

MARRIAGE AND THE UTOPIAN TEMPTATION

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But beauty like the fair Hesperian Tree
Laden with blooming gold, had need the guard
Of dragon watch with unenchanted [sic] eye,
To save her blossoms, and defend her fruit
From the rash hand of bold Incontinence.¹

I. INTRODUCTION

The July 2006 decision of the New York Court of Appeals affirming the constitutionality of that state's marriage law, occasioned some bitter amusement among those who deplored its result. These advocates of redefining marriage focused their scorn and mockery on the portion of the opinion addressed to the state's interest in marriage. In the opinion, the court said:

[T]he Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships. Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not. Despite the advances of science, it remains true that the vast majority of children are born as a result of a sexual relationship between a man and a woman, and the Legislature could find that this will continue to be true. The Legislature could also find that such relationships are all too often casual or temporary. It could find that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born. It thus could choose to offer an inducement—in the form of marriage and its attendant benefits—to opposite-sex couples who make a solemn, long-term commitment to each other.²

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1. John Milton, *Comus*, in ENGLISH MINOR POEMS 33, 42 (1952).
2. *Hernandez v. Robles*, 855 N.E.2d 1, 6-7 (N.Y. 2006).

Writing in the *New York Times*, a law professor called this argument “heterophobic” and “cockeyed” before charging more seriously that it was “a new guise for an old prejudice.”³

This incredulity over the court’s holding as to the state interest in marriage highlights a more fundamental divergence in how marriage is understood by advocates of redefining marriage and defenders of our inherited understanding, respectively.⁴ This understanding, in turn, creates different perceptions of what interests are served by marriage and the state’s role in advancing those interests. Marriage laws cannot avoid advancing some types of interests and ignoring or suppressing others. The question then as we weigh the alternative understandings is, what interests will the various choices promote or suppress?

II. THE INHERITED UNDERSTANDING OF MARRIAGE

The passage from the New York Court of Appeals reproduced above can be situated in a long tradition that explains much of our law on the family. In fact, when a California appellate court upheld that state’s marriage law against a constitutional challenge, the court accepted the state’s proffered interest in preserving the traditional understanding of marriage without spending significant time explicating that tradition.⁵ Perhaps this is because the elements of our inherited understanding of marriage are so familiar to us and so foundational to the way we order our lives that the court did not see a need for elaboration.

The inherited understanding of marriage accepts it as a pre-political institution involving the union of a man and a woman that has existed in virtually every human society. Professor Robert Nagel notes that “marriage is the primary institution that has been used all over the world to tame the turbulent power of human sexuality, to raise psychologically healthy children, to instill moral values, and to provide for some degree of mutual protection and support.”⁶ Anthropologist Peter Wood notes this near-unanimity, but also notes

3. Kenji Yoshino, *Too Good For Marriage*, N.Y. TIMES, July 14, 2006, at A19.

4. See generally William C. Duncan, *Portrait of an Institution: How Recent Cases Distort Our Understanding of Marriage*, 50 HOW. L. J. 95 (2006).

5. See *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 718-24 (Ct. App. 2006) (see discussion *infra* Part IV.A). This holding is consistent with our constitutional guarantees: “If, in enforcing our Constitution, judges are to establish our values by interpreting our political history, then judges should interpret our whole history, not only what has been desired and said but also what has been accepted and left unspoken.” Robert F. Nagel, *Political Pressure and Judging in Constitutional Cases*, 61 U. COLO. L. REV. 685, 701 (1990).

6. Robert F. Nagel, *Diversity and the Practice of Interest Assessment*, 53 DUKE L. J. 1515, 1533 (2004).

how tiny societies with arrangements that seemingly diverge from it help reinforce the normative nature of male-female marriage.⁷ In these “non-conforming” societies, social order is maintained in ways deeply inimical to values of freedom and human dignity partially because they have rejected the male-female marriage norm.⁸

The longstanding marriage tradition does not arise from a state attempt at social engineering. Professor F.C. DeCoste notes that the state cannot “claim ownership” over marriage:

[T]he facts are these: (a) prior to the thirteenth century, when the Church finally managed to take control of it, marriage was an entirely social practice; (b) marriage only became a sacrament in 1439; and c) the Catholic Church only began requiring the attendance of a priest for a valid marriage in 1563, after the Reformation. The state came to marriage even later than did the Church. Indeed, it was not until 1753, with the passage of Lord Hardwicke’s *Marriage Act*, that the British state became a significant player in the joining together of men and women as husbands and wives.⁹

