MARRIAGE FACTS

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Do constitutional norms, particularly of equality and liberty, require the redefinition of marriage from the union of a man and a woman to the union of any two persons? In the present judicial contest over this issue, the real dispute is not over principles of law but about the facts of marriage. This Article identifies the marriage facts presented by those on each side of the debate and articulates each side's responses to the other's factual position. A critical examination of the two accounts reveals that the factual description of marriage advanced by proponents of man-woman marriage is more accurate. The Article then analyzes the widely held assumption that judicial selection of the standard of review—rational basis, heightened (but not strict) scrutiny, or strict scrutiny—determines the outcome in cases addressing the constitutionality of traditional marriage laws. That analysis concludes that the choice of marriage facts, not the standard of review, is ultimately dispositive.

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INTRODUCTION

The marriage issue of our time is whether constitutional norms, particularly of equality and liberty, require the redefinition of marriage from the union of a man and a woman to the union of any two persons. Perhaps no great issue in American constitutional law has been so plagued by conflict, confusion, and carelessness regarding the relevant facts. This is not to say that divisiveness over certain facts has not influenced earlier constitutional contests.[1] Typically in those earlier contests, however, legislative or administrative action provided some coherent and even authoritative body of facts helpful to judicial consideration of the subject matter.[2] Even in the absence of such legislative or administrative guidance, courts have often

1. Samuel Freeman Miller, appointed to the Supreme Court in 1862 by Abraham Lincoln, is reported to have said: "In my experience in the conference room of the Supreme Court of the United States, . . . I have been surprised to find how readily those judges came to an agreement upon questions of law, and how often they disagree in regard to questions of facts." JEROME FRANK, IF MEN WERE ANGELS: SOME ASPECTS OF GOVERNMENT IN A DEMOCRACY 78 (Harper & Brothers 1942) (1930).

2. When deciding the constitutionality of the post-war restrictions on Communist Party activities, for example, the Supreme Court deferred to congressional findings of fact about the nature of the threat posed by the Communist Party and the international communist movement. *See* Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 5–8, 96–97 (1961). Similarly, the Court considered testimony before congressional committees on the invidious effects of racial discrimination in sustaining the Civil Rights Act of 1964 against a Commerce Clause challenge. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 252–53 (1964). *But see* Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.").

managed to develop clear understandings of the factual underpinnings of contested constitutional issues.[3] By contrast, the treatment of constitutional facts in recent American appellate court decisions addressing the marriage issue[4] has been confused and even careless.[5]

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3. In striking down laws restricting non-whites from marrying whites, for example, the California Supreme Court in *Perez v. Lippold,* 198 P.2d 17 (Cal. 1948), and the United States Supreme Court in *Loving v. Virginia,* 388 U.S. 1 (1967), correctly found the origin of those laws to be in white supremacist dogma and political action. *See* Monte Neil Stewart & William C. Duncan, *Marriage and the Betrayal of* Perez *and* Loving, 2005 BYU L. REV. 555, 570–75, *available at* http://marriagelawfoundation.org/mlf/publications/Betrayal.pdf.

