAS L.REV. 33, 51 (2004) (“Laws do more than incentivize or punish They educate directly and indirectly.”); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 69–71 (1996); Minister of Public Health v. Fourie, CCT 60/04, slip op. at para. 138 (S. Afr. Const. Ct. Dec. 1, 2005) (“The law is ... a great teacher [and] establishes public norms”, *available at* <http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT60-04>).

meanings that constitute a social institution. Regarding the reinforcing function, Joseph Raz observes:

Perfectionist political action may be taken in support of social institutions which enjoy unanimous support in the community, in order to give them formal recognition, bring legal and administrative arrangements into line with them, facilitate their use by members of the community who wish to do so, and encourage the transmission of belief in their value to future generations. In many countries this is the significance of the legal recognition of monogamous marriage and prohibition of polygamy.¹⁹

Use of the law to reinforce or alter or extinguish the shared public meanings that constitute a social institution is a political act. 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.”²⁰ 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.²¹

¹⁹ Raz, *supra* note 15, at 161.

²⁰ Edward Schiappa, *DEFINING REALITY: DEFINITIONS AND THE POLITICS OF MEANING* 3 (2003).

²¹ *Id.* at 69–70 (citation omitted) (emphasis in original). Kitzinger and Wilkinson apply the reality articulated by Schiappa to the marriage context:

Marriage is a linchpin 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 and Sue Wilkinson, *The Re-Branding of Marriage: Why We Got Married Instead of Registering a Civil Partnership*, 14 *FEMINISM & PSYCHOLOGY* 127, 132 (2004).

Schiappa's reference to "a shared understanding among people about ... the objects of their world" illuminates a distinction that ought not be missed, the distinction between a social institution, on one hand, and, on the other hand, the objects or arrangements to which the institution relates most directly or intimately. They are not the same, although casual or uncritical thought may mistake the latter for the former. A dollar bill, although commonly referred to as *money*, is not the social institution of money. Likewise, a wheat farm or a phosphate mine or a marshmallow factory, although reflexively thought of in our society as *private property*, is not the institution of private property. The dollar bill and the marshmallow factory are only objects in our world about which we may or may not share understandings, meanings, and norms – depending on the presence or absence in our particular society of particular social institutions.²²

Still focusing on the law's role in sustaining, altering, or extinguishing social institutions, if the extinguishing law is "constitutional law," meaning the most fundamental law of the polity, the legal project of suppressing the old meanings and/or replacing them with radically different meanings operates across the entire public square. The very logic of constitutional law requires that it not be otherwise. And it would seem that the more totalitarian the government, the more extensive the public square and therefore the more influential or even invasive the

²² Stewart, *Genderless Marriage*, *supra* note 8, at 12-13.

constitutional law in whatever remains of the private. An example of “deinstitutionalization” by constitutional law is found in the first Soviet constitution’s treatment of private property, which in great detail converted every form of property “into the property of the Soviet Workers' and Peasants' Republic.”²³

Finally, from these understandings of social institutions there necessarily follows this: To alter a social institution by altering the shared public meanings that constitute it (whether by use of the law or otherwise) is to alter — if not immediately then certainly soon — the individual identity, perceptions, aspirations, and conduct formed by reference to the old institution. The greater the alteration to the institution, the greater the changes in the individual. Likewise, the more influential the social institution being changed, the greater the changes in the individual.²⁴

C. An Illustration of Social Institutional Realities

A simple event that occurred in California 46 years ago helps put flesh on these uncontroversial but somewhat abstract concepts. After winning a spot on the American team headed to the 1960 Olympic Winter Games in Squaw Valley,

²³ SOVIET CONST. (Constitution (Fundamental Law) of the R.S.F.S.R, 1918) ch. 2, art. 3, available at http://www.politicsforum.org/documents/constitution_rsfsr_1918.php.

²⁴ *E.g.*, Raz, *supra* note 15, at 392; Stewart, *Genderless Marriage*, *supra* note 8, at 13-14.

California, 18-year-old speed skater Barbara Lockhart decided to learn Russian.²⁵

At that time, the Soviet Union had the best speed skaters in the world, and Barbara wanted to become acquainted with them and even establish some friendships. She succeeded. Klara Guseva, who won the gold medal in the 1,000 meter race, and Barbara spent a fair amount of time together at Squaw Valley and became friends.

Near the end of the Games, Barbara and two American teammates were visiting in their Olympic Village dorm room. Klara entered, removed the slippers she was wearing, and began trying on the American athletes' shoes. She seemed particularly pleased with a pair of brown loafers. With the loafers on her feet, Klara walked out. The Americans watched dumbfounded. Klara kept the shoes for her own use, and the flummoxed Americans never could bring themselves to seek the shoes' return.

The profound differences in Barbara's and Klara's respective conducts regarding, relationships with, and perceptions of the brown loafers, and indeed their respective self-identities in that context, are rather readily explained by understandings of social institutions. Clearly, Barbara and Klara had radically different relationships to and understandings of the same pair of brown loafers.

The reason is that Barbara had been taught, formed, and transformed by her

²⁵ Barbara Lockhart related this experience orally to counsel in September 2005 and then reviewed and confirmed the accuracy of the written account appearing in the text. Dr. Lockhart has been a professor of exercise science at Temple University, the University of Iowa, and Brigham Young University.

society's strong social institution of private property, an institution reinforced by law and even enshrined in American constitutional law,²⁶ while Klara's society had no equivalent private property institution but rather another institution that, in radically different ways, taught, formed, and transformed individuals in relation to such things as marshmallow factories, wheat farms, and shoes, with, again, that different institution being reinforced by Soviet law and constitution.²⁷

The American private property institution had formed an important part of Barbara's identity, or, more accurately, identities; she understood herself to be relative to some objects an "owner" and relative to other objects "not an owner." Since her early childhood, the institution had been teaching her the complex web of meanings, relationships, projects, and conducts comprising those two interrelated identities. Likewise, the Soviet property institution had, equally effectively, formed Klara's identities and hence her conducts relative both to various objects and to the various users of those objects. Except perhaps in an abstract fashion, Barbara's "property ways" were incomprehensible to Klara and to Klara's parents – but not to her grandparents, for they would have been taught and formed by an effective social institution of private property. The startled reaction

²⁶ *E.g.*, United States Constitution, amendment 5 and amendment 14, section 1; New York Constitution, article I, section 7.

²⁷ Not until 1977 was there any Soviet constitutional reference to something akin to "private property." 1977 Soviet Constitution, Chapter 2, Article 13.

of the American athletes that day in that Olympic Village dorm room evidences that they had a similar incomprehension of Klara's "property ways."

On the foundation of these understandings from social institutional theory, this brief now turns to the social institutional realities pertaining to the legal definition of marriage.

D. Social Institutional Realities and the Legal Definition of Marriage

Almost universally, a shared, public, and core meaning is that marriage is the union of a man and a woman.²⁸ Thus, that meaning has been a constitutive core of the institution. That core meaning has been and continues to be influential in forming individual identity, perceptions, aspirations, and conduct in a way and to an extent that common sense readily comprehends. Any word-picture of that influence seems doomed to incompleteness, but here is Daniel Cere's concise effort:

[M]arriage is an institution that interacts with a unique social-sexual ecology in human life. It bridges the male-female divide. It negotiates a stable partnership of life and property. It seeks to manage the procreative process and to establish parental obligations to offspring. It supports the birthright of children to be connected to their mothers and fathers.

. . . .

Michael Foucault contends that marriage has fostered a particular type of human identity, namely, the "conjugal self." Be that as it may, marriage has always been the central cultural site of male-female relations. A rich history and a complex heritage of symbols, myths, theologies, traditions, poetry, and art have been generated by the institution of marriage, which encodes a

²⁸ See Gallagher, *supra* note 18, at 45-46.

unique set of aspirations into human culture along the axis of permanent opposite-sex bonding and parent-child connectedness.²⁹

As Cere's description suggests, man/woman marriage is deemed to provide well, and even uniquely, a number of social goods. Without claiming completeness or suggesting any significance to the order of appearance, we set forth six of those valuable social goods gleaned from the literature and particularly relevant in the context of the current marriage debate. The six social goods set forth are particularly relevant exactly because the institution's man/woman meaning plays at least a powerful and usually an indispensable role in producing them.

1. Six Social Goods Provided by Man/Woman Marriage.

First, the institution of man/woman marriage is quite certainly society's best and probably its only effective means to make meaningful a child's right to know and be brought up by his or her biological parents (with exceptions being justified only in the best interests of the child, not those of any adult).³⁰ This must be what Cere had in mind when he said: "[Man/woman marriage] supports the birthright of children to be connected to their mothers and fathers."

²⁹ Daniel Cere, *War of the Ring*, in *DIVORCING MARRIAGE: UNVEILING THE DANGERS IN CANADA'S NEW SOCIAL EXPERIMENT* 9, 11, 14 (Daniel Cere & Douglas Farrow eds., 2004) (footnote omitted) (hereafter *DIVORCING MARRIAGE*).