Professor Richard Garnett’s pithy comment is excellent on this point: “The law no more ‘creates’ the family than the Rule Against Perpetuities ‘creates’ dirt.”¹⁰

The laws related to marriage, like other “[l]aws arise out of a social order; they are the general rules which make possible the tolerable functioning of an order. Nevertheless an order is bigger than its laws, and many aspects of any social order are determined by beliefs and customs, rather than being governed by positive laws.”¹¹ Indeed, “the formal law stops at the family threshold not merely because it *should not* regulate intimate relations but because it *cannot* regulate them without impairing their very existence.”¹²

The social understandings and practices that have contributed to our current marriage laws, particularly the continued acceptance of marriage as the union of a man and a woman are, in turn, rooted in

7. Peter Wood, *Husbanding Sex: An Anthropological View of Why Conjugal Marriage Prevails in Human Societies and Homoeroticism Doesn’t* 15-22 (Sept. 15, 2006) (unpublished paper presented at Brigham Young University), *available at* http://www.law2.byu.edu/Organizations/Marriage_Family/Sept/Drafts/Wood.pdf.

8. *Id.* at 21.

9. F.C. DeCoste, *Courting Leviathan: Limited Government and Social Freedom in Reference re Same-Sex Marriage*, 42 ALBERTA L. REV. 1099, 1112-13 (2005) (citation omitted) [hereinafter DeCoste, *Courting Leviathan*].

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

11. RUSSELL KIRK, *THE ROOTS OF AMERICAN ORDER* 5 (1974).

12. Bruce C. Hafen, *Law, Custom, and Mediating Structures: The Family as a Community of Memory*, in *LAW AND THE ORDERING OF OUR LIFE TOGETHER* 82, 106-107 (Richard John Neuhaus ed. 1989).

realistic understandings of human nature and the consequences of sex difference. First, as a concurring opinion in the Washington marriage case notes: “The unique and binary biological nature of marriage and its exclusive link with procreation and responsible child rearing has defined the institution at common law and in statutory codes and express constitutional provisions of many states.”¹³ This same opinion further notes: “The binary character of marriage exists first because there are two sexes.”¹⁴

This reality is linked to the reality that only opposite-sex sexual relations can result in procreation without intention and without the participation of a third party. In addition to the New York decision with which this article began, a number of recent court decisions have recognized the state’s interest in channeling the procreative potential of opposite-sex relationships into marriage.¹⁵ These decisions understand that a premier value of marriage is its ability to protect the parties most vulnerable to the consequences of opposite-sex sexual relations, the woman who may become pregnant and the child that will result.¹⁶

The law’s continued recognition of marriage as the union of a man and a woman serves the law’s channeling function¹⁷ by encouraging potential procreative behavior in an institution that provides this protection and that is, beyond cavil, beneficial to children and spouses.¹⁸ The law reinforces the “social status” of marriage. Professor Spencer MacCallum has noted that status “is more than a mere standing, it is a *standing ready to respond*. It is

13. *Andersen v. King County*, 138 P.3d 963, 991 (Wash. 2006) (J. Johnson, J., concurring).

14. *Id.* at 1002.

15. *See* *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006); *Morrison v. Sadler*, 821 N.E.2d 15, 23 (Ind. Ct. App. 2005); *Standhardt v. Superior Court*, 77 P.3d 451, 463-64 (Ariz. Ct. App. 2003); *see also Andersen*, 138 P.3d at 1002 (J. Johnson, J., concurring) (“A society mindful of the biologically unique nature of the marital relationship and its special capacity for procreation has ample justification for safeguarding this institution to promote procreation and a stable environment for raising children.”).

16. William C. Duncan, *The State Interests in Marriage*, 2 AVE MARIA L. REV. 153, 168-169 (2004).

17. *See* Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 496 (1992); *see also* JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY 63-64 (R.J. White ed., Cambridge Univ. Press 1967) (1874) (“The life of the great mass of men, to a great extent the life of all men, is like a watercourse guided this way or that by a system of dams, sluices, weirs, and embankments.”).

18. *See* INST. FOR AM. VALUES & INST. FOR MARRIAGE AND PUB. POLICY, MARRIAGE AND THE LAW: A STATEMENT OF PRINCIPLES (2006); WITHERSPOON INST., MARRIAGE AND THE PUB. GOOD: TEN PRINCIPLES (2006) (citing surveys of relevant evidence on this point).

literally *responsibility*, or the social capacity to respond.”¹⁹ In this sense, status is not a mark of favor, but an assignment of responsibility. Of course, “[m]arriage is chosen, but its obligations are largely indeterminate, being generated by the institution itself, and discovered by the participants as they become involved in it.”²⁰ Where there is no legal status (as with non-marital cohabitation) there is a largely diminished or totally absent obligation.