4. In chronological order, those appellate court decisions are: Minnesota: Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed for want of a federal question*, 409 U.S. 810 (1972); Kentucky: Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973); Washington: Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974), *review denied*, 84 Wash. 2d 1008 (1974); Ninth Circuit: Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982), *cert denied*, 458 U.S. 1111 (1982); Pennsylvania: De Santo v. Barnsley, 476 A.2d 952 (Pa. Super. Ct. 1984); Hawaii: Baehr v. Lewin, 852 P.2d 44 (Haw. 1993); *id.* at 68 (Burns, C.J., concurring); *id.* at 70 (Heen, J., dissenting); District of Columbia: Dean v. District of Columbia, 653 A.2d 307 (D.C. 1995); *id.* at 361 (Terry, J., concurring); *id.* at 362 (Steadman, J., concurring); Vermont: Baker v. State, 744 A.2d 864 (Vt. 1999); *id.* at 889 (Dooley, J., concurring); *id.* at 897 (Johnson, J., concurring in part and dissenting in part); Arizona: Standhardt v. Superior Court, 77 P.3d 451 (Ariz. Ct. App. 2003); Massachusetts: Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); *id.* at 970 (Greaney, J., concurring); *id.* at 974 (Spina, J., dissenting); *id.* at 978 (Sosman, J., dissenting); *id.* at 983 (Cordy, J., dissenting); Indiana: Morrison v. Sadler, 821 N.E.2d 15 (Ind. Ct. App. 2005); *id.* at 35 (Friedlander, J., concurring); New Jersey: Lewis v. Harris, 875 A.2d 259 (N.J. Super. Ct. App. Div. 2005); *id*. at 274 (Parrillo, J., concurring); *id*. at 278 (Collester, J., dissenting); New York: Hernandez v. Robles, 805 N.Y.S.2d 354 (App. Div. 2005); *id*. at 363 (Catterson, J., concurring); *id*. at 377 (Saxe, J., dissenting); Samuels v. N.Y. Dep't. of Pub. Health, 811 N.Y.S.2d 136 (App. Div. 2006); Seymour v. Holcomb, 811 N.Y.S.2d 134 (App. Div. 2006); Kane v. Marsolais, 808 N.Y.S.2d 566 (App. Div. 2006); Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006); *id.* at 12 (Graffeo, J., concurring); *id.* at 22 (Kaye, C.J., dissenting); Washington: Andersen v. King County, 138 P.3d 963 (Wash. 2006); *id.* at 991 (Alexander, C.J., concurring); *id.* (Johnson, J., concurring); *id*. at 1027 (Bridge, J., dissenting); *id.* at 1040 (Chambers, J., dissenting); *id*. at 1012 (Fairhurst, J., dissenting); California: *In re* Marriage Cases, 49 Cal. Rptr. 3d 675 (Ct. App. 2006); *id.* at 727 (Parilli, J., concurring); *id*. at 731 (Kline, J., dissenting); New Jersey: Lewis v. Harris, 908 A.2d 196 (N.J. 2006); *id.* at 224 (Poritz, C.J., concurring in part and dissenting in part); Maryland: Conaway v. Deane, No. 44, 2007 WL 2702132 (Md. Sept. 18 2007); *id*. at *39 (Raker J., concurring in part and dissenting in part); *id.* at *81 (Bell, C.J., dissenting); *id.* at *50 (Battaglia, J., dissenting). This list is current as of November 20, 2007.

5. *See, e.g.*, INST. FOR AM. VALUES, MARRIAGE AND THE LAW: A STATEMENT OF PRINCIPLES 18 (2006) ("[T]he basic understanding of marriage underlying much of the current same-sex marriage discourse is seriously flawed . . . ."); s*ee also* Maggie Gallagher, *Does Sex Make Babies? Marriage, Same-Sex Marriage and Legal Justifications for the Regulation of Intimacy in a Post-*Lawrence *World*, 23 QUINNIPIAC L. REV. 447, 451–71 (2004) [hereinafter Gallagher, *Does Sex Make Babies?*]; Maggie Galla-

Such factual confusion in the marriage cases, although it does not bode well for constitutional adjudication, is at least understandable for three reasons. First, man-woman marriage is an ancient and virtually universal social institution;[6] hence, those enacting or interpreting marriage laws in recent centuries apparently sensed little or no need to articulate the factual basis for the man-woman meaning reinforced by those laws.[7] Even congressional deliberation leading up to the 1996 Defense of Marriage Act[8] focused largely on the role of individual states in fashioning their own marriage laws; Congress did not con-