³⁰ Margaret Somerville, *What About the Children?*, in *DIVORCING MARRIAGE*, *supra* note 29, at 67.

Second, the institution almost certainly qualifies as the most effective means humankind has developed so far to maximize the level of private welfare provided to the children conceived by passionate, heterosexual coupling.³¹ Indeed, the provision of this social good has been called “society’s deep logic of marriage.”³² That logic can be understood as follows: Two essential realities of man/woman intercourse are its procreative power and its passion. Society’s interest relative to those realities is in assuring, to the greatest extent possible, the provision of adequate private welfare to children. (As used here, the phrase *private welfare* includes not just the provision of physical needs such as food, clothing, and shelter; it encompasses opportunities such as education, play, work, and discipline and intangibles such as love, respect, and security.) Societal interests are corroded when child-bearing occurs in a setting of inadequate private welfare and are advanced when it occurs in a setting of adequate private welfare. Passion-based procreation militates against the latter and is conducive of the former. That is because passion, not rationality, may well dictate the terms of the procreative encounter. While rationality considers consequences nine months hence and thereafter, passion does not, to society’s detriment. Hence, what is understood to be a fundamental and originating purpose of marriage: to confine procreative

³¹ Maggie Gallagher, *(How) Does Marriage Protect Child Well-Being?*, in THE MEANING OF MARRIAGE 197, 198-200 (Robert P. George & Jean Bethke Elshtain eds., 2006) [hereafter MEANING OF MARRIAGE]; Stewart, *Judicial Redefinition*, *supra* note 8, at 44–52.

³² *Id.*

passion to a setting, a social institution actually, that will assure, to the largest practical extent, that passion's consequences (children) begin and continue life with adequate private welfare. Although the immediate objects of the protective aspects of this private welfare purpose are the child and the often vulnerable mother, society rationally sees itself as the ultimate beneficiary.³³

The third social good is related to the second. Man/woman marriage is the irreplaceable foundation of the child-rearing mode — that is, married mother/father child-rearing — that correlates (in ways not subject to reasonable dispute³⁴) with

³³ Justice Cordy's dissent in *Goodridge* articulates these understandings particularly well. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 995-96 (Mass. 2003) (Cordy, J., dissenting); see also W. Bradford Wilcox, *Suffer the Little Children*, in MEANING OF MARRIAGE, *supra* note 31, at 242, 243-44 ("Clearly, then, a strong marriage culture serves the common good. This is why the vast majority of cultures, and virtually all of the great civilizations of the world, have sought to unite the goods of sexual intimacy, childbearing and childrearing, and lifelong love between adults in the institution of marriage."); Stewart, *Genderless Marriage*, *supra* note 8, at 17-18.

³⁴ Regarding this notion of "not subject to reasonable dispute" in the context of different child-rearing modes and outcomes, Justice Sosman said in her dissenting opinion in *Goodridge*:

[S]tudies to date reveal that there are still some observable differences between children raised by opposite-sex couples and children raised by same-sex couples. Interpretation of the data gathered by those studies then becomes clouded by the personal and political beliefs of the investigators, both as to whether the differences identified are positive or negative, and as to the untested explanations of what might account for those differences. (This is hardly the first time in history that the ostensible steel of the scientific method has melted and buckled under the intense heat of political and religious passions.) . . . [T]he most neutral and strict application of scientific principles to this field would be constrained by the limited period of observation that has been available. . . . The Legislature can rationally view the state of the scientific evidence as unsettled on the critical question it now faces: are families headed by same-sex parents equally successful in rearing children from infancy to adulthood as families headed by parents of opposite sexes?

Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 979-80 (Mass. 2003) (Sosman, J., dissenting) (citation omitted); see also Gallagher, *supra* note 31, at 200-03.

the optimal outcomes deemed crucial for a child's (and hence society's) well being. These outcomes include physical, mental, and emotional health and development; academic performance and levels of attainment; and avoidance of crime and other forms of self- and other-destructive behavior such as drug abuse and high-risk sexual conduct.³⁵

Fourth, man/woman marriage serves as an effective bridge over the male-female divide. “[M]arriage has always been the central cultural site of male-female relations”³⁶ and society's primary and most effective means of bridging the male-female divide —that “massive cultural effort of every human society at all times and in all places.”³⁷

Fifth, man/woman marriage is the only institution that can confer the status of *husband* and *wife*, that can transform a male into a husband or a female into a wife (a social identity quite different from “partner”),³⁸ and thus that can transform

Regarding married mother/father as the optimal child-rearing mode when compared with all other adequately studied modes, see *id.* at 198-200; Maggie Gallagher and Joshua K. Baker, *Do Moms and Dads Matter? Evidence from the Social Sciences on Family Structure and the Best Interests of the Child*, 4 MARGINS L. REV. 161 (2004) (collecting references to and summarizing the literature).

³⁵ Gallagher, *supra* note 31, at 198-200; Stewart, *Judicial Redefinition*, *supra* note 8, at 64–70; Gallagher, *supra* note 18, at 50-51.

³⁶ Cere, *supra* note 29, at 14.

³⁷ Katherine K. Young & Paul Nathanson, *The Future of an Experiment*, in DIVORCING MARRIAGE, *supra* note 29, at 43.

³⁸ See, e.g., F.C. DeCoste, *The Halpern Transformation: Same-Sex Marriage, Civil Society, and the Limits of Liberal Law*, 41 ALBERTA L.REV. 619,625–26 (2003).

males into husband/fathers (a category of males particularly beneficial to society)³⁹ and females into wife/mothers (likewise a socially beneficial category).⁴⁰

Sixth, legally recognized and privileged man/woman marriage constitutes both social and official endorsement of that form of adult intimacy — married heterosexual intercourse — that society may rationally value above all other such forms. That rationality has been demonstrated elsewhere,⁴¹ and to date there has been no counter to that demonstration.⁴²

2. *Why Genderless Marriage Cannot Deliver the Same Social Goods.*

A social institution defined at its core as the union of any two persons is unmistakably different from the historic marriage institution.⁴³

³⁹ See, e.g., David Popenoe, LIFE WITHOUT FATHER 139–88 (1996); Wilcox, *supra* note 33, at 243 (“Likewise, marriage can play a unique role in turning single men away from the selfish and dangerous pursuits that often occupy them and toward the needs of their families and communities, as evidenced by increases in hard work, sobriety, and religious attendance among newly-married men.”).

⁴⁰ See *id.* at 242-44; Gallagher, *supra* note 33 (collecting references to and summarizing the literature).

⁴¹ Stewart, *Judicial Redefinition*, *supra* note 8, 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 (2004).

⁴² Nor is there any sound basis for a constitutional challenge to a societal judgment valuing and on that basis privileging one form of adult intimacy above all others, although many uncritically assume that the United States Supreme Court decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), prohibits society from making such a judgment. One or more of the many possible readings of *Lawrence* may well prohibit government from burdening a particular form of adult intimacy on no basis other than conventional morality, but no responsible reading to date takes *Lawrence* so far as to prohibit a government, acting on the basis of demonstrable rationality, from most highly valuing and on that basis privileging married heterosexual intercourse.

⁴³ Observers of marriage who are both rigorous and well informed regarding the realities of social institutions uniformly acknowledge the magnitude of these differences between the two possible institutions of marriage. This is so regardless of the observer’s own sexual, political, or

Much has been and can be said about public meanings influencing, [or] constituting, social institutions, which in turn influence, even define, the human participants. All of that can be said, of course, about both man/woman marriage as an institution and genderless marriage as an institution. The point is the high likelihood that an institution defined at its core as the union of a man and a woman (with all that limitation implies and entails regarding purposes and activities) will intend and sustain “the social understandings, the practices, the goods, and the social selves” in large measure not intended or sustained by an institution defined at its core as any two persons in a close personal relationship.⁴⁴

The difference in constitutive meanings of necessity means that what the new institution teaches relative to individual identity, perceptions, aspirations, and conduct is substantially different from the formative instruction of the current institution of man/woman marriage. That does not mean, of course, that there is no overlap in formative instruction; the significance is in the divergence. One important divergence centers on the normativeness of married heterosexual relations and the normative exceptionality of all other forms of intimate human

theoretical orientation or preference. *See, e.g.*, Ladelle McWhorter, *BODIES AND PLEASURES: FOUCAULT AND THE POLITICS OF SEXUAL NORMALIZATION* 125 (1999); Raz, *supra* note 15, at 393; Cere, *supra* note 29, at 11–18; Douglas Farrow, *Canada’s Romantic Mistake*, in *DIVORCING MARRIAGE*, *supra* note 29, at 1, 1–5; Young & Nathanson, *supra* note 37, at 48–56; Gallagher, *supra* note 18, at 53 (“Many thoughtful supporters of same-sex marriage recognize that some profound shift in our whole understanding of the world is wrapped up in this legal re-engineering of the meaning of marriage.”); Angela Bolt, *Do Wedding Dresses Come in Lavender? The Prospects and Implications of Same-Sex Marriage*, 24 *Social Theory and Practice* 111, 114 (Spring 1998); Andrew Sullivan, *Recognition of Same-Sex Marriage* 16 *QUINNIPIAC L. REV.* 13, 15, 17-18 (1996); Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 *LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES* 9, 12-19 (1991); E.J. Graff, *Retying the Knot*, 262 *The Nation* 12 (June 24, 1996) (“The right wing gets it: Same-sex marriage is a breathtakingly subversive idea. ... Marriage is an institution that towers on our social horizon, defining how we think about one another [S]ame-sex marriage ... announces that marriage has changed shape.”).

