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# Supreme Court of New York

## Appellate Division—Third Department

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SYLVIA SAMUELS and DIANE GALLAGHER, HEATHER McDONNELL and CAROL SNYDER, AMY TRIPI and JEANNE VITALE, WADE NICHOLS and HARNG SHEN, MICHAEL HAHN and PAUL MUHONEN, DANIEL J. O'DONNELL and JOHN BANTA, CYNTHIA BINK and ANN PACHNER, KATHLEEN TUGGLE and TONJA ALVIS, REGINA CICCHETTI and SUSAN ZIMMER, ALICE J. MUNIZ and ONEIDA GARCIA, ELLEN DREHER and LAURA COLLINS, JOHN WESSEL and WILLIAM O'CONNOR, and MICHELLE CHERRY-SLACK and MONTEL CHERRY-SLACK,

Plaintiffs-Appellants,

-against-

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

Defendant-Respondent.

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### **BRIEF OF *AMICUS CURIAE* UNITED FAMILIES INTERNATIONAL IN SUPPORT OF DEFENDANT-RESPONDENT**

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Index No. 98084

No Oral Argument Requested

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## INTRODUCTION AND INTEREST OF AMICUS

In this case, plaintiffs have sought a court mandate that marriage in New York be redefined from the union of a man and a woman to the union of any two persons. The court below correctly ruled that the New York Constitution does not require such a redefinition. The lower court thereby joined the majority of courts in this state that have addressed the issue (*Seymour v. Holcomb*, 7 Misc3d 530, 790 N.Y.S.2d 858 (Tompkins Cty. 2005); *Kane v. Marsolais*, Index No. 3473-04 (Albany Cty. 2005); *Shields v. Madigan*, 5 Misc.3d 901, 783 N.Y.S.2d 270 (Rockland Cty. 2004); *Storrs v. Holcomb*, 168 Misc.2d 898, 645 N.Y.S.2d 286 (1996) dismissed on other grounds, 245 A.D.2d 943, 666 N.Y.S.2d 835; but see *Hernandez v. Robles*, 7 Misc.3d 459, 794 N.Y.S.2d 579 (N.Y. Cty. 2005),

In order to “make” their argument on appeal, the plaintiffs present as “fact” two controversial theories about marriage and, incidentally, posit an analogy to previous cases that correctly struck down anti-miscegenation statutes on state and federal constitutional grounds. See *Loving v. Virginia*, 388 U.S. 1 (1967); *Perez v. Lippold*, 32 Cal. 2d 711, 198 P.2d 17 (Cal. 1948). A thoughtful analysis of the theories advanced by the plaintiffs and their purported analogy reveals that both the nature of marriage and the lesson of the anti-miscegenation cases compel a result exactly opposite to the one which the plaintiffs urge upon this Court.

*Amicus curiae* is United Families International (UFI), a non-sectarian

501(c)(3) public charity based in Gilbert, Arizona. UFI, founded in 1978, seeks to maintain and strengthen the family in the United States and other countries. UFI has been granted official consultative status at the United Nations as a non-governmental organization and has participated in UN conferences.

Recognizing that the family is the natural and fundamental unit of society, UFI is committed to supporting those measures that maintain and strengthen the family.

UFI believes a decision requiring New York to redefine marriage as the union of any two persons will change the vital social institution of marriage in a way that will be harmful to society in general and children in particular.

## **ARGUMENT**

The plaintiffs argument on appeal begins with an assertion indispensable to that argument's success: "appellants are in every practical sense identical to the countless married couples whom we know as our neighbors, co-workers, friends and family." Brief of Appellants-Petitioners at 1. This assertion then becomes the key element in plaintiffs' proffered analogy to the cases invalidating racial restrictions on the right to marry. This assertion also serves as the linchpin of plaintiffs' demand for the judicial redefinition of marriage in New York. Yet, this assertion is fatally flawed and so are the arguments premised on it. That is because those arguments promote two misapprehensions. The first relates to the nature of

marriage and the second to the evil the anti-miscegenation cases sought to counter.