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gher, (*How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 U. ST. THOMAS L.J. 33, 35–65 (2004) [hereinafter Gallagher, *Reply*]; Monte Neil Stewart, *Eliding in Washington and California*, 42 GONZ. L. REV. 501, 516–46 (2007) [hereinafter Stewart, *Washington and California*]; Monte Neil Stewart, *Eliding in New York*, 1 DUKE J. CONST. L. & PUB. POL'Y 221, 231–58 (2006), *available at* http://www.manwomanmarriage.org/jrm/pdf/ElidingInNewYork.pdf [hereinafter Stewart, *New York*]; Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 DUKE J. CONST. L. & PUB. POL'Y 1, 28–78 (2006), *available at* http://www.manwomanmarriage.org/jrm/pdf/Duke_Journal_Article.pdf [hereinafter Stewart, *Judicial Elision*]; Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 CAN. J. FAM. L. 11, 41–99 (2004), [hereinafter Stewart, *Redefinition*]; Monte Neil Stewart, *Dworkin, Marriage, Meanings—and New Jersey*, 4 RUTGERS J.L. & PUB. POL'Y 271, 280–81 (2007), *available at* http://manwomanmarriage.org/jrm/pdf/Dworkin.pdf [hereinafter Stewart, *Dworkin*]. *Cf.* F.C. DeCoste, *Courting Leviathan: Limited Government and Social Freedom in* Reference re Same-Sex Marriage, 42 ALTA. L. REV. 1099, 1102–03 (2005) [hereinafter DeCoste, *Leviathan*] (criticizing the Canadian Supreme Court's distinction between "civil" and "religious" marriage); F.C. DeCoste, *The* Halpern *Transformation: Same-Sex Marriage, Civil Society, and the Limits of Liberal Law*, 41 ALTA. L. REV. 619, 625–28 (2003) [hereinafter DeCoste, *Transformation*] (criticizing a Canadian Appeals Court decision for "ignoring, by defining away, the meaning of marriage at law and as cultural practice").

6. *See* INST. FOR AM. VALUES, WHY MARRIAGE MATTERS: TWENTY-SIX CONCLUSIONS FROM THE SOCIAL SCIENCES 15 (2d ed. 2005).

7. *See* Bruce Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy: Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 472 (1983):

> Perhaps because family life is so much a part of the unspecifiable bedrock of society, there has been a puzzling inattention in both legal and other literature to the broad social policies underlying the preference historically given by the law to family relationships. This contrasts remarkably with the voluminous scholarly work on individual rights. Domestic patterns universally accepted before the dawn of law and government have hardly seemed to require full-dress justification. Thus, the case law and other commentary on our traditional assumptions seldom go beyond platitudes and cliches. The objectives of a democratic society based on established patterns of marriage and kinship should not be terribly mysterious; serious scholars, however, have seldom felt a need to document them.

8. Pub. L. 104-199, 110 Stat. 2419 (1996), (codified at 1 U.S.C. § 7 & 28 U.S.C. § 1738(C) (1997)).

duct a thorough examination of the man-woman marriage institution or the factual consequences of replacing it with a marriage scheme in which the parties' genders are legally irrelevant and socially inconsequential.[9] Second, at least until quite recently, the key players in the constitutional debates surrounding marriage (lawyers, judges, and legal scholars) had little specialized knowledge about marriage.[10] Third, those participants *thought* they had a great deal of general knowledge about marriage. This is understandable because marriage is a ubiquitous social reality, encountered or experienced by nearly everyone; as a result, most people believe that they understand marriage. As we will see, however, that belief can impede defensible legal work on the marriage issue.

Before outlining the structure of this Article, a few notes about terminology are warranted. By "the facts of marriage" or "marriage facts," I mean those facts that almost fifteen years[11] of litigating the marriage issue in sixteen states and the District

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9. The legislative history of the Act indicates that the bill was born out of concern that, because of the requirements of interstate comity (specifically, full faith and credit), a judicially mandated recognition of genderless marriage in Hawaii could limit the power of the other 49 states to decide their own marriage policies. *See, e.g.*, H.R. REP. NO. 104-664, at 4–10 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2908–2914. Opponents of the legislation also focused their discussion on "the legal history of the full faith and credit clause which is central to this dispute [sic]." *Id.* at 36, *as reprinted in* 1996 U.S.C.C.A.N. 2905, 2939. Testimony in committees focused mainly on issues of full faith and credit, the role of the federal government, and the constitutionality of the bill. *See, e.g.*, *The Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary,* 104th Cong. 23–41 (1996) (statement of Lynn D. Wardle, Professor of Law, Brigham Young University); *The Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 104th Cong. 87–117 (1996) (statement of Hadley Arkes, Ney Professor of Jurisprudence and American Institutions, Amherst College); *id.* at 202–211 (1996) (statement of David Saperstein, Director and Counsel, Religious Action Center of Reform Judaism). The Senate debate, 142 CONG. REC. S10100-123 (1996), and the House debate, 142 CONG. REC. H7441-83 (1996), had similar foci. None of the legislators, then, debated the fundamental policy issue: whether society as a whole would be better served by the existing marriage institution or by the newly proposed one.