Obligation, of course, while similar is not the same as commitment, which can be present in many relationships that have no legal implications. Some courts have seized on the existent of commitment in same-sex relationships as evidence that they are functionally equivalent to any other adult relationship.²¹ This reasoning elides the commitment/obligation distinction and the fact that the obligation associated with marriage is primarily related to marriage’s protective function, not merely an extension of the passionate commitment that induced a couple to seek marriage initially. Historically, the family has “been built around” not “love and unremitting devotion” but “duty and obligation.”²² To reject this reality by “encouraging . . . a false sentimentality in the idea of marriage, and the slurring over of its importance as a social institution and as the basis of the family, is one of the sure ways of degrading that natural relation into something we do not like to consider.”²³

As noted in the introduction, opponents of our inherited understanding of marriage have tried to mock the New York decision by characterizing the court’s argument as follows: opposite-sex couples are so irresponsible that the law must step in and encourage them to marry before having children, while same-sex couples can be trusted to make adequate provision for the children they may choose to acquire. Absent the sarcasm, this is very nearly right. The procreative capacity of male-female relations is a central fact of human existence. This capacity cannot be ignored and must be channeled. The law provides one resource for this channeling function to be fulfilled. Thus, when proponents of same-sex marriage joke about some celebrity who contracts an impulsive Nevada marriage, they miss much of the point of our marriage law.

19. Spencer MacCallum, *The Social Nature of Ownership*, MODERN AGE, Winter 1964-65, at 49, 56.

20. ROGER SCRUTON, *THE MEANING OF CONSERVATISM* 132 (3d ed. 2002).

21. See *Lewis v. Harris*, 908 A.2d 196, 217 (N.J. 2006) (“Thus, under our current laws, committed same-sex couples and their children are not afforded the benefits and protections available to similar heterosexual households.”).

22. ROBERT NISBET, *TWILIGHT OF AUTHORITY* 256 (1975).

23. PAUL ELMER MORE, *Property and Law*, in *THE ESSENTIAL PAUL ELMER MORE* 293, 304 (Byron C. Lambert ed. 1972).

Subsequent to the marriage, any children that result from that marriage relationship have a legal tie to their mother and father, with all the benefits that come from that tie and its related obligations. Even a well thought out decision by a same-sex couple to commit to share one another's lives does not raise the same concerns.

The way of thinking about the relationship between law and reality reflected in our law of marriage is wise. "Just so soon as, in any large measure, [law] fails to recognize the actuality of human nature, or pronounces in conformity with an ideal of human nature, it becomes inoperative or mischievous."²⁴

III. THE UTOPIAN PROJECT FOR MARRIAGE

Not everyone recognizes traditional social arrangements, built on concessions to human nature, as undisputedly good. As Professor F.C. DeCoste has pointed out:

Social engineers do not affirm ordinary life. They deny it. For them, ordinary life is a problem in need of a solution, and they are therefore moved to re-design extant social practices and to erect new ones. In all of this, the lived lives of "human beings serve as raw material."²⁵

Along this line, utopian schemes have typically included plans for modifying family relationships.²⁶ This is also an element in the major dystopian novels.²⁷ For instance, in *1984*, the narrator says that one aim of the totalitarian state depicted in the novel was "to prevent men and women from forming loyalties which it might not be able to control."²⁸ As Professor George Carey has written: "We know, for instance, that the family has long been a stumbling block to the efforts of those who seek to level; the fully progressive society, this is to say, is not possible so long as the family unit exists."²⁹ Examining these various schemes, real and fictional suggests some commonalities. Thus, the utopian impulse is typically state-driven,

24. *Id.* at 301.

25. F.C. DeCoste, *The Halpern Transformation: Same-Sex Marriage, Civil Society, and the Limits of Liberal Law*, 41 ALBERTA L. REV. 619, 636 (2003).

26. See BRYCE J. CHRISTENSEN, UTOPIA AGAINST THE FAMILY (1990); PAUL JOHNSON, MODERN TIMES 548, 581, 656 (1983) (describing attempts to swallow up family in the state in Mao's China, Nazi Germany and Pol Pot's Cambodia); CLAUDIA KOONZ, MOTHERS IN THE FATHERLAND: WOMEN, THE FAMILY, AND NAZI POLITICS 388-93 (1987) (describing the co-opting of family by Nazi ideology).