While *amicus* believes there are other legal errors in the plaintiffs' arguments below,<sup>1</sup> this brief will analyze only (1) the nature of marriage and (2) the anti-miscegenation analogy. It will be clear, however, that our analysis has important implications for other arguments advanced by the plaintiffs.

Plaintiffs' argument begins with a description of the fundamental right to marry recognized by the United States Supreme Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967). Although there are few express citations to *Loving* in the brief,<sup>2</sup> repeated references and allusions to that case throughout the brief leave no doubt about plaintiffs' intent to equate New York's present marriage law (marriage as the union of a man and a woman) with the marriage laws (prohibiting interracial man/woman marriages) held unconstitutional in *Loving* and the justly famous California Supreme Court decision in *Perez v. Lippold*, 32 Cal. 2d 711, 198 P.2d 17 (Cal. 1948). Plaintiffs' brief argues that "[t]he abandonment of the traditional restriction of marriage based on race highlights how central choice is to

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<sup>1</sup>For a comprehensive critique of the American and Canadian cases redefining marriage as plaintiffs are now demanding, see Monte N. Stewart, *Judicial Redefinition of Marriage*, 21 CAN. J. FAM. L. 11 (2004), available at [www.manwomanmarriage.org](http://www.manwomanmarriage.org) (hereafter Stewart).

<sup>2</sup>Plaintiffs do try to use *Loving* as authority for their argument that despite the equal treatment of men and women in New York marriage law, this court should hold that marriage is a form of sex discrimination. Brief of Appellants-Petitioners at 58. We have responded to this claim elsewhere. See William C. Duncan, "*The Mere Allusion to Gender*": *Answering the Charge that Marriage is Sex Discrimination* 46 ST. LOUIS U. L. J. 963 (2002).

the very concept of marriage.” Brief of Appellants-Petitioners at 20. In this way, plaintiffs (1) reduce marriage to a mere personal choice and (2) equate the institution of man/woman marriage with racist practices and projects, thereby creating a perception that man/woman marriage needs to be “reformed” to comply with constitutional values.

There are two significantly flawed assumptions underlying this effort. The first is that marriage is nothing more than a personal decision made by adults. The second is that the constitutional problem with the anti-miscegenation laws was that they circumscribed the right to make this personal decision for no reason other than deference to tradition. Both assumptions are fatally flawed. We so show below.

## **I. MARRIAGE IS A SOCIAL INSTITUTION**

### **A. Plaintiffs’ argument radically constricts the meaning of marriage.**

In its opening brief, plaintiffs promulgate a vision of marriage as “an element of the larger sphere of personal autonomy.” Brief of Appellants-Petitioners at 12. Indeed, preceding the initial discussion of the right to marry, the brief contains a discussion of cases recognizing individual choices meriting legal protection. Brief of Appellants-Petitioners at 16. To the plaintiffs, marriage seems to be a mere personal choice, as nothing more than an expression of the couple’s loving commitment. Indeed, plaintiffs characterize “the core aspects of marriage” as “commitment to another adult and individual choice of a spouse.” Brief of

Appellants-Petitioners at 19. The brief claims that the right to marry “protects consensual relationships of mutual commitment, trust and support between two adults.” Brief of Appellants-Petitioners at 17.

In this fashion, plaintiffs anoint as “valid” a socially contested theory of marriage known in the literature as “the close personal relationship” theory or model. The profound error of that anointing is explained elsewhere<sup>3</sup>; for our

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<sup>3</sup>Stewart at 60-61, 85-86, 95-99. Plaintiffs are not the first to begin their analysis of the “same-sex marriage” issue by assuming or asserting that all marriage “is” a close personal relationship between two committed adults, before proceeding on to the conclusion that constitutional equality norms mandate the redefinition of marriage. Professor Doug Farrow has identified the “vicious circularity” of this mode of analysis:

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 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 [or statutory] 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.