10. *See* Gallagher, *Reply*, *supra* note 5, at 34 ("[F]or many years, the same-sex marriage debate has been a legal debate, mostly confined to lawyers, judges, and legal scholars, few of whom have any particular background in marriage at all.").

11. Although some litigated the same-sex marriage issue before 1991, *see supra* note 4, the commencement of the marriage litigation in Hawaii that year marked the beginning of the organized and strategic effort to redefine marriage by judicial mandate. *See* William C. Duncan, *The Litigation to Redefine Marriage: Equality and Social Meaning*, 18 BYU J. PUB. L. 623, 630–42 (2003) (discussing Baehr v. Lewin, 852 P.2d 44 (Haw. 1993)).

of Columbia[12] have shown to be relevant to that issue. Thus, the word "facts" is used in a narrow, lawyerly way; it includes those matters disputed in litigation other than legal principles and procedures, a distinction seen in such oft-used phrases as "issue of fact," "question of law," and "mixed question of law and fact."[13] As described by those terms, a fact is not necessarily "[s]omething that has really occurred or is actually the case"[14] but rather what a judge, for purposes of resolving a case, will accept as such—or will accept as something that a reasonable legislator could accept as such. Thus, in the lawyer's realm, the notion of "alleged fact" or even "false fact" is not unintelligible.[15] References in this Article to the facts of marriage or marriage facts are of that realm.

On one side of the marriage issue are those who want marriage to be legally redefined to encompass "the union of any two persons," with the law treating the parties' genders as irrelevant to the meaning of marriage—hence, "genderless marriage."[16] On the other side are those who want to preserve "the union of a man and a woman" as a core meaning of the marriage institution—hence, "man-woman marriage." I do not use the terms "same-sex marriage," "homosexual marriage," or "gay marriage" because they are misleading, in two related ways. First, nowhere in the world is marriage defined legally,

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12. For a list of the cases since 1992 that have culminated in appellate court decisions, see *supra* note 4. Here, in chronological order, are the cases that have not yet had such a decision: Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Feb. 27, 1998); Li v. State, No. 0403-03057, 2004 WL 1258167 (Or. Cir. Apr. 20, 2004); *In re* Kandu, 315 B.R. 123 (Bankr. W.D. Wash. 2004); Wilson v. Ake, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); Deane v. Conway, No. 24-C-04-53900, 2006 WL 148145 (Md. Cir. Ct. Jan. 20, 2006); Kerrigan v. State, 909 A.2d 89 (Conn. Super. Ct. 2006); Bishop v. Oklahoma *ex rel.* Edmondson, 447 F. Supp. 2d 1239 (N.D. Okla. 2006); Varnum v. Brien, No. CV 5965 (Iowa Dist. Ct. Aug. 30, 2007), *available at* http://data.lambdalegal.org/pdf/legal/varnum/varnum-d-08302007-ia-district.pdf. This list is current as of November 20, 2007.

13. *Cf.* Armour & Co. v. Wilson & Co., 274 F.2d 143, 155 (7th Cir. 1960) (Hastings, C.J.) (confirming that such terms are oft-used, but suggesting that they are not always helpful).

14. 5 OXFORD ENGLISH DICTIONARY 651 (2d ed. 1989) (definition 4a of "fact").

15. *See id.* (definition 5 of "fact").

16. Some proponents of genderless marriage have expressed discomfort with this particular shorthand phrase—suggesting that the phrase somehow neuters or paints as without gender those who enter into such a marriage. It does no such thing. "Genderless" modifies "marriage," not the persons participating in the marriage. Each man or woman participating in a marriage, of course, is just that, a man or a woman.

socially, or otherwise as the union of two persons of the same sex. It is defined either as the union of any two persons, as in Massachusetts (at least legally), or as the union of a man and a woman, as in the other 49 states (both legally and socially). Second, when people confront the marriage issue, the term "same-sex marriage" and others like it often prompt them to think of a new, different, and separate marriage arrangement or institution that will coexist with the old man-woman marriage institution. But once the judiciary or legislature adopts "the union of any two persons" as the legal definition of civil marriage, that conception becomes the *sole* definitional basis for the *only* law-sanctioned marriage that any couple can enter, whether same-sex or man-woman. Therefore, legally sanctioned genderless marriage, rather than peacefully coexisting with the contemporary man-woman marriage institution, actually displaces and replaces it.