⁴⁴ Stewart, *Judicial Redefinition*, *supra* note 8, at 77 (footnote omitted).

conduct.⁴⁵ Another centers on the relative pre-eminence or subordination of the interests and desires of adults, on one hand, and of the interests and needs of children, on the other hand.⁴⁶

That last point leads to further evidence of the radical difference between the two possible marriage institutions, and that is the profound difference in social goods provided. For example, as 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 best interests of the child, not those of any adult), hereafter referred to in shorthand as *the child's bonding right*.

Governmental selection of genderless marriage in the place of man/woman marriage, and especially a constitutional mandate for such, further withdraws official recognition of the child's bonding right.⁴⁷ It could not be otherwise because 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

⁴⁵ See Gallagher, *supra* note 41, at 448-49.

⁴⁶ See *Hernandez v. Robles*, 26 A.D.3d 98, 805 N.Y.S.2d 354 (App. Div.2005) ("Marriage laws are not primarily about adult needs for official recognition and support, but about the well-being of children . . ."); Margaret Somerville, *supra* note 30, at 66-67, 78; Seana Sugrue, "Marriage: Inside and Out" 14-15 (18-20 May 2005), paper presented at Illuminating Marriage Conference, Kananaskis, Alberta, Canada ("Hence, same-sex marriage as well as a number of other marital reforms, . . . foster the vulnerability of children to advance the desires of adults."); CNW Group, "France rejects same-sex marriage to protect children's rights," available at <http://www.newswire.ca/en/releases/archive/March2006/20/c3914.html?view=prin>.

⁴⁷ We say "further" because government allowance, albeit regulated, of anonymous donor conception began 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.

that both the same-sex couples and these donor-conceived children are entitled to the benefits of civil marriage. 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.⁴⁸

Another example 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. Moreover, as Camille Williams has shown, man/woman marriage “is the only important social institution in which women have always been necessary participants.”⁴⁹ Displacement of that institution “may result in future generations

⁴⁸ Margaret Somerville, *supra* note 30, at 67.

⁴⁹ Camille S. Williams, *Women, Equality, and the Federal Marriage Amendment 1*, paper presented at the Federal Marriage Protection Amendment Symposium, Brigham Young

with a decreased ability or desire for men and women to cooperate in families, and may ultimately contribute to a new form of gender hierarchy and a new variation of a sex-segregated society.”⁵⁰ The reason is that man/woman marriage produces, indeed is,

the norm for cooperation between the sexes. While marriage patterns and practices have varied across cultures and over time, marriage has involved both sexes, and by doing so has set a pattern for cooperation between the sexes.⁵¹

The last example given here is the preparation for, conferral of, and sustenance in the status of *husband* or *wife*, with there being no need to belabor the large differences between the two possible marriage institutions relative to that social good.

This exercise is not meant to suggest that genderless marriage proponents do not predict that the new, replacement institution will uniquely provide valuable social goods. Proponents of that institution have so predicted, and this brief takes up that issue later. The point is that man/woman marriage and genderless marriage are radically different social institutions as demonstrated by their wide divergence relative to important social goods.

University, Provo, Utah (9 September 2005) (available on-line at http://www.law2.byu.edu/marriage_family/).

⁵⁰ *Id.*

⁵¹ *Id.* at 9.

3. One or the Other: The Limit to One Marriage Institution.

Governmental selection of genderless marriage has other practical outcomes. For our purposes, perhaps the most important is found at the intersection of the law's authoritative role relative to marriage's meanings and the unitary nature of the institution. By *unitary nature*, we mean simply that society can sustain one and only one marriage institution. Society cannot, at one and the same time, 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. Given the role of language and meaning in constituting and sustaining institutions, two "coexisting" social institutions known society-wide as *marriage* would seem to amount to a factual impossibility. When we speak of law's authoritative role relative to marriage's meaning, we are thinking of this: Once the law (on constitutional grounds no less) has taken a stand that the core meaning is the union of any two persons, the law will then be unrelenting and thoroughgoing in enforcement of that decision. The law's own internal logic and institutional mandates require no less. Thus, at the intersection of the unitary nature of marriage and the law's authoritative role in marriage's meaning, what will result is the new meaning being mandated in texts, in schools, and in virtually every other part of the public square, and also being voluntarily published by the media

and other institutions.⁵² Even linguistic, social, or religious enclaves dedicated to preserving the old meaning will have a difficult time,⁵³ a matter discussed at more length later.

4. Inclusion and Exclusion: Limits on and Effects of the Law's Power.

Two other and related social institutional realities merit note. First, same-sex couples cannot enter the institution of marriage as it has existed to the present; in other words, it is not possible in reality for same-sex couples to enter the privileged and vital civil institution previously enjoyed only by opposite-sex couples. The very act of legal redefinition will radically transform (not all at once, of course, but over time and probably quickly) the old institution and make it into a profoundly different institution, one whose meanings, value, and vitality are speculative. Some same-sex couples look to the law to let them into the privileged

⁵² Stewart, *Judicial Redefinition*, *supra* note 8, at 111.

⁵³ Helen Reece explains:

When norms are socially contested, this can lead to the formation of diverse norm communities, such as religious organisations or feminist groups, so that people who are dissatisfied with the prevailing norms can enter a different and more congenial norm community. But this is not a complete solution because the social construction of choices runs too deep: the dissident community may seem unthinkable or may be too costly for someone raised in the dominant community; it may also be merely reactive to or even defined by the dominant norm community.

Reece, *supra* note 13, at 38.

institution, and the law may want to, but it cannot; it can only give them access to a different institution of different value.⁵⁴

The second reality applies to already married opposite-sex couples. Redefinition and no act of their own removes them from the institution they voluntarily entered (man/woman marriage) into a markedly different one. To the extent that institutions are constituted by social meaning, and to the extent that the law dictates the social meaning of civil marriage, to redefine marriage as the union of any two persons is not to pull gay men and lesbians into marriage as our society now knows it but to pull married man/woman couples into what the media calls imprecisely “gay marriage” and this brief calls genderless marriage.⁵⁵

⁵⁴ Brian Bix, *Reflections on the Nature of Marriage*, in REVITALIZING THE INSTITUTION OF MARRIAGE FOR THE TWENTY-FIRST CENTURY 111,112-13 (Alan J. Hawkins, Lynn D. Wardle, David O. Coolidge eds., 2002):

Marriage is an existing social institution. One might also helpfully speak of it as an existing “social good.” The complication in the analysis is that one cannot fully distinguish the *terms* on which the good is available from the *nature* of the good. As Joseph Raz wrote regarding same-sex marriage, “When people demand recognition of gay marriages, they usually mean to demand access to an existing good. In fact they also ask for the transformation of that good. For there can be no doubt that the recognition of gay marriage will effect as great a transformation in the nature of marriage as that from polygamous to monogamous or from arranged to unarranged marriage.”

⁵⁵ This reality has been understood since before the marriage issue drew public attention. [Adoption of genderless marriage] has fascinating potential for denaturalizing the gender structure of marriage law for heterosexual couples. ... [T]he impact [of genderless marriage], if such ... prevails, will be to dismantle the legal structure of gender *in every marriage*.

Nan D. Hunter, *supra* note 42, at 16,19 [emphasis added].

5. Society's Compelling Interests in Man/Woman Marriage.

All these social institutional realities regarding marriage bring into sharp focus the societal (and hence governmental) interests in preserving marriage as the union of a man and a woman. For it is that man/woman meaning, among the complex web of meanings constituting the marriage institution, that uniquely (or at least materially) provides the social goods described above and without which, therefore, society would be deprived of those vital social goods. This realization, lit by understandings of social institutions in general and marriage in particular, thus renders less consequential the heated battle over the appropriate standard of judicial review of constitutional challenges to the legal definition of marriage.⁵⁶ That is because society's interests in the perpetuation of those uniquely provided goods is quite simply compelling and because what ostensibly⁵⁷ is sought through this great contest – same-sex couple entry into that institution of marriage highly esteemed for so very long now – is simply not possible.