Douglas Farrow, *Rights and Recognition*, in *DIVORCING MARRIAGE: UNVEILING THE DANGERS*

limited purposes here, what is important to understand is this: Only by deploying this radically constricted notion of what marriage “is” can the plaintiffs carry off their argument and tar New York’s marriage law with the anti-miscegenation analogy. To work, that analogy requires a common point of reference. Plaintiffs supply it by main strength: marriage “is” nothing more than a personal choice to publicly enter, with State sanction, a committed relationship with another adult of one’s choosing. With this common point of reference thus “established,” the analogy flows unhindered to its conclusion: Because New York’s marriage law restricts who one may choose to marry, it is just like Virginia’s marriage law struck down by *Loving* and California’s marriage law struck down by *Perez*. Therefore, New York’s marriage law is likewise unconstitutional.

**B. Man/woman marriage is a vital social institution that serves important public purposes.**

The understanding of marriage as nothing more than an adult choice of how to order a close personal relationship, one which triggers State recognition, is in direct contrast to the understanding of marriage underlying the *Loving* and *Perez* decisions. Those decisions recognized, of course, that individuals must choose to marry. But those decisions most certainly did not use personal choice as a mechanism for defining marriage. Instead, they proceeded on the uncontroversial

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IN CANADA’S NEW SOCIAL EXPERIMENT 98-99 (Daniel Cere & Douglas Farrow eds., 2004) (hereafter *DIVORCING MARRIAGE*).

understanding that man/woman marriage is a social institution, indeed, “an institution more basic in our civilization than any other.” *Williams v. North Carolina*, 317 U.S. 287, 303 (1942). On that understanding, *Perez and Loving* addressed “an ugly feature grafted onto the marriage institution”—the “dogma of white supremacy.” Monte N. Stewart & William C. Duncan, *Marriage and the Betrayal of Perez and Loving*, 2005 BYU L. REV. 555, 557, available at [www.manwomanmarriage.org](http://www.manwomanmarriage.org) (hereafter Stewart & Duncan).

Uncontroversial understandings of the nature of social institutions in general and of marriage in particular dismantle the very basis of plaintiffs’ racial analogy. We now turn to those understandings.<sup>4</sup>

Because marriage is a social institution, it shares with all other social institutions certain salient features. One of the most important features is this: social institutions are constituted in large measure by shared public meanings. An institution is “constituted by complex webs of social meaning.”<sup>5</sup> 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. . . .

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<sup>4</sup>What follows through note 23 tracks in part the work set out in Stewart & Duncan at 560-67.

<sup>5</sup>Stewart at 83.

[I]n order that a type of thing should satisfy the definition, in order that it should fall under the concept of money, it must be believed to be, or used as, or regarded as, etc., satisfying the definition. . . . And what goes for money goes for elections, private property, wars, voting, promises, *marriages*, buying and selling, political offices, and so on.<sup>6</sup>

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.”<sup>7</sup>

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.”<sup>8</sup> 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.”<sup>9</sup> Thus, “an institution guides and sustains individual identity in the same

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<sup>6</sup>JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 32 (1995) (emphasis added).

<sup>7</sup>Victor Nee & Paul Ingram, *Embeddedness and Beyond: Institutions, Exchange, and Social Structure*, in *THE NEW INSTITUTIONALISM IN SOCIOLOGY* 19, 19 (Mary C. Brinton & Victor Nee eds., 1998).

<sup>8</sup>Stewart at 111.

<sup>9</sup>*Id.*

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 on the opportunities opened up within the institution to which the person belongs."<sup>10</sup>

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."<sup>11</sup> 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.<sup>12</sup>

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

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<sup>10</sup>HELEN REECE, *DIVORCING RESPONSIBLY* 185 (2003).

<sup>11</sup>EERIK LAGERSPETZ, *THE OPPOSITE MIRRORS: AN ESSAY ON THE CONVENTIONALIST THEORY OF INSTITUTIONS* 28 (1995).