The opposing sides have repeatedly presented to the courts two quite different "packages" of marriage facts; each judge, in upholding man-woman marriage or mandating its replacement with genderless marriage, has to some degree both premised her ultimate legal conclusion on one package and attempted to counter the contents of the other package.[17] Part I describes the contents of the two packages, *as presented in the litigation of the marriage issue*, and examines their divergence. This critical evaluation of marriage facts leads to the conclusion that the

17. Since the beginning of the organized and strategic effort to redefine marriage by judicial mandate—that is, since the beginning of the Hawaii litigation in 1991, *see supra* notes 4 and 11—the judges and lawyers involved in the litigation have proceeded in very large measure as if the marriage facts are not "adjudicative facts" as Professor Davis conceived such. Kenneth C. Davis, *An Approach to Problems of Evidence in Administrative Process*, 55 HARV. L. REV. 364, 402–03 (1942) (adjudicative facts are those particular to the dispute—the who, what, when, and where type of facts—and generally are within the province of the trier-of-fact). Rather, the courts and counsel have proceeded—and rightly so—as if the marriage facts are or are akin to "legislative facts," *id.* (facts that transcend the particular dispute and help the court resolve questions of law, policy, and discretion), or, more narrowly, "constitutional facts," including "constitutional-review facts," *id.* (legislative facts and other understandings of broad social phenomenon underlying and interwoven through normative constitutional judgments). *See* David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 552–55 (1991). Discernment of the constitutional facts is ultimately the province of the appellate courts and necessarily and appropriately involves them in "normative constitutional fact-finding." *Id.* at 551–65; *see also* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 233–40 (1985).

package supportive of man-woman marriage is decidedly more defensible. Part II then examines the conventional wisdom that, in adjudication of the marriage issue, judicial choice of a particular standard of review is generally dispositive. That analysis concludes that the choice of marriage facts, not the standard of review, actually determines the outcome.

I. THE FACTS OF MARRIAGE

This Part begins by identifying the marriage facts as they have been presented by litigants, starting with the factual basis of man-woman marriage's constitutionality.

A. The Factual Basis of Man-Woman Marriage's Constitutionality

"Marriage is a vital social institution."[18] Like all social institutions, marriage is constituted by a unique web of shared public meanings.[19] For important institutions, including marriage, many of those meanings rise to the level of norms.[20] Such social institutions affect individuals profoundly; institutional meanings and norms teach, form, and transform individuals, supplying identities, purposes, practices, and projects.[21]

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18. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003); *see also* 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.").

19. *See* Peter A. Hall & Rosemary C.R. Taylor, *Political Science and the Three New Institutionalisms*, 44 POL. STUD. 936, 947–48 (1996); Stewart, *Judicial Elision*, *supra* note 5, at 9–10.

20. Professor Clayton defines an "institution" as: "[a]n organized system of social relationships (roles, positions, *norms*) that is pervasively implemented in the society and that serves certain basic needs of the society." RICHARD R. CLAYTON, THE FAMILY, MARRIAGE, AND SOCIAL CHANGE 22 (2d ed. 1979) (emphasis added); *see also* 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., 2001) ("An institution is a *web of interrelated norms*—formal and informal—governing social relationships."); William M. Sullivan, *Institutions as the Infrastructure of Democracy*, *in* NEW COMMUNITARIAN THINKING: PERSONS, VIRTUES, INSTITUTIONS, AND COMMUNITIES 170, 175 (Amitai Etzioni ed., 1995) ("Institutions . . . are normative patterns that define purposes and practices, patterns embedded in and sanctioned by customs and law."). For an "omnibus conception of institutions," see W. RICHARD SCOTT, INSTITUTIONS AND ORGANIZATIONS 48–58 (2d ed. 2001).

21. *See* SCOTT, *supra* note 20, at 54–58; HELEN REECE, DIVORCING RESPONSIBLY 185 (2003); MARY DOUGLAS, HOW INSTITUTIONS THINK 108 (1986); Stewart, *Judicial Elision*, *supra* note 5, at 9–10; Sullivan, *supra* note 20, at 175.