⁵⁶ *E.g.*, *Bower Assocs. v. Town of Pleasant Valley*, 2 N.Y.3d 617, 630-31 (N.Y. 2004); compare *Hernandez v. Robles*, 26 A.D.3d 98, 805 N.Y.S.2d 354, 361 (App. Div.2005) (rational basis test) *with id.* at 385-86 (Saxe, J., dissenting) (strict scrutiny).

⁵⁷ We say “ostensibly” because of strong evidence that the movement to replace man/woman marriage with genderless marriage sees that project not as an end in itself but rather as a means to an essentially “nonmarriage” end. Monte Neil Stewart & William C. Duncan, *Marriage and the Betrayal of Perez and Loving*, 2005 BYU L. REV. 555; see also Sue Wise and Liz Stanley, *Beyond Marriage: “The Less Said About Love and Life-long Continuance Together the Better”* 14 FEMINISM & PSYCHOLOGY 332, 335 (2004) (referencing the gay/lesbian rights movement's advocacy of genderless marriage; “This position acknowledges the key, foundational properties of marriage as a social institution, for this is precisely why it is thought it will lead to social equality.”).

* * * * *

The courts that give these social institutional realities their due reject the argument urged by the appellants, that man/woman marriage violates constitutional norms and therefore must be replaced with genderless marriage. The courts that have held man/woman marriage to be constitutionally infirm have, in one way or another, gotten to that result by eliding the social institutional realities. The next section so demonstrates.

II.

THE COURTS THAT HAVE REDEFINED MARRIAGE HAVE ELIDED THE SOCIAL INSTITUTIONAL REALITIES OF MARRIAGE.

A. The Dissenting Opinion Below in *Hernandez v. Robles* and the Dissent in New Jersey's *Lewis v. Harris* Ignore the Social Institutional Argument.

The dissenting opinion below in *Hernandez v. Robles* (Saxe, J.), calling for judicial redefinition of marriage, simply ignores entirely the social institutional realities pertaining to that redefinition.⁵⁸ In this respect, that dissenting opinion is akin to the dissenting opinion in New Jersey's recent *Lewis v. Harris* decision.⁵⁹ In that decision, the two judges in the majority engaged the social institutional

⁵⁸ *Hernandez v. Robles*, 26 A.D.3d 98, 805 N.Y.S.2d 354, 377 (App. Div.2005) (Saxe, J., dissenting). Moreover, that dissenting opinion relies heavily on the "racial analogy," also known as "the *Perez/Loving* analogy." Yet that "analogy" is actually a deep disanalogy; as has been demonstrated, the current project to redefine marriage is analogous not to the judicial repudiation of the white supremacists' redefinition-of-marriage project but to that older project itself.

Stewart & Duncan, *supra* note 57.

⁵⁹ 378 N.J. Super. 168, 875 A.2d 259 (N.J. Super. A.D. 2005).

realities⁶⁰ and went on to reject the argument that state constitutional norms mandated the redefinition of marriage. The dissenting opinion, however, would have held that man/woman marriage must be replaced by genderless marriage. But in arguing for redefinition of marriage, that opinion quite simply ignored entirely the social institutional argument,⁶¹ even though that argument was material to the majority's analysis and conclusion.

This particular approach may be fairly characterized as the “willful blindness” elision. The other judges who, to date, have ruled for genderless marriage have employed other kinds of elision. Scholarly work has described in some detail that elision phenomenon and has demonstrated the inadequacies of such judicial

⁶⁰ Both the majority opinion and the concurring opinion in the *Lewis* decision addressed the social institutional nature of marriage, and the concurring opinion sets out in fairly complete fashion the social institutional argument. Thus, the concurring opinion notes that marriage is a social institution comprised by shared public meanings, that those meanings extend beyond the constricted “close personal relationship” model of marriage (which “strips the social institution ‘of any goal or end beyond the intrinsic emotional, psychological, or sexual satisfaction which the relationship brings to the individuals involved’”), that to eliminate the core constitutive meaning of the union of a man and a woman would be to render the institution “non-recognizable and unable to perform its vital function” and would be to “seriously compromise[, if not entirely destabilize[] ... the durability and viability of this fundamental social institution,” that the law “‘has a purpose and a power to preserve or change public meanings and thus a purpose and a power to preserve or change social institutions,’” and that “its opposite-sex feature makes it [the marriage institution] meaningful and achieves important public purposes,” including the public and rational privileging of heterosexual intercourse in marriage and the advancement of marriage’s “private welfare” purpose. *Lewis v. Harris*, 378 N.J. Super. 168, 875 A.2d 259, 275-78 (N.J. Super. A.D. 2005) (Parrillo, J., concurring).

⁶¹ *Id.* at 278-290 (Collester, J., dissenting).

performances.⁶² Each of the following subsections describes one of these judicial elisions and, in so doing, captures the essence of the analytical failure behind it.

B. The Elisions in *Goodridge*, *Halpern*, and *EGALE* Destroy Those Opinions’ Intellectual Integrity.

The phenomenon of judicial elision of the social institutional argument can be seen clearly in the three most important genderless marriage cases – *Goodridge*⁶³ in Massachusetts, *EGALE*⁶⁴ in British Columbia, *Halpern*⁶⁵ in Ontario.⁶⁶ There is considerable similarity of analytic strategy between the three across a number of issues,⁶⁷ and that similarity is certainly present with respect to the social institutional argument.⁶⁸ The *EGALE*, *Halpern*, and *Goodridge* courts all proceeded with a full awareness of the social institutional nature of marriage.⁶⁹

⁶² Stewart, *Genderless Marriage*, *supra* note 8, at 28-60.

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

⁶⁴ *EGALE v. Attorney General (Canada)*, 2003 BCCA 251, 225 DLR (4th) 472 (2003).

⁶⁵ *Halpern v. Toronto (City)*, 225 DLR (4th) 528 (Ont. Ct. App. 2003).

⁶⁶ Consideration of both American and Canadian cases is warranted in this context for several interrelated reasons. Most fundamentally, despite some not insubstantial differences in equality jurisprudence between the two nations, certain fundamental concepts (although carrying different labels) appear nearly universally in the equality jurisprudence of polities with judicial review and constitutional equality norms, and that includes Canada and the American jurisdictions, including California. *See generally* Stewart, *supra* note 8, at 26-31, 36-38. One of the universals in the equality equation is the weight of the societal (or governmental) interest advanced (or thought to be) by the impugned state action. The social institutional argument aims to give a fair weight to the societal interests implicated by the man/woman limitation in marriage. Thus, the argument has been raised in both countries, Canadian judicial experience with equality-based demands for redefinition of marriage is at least as great as the corresponding American experience, and the elision phenomenon is to be seen in both countries.

⁶⁷ Stewart, *supra* note 8, at 41-99.

⁶⁸ *Id.* at 75-85.

⁶⁹ Indeed, the plurality opinion in *Goodridge* begins: “Marriage is a vital social institution.” 798 N.E.2d at 948. The opinions in that case then go on to refer to institution in the context of

Moreover, the three courts repeatedly acknowledged both the large change they were mandating in the public meaning of marriage and the law's strong "educative" or "expressive" function in cases such as this.

So the important question arises how these courts proceeded to reach a conclusion that mandated genderless marriage. The answer is that, with a variety of tactics, they elided the very argument that sustains the constitutionality of man/woman marriage.

1. The "large change/no change" elision.

As noted, the three courts repeatedly acknowledged the large change the courts' mandates would effect in the public meaning of marriage. *EGALE* states that "the relief requested, if granted, would constitute a profound change to the meaning of marriage, and would be viewed as such by a significant portion of the Canadian public, whether or not it supported the change."⁷⁰ The lower court in the *Halpern* case expressed the same view,⁷¹ and the *Goodridge* plurality opinion stated: "Certainly our decision today marks a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries."⁷² But juxtaposed with these assessments of "profound" and "significant" change of meaning are assertions that the genderless marriage

marriage over 80 times. The *Halpern* decision has more than 40 such references; the decision in *EGALE*, more than 35.

⁷⁰ 2003 BCCA 251 at para. 78.

⁷¹ [2002] OJ 2714, 215 DLR (4th) 223 (Ont. Civ. Ct.) at paras. 97-98.

⁷² 798 N.E.2d at 965.

decisions do not and will not change the institution of marriage. Thus, the *Goodridge* plurality opinion says, immediately after the sentence just quoted: “But it [the court’s decision] does not disturb the fundamental value of marriage in our society.”⁷³ And *EGALE* and *Halpern* manifest a similar view.

These judicial assertions of “no change” in the institution of marriage, in light of the acknowledged “profound” and “significant” change in the public meaning of marriage, are flatly contradicted by social institutional realities. Social institutions are constituted by -- are nothing other than, if you will -- shared public meanings. To change those meanings is to change the institution, including the quantity and quality of its social goods. To change those meanings radically is to deinstitutionalize the old institution (and thereby lose its social goods) and to replace it with a new one.