27. See generally ANTHONY BURGESS, THE WANTING SEED (1962); YEVGENY ZAMYATIN, WE (Avon Books 1972) (1921); ALDOUS HUXLEY, BRAVE NEW WORLD (Harper Perennial 1946) (1932).

28. GEORGE ORWELL, NINETEEN EIGHTY-FOUR 45 (Harcourt, Brace 1982) (1949).

29. George W. Carey, *The Conservative Mission and Progressive Ideology*, MODERN AGE, Winter 2000, at 14, 20.

motivated by a rigid ideology and heedless of limitations (substantive or structural).

A. *State-Driven*

The redefinition project, at the outset, requires a major repudiation of a core element of our inherited understanding of marriage—the recognition that marriage is a pre-political, social institution. Instead, the redefining project aims “to de-naturalize the family by rendering familial relationships, in their entirety, expressions of law. But relationships of that sort—bled as they are of the stuff of social tradition and experience—are no longer family relationships at all. They are rather policy relationships, defined and imposed by the state.”³⁰ In this, the courts have taken their cue from the French revolutionaries who “asserted the ‘right’ not to be free from any authority that did *not* emanate from the State”³¹

So for instance, when the Hawaii Supreme Court held that marriage was a form of sex discrimination, it badly asserted that “[m]arriage is a state-conferred legal partnership status.”³² The Massachusetts Supreme Court said: “Simply put, the government creates civil marriage.”³³ Although facially plausible, the assertion is circular. While it is true that without a state there would presumably not be a mechanism for government-issued licensing of marriages, it is hardly the case that there was no understanding of marriage before the Commonwealth of Massachusetts or the State of Hawaii came into being. Indeed, at the time of the Massachusetts’ decision, no specific statute defined marriage in the state. That definition was assumed and reflected in gender-neutral terminology in statutes touching on marriage.³⁴ The same is true in New Jersey.³⁵ The New Jersey court implicitly endorses the idea that marriage (other than the “label”) is nothing more than statutorily-created benefits and

30. DeCoste, *Courting Leviathan*, *supra* note 9, at 1122. “If the law could not discriminate among points along the spectrum of ‘intimate associations,’ our biological and psychological ties would become unceasingly tangled and subjected to judicial supervision, as if the entire population were a series of split families all involved in one continuous hearing on support, custody, and visitation privileges.” Bruce C. Hafen, *Law, Custom, and Mediating Structures: The Family as a Community of Memory*, in *LAW AND THE ORDERING OF OUR LIFE TOGETHER* 82, 111-12 (Richard John Neuhaus ed. 1989).

31. Garnett, *supra* note 10, at 143-44.

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

33. Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 945 (Mass. 2003).

34. *Id.* at 952-53 (noting that the marriage license statute leaves marriage “undefined”).

35. See Lewis v. Harris, 908 A.2d 196, 208 (N.J. 2006) (noting that the definition of marriage “is clear from the use of gender-specific language in the text of various statutes”).

obligations.³⁶ Thus, for these courts to claim the prerogative to decide what a family is requires a significant appropriation of an authority not assumed by their respective states in the past. It is to make the concept of family “a policy relationship.”

B. Ideologically Motivated

Another characteristic of utopian plans is their adherence to a rigid ideology, abstract in nature, which is used to measure all policies and outcomes.³⁷ “By definition, ‘ideology’ means servitude to political dogmas, abstract ideas not founded upon historical experience.”³⁸ The relevant ideology driving the redefinition project is a perfectionist egalitarianism that denies validity to even the most benign and reasonable distinctions between relationships founded on adult choice. One writer has noted:

As a political and cultural matter, [same-sex marriage cases] are contests over something less easy to codify: the official recognition of love. . . . The state is being asked not only to distribute benefits equally but to legitimate gay people’s love and affection for their partners. The gay couples now marrying in Massachusetts want not only the same protections that straight people enjoy but the social status that goes along with the state’s recognition of a romantic relationship.³⁹

This equality of social status becomes the measure for all state marriage laws and no variance can be tolerated.