<sup>12</sup>Eerik Lagerspetz, *On the Existence of Institution*, in *ON THE NATURE OF SOCIAL AND INSTITUTIONAL REALITY* 70, 82 (Eerik Lagerspetz et al. eds., 2001).

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.<sup>13</sup>

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.<sup>14</sup> And in actual practice, the law's authoritative voice is used to reinforce, to alter, or to dismantle the shared public 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.<sup>15</sup>

Use of the law to reinforce or alter or extinguish the shared public meanings

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<sup>13</sup>Id. at 117.

<sup>14</sup>*E.g.*, 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.”); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 69–71 (1996).

<sup>15</sup>JOSEPH RAZ, THE MORALITY OF FREEDOM 161 (1986).

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.”<sup>16</sup> 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.”<sup>17</sup>

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.<sup>18</sup>

Almost universally, a shared, public, and core meaning (constituting the

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<sup>16</sup>EDWARD SCHIAPPA, *DEFINING REALITY: DEFINITIONS AND THE POLITICS OF MEANING* 3 (2003).

<sup>17</sup>*Id.* at 69–70(citation omitted).

<sup>18</sup>JOSEPH RAZ, *THE MORALITY OF FREEDOM* 392 (1986).

social institution of marriage) is that marriage is the union of a man and a woman.<sup>19</sup>

That meaning has been a constitutive core of the institution in the American experience. 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.

[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 unique set of aspirations into human culture along the axis of permanent opposite-sex bonding and parent-child connectedness.<sup>20</sup>

Man/woman marriage is deemed to provide well, and even uniquely, a number of social goods besides those just identified. It is the only institution that

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<sup>19</sup>As put by Justice Blair in the Ontario Divisional Court decision in *Halpern v. Toronto*, 60 O.R.3d 321 (Ont. Div. Ct. 2002), *aff'd in part, rev'd in part*, 65 O.R.3d 161 (Ont. 2003) (“Anthropological, sociological and historical studies reveal that from time immemorial ‘marriage’ has *almost* universally been viewed as a monogamous union between a man and a woman.”).

<sup>20</sup>Daniel Cere, *War of the Ring*, in *DIVORCING MARRIAGE* 11, 14.

can confer the status of *husband* and *wife*.<sup>21</sup> In particular, it is the only effective means to socialize and acculturate and thereby transform males into husbands—a process the institution sustains both before and after the wedding.<sup>22</sup> The institution performs the same transformative role in the creation of husband/fathers, another identity beneficially different than that of a mere male.<sup>23</sup> It also promotes (by privileging) that form of adult intimacy—married heterosexual intercourse—that society may rationally value above all other such forms.<sup>24</sup>

This repetition seems merited. These realities regarding social institutions in general and the social institution of marriage in particular are not controversial in the literature on the nature of institutions. And these social institutional realities present a starkly different picture of marriage from the one the plaintiffs force in order to make their racial analogy “work.” To repeat, plaintiffs’ argument requires first an assumption that marriage is nothing more than a choice made by individuals to publicly express mutual commitment. If this is so, then anti-miscegenation laws can be understood as unconstitutional because they limit this

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<sup>21</sup>See 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).

<sup>22</sup>See Katherine K. Young & Paul Nathanson, *The Future of an Experiment*, in DIVORCING MARRIAGE at 41, 47–48.

<sup>23</sup>See, e.g., DAVID POPENOE, LIFE WITHOUT FATHER 139–88 (1996).

<sup>24</sup>Stewart at 52–57.

choice. If, as plaintiffs argue, marriage is a mere public announcement of private commitment, then it is not a great logical leap to conclude (as do plaintiffs) that “same-sex couples make lasting commitments to each other of the exact same nature” as those of married couples. Brief of Appellants-Petitioners at 18. Then, all that is left is for plaintiffs to draw the obvious inference – anti-miscegenation laws limited choice and defining marriage as a male-female institution limits choice; therefore, if the first is unconstitutional, the second is as well.