And the argument advanced by *Halpern* and *Goodridge* to buttress the “no change” assertion is itself contradicted by social institutional realities. The *Goodridge* plurality opinion presents as proof of “no change” the intentions of the same-sex couples then before the court: “Here, the plaintiffs seek only to be married, not to undermine the institution of civil marriage”,⁷⁴ and: “That same-sex couples are willing to [enter civil marriage] ... is a testament to the enduring place

⁷³ *Id.*

⁷⁴ *Id.* at 995-97.

of marriage in our laws and in the human spirit.”⁷⁵ *Halpern* takes the same tack: “The Couples are not seeking to abolish the institution of marriage; they are seeking access to it.”⁷⁶ Yet the probative value of such intentions and willingness is not at all apparent; it seems nonsensical that the intentions of a handful of people could insulate a vast social institution constituted by its public meanings from change resulting from a profound alteration in those meanings. The 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.

2. *The “selectively impotent law” elision.*

The second answer to the key question of how these three courts handled the social institutional argument is that they used what fairly may be called the “selectively impotent law” elision. Again as noted, the three courts acknowledged the law’s strong “educative,” or “expressive,” function and, indeed, make that function a linchpin of many arguments. For example, the *Goodridge* plurality opinion speaks of an unchanged definition giving a “stamp of approval” to stereotypes.⁷⁷ And *Halpern* repeatedly speaks of the definition of man/woman marriage “perpetuating” “views” about the capacities of same-sex couples.⁷⁸ Yet the acknowledged educative function of law seems to reinforce the lessons of

⁷⁵ *Id.*

⁷⁶ 225 DLR (4th) 529 at para. 129.

⁷⁷ 798 N.E.2d at 962.

⁷⁸ *E.g.*, 225 DLR (4th) 529 at para. 94.

social institutional theory regarding civil institutions as webs of significance; law has a purpose and a power to preserve or change public meanings and thus a purpose and a power to preserve or change social institutions. More directly to the present context, the social institution of marriage is not at all immune but rather is open to fundamental change resulting from a profound change in the law's definition of marriage. The three cases manifest a quick readiness to acknowledge law's educative and hence society-changing power when some preferred value is being advanced, while manifesting a stubborn refusal to acknowledge that same power when its use places the goods of man/woman marriage at risk. Yet the law is not both potent and impotent in the very same endeavor.⁷⁹

Even if it were a proper judicial role to weigh the societal costs against the societal benefits flowing from a profound change in the public meanings of marriage (it is not, as shown later), the three cases' fundamental inconsistency of approach to benefits and costs cannot qualify as a defensible judicial performance.

3. Preserving the institution and providing child welfare: eliding the differences.

The *Goodridge* plurality opinion contains another elision, one unique to itself. The Commonwealth had pled for the preservation of man/woman marriage by pointing to one of its valuable social goods: man/woman marriage provides for

⁷⁹ For a strong rejection of the "impotent law" argument by a leading scholar on historical and contemporary marriage in America, see Nancy F. Cott, *The Power of Government in Marriage*, 11 THE GOOD SOCIETY 88 (2002).

that child-rearing mode — married mother/father child-rearing — that correlates (in ways not subject to reasonable dispute) with the optimal outcomes deemed crucial for a child’s (and hence society’s) well being. The plurality opinion studiously avoided taking issue with the reality of that social good. What it did rather was shift the asserted State interest from protecting the optimal child-rearing mode (man/woman marriage) to “[p]rotecting the welfare of children”,⁸⁰ and, on that shifted basis, argued that limiting marriage to opposite-sex couples does not promote the present welfare of all children, is contrary to the Commonwealth’s policy and practice of helping children whatever their family situation, and “penalize[s] children by depriving them of State benefits because the State disapproves of their parents’ sexual orientation.”⁸¹

This analysis is valid only to the extent that protecting the optimal child-rearing mode (man/woman marriage) is the same governmental endeavor as “protecting the welfare of children” (as the plurality opinion uses that phrase). But this is not at all clear. Reflection suggests that the two endeavors are substantially different. Protecting the present welfare of individual children found in varying circumstances is, in the way the plurality opinion addresses it, the provision of public assistance of some form or another to individuals (or their care-takers). By contrast, protecting the optimal child-rearing mode (man/woman marriage) entails

⁸⁰ 798 N.E.2d at 962-63.

⁸¹ *Id.* at 962-64.

the protection, sustenance, and perpetuation of a social institution. Thus understood, the two different governmental protective endeavors are just that, different. The plurality opinion disappoints in that it provides no demonstration of the equivalency or overlap of the two endeavors and thus provides no justification for its shift from one to the other. Nor does the difference the plurality opinion ignores seem much diminished by the common notion of “child welfare” even broadly conceived; that is because the endeavor to protect the optimal child-rearing mode, with its institutional focus, looks primarily to improve the private welfare received by future generations, whereas the personalized protective endeavor made the basis of the plurality opinion’s argument is an exercise in the present provision of public welfare.

Simply put then, the *Goodridge* plurality opinion never honestly came to grips with important social institutional realities relative to man/woman marriage, because it chose yet again to elide those realities.

4. The “speculative” elision.

Finally, there is an elision unique to *Halpern*. With respect to the Attorney General’s institutional argument, the *Halpern* court insisted that the government must prove with “cogent evidence” that the redefinition of marriage would in the future result in any loss of valuable social goods or otherwise lead to societal harm. Ignoring the predictive power of institutional theory in general and the power of

the Attorney General’s specific demonstration – the no-fault divorce “reform” battered permanence as a core constitutive meaning of the marriage institution, resulting in a great upsurge in divorce with all that development’s accompanying and now well-documented societal harm – the *Halpern* court labelled any evidence of adverse consequences from legal redefinition as “speculative.” It did this without acknowledging the obvious reason no historical (as opposed to “speculative”) evidence exists in the genderless marriage context; genderless marriage is a new experiment, and it is the very pace of the genderless marriage advocates’ march that leaves “unprovable” with historic evidence the experiment’s outcomes. As to the uncontroversial teachings of social institutional theory and its resulting predictive power, the court was silent.

C. Four Elisions Seen in Trial Court Decisions Are Likewise Indefensible.⁸²

1. Shifting from the macro to the micro.

The first elision is a common one in the popular debate, a shift from the macro to the micro. Genderless marriage proponents often deploy the language of autonomous individuality. By that, we mean a discourse focused 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 actually the most

⁸² Citations to and quotes from the referenced trial court decisions are found at Stewart, *Genderless Marriage*, *supra* note 8, at 39-49.

effective political tactic deployed by genderless marriage proponents. It is to ask, “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 yours and your husband’s relationship.” By its very language, this question forces the issue into the micro framework, that is, 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, that is, the framework provided by social institutional theory. Moreover, 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 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.”

Nor can the macro-to-micro shift be justified by the assertion that the constitutional rights at play, whether of equality or liberty, are individual rights and that therefore the legal analysis must operate at the micro level. Although the relevant equality and liberty rights are indeed individual (or personal) rights, the social institutional argument is not advanced to counter abstract notions of equality, liberty, 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. At some point any rational equality or liberty jurisprudence must, to retain its rationality, give important societal interests their due. New York’s equality and liberty jurisprudence do that.⁸³ And a 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, and, in the marriage cases, that is what the social institutional argument provides. The macro-to-micro shift is a mechanism to obscure that understanding and thereby preclude that fair measurement.

⁸³ *E.g.*, *People v. Aguilera*, 82 N.Y. 2d 23, 603 N.Y.S. 2d 392 (N.Y. 1993).

2. *The “variety of marriages” elision.*

A common and further elision is the notion that ubiquitous variety in individuals’ marriage customs, perceptions, and conduct somehow means that the whole institution is up for grabs. Yet this notion elides the virtually universal reality that a shared core and constitutive meaning of marriage is the union of a man and a woman.⁸⁴ Although it is true that in our society the constitutive meanings of the marriage institution do not include a bride in a white wedding gown or a stay-at-home wife, those meanings most certainly include a bride and a groom, a wife and a husband. And of course it is that core meaning of the union of a man and a woman that must leave in order for genderless marriage to arrive.

3. *The “two co-existing marriage institutions” elision.*

This elision is seen when a court suggests or implies that society can indeed sustain at the same time two social institutions authoritatively called marriage but radically different in their core constitutive meanings. This is an argument that society, at one and the same time, can teach the people (especially the children) that marriage means the union of a man and a woman and that marriage means the union of any two persons. But of course society cannot do that; it is nonsensical to say that it can.

⁸⁴ Gallagher, *supra* note 18, at 45 (“Marriage is a virtually universal social institution. ... [E]verywhere marriage has something to do with bringing together a man and a woman into a public – not merely private – sexual union, in which the rights and responsibilities of the husband and wife towards each other and any children their sexual union produces are publicly – not privately – defined and enforced.”).