Those meanings, as the constitutive elements of social institutions, are therefore the source of the social goods that any institution provides. In other words, it is by teaching and transforming individuals across society that an institution's constitutive meanings generate social goods. These social goods lead to the institution's evolution and justify its perpetuation.[22]

Across time and cultures, a core meaning constitutive of the marriage institution has nearly always been the union of a man and a woman.[23] This core man-woman meaning is indispensable for the marriage institution's production of at least six valuable social goods.[24] The man-woman marriage institution is:

1. Society's best and perhaps only effective means to secure the right of a child to know and be raised by her biological parents (with exceptions justified only when they are in the best interests of the child).[25]
2. The most effective means yet developed to maximize the private welfare provided to children conceived by passionate, heterosexual coupling (with "private welfare" meaning not only basic requirements like food and shelter but also education, play, work, discipline, love, and respect).[26]
3. The indispensable foundation for that child-rearing mode—that is, married mother-father child-rearing—that correlates (in ways not subject to reasonable dis-

22. *See generally* Stewart, *Washington and California*, *supra* note 5, at 503 n.9.

23. *See* INST. FOR AM. VALUES, *supra* note 6, at 15.

24. For a detailed discussion of these six goods, see Stewart, *Judicial Elision*, *supra* note 5, at 16–20.

25. *See, e.g.*, COMM'N ON PARENTHOOD'S FUTURE, THE REVOLUTION IN PARENTHOOD: THE EMERGING GLOBAL CLASH BETWEEN ADULT RIGHTS AND CHILDREN'S NEEDS 32 (2006), *available at* http://www.americanvalues.org/pdfs/parenthood.pdf ("The legalization of same-sex marriage, while sometimes seen as a small change affecting just a few people, raises the startling prospect of fundamentally breaking the legal institution of marriage from any ties to biological parenthood."); Margaret Somerville, *What About the Children?*, *in* DIVORCING MARRIAGE: UNVEILING THE DANGERS IN CANADA'S NEW SOCIAL EXPERIMENT 63, 67 (Daniel Cere & Douglas Farrow eds., 2004) ("[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.").

26. *See* Stewart, *Judicial Elision*, *supra* note 5, at 17–18; Stewart, *Redefinition*, *supra* note 5, at 44–48.

pute) with the optimal outcomes deemed crucial for a child's, and therefore society's, well-being.[27]

4. Society's primary and most effective means of bridging the male-female divide.[28]
5. Society's only means of transforming a male into husband-father, and a female into wife-mother,[29] statuses and identities particularly beneficial to society.[30]
6. Social and official endorsement of the form of adult intimacy—married heterosexual intercourse—that society may rationally value above all other such forms.[31]

These are not the only social goods produced by the marriage institution, but they are the relevant ones for purposes of adjudicating the marriage issue. They are relevant because they are the social goods produced uniquely by the man-woman *meaning*, and that must, therefore, disappear when that meaning is deinstitutionalized.[32]

In contemporary America, the man-woman meaning has *not* been deinstitutionalized by broad social trends anywhere, and

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27. Putting aside for the moment the scientific adequacy of studies of the mother-lesbian partner child-rearing mode, discussed *infra* Part II.C.2.b, it is now uncontroversial that the married mother-father child-rearing mode significantly correlates with the optimal outcomes deemed crucial for a child's well-being. *See, e.g.*, THE WITHERSPOON INST., MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES 16–38 (2006), *available at* http://www.princetonprinciples.org/files/Marriage%20and%20the%20Public%20Good.pdf; INST. FOR AM. VALUES, *supra* note 6, at 12–32 (listing twenty-six positive social effects of marriage).

28. *See, e.g.*, DAVID BLANKENHORN, THE FUTURE OF MARRIAGE 93 (2007) ("More than any other human relationship, marriage bridges the sexual divide in the human species."); COUNCIL ON FAMILY LAW, THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA 12–13 (2005), *available at* http://www.marriagedebate.com/pdf/future_of_family_law.pdf (noting that marriage "provides an evolving form of life that helps men and women negotiate the sex divide").

29. *See* DeCoste, *Transformation*, *supra* note 5, at 625–27.

30. *See, e.g.*, DAVID POPENOE, LIFE WITHOUT FATHER