In the recent New Jersey decision, the court speaks consistently of equality, invoking the “unequal dispensation of rights and benefits to committed same-sex partners,” same-sex couples’ “strong interest in equality of treatment relative to comparable heterosexual couples,” an “unequal legal scheme of benefits and privileges that disadvantages committed same-sex couples,” etc.⁴⁰ In its redefinition decision, the Massachusetts Supreme Judicial Court coupled “dignity” and “equality” and suggested the male-female marriage definition created “second-class citizens.”⁴¹ The advocacy organizations working to promote a redefinition of marriage in New Jersey speak of “full equality” in marriage, use equal signs as their

36. *Id.* at 223-24.

37. For the Nazis, it was racial supremacy; for Communists, equal distribution of wealth. “To be oppressed by an individual tyrant is terrible enough . . . but [H.A.] Taine is right when he contends that the worst of all fates is to be oppressed by a general idea.” MALCOLM MUGGERIDGE, CHRONICLES OF WASTED TIME: CHRONICLE I: THE GREEN STICK 258 (1972).

38. RUSSELL KIRK, THE ROOTS OF AMERICAN ORDER 9 (1974).

39. Adam Haslett, *Love Supreme*, NEW YORKER, May 31, 2004, at 19.

40. *Lewis*, 908 A.2d at 200, 215, 218.

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

iconography, and call for “marriage equality” in their public statements. As the *New Yorker* article cited above makes clear, this is more than mere equality of benefits but goes to “social status.”⁴²

The assumptions of the redefinition movement, then, are shared with “the totalitarian, namely, that politics is a means to an end, and the end is equality—not, it is true, material equality, but moral equality, an equality of ‘rights.’”⁴³ The “tradition” invoked in support of the new meaning of marriage “holds that we are solemnly committed as a people to the realization of a ‘metaphysical equality’ and abstract natural rights, not unlike the equality and generic human rights exalted by the more radical eighteenth century *philosophes*.”⁴⁴ Egalitarianism is an exacting ideology, rather like the shark in the poem: “With those two bright eyes and that one dark thought. He has only one but he thinks it a lot.”⁴⁵ Robert Nisbet has noted:

For once the ideal of equality becomes uppermost it can become insatiable in its demands. It is possible to conceive of human beings conceding that they have enough freedom or justice in a social order; it is not possible to imagine them ever declaring that they have enough equality—once, that is, equality becomes a cornerstone of national policy. In this respect, it resembles some of the religious ideals or passions which offer, just by virtue of the impossibility of ever giving them adequate representation in the actual world, almost unlimited potentialities for continuous onslaught against institutions.⁴⁶

In the context of marriage, the ideology of equality is like a Procrustean bed—some parts of the inherited institution have to be lopped off to make it fit the notions propounded by egalitarianism.

The most obvious feature that must be excluded from current marriage law to ensure the institution treats all relationships equally is any notion of sex difference. Unlike the Washington concurrence noted above, the Massachusetts and New Jersey cases do not

42. Haslett, *supra* note 39, at 19.

43. Roger Scruton, *How to be a Non-Liberal, Anti-Socialist Conservative*, THE INTERCOLLEGIATE REV., Spring 1993, at 17, 20.

44. George W. Carey, *Bradford Meets the Barbarians*, THE INTERCOLLEGIATE REV., Spring 1994, at 49, 50 (reviewing M.E. BRADFORD, *AGAINST THE BARBARIANS AND OTHER REFLECTIONS ON FAMILIAR THEMES* (1992)). The judges, urging a marriage redefinition, “have acted *as if* they were the true sons of the Enlightenment, not guardians of the Constitution.” George W. Carey, *On Restoring Popular Self-Government*, MODERN AGE, Winter 1998, at 44, 50.

45. John Ciardi, *The Shark*, in THE BEAUTY OF THE BEAST: POEMS FROM THE ANIMAL KINGDOM 19 (Jack Prelutsky ed. 1997).

46. ROBERT NISBET, TWILIGHT OF AUTHORITY 202 (1975).

recognize that “there are two sexes.”⁴⁷ To these courts, men and women are fungible.