But, of course, marriage is something more, much more, than public recognition of private commitment. It is a social institution with its own logic and broad social purposes. So the analogy breaks down. And that break-down does not end there. Plaintiffs provide no evidence that the anti-miscegenation precedents (*Perez* and *Loving*) relied on a definition of marriage as merely the close personal relationship of two persons. Rather, plaintiffs merely assume that this must be so because those precedents speak of limitations on the choice of whom to marry. But, in fact, nothing in *Loving* and *Perez* supports the view that those cases see marriage as no more than the impoverished and narrow construct posited by the close personal relationship model. Only by ignoring this fact can plaintiffs make their racial analogy “work,” but in the process they necessarily do violence to the broader, more realistic understanding of marriage shared by *Loving*, *Perez*, and New York’s marriage law.

## II. BY REJECTING THE WHITE SUPREMACISTS' REDEFINITION OF MARRIAGE, *PEREZ* AND *LOVING* RESTORED TO MARRIAGE THE INTEGRITY OF ITS FUNDAMENTAL INSTITUTIONAL LOGIC AND PURPOSES

### A. Plaintiffs get *Loving* and *Perez* all wrong.

Plaintiffs characterize the anti-miscegenation cases as casting off tradition in deference to personal choice: “[t]he abandonment of the traditional restriction of marriage based on race highlights how central choice is to the very concept of marriage.” Brief of Appellants-Petitioners at 20. This conclusion assumes that the evil the *Loving* and *Perez* decisions sought to eradicate was historical deference to limitations on choice. The history of anti-miscegenation laws and the *Perez* and *Loving* decisions themselves counter this assumption.

The existence of anti-miscegenation laws at the time of the *Loving* and *Perez* decisions was not a function of mere historical continuation. “Under the common law of England, difference in race was not a disability rendering parties incapable of contracting marriage.”<sup>25</sup> In fact, while some anti-miscegenation laws date to colonial times, a number of Southern states had no anti-miscegenation laws until the post-Civil War period.<sup>26</sup> Rather than being a mere historical relic, anti-

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<sup>25</sup>Robert Kovach, Note, *Miscegenation Statutes and the Fourteenth Amendment*, 1 CASE W. RES. L. REV. 89 (1949). The rest of this sub-section in part tracks Stewart & Duncan at 567-75.

<sup>26</sup>Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s-1960s*, 70 CHI.-KENT L. REV. 371, 372 & 389 (1994); Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1345 note 172 (1998).

miscegenation laws were conscious attempts to use the powerful educative force of marriage laws to promote a theory of white supremacy.

A 1912 treatise on Georgia constitutional law described anti-miscegenation laws as “erect[ing] a barrier behind which legitimate home life should be sheltered from African admixture.”<sup>27</sup> A 1931 treatise said: “racial prejudice, social or ethnological considerations, or the dogma of white superiority, have resulted in the prohibition of inter-racial marriages.”<sup>28</sup> This same treatise commented on the fact that most such laws were confined to Western and Southern states by the early twentieth century:

The peculiarly geographic distribution of statutes prohibiting racial intermarriage forces one to conclude (all logical justification to the contrary, notwithstanding) that such legislation is not based primarily upon physiological, psychological, or other scientific bases, but is for the most part the product of local prejudice and of local efforts to protect the social and economic standards of the white race.<sup>29</sup>

Anti-miscegenation laws were also tied to eugenic theories as evidenced by their minute rules governing what constituted a “white” or “colored” person.<sup>30</sup>

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<sup>27</sup>Emily Field Van Tassel, “*Only the Law Would Rule Between Us*”: *Antimiscegenation, the Moral Economy of Dependency, and the Debate Over Rights After the Civil War*, 70 CHI.-KENT L. REV. 873, 905 (1995) (quoting WALTER McELREATH, A TREATISE ON THE CONSTITUTION OF GEORGIA 145 (1912)).

<sup>28</sup>CHESTER G. VERNIER, 1 AMERICAN FAMILY LAWS 204 (1931).