This notion of two co-existing “arrangements” makes sense only if a court has in mind the de-institutionalization of marriage, for a society is capable of accommodating a number of alternative lifestyles. But it seems clear that the courts have no such thing in mind; certainly the genderless marriage proponents are not asking the courts to de-institutionalize marriage but rather to replace the old man/woman institution with the new genderless marriage one.

4. *The “enclave argument” elision.*

The enclave argument holds that those in our society who do not agree with the teachings and formative influences of the genderless marriage institution and the interests genderless marriage advances can simply retreat to an enclave, whether it be a linguistic, social, and/or religious enclave. In their own enclave, such persons would be free to do their own marriage thing unaffected by the new social institution.

But as scholarship has noted elsewhere,⁸⁵ there are problems with the notion that resourceful people could still find ways to communicate to the next generations of children the unique goods of man/woman marriage and its value. Certainly some might; by private educational endeavor it is possible for families or other groups to establish a sort of linguistic enclave in the heart of a community that has no comprehension of what matters to them. But to the degree that

⁸⁵ E.g., Stewart, *Judicial Redefinition*, *supra* note 8, at 82–83.

members of the enclave were to adopt the speech of the community, they would lose the power to name and, in large part, the power to discern what once mattered to their forbears. To that degree, their forbears' ways would seem implausible to them, and probably even unintelligible. (This was Klara's experience relative to the social institution of private property.) The bare possibility that people could, with considerable difficulty and sacrifice, maintain the meanings for their children of man/woman marriage is therefore just that — a bare possibility.

The possibility becomes even less substantial upon realization that

[t]o change the core meaning of marriage from the union of a man and a woman . . . to the union of any two persons [will result in] . . . the new meaning [being] mandated in texts, in schools, and in many other parts of the public square and voluntarily published by the media and other institutions, with society, especially its children, thereby losing the ability to discern the meanings of the old institution.⁸⁶

Thus, this picture is misleading: New York as the happy home of many different marriage norm communities, each doing its own marriage thing, each equally valid before the law, each equally secure in its own space. There is reason to believe that the genuinely realistic picture as a matter of legal and social fact is far different: The State mandates by force of state-wide law one and only one marriage institution and one and only one marriage norm, and that is genderless marriage. After all, the advocates of genderless marriage are not taking the

⁸⁶ *Id.* at 111.

position that the law should get out of the marriage business and leave the definition of marriage to private action or private enclaves. Quite the contrary, they are insisting that constitutional doctrine compels the statewide adoption of the genderless marriage institution. Consequently, the genderless marriage norm will be mandated in and reinforced by texts, mandated in and reinforced by schools, and mandated in and reinforced by many other parts of the public square and, furthermore, will be voluntarily published by the media and other institutions. One marriage norm community will be officially sanctioned and protected; all other marriage norm communities will be officially constrained, will be officially disdained.⁸⁷

To say otherwise is to say that the law, as an institution itself, would not be subject to strong institutional mandates —some sounding in logic and consistency, some in more elementary considerations — to be persistent and thoroughgoing in enforcing its newly declared “constitutional” norm. In the same vein, to say

⁸⁷ Gallagher, *supra* note 18, at 67 (“If same-sex marriage is a right, powerful legal pressures will be brought to bear on religions and other organizations that fail to acknowledge this right. The capacity of schools and faith communities to transmit the marriage idea to the next generation will be sharply curtailed. People who believe that children need mothers and fathers will be treated like bigots in the public square.”). Farrow, *supra* note 43, at 101–02 (“The preamble to this draft legislation [the Chrétien government’s proposed genderless marriage bill of 2003] indicates that redefining marriage to make it accessible to same-sex couples will ‘reflect values of tolerance, respect and equality’ consistent with the *Charter*. But of course it follows that those who oppose redefinition do not reflect such values. This charge, publicly made and enshrined in law, can only diminish the respect in which such people are held”); Darrel Reid & Janet Epp Buckingham, *Whose Rights? Whose Freedoms?*, in *DIVORCING MARRIAGE*, *supra* note 29, at 84 (“The fact is that millions of Canadians who are opposed to same-sex marriage have now been told by the courts that their view on marriage is contrary to the *Charter* and, by extension, un-Canadian.”).

otherwise is to say that the law is impotent to reinforce, to alter, or to dismantle social institutions, and no rational, informed person says that.

III.

THE OTHER EFFORTS TO HARMONIZE GENDERLESS MARRIAGE WITH SOCIAL INSTITUTIONAL REALITIES ALSO FAIL.

A. The “Evolving Marriage Institution” Argument Cannot Sustain the Redefinition of Marriage.

The “evolving marriage institution” argument⁸⁸ is an attempt to counter the social institutional argument and thereby keep the door open to judicially mandated genderless marriage. This counter is premised most fundamentally on the uncontroversial understanding that certain aspects of marriage in our society and in our society’s predecessors have changed. This leads to the assertion that marriage is therefore an “evolving” social institution.⁸⁹

The “evolving” argument generally acknowledges that “marriage laws [have] both reflected and reinforced changes in attitudes towards and behavior in

⁸⁸ This argument’s most recent and perhaps most articulate iteration is Nicholas Bala, “The Debates About Same-sex Marriage in Canada and the United States: Controversy over the Evolution of a Fundamental Social Institution,” (9 September 2005) paper presented at the Federal Marriage Protection Amendment Symposium, Brigham Young University, Provo, Utah (available on-line at http://www.law2.byu.edu/marriage_family/) (soon to be published in the *BYU J. PUB. L.*).

⁸⁹ In Professor Bala’s words:

[M]arriage has not been a static social or legal institution. Rather marriage has changed over the course of history in response to changing religious beliefs, social values and behaviors, technology and even demographics. Similarly there is great variation today in marital behaviors, attitudes and laws about marriage in different countries.

Id at 1.

marriage.”⁹⁰ This, of course, is simply an acknowledgement of the uncontroversial social institutional reality that society uses the law’s authoritative voice to reinforce, to alter, or to dismantle the shared public meanings that constitute a social institution.

The next step is to point to legal “reforms” already in place and deemed to prepare the way for genderless marriage. These include legal changes moving away from gender-based rights and roles towards legal equality of spouses⁹¹; away from “the procreation of children ... as a central purpose of marriage, as ... reflected in the common concept of consummation”⁹²; away from no legal protection (even penalties) for unwed, co-habiting couples and their offspring towards legal provision to them of a variety of rights and protections⁹³; and away from the recognition of natural parenthood (that is, parenthood arising from biological ties) towards the recognition of legal parenthood (that is, parenthood as solely a status conferred by law, which may or may not consider biological ties).⁹⁴ Regarding the elimination of gender rights and roles in marriage, for example, it is asserted: “It is more difficult to argue that marriage requires two spouses of

⁹⁰ *Id.*

⁹¹ “Spouses are viewed as legally equal. Gender roles in marriage are no longer *legally* prescribed.” Bala, *supra* at 88, at 6 (emphasis in original).

⁹² *Id.* at 3, 6-7.

⁹³ *Id.* at 3, 8-12.

⁹⁴ *Id.* at 12-14. Bala does not note this but C-38, the Canadian law mandating genderless marriage, contains a provision, albeit amending the Income Tax Act, expressly replacing natural parenthood with legal parenthood.

opposite gender, since there are no longer legally specified gender roles, and socially there is growing ambiguity about the roles of ‘husband’ and ‘wife.’”⁹⁵ The emergence of both marriage-like legal arrangements governing unwed, co-habiting couples and the recognition of legal parenthood, is also deemed to have laid the groundwork for a more flexible approach for the recognition of same-sex relationships.

The “evolving” argument can be fairly abridged to this: The social and legal trends relative to the marriage institution are clear; the constitutive meanings of the institution are changing in a way that must inevitably lead to the law’s replacement of the core man/woman meaning with the “any two persons” meaning.

Any helpful evaluation of the “evolving” argument requires the application of two important distinctions. The first is between institutional change resulting from forces other than the law, on one hand, and, on the other hand, law-mandated institutional change. In other words, the law can either require or merely reflect institutional change, and those are different phenomenon. With some subjects, those two phenomenon may play on each other so subtly and imperceptibly that they appear as one. But that is certainly not the North American marriage experience. But for *EGALE* and *Halpern*, there would be no genderless marriage in Canada today. In the presence of authoritative court decisions holding that

⁹⁵ *Id.* at 7.

man/woman marriage is compatible with and can certainly continue to be nurtured under the Canadian Charter of Rights and Freedoms, there would be no genderless marriage in Canada for a long time, if ever. But for *Goodridge*, there would be no genderless marriage anywhere in the United States today, and most probably that would continue to be the case for a long time. To state the obvious in slightly different words, it was *EGALE*, *Halpern*, and *Goodridge* that switched the meaning of marriage at its core, not society.⁹⁶ As noted earlier, while it is true that in our society the shared constitutive meanings of the marriage institution do not include a large number of less central practices, those shared constitutive meanings most certainly include a bride and a groom, a wife and a husband.