Coupled with this excision is the need to remove any link between marriage and procreation. Recent decisions from New York, Washington and the Eighth Circuit all recognized the centrality of procreation to our legal treatment of marriage.⁴⁸ These courts came to the obvious conclusion that since same-sex relationships are not inherently procreative, a natural link between marriage and children would have to be abandoned for marriage to be understood as encompassing same-sex couples.⁴⁹ So willing was the New Jersey Supreme Court to jettison a link between children and marriage that they refused to even consider state interests in marriage related to procreation.⁵⁰ The Massachusetts decision focused on the inapposite scenario of same-sex couples acquiring children through the use of assisted reproduction and adoption as if the intentional nature of such arrangements was of no moment.⁵¹

The ideology of total equality between all types of relationships requires that mothers and fathers and parents and non-parents be treated as fungible. This is indeed a utopian notion. As Professor Robert Nagel wrote in reference to an argument that a good society is one in which there are no distinctions based on sex, “[t]he disadvantage [of the argument] is that it elevates the conceptual over the experiential and historical, and thereby achieves goofiness.”⁵² Newly emergent evidence suggests that it also has the potential to be detrimental to children who benefit from a relationship with their biological parents.⁵³ Professor J. David Velleman points out:

[O]ur society has embarked on a vast social experiment in producing children designed to have no human relations with some of their biological relatives. . . . The experiment of creating these children is supported by a new ideology of the family, developed for people who want to have children but lack the biological means to ‘have’ them in the usual sense.⁵⁴

47. *Andersen v. King County*, 138 P.3d 963, 1002 (Wash. 2006) (J. Johnson, J., concurring).

48. *Hernandez v. Robles*, 855 N.E.2d 1, 1 (N.Y. 2006); *Andersen*, 138 P.3d 963; *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006).

49. *Hernandez*, 855 N.E.2d at 7-8; *Andersen*, 138 P.3d at 982-83; *Citizens for Equal Protection*, 455 F.3d at 868.

50. *See Lewis v. Harris*, 908 A.2d 196, 206 n.7 (N.J. 2006).

51. *See Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 964 (Mass. 2003).

52. Robert F. Nagel, *Meeting the Enemy*, 57 U. CHI. L. REV. 633, 647 (1990).

53. *See generally* INST. FOR AM. VALUES, COMM’N ON PARENTHOOD’S FUTURE, THE REVOLUTION IN PARENTHOOD: THE EMERGING GLOBAL CLASH BETWEEN ADULT RIGHTS AND CHILDREN’S NEEDS (2006).

54. J. David Velleman, *Family History*, 34 PHIL. PAPERS 357, 360 (2005).

The redefinition of marriage endorses and accelerates this experiment by lending the authority of the state to the proposition that children's parents are replaceable by any other adults.

Given this endorsement, the language of another recent New Jersey case seems less surprising. In that case, a court provided parental rights to an adult not biologically related to the child based on the intent of the biological mother to "co-parent" with this person.⁵⁵ The court described the biological parent as designating one partner as the birth mother and noted that the child's father was entirely absent from the child's life.⁵⁶ The court also said: "No agreement exists with the donor giving him any *birthrights* to the child."⁵⁷ Although an odd choice of terminology since "birthright" usually refers to a child's inheritance rather than parental privileges bestowed on an adult by another adult's act of will, it is the logical extension of the idea that all family structures must be treated as precisely the same. This is hardly a child-centered model.

It is important to note how far this ideology of egalitarianism is from the tradition reflected in American constitutionalism. America's Founders were not ideologues. Professor Forrest McDonald notes: "as an empirical, practical, essentially nonideological people, they belittled speculative theorizing, preferred experience as a teacher, and treasured history as experience writ large."⁵⁸

[The Founders] could think as systematically as any rationalist, but their systems were based in history, not in logic; accordingly, they believed that men have rights, but only such as have, over the years, been won and incorporated into tradition. As to the Age of Reason, Hamilton could offhandedly dismiss the whole idea: "A great source of error," he wrote, "is the judging of events by abstract calculations, which though geometrically true or false as they relate to the concerns of being governed more by passion and prejudice than by an enlightened sense of their interests."⁵⁹

A constitution that mandates a redefinition of marriage is not the product of the Philadelphia Convention or a similar state gathering. It is the brainchild of a *philosophe* in the mold of Jean-Jacques Rousseau.

55. *In re Parentage of Robinson*, 890 A.2d 1036 (N.J. Super. Ct. Ch. Div. 2005).

56. *Id.* at 1037, 1042.

57. *Id.* at 1038 n.2 (emphasis added).