<sup>29</sup>Id. at 204-205.

<sup>30</sup>Stewart & Duncan at 569-570.

In summary, the anti-miscegenation laws were a consequence of racial dogma and not of the purposes and logic of marriage as understood for many centuries before.<sup>31</sup> In David Wagner’s phrasing, the anti-miscegenation laws must be seen as a logical extension of racial law, not of marriage law.<sup>32</sup>

The *Loving* court stated: “Under our Constitution, the freedom to marry or not to marry a person *of another race* resides with the individual and cannot be infringed by the State.” *Loving v. Virginia*, 388 U.S. at 12 (emphasis added). In the context of *Loving*’s own facts, this language identifies the evil against which the Court acted; that evil was not a restriction on some generalized freedom of choice but rather a racially based restriction imposed to further white supremacist dogma. In *Loving*, a white man and black woman were indicted on criminal charges for marrying, pled guilty, and were given a suspended sentence on condition they leave the state for twenty-five years. 388 U.S. at 2-3. In reviewing their conviction, the Supreme Court framed the relevant question as “whether a statutory scheme adopted by the state of Virginia to prevent marriages between persons *solely on the basis of racial classifications* violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.” *Id.* at 2 (emphasis

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<sup>31</sup>As to those “purposes and logic,” see Stewart & Duncan at 559 note 8; Stewart at 44–52, 64–67.

<sup>32</sup>David Wagner, Why *Goodridge* Isn’t *Loving*, Address at the Conference on State Marriage Amendments at Georgia State University (Apr. 16, 2005).

added). The Court noted both the historical roots of anti-miscegenation laws “as an incident of slavery” and the eugenic trappings of the challenged law, such as a requirement of “certificates of ‘racial composition’ to be kept by both local and state registrars.” *Id.* at 6-7. The Court concluded that Virginia’s law rested “solely upon distinctions drawn according to race” and that there was “patently no legitimate overriding purpose independent of invidious racial discrimination which justifies the classification.” *Id.* at 11. For the Court, the unconstitutional restriction was not a restriction of some generalized right of choice in marriage but a restriction of “the freedom to marry *solely because of racial classifications.*” *Id.* at 12 (emphasis added).

The analysis was the same in the earlier *Perez* decision. There a clerk refused to issue a marriage license to a couple because of their answers to questions about their race on an application form. *Perez v. Lippold*, 198 P.2d 17, 18 (Cal. 1948). The clerk relied on a statute which prohibited marriages between white persons and those of other races. *Id.* at 18. As in the later *Loving* decision, the California Supreme Court asked “whether the state can restrict” the right to marry “on the basis of race alone.” *Id.* at 19. The court noted that “[r]ace restrictions must be viewed with great suspicion,” and that “[a]ny state legislation discriminating against persons on the basis of race or color has to overcome the strong presumption [against such discrimination] inherent in this constitutional

policy.” *Id.* at 21. The court also noted that the challenged laws had been enacted along with other racial restriction and that cases upholding the laws had been replete with prejudiced statements about nonwhite races. *Id.* at 21-22. The court suggested that the law was “based upon the theory that the progeny of a white person and a Mongolian or Negro or Malay are inferior or undesirable, while the progeny of other different races are not.” *Id.* at 23. The court concluded that the laws violated equal protection guarantees “by impairing the right of individuals to marry *on the basis of race alone and by arbitrarily and unreasonably discriminating against certain racial groups.*” *Id.* at 29 (emphasis added).

For both *Perez* and *Loving* then, the existence of a racial restriction on marriage was the unconstitutional evil. Plaintiffs’ argument gets those two decisions all wrong when it tries to transform them into something they were not and did not purport to be: creators of a generalized right to compel State sanction of what one wants to call “marriage,” even if that compulsion requires a radical alteration of a core constitutive meaning of the institution. And this last understanding leads to two more, of considerable importance. The first understanding pertains to an historic achievement of *Perez* and *Loving*; the second, to the social institutional realities associated with the redefinition urged by plaintiffs.