For reasons that should become clear, the second important distinction is related practically to the first. That is the distinction between judge-made law and legislation. In the world, we see judicial redefinition of marriage with no legislative role (Massachusetts), legislative redefinition of marriage pursuant or in response to a judicial mandate (Canada), and legislative redefinition without judicial involvement (Netherlands, Belgium, Spain).

The “evolving” argument fails to work through the implications of these two distinctions. Consequently, the “evolving” argument is ill-situated in the judicial arena, especially if this is what the “evolving” argument intends to say to a judge:

⁹⁶ Stewart, *Genderless Marriage*, *supra* note 8, at 63-64.

“The direction and pace of the social/legal changes relative to the marriage institution make inevitable the big change to genderless marriage. Therefore, Judge, you can greatly discount the societal interests in man/woman marriage’s social goods because of those goods’ very short shelf-life.” The validity of this argument, of course, depends on the validity of the claim of inevitability, a claim founded on a confidently made reading of where social currents in history will certainly carry the marriage institution. Although the message of inevitability is a brilliant political move,⁹⁷ as an intellectual proposition it is dubious. No one, especially a judge, should accord to the inevitability message relative to genderless marriage any more respect and acknowledgements of validity than is due to another message of inevitability clearly to be perceived in powerful social currents revealed by history, the message preached by Karl Marx. If nothing else, the course of Marxism should teach all to be amply humble when setting forth, as an intellectual proposition, the inevitability of something as radical as the deinstitutionalization of man/woman marriage and its replacement by the institution of genderless marriage.⁹⁸

⁹⁷ This message of inevitability is a brilliant political move because it strengthens and encourages the troops on one side to see the long conflict through to its inevitable glorious outcome. At the same time, the message is influential in making those whose hearts and minds have them on the other side of the conflict more passive, more defeatist, less willing to make the kinds of sacrifices that could well make a material difference in the conflict.

⁹⁸ Maggie Gallagher strongly counters the “inevitability” argument at Gallagher, *supra* note 8, at 68-69, and, with Joshua K. Baker, at “Not Inevitable,” National Review Online (1 December

A particularly toxic aspect of the inevitability argument in the judicial arena is its proclivity to become a self-fulfilling prophecy. Each judge who acts on the basis of the argument supplies further “evidence” of the inevitability of genderless marriage. It is possible that a bare majority of the judges (21 individuals) on the highest courts of a handful of key states -- Massachusetts (a 4-3 decision), Washington, New Jersey, California, and New York -- will play a material role in replacing man/woman marriage with genderless marriage. To then label that outcome the result of irresistible social forces is to be devious; to label it the work of 21 individuals who could have (and almost certainly should have⁹⁹) chosen to do otherwise is to be very much more accurate.

The “evolving” argument may also be saying to a judge, “The direction and pace of the social/legal changes relative to the marriage institution means that the change to genderless marriage must be seen as a relatively small and evolutionary step, which means in turn that the societal impacts will be small and readily accommodated, without any serious societal harm.” But this argument ignores social institutional realities. One is that, although constitutive meanings interact, some of the social goods provided by an institution flow quite particularly from

2004), available on-line at

http://www.nationalreview.com/comment/baker_gallagher200412010836.asp.

⁹⁹ See Stewart, *Judicial Redefinition*, *supra* note 8, at 130-32 (a summary of how the *EGALE*, *Halpern*, and *Goodridge* courts “did an unacceptable job with their performance of the very tasks that lie at the heart of judicial responsibility in virtually every case.”).

one core meaning, while some of its other goods flow from another.¹⁰⁰ The “evolving” argument does not explain how past changes of some constitutive meanings of marriage (whether for good or for ill) make more or less wise the proposed elimination of the man/woman meaning. Unless the argument is that change for change’s sake is good, it seems fair to require that any argument based on the “evolving” nature of marriage demonstrate the wisdom of the next proposed change. After all, the valuable social goods identified at this brief’s outset result in large measure or entirely from the man/woman meaning. To lose that meaning is to lose those goods, just as the loss, through the no-fault divorce “reform” of the 1970s, of the core meaning of permanence meant the loss of that meaning’s goods, a loss now viewed, in the midst of considerable resulting suffering, as grievous.¹⁰¹ Any comfort derived from this assurance thus seems illusory: “Genderless marriage must be seen as a relatively small and evolutionary step, which means in turn that the societal impacts will be small and readily accommodated, without any serious societal harm.”

Two additional aspects of the “evolving” argument merit analysis. That argument often invokes the classic statement of the “no-downside” argument:

¹⁰⁰ See section I.D.1. *supra*.

¹⁰¹ *E.g.*, Elizabeth Marquardt, *BETWEEN TWO WORLDS: THE INNER LIVES OF CHILDREN OF DIVORCE* (2005); Judith S. Wallerstein, Julia M. Lewis, Sandra Blakeslee, *THE UNEXPECTED LEGACY OF DIVORCE: A TWENTY-FIVE YEAR LANDMARK STUDY* (2000); Linda J. Waite & Maggie Gallagher, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* (2000); Barbara Dafoe Whitehead, *THE DIVORCE CULTURE: RETHINKING OUR COMMITMENTS TO MARRIAGE AND FAMILY* (1996).

“[R]ecognizing same-sex unions will not be likely to deter any heterosexual person from marrying or having children.”¹⁰² This language suggests, and no doubt intends to, that all the goods of man/woman marriage will still be available post-redefinition because men and women will continue to marry each other at an undiminished rate. But this suggestion misses the point. The point is what the straight men and women will be marrying “into.” They will be marrying into a much different social institution than their parents married into simply because, undeniably, a constitutive core meaning will be radically different. And it is not state-sanctioned opposite-sex coupling that produces the old institution’s social goods; it is the old institution’s meanings that do that. So with the loss of those meanings comes the loss of the social goods and thus the collapse of the “no-downside” argument.

This realization of what opposite-sex couples will be marrying into illuminates a further inadequacy of the “no-downside” argument. Social institutions are renewed and strengthened by use consistent with the shared public meanings constituting them. “[E]ach use of the institution is in a sense a renewal of that institution. Cars and shirts wear out as we use them but constant use renews and strengthens institutions such as marriage. . . .”¹⁰³ After redefinition, every use of the new institution by a man/woman couple will validate and reinforce it; after

¹⁰² *E.g.*, Bala, *supra* note 88, at 19.

¹⁰³ SEARLE, *supra* note 9, at 57.

all, that couple will be invoking on their union the sanctioning power of a polity that rigorously views their union as one between “two persons.” Because those “two persons” happen to be a man and a woman, the consequences may initially be misunderstood by many or even most, but the strengthening effect on the new institution is largely unavoidable.¹⁰⁴ Thus the argument — “just as many straight men and women will marry” — actually cuts against, not in favor of, genderless marriage once the social institutional realities are given their due.

**B. The “Overt Social Engineering” Argument
Is Likewise Fatally Defective.**

The “overt social engineering” argument accepts, at least implicitly, virtually all the building blocks of the social institutional argument. On that basis, it then asserts that, exactly because of the powerful formative and transformative nature of social institutions, especially marriage, this core man/woman meaning must be changed, for to do so will result in a more just and equal society.

The “overt social engineering” argument, however, provides no answer to two questions raised by what it does provide. The first question is this: Why should we conclude that a rigorous valuation of the promised gains and the certain

¹⁰⁴ We say “largely” because a man and a woman desiring to avoid complicity with the new institutional regime could fulfill that desire — but only by openly participating in a decidedly exclusive marriage ceremony sanctioned only by a decidedly exclusive norm community (in other words, by openly foregoing civilly sanctioned genderless marriage by means of a consciously political act). The price for doing so includes forfeiting the benefits of civil marriage and being officially labeled as bigoted (or at least “discriminatory”) — that is, as hostile to the constitutional ideal of equality.

losses will show a net gain to society generally? The second: To what extent, if any, is that valuation, that cost-benefit analysis, rightly a job for judges?

That first question brings us back to Barbara and Klara. The 1918 Soviet constitution replaced the old private property institution with a new property institution. That exchange undoubtedly made for, in certain respects, a more equal society. But with its eye on the whole of human experience, history has judged that exchange a very bad one indeed. So the first question is crucial, and to date no one has made a careful, transparent valuation of man/woman marriage's unique social goods sure to be lost and genderless marriage's necessarily speculative benefits. Those who have spoken somewhat openly about using the institution of marriage for non-marriage ends speak almost exclusively of genderless marriage's benefits to the gay and lesbian community and thus say virtually nothing about the consequences to society generally, apparently out of a lack of interest in that subject or on the basis of an unstated assumption that what is good for the gay and lesbian community is good for society generally. Yet absent a credible society-wide valuation of the losses and gains to result from the proposed institutional exchange, the case for that exchange must remain materially deficient.