58. Forrest McDonald, *A Founding Father's Library*, LITERATURE OF LIBERTY, Jan.-Mar. 1978, at 4, 5.

59. FORREST MCDONALD, *E PLURIBUS UNUM* 5 (1965).

C. Heedless of Restraints

A characteristic of rigid ideology is its disdain for ordinary restraints. As the previous section demonstrates, the redefinition movement is unwilling to be constrained by natural realities such as sex difference and the biology of human reproduction. As already noted, these kinds of realities play no role in the decisions of the Massachusetts and New Jersey high courts although they are prominent in other state decisions. The ideology driving these decisions relies upon a belief in an “abstract man” evoked “to construct a battering ram against all normal social relationships.”⁶⁰ The notion that the law ought to work to encourage those who create children to accept the obligations such an act creates may be unflattering to opposite-sex couples. It is infinitely more realistic, however, than the model of marriage advanced by the redefining courts that assumes a nebulous notion of “commitment” will be enough to encourage those whom the law treats as optional to meet their obligations. If this were the case, there would be no need for the vast child support enforcement regime in the United States. Experience does not bear out this utopian optimism.

The redefinition effort is also unwilling to be constrained by structural limitations on government power. “It is the ineffaceable mark of every philosophy of moral absolutism to despise ‘political bargaining’ and to see this as necessarily inimical to the good and just society.”⁶¹ Thus, does a prominent advocate of redefining marriage describe a hypothetical ruling mandating a redefinition of marriage as the court “conclud[ing], in the clear, cool, dispassionate light of a courtroom, that none of [the state’s justifications for the overturned marriage law] stood up”?⁶² This invocation of the “dispassionate” judgment of courts is of a piece with “what Michael Oakeshott calls teleocratic [reasoning]—indifferent to the harm which might be done to our political and social structure by insisting on the absolute priority of realizing certain ideological goals, regardless of impediments to such a realization built into the American regime.”⁶³ Professor Robert Nagel warns that “[t]he effort

60. Jeffrey Hart, *Burke and Radical Freedom*, in *AMERICAN CONSERVATIVE THOUGHT IN THE TWENTIETH CENTURY* 461, 466 (William F. Buckley, Jr. ed. 1970).

61. Robert Nisbet, *The Pursuit of Equality*, 35 *THE PUB. INTEREST* 103, 109-110 (1974).

62. Evan Wolfson, *Winning Marriage Equality: The Road Ahead*, Cal Anderson Memorial Lecture Series at Evergreen State College (Jan. 24, 2006) (transcript available at http://www.freedomtomarry.org/images/pdfs/CalAndersonLecture_OlympiaWA012406.pdf).

63. M.E. Bradford, *Rhetoric and Responsibility*, *MODERN AGE*, Summer 1989, at 238-39. “People who think a country’s institutions can be built ‘on the pure principles of abstract justice, as these principles exist in theories, know little of human nature, or

to establish a virtuous social order by the force of intelligence, exercised by an elite of lawyer-philosophers, represents a dangerously narrow view of the governmental process.”⁶⁴

Yet this is exactly what courts in Massachusetts, Vermont and New Jersey are attempting. The New Jersey and Vermont decisions involved significant overreaching beyond traditional restraints on the judicial branch where the courts mandate a certain type of legislation and require the legislature to act. The decisions even specify the content of the legislation, with the New Jersey decision being particularly specific in this regard. In the context of New Jersey, the court has left to the legislature only the decision of what to call the status the court has created. When the Massachusetts legislature assumed it was competent to weigh in on the matter of the state’s definition of marriage, they were soundly rebuffed by the court.⁶⁵

D. Efficacy

Whatever the motivation for seeking a redefinition of marriage, the project is not likely to achieve its aim. The motivation may be wholly understandable. One novel that portrays a utopian society perceptively notes an important impetus for the utopian project—the desire to remove the hurtful effects of disease, death, degeneration, inequality, etc.⁶⁶ Perhaps the redefinition movement is merely an attempt to create greater tolerance and ensure provision for otherwise vulnerable individuals who cannot currently marry. These kinds of goals, however, do not have a necessary connection to the effort to redefine marriage. Creating tolerance is largely a matter of promoting personal virtue and statutory benefits can be distributed without changing the definition of marriage.

Ironically, the redefinition movement may actually interfere with such laudable aims. A perfectionist ideology necessarily requires demonizing its opponents.⁶⁷ True tolerance is not fostered by extreme egalitarianism’s politics of envy.

The comity of peoples in groups large or small rests not upon this chimerical notion of equality but upon fraternity, a concept

of the restraints that are necessary to society.” Grant Morrison, *James Fenimore Cooper and American Republicanism*, MODERN AGE, Spring 1992, at 214, 218 (quoting JAMES FENIMORE COOPER, THE AMERICAN DEMOCRAT 19 (Liberty Classics 1981) (1838)).

64. Robert F. Nagel, Book Review, 127 U. PA. L. REV. 1174, 1177 (1979) (reviewing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978)).