**B. Plaintiffs argument actually betrays an historic achievement of *Perez* and *Loving*.**

Because marriage has a powerful educative role in our society—a power reinforced by the supporting law’s authoritative voice—the marriage institution is a tempting target for those seeking to advance the sociopolitical purposes of an ideology unrelated to marriage. If those so seeking can appropriate the institution and bend it to their purposes, they have gone far in assuring the triumph of their agenda.<sup>33</sup>

In the American past, two social movements temporarily succeeded in using marriage as a means to achieve ulterior ends: the white supremacist movement and the eugenics movement. In fact, the anti-miscegenation laws were often found in the same legislative package as the laws calling for the sterilization of “idiots” and other so-called “genetic undesirables.” Central to the white supremacists’ project was the alteration of a core meaning of marriage from the union of a man and a woman to the union of a man and a woman of the same “race.” Laws that prohibited blacks from marrying whites were an ugly feature grafted onto the marriage institution—the very logic of which makes the graft a foreign object. The voice of those laws, however, greatly magnified by social institutional power, subtly but effectively inculcated throughout society the core dogma of white

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<sup>33</sup>Stewart & Duncan at 557.

supremacy. The courts that gave us the *Perez* and *Loving* decisions apprehended the white supremacists' marriage project for what it was and rightly used constitutional equality norms to dismantle it. In the process, those courts restored to marriage the integrity of its institutional purposes and logic,<sup>34</sup> an historic achievement.<sup>35</sup>

But to use *Perez* and *Loving* as the plaintiffs urge – not to strike down a redefinition made to advance sociopolitical ends unrelated to marriage but to impose just such a redefinition – is to betray that historic achievement. For the probative evidence points rather clearly to this: The goal of the gay/lesbian rights movement's marriage project, like that of the white supremacists, is to appropriate the institution and change it to achieve sociopolitical purposes unrelated to marriage.<sup>36</sup> Stated slightly differently, for the gay/lesbian rights movement, the institution of marriage is not really a destination but rather a powerful tool for the achievement of a broader cultural, social, and political agenda. This appropriative strategy entails an alteration in a core, constitutive meaning: from the union of a man and a woman to the union of any two persons. Certainly the respective objectives of the old and the new marriage projects are very different; still the

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<sup>34</sup>See Stewart & Duncan at 559 note 8; Stewart at 44–52, 64–67.

<sup>35</sup>Id. at 557, 567-75.

<sup>36</sup>Id. at 581-88.

projects in their appropriative strategy are of a kind.<sup>37</sup> Thus, because *Perez* and *Loving* refused to allow the marriage institution to be appropriated for nonmarriage ends, to use those two cases to advance just such an appropriative project is to betray them. In other words, to use *Perez* and *Loving* as plaintiffs suggest is to advance a superficial analogy that masks a deep disanalogy. That disanalogy is between the intention of *Perez* and *Loving* to protect marriage from appropriation for nonmarriage purposes and the intention of the present marriage project to make such an appropriation.

Nor is this betrayal cured by an appeal to *Perez*'s and *Loving*'s vindication of constitutional equality norms—that is, by the argument that whereas the white supremacist marriage project fostered inequality by the *exclusiveness* of the antimiscegenation laws, the new marriage project fosters equality by the *inclusiveness* of its different redefinition of marriage. This, of course, is an argument that the ends justify the means, but the argument steadfastly ignores certain realities regarding those means. That is the subject of the next sub-section.

**C. Plaintiffs ignore the social institutional realities of the redefinition they urge.**

Plaintiffs argument ignores relevant social institutional realities. One is this: Our society can sustain one and only one marriage institution. Society cannot, at

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<sup>37</sup>Id.

the same time, tell the people (and especially the children) that marriage is the union of any two persons and that marriage is the union of a man and a woman. Two “coexisting” social institutions known society-wide as *marriage* is a factual impossibility. Thus, redefinition will in the process of time necessarily displace the institution of man/woman marriage and necessarily deprive society of the social goods provided, sometimes uniquely, by the old institution. So, although one may by selective reference to social institutional realities tout genderless marriage as the way to a more just and equal society, the full panoply of relevant institutional realities compels acknowledgment of the awesome price that must be paid for entry into such a radically new and different world.