The second question – should judges be in the business either of creating their own or evaluating someone else's valuation of the losses and gains to result from the proposed institutional exchange – quite clearly ought to be answered

“no.” Even the judges mandating genderless marriage in *Goodridge*, *Halpern*, and *EGALE* did not claim a competence to engage in such a task; they achieved their desired end by denying the possibility of any losses, any downside, from their replacement of the old institution with the new, a denial clearly false. Once social institutional realities are given their due – and consequently once the judicial task can no longer be characterized with any credibility as discarding a legal definition of marriage with no rational basis¹⁰⁵ – the fact-finding and constitutional competence of judges to engage the real task must be seriously doubted.¹⁰⁶

The “overt social engineering” argument has other defects. It is plagued by a very considerable circularity in its notion of using the marriage institution to make ours a more just and equal society. The notion proceeds from the assumed or implied premise that of course man/woman marriage violates equality norms and that genderless marriage will make ours a more equal society. From this beginning, it is not difficult to move to the conclusion that man/woman marriage violates equality norms and that genderless marriage will make ours a more equal society. But it should go without saying that what the important discourse is all about is the meaning of equality in the context of marriage, particularly its social

¹⁰⁵ See *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 961 (Mass. 2003).

¹⁰⁶ *Cf. United States v. Lopez*, 514 U.S. 549, 605 (1995) (Souter, J., dissenting) (“The practice of deferring to rationally based legislative judgments ... reflects our respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes from Congress's political accountability in dealing with matters open to a wide range of possible choices.”)

institutional realities. The debate to date strongly suggests that the equality argument for genderless marriage can succeed only if one ignores those realities and, even more, only if one replaces the full institutional understanding of man/woman marriage with the impoverished “close personal relationship model.” That model is of a “pure relationship,” that is, a relationship stripped of any goal or end beyond the intrinsic, emotional, psychological, or sexual satisfaction that the relationship brings to the two adult individuals involved.¹⁰⁷ Judicial rejection of that model because it inadequately describes what marriage “is” results in judicial rejection of the equality argument for genderless marriage.¹⁰⁸ Judicial acceptance of that model’s accuracy and adequacy is the foundation for judicial acceptance of that equality argument,¹⁰⁹ but to date judicial acceptance of the close personal relationship model has been an unexamined and unproven starting point of analysis, not the result of thoughtful examination. This obvious feature of cases such as *Halpern* and *Goodridge* has led Douglas Farrow to label, and fairly so, their approach as “obviously circular, and viciously so.”¹¹⁰

¹⁰⁷ Stewart, *Judicial Redefinition*, *supra* note 8, at 95-96; Cere, *supra* note 29, at 12.

¹⁰⁸ E.g., *Lewis v. Harris*, 378 N.J. Super. 168, 875 A.2d 259, 275-76 (N.J. Super. A.D. 2005) (Parrillo, J., concurring).

¹⁰⁹ Stewart, *Judicial Redefinition*, *supra* note 8, at 97 (“Language in [*EGALE*, *Halpern*, and *Goodridge*] suggests ... that the courts deciding those case have consciously accepted the arguments of the close personal relationship theorists.”; collecting language and citations).

¹¹⁰ Douglas Farrow, *Rights and Recognition*, in *DIVORCING MARRIAGE*, *supra* note 29, at 98–99:

To proceed at all, we need to notice that the main rights argument [equality] amounts to a nice piece of subterfuge. Its conclusion is that marriage must be

Further, the equality argument for genderless marriage has not yet come to grips with other social institutional realities, particularly the understandings that same-sex couples simply cannot enter the privileged marriage institution we have always known and that the sought for “marriage equality” can be achieved only by creating a radically new institution into which already married men and women are pulled and into which all couples seeking marriage in the future will enter. These understandings necessarily lead to reflection on some basic ideals of equality jurisprudence: to treat similarly situated people similarly and to not treat

redefined. This distracts us from the fact that marriage has *already* been redefined in the argument’s very first move. That is, a new category - the “close personal adult relationship”- has been invented to provide a framework for our understanding of marriage. Once this framework is accepted, it follows that homosexual unions can be marriage-like and, in that case, should qualify as marriage. If marriage is nothing but a certain form of publicly acknowledged sexual intimacy and commitment between two persons, one to which gender and biology and procreation are not directly relevant, why should the two persons not be of the same sex? Would we not be discriminating against such persons by denying to their relationship the name and benefits of marriage? And what requires such a denial? Merely the common-law definition of marriage as the union of a man and a woman. So let us change the definition and write into law that marriage is a close personal relationship between adults, a union of two persons. That will erase the discrimination and resolve the equality-rights violation. Marriage will be open to homosexuals.

This argument is obviously circular, and viciously so. Certainly there can be nothing wrong with saying that, if marriage is simply a union of two persons, two persons of the same sex must not be denied a marriage licence. Nor is it necessarily wrong (though it may be foolish) to write into law that marriage is, or rather will be, simply a union of two persons. It is wrong, however, to claim that we *must* write this new definition into law in order to avoid unconstitutional discrimination and equality-rights violations, when in fact no such discrimination or violation is possible until after the new definition is in place.

dissimilarly situated people as the same.¹¹¹ The simple fact is that, relative to the valued marriage institution received to date, man/woman couples and same-sex couples are not similarly situated. And this is not a matter of “legal definitional preclusion.” Rather, this is a matter of the very nature and purposes of this social institution. That nature and those purposes are clearly not the result of any anti-gay/lesbian animus¹¹² but have their own practical logic and effectiveness. In this light, those making the equality argument for genderless marriage simply have not made their case at the most fundamental level of equality jurisprudence. In this light, the equality argument for genderless marriage shows itself as nothing more than a demand that the law eliminate a vital social institution – an ancient institution of betterment and one fashioned from the beginning with no relevant

¹¹¹ *E.g.*, *Bower Assocs. v. Town of Pleasant Valley*, 2 N.Y.3d 617, 630 (N.Y. 2004) (“The essence of a violation of the constitutional guarantee of equal protection is, of course, that all persons similarly situated must be treated alike”); *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985) (the Equal Protection Clause is “essentially a direction that all persons similarly situated should be treated alike.”); Aristotle, *ETHICA NICHOMACEA* 1113a-13b (1925)(trans. W. Ross, Book VC, 1925) (“[T]hings that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unalikehood.”).

¹¹² *Baker v. State*, 744 A.2d 864, 887 (Vt. 1999) (“Plaintiffs have not demonstrated that the exclusion of same-sex couples from the definition of marriage was intended to discriminate against women or lesbians and gay men, as racial segregation was designed to maintain the pernicious doctrine of white supremacy.”); *compare* *Hernandez v. Robles*, 26 A.D.3d 98, 805 N.Y.S.2d 354, 370 (App. Div.2005) (Catterson, J., concurring) (“Plaintiffs have not alleged, much less proved, that the legislators who enacted the New York statutes related to marriage were motivated by” an “anti-homosexual animus.”), *with id.* at 386 (Saxe, J.P., dissenting) (“The discriminatory impetus for the distinction made by the [marriage] statutes ... was implicit.”); see Stewart, *Judicial Redefinition*, *supra* note 8, at 112-14 (the *Goodridge* plurality opinion’s suggestion of “animus” rests solely on that opinion’s now-discredited argument that no rational basis sustains man/woman marriage.)

animus, an institution that provides social goods crucially important to society – so that those dissimilarly situated relative to that institution will be leveled.

V.

CONCLUSION

This brief has verified the three sentences with which it opened: Society has compelling interests in preserving the union of a man and a woman as a core meaning of the vital social institution of marriage. For the law to replace that meaning with a radically different meaning, the union of any two persons, assures in time the loss of a number of invaluable social goods. Because of the very nature of social institutions, including marriage, it could not be otherwise.

This brief has also fulfilled its promise to engage the marriage issue on the basis of public reason. This fulfilled promise must not be overlooked exactly because of an unfortunate phenomenon in the contemporary marriage debate, one described by Margaret Somerville in these words:

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. 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. ... These [tactics] ... do not serve the best interests of either individuals or society in this debate.¹¹³

¹¹³ Margaret Somerville, *supra* note 30, at 70-71.

Finally, to not blink at the social institutional realities is to realize, with understandable regret, that there can be no “win-win” outcome to the present marriage contest. A society can sustain and nurture man/woman marriage but only by declining genderless marriage. Or a society can sustain and nurture genderless marriage but only by causing, through force of law, the demise of the old institution. Each society must choose. And a choice as portentous as this choice may never come before us again.¹¹⁴

Dated: 12 April 2006

By: _____
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¹¹⁴ Andrew Sullivan, *Recognition of Same-Sex Marriage*, 16 QUINNIPIAC L. REV. 13, 18 (1996): “The work we do today, and the issues we raise in this debate are among the most profound that this country has ever discussed and among the most important the country now faces.”