65. See generally *In re* Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

66. LOIS LOWRY, THE GIVER (1993).

67. See Steven D. Smith, *Conciliating Hatred*, FIRST THINGS, June-July 2004, at 17.

which long antedates it in history because it goes immeasurably deeper in human sentiment. The ancient feeling of brotherhood carries obligations of which equality know nothing. It calls for respect and protection, for brotherhood is status in family, and family is by nature hierarchical. It demands patience with little brother, and it may sternly exact duty of big brother. It places people in a network of sentiment, not of rights—that *hortus siccus* of modern vainglory.⁶⁸

In jettisoning the inherited understanding of marriage, with its link to procreation, redefinition also makes more difficult the law's channeling function that aims to ensure each child's opportunity to be raised by her mother and father with all the beneficial results that opportunity is likely to provide.⁶⁹

IV. CONCLUSION

The logic and implications of these competing understandings of marriage could not be more starkly opposed. The new institution created to achieve egalitarian ends will assuredly be justified by its supporters as beneficial because of the tangible benefits that will flow to individual couples. In order to create this benefit, however, the theoretical considerations underlying the traditional understanding of marriage (such as its nature as a social institution channeling adult sexuality into socially beneficial relationships) must be abandoned. Though theoretical, “[t]hese considerations do have real world consequences but often only in the long run and only in a diffuse or systemic way.”⁷⁰

Ideas have consequences. Ideas endorsed and enforced by law have large consequences. Some of those consequences may be ameliorated by social practice⁷¹ but the consequences will come as has been amply demonstrated by our nation's experience with the no-fault divorce revolution. To argue that a major legal change will have

68. RICHARD M. WEAVER, *IDEAS HAVE CONSEQUENCES* 41-42 (1948).

69. See Kristin Anderson Moore et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do about It?*, CHILD TRENDS RESEARCH BRIEF, June 2002, at 6, available at <http://www.childtrends.org/PDF/MarriageRB602.pdf> (“[R]esearch clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes There is thus value for children in promoting strong, stable marriages between biological parents.”)

70. Robert F. Nagel, *Liberals and Balancing*, 63 U. COLO. L. REV. 319, 322 (1992).

71. See Steven L. Nock, *The Future of Public Laws for Private Marriages*, 11 THE GOOD SOC'Y 74, 74 (2002) (“Whenever a law is viewed as illegitimate, it is unlikely to influence social norms, at least in the short term.”).

no consequences virtually guarantees that one will be contradicted by circumstances.

Unfortunately, as is consistently demonstrated in similar leveling schemes, equality of esteem is most likely to be secured by downgrading the importance of those features unique to our inherited understanding of marriage, so that children and sex difference are merely incidental. This is clearly the import of the New Jersey Supreme Court's decision that marriage is only a term used to describe a package of state-conferred benefits and obligations. From this follows its conclusion that equality of outcome can be assured by extending all of these benefits and obligations to same-sex couples, regardless of what the final product is called.⁷²

What must be lost to create the new egalitarian institution may be incalculable, for "to treat marriage as a human toy, that can be redesigned at will and for the pleasure of the merely living, is to jeopardize the rightful hopes of those unborn."⁷³ In our debates, we would be wise to remember that society

is not a mechanical aggregate of individual particles subject to whatever rearrangement may occur to the mind of the industrialist or the governmental official. It is an organic entity, with internal laws of development and with infinitely subtle personal and institutional relationships. Society cannot be created by individual reason, but it can be weakened by those unmindful of its true nature, for it has deep roots in the past—roots from which the present cannot escape through rational manipulation.⁷⁴

Indeed, as we debate marriage we must remember that "[t]he continuity of a nation's establishments and institutions, the true consensus of many generations, must not be imperiled by the rash innovations of a talented reformer; for though the individual is foolish, the species is wise."⁷⁵

72. The court seems to have felt the label so unimportant that it was willing to trust the legislature with a say in the matter. See *Lewis v. Harris*, 908 A.2d 196, 206 n.7 (N.J. 2006) ("We will not presume that a difference in name alone is of constitutional magnitude.").

73. Roger Scruton, *Perversion*, NAT'L REV., June 14, 2004, at 36.

74. Robert A. Nisbet, *Conservatism and Sociology*, 58 AM. J. OF SOC. 167, 169 (1952).

75. RUSSELL KIRK, EDMUND BURKE: A GENIUS RECONSIDERED 83 (1967).