How large the price is suggested by a listing of what must of necessity be lost with the deinstitutionalization of man/woman marriage:

First, husbands and wives. Man/woman marriage is the only institution that can confer the status of *husband* and *wife*, that can transform a male into a husband (a social identity quite different from “partner”),<sup>38</sup> and thus that can transform males into husband/fathers (a category of males particularly beneficial to society).<sup>39</sup>

Second, an effective bridge over the male-female divide. “[M]arriage has always

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<sup>38</sup>See 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)

<sup>39</sup>See, e.g., DAVID POPENOE, *LIFE WITHOUT FATHER* 139–88 (1996).

been the central cultural site of male-female relations”<sup>40</sup> 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.”<sup>41</sup>

Third, 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.<sup>42</sup> 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.

Fourth, the effective means to make real the child’s right to know and to 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).

[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

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<sup>40</sup>Daniel Cere, *War of the Ring*, in *DIVORCING MARRIAGE* 14.

<sup>41</sup>See Katherine K. Young & Paul Nathanson, *The Future of an Experiment*, in *DIVORCING MARRIAGE* at 41, 47–48.

<sup>42</sup>Stewart at 44–52.

abolishing the norm would have a far-reaching impact.<sup>43</sup>

This is the purpose only alluded to in a quote highlighted by the plaintiffs:

“Marriage is the cornerstone of the family.” ” Brief of Appellants-Petitioners at 17 (quoting *People v. De Stefano*, 121 Misc.2d 113, 121 (N.Y. Cty. Ct. Suffolk Cty. 1983).

Fifth, authoritative encouragement of the child-rearing mode—that is, married mother/father child-rearing—that correlates (in ways not subject to reasonable dispute<sup>44</sup>) with 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

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<sup>43</sup>Margaret Somerville, *What About the Children?*, in *DIVORCING MARRIAGE* at 67.

<sup>44</sup>As 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).

drug abuse and high-risk sexual conduct.<sup>45</sup>

Sixth, the power to officially endorse that form of adult intimacy—married heterosexual intercourse—that society may rationally value above all other such forms.<sup>46</sup>

Here is another social institutional reality ignored by plaintiffs' argument:

The very act of 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. Same-sex couples look to the law to let them into the privileged institution, and the law (as in [the lower court decision] ...) may want to, but it cannot; it can only give them access to a different institution of different value. Thus, the [lower court decision and others like it] ... proceed on an assumption not easily defended, that they can do what they most probably cannot do; just so, any magnanimity motivating those cases' holdings is fundamentally false. And there is another aspect of this same consequence, one affecting 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 societies now know it but to pull married man/woman couples into what the media calls imprecisely "gay marriage" and this article calls genderless marriage.<sup>47</sup>

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<sup>45</sup>Stewart at 64–70.

<sup>46</sup>Id. at 54–57. Because the redefinition occurs by judicial mandate, assertedly compelled by constitutional norms—this being the context in which the *Perez/Loving* argument is deployed—*any* official or "state action" acknowledgment of marriage as the union of a man and a woman is Constitution-taboo.

<sup>47</sup>Stewart at 84–85.

In sum, to give essentially uncontroversial social institutional realities their due is to reveal plaintiffs' argumentation as profoundly misguided.

### CONCLUSION

For the reasons set forth above, the plaintiffs fundamentally misapprehended the nature of marriage and the meaning of the important court decisions invalidating racist anti-miscegenation laws. As a result, the plaintiffs' arguments are materially flawed. This fatal defect and others identified in the briefs of defendants-respondents and other amici compel the conclusion that the lower court's order upholding New York's marriage law should be affirmed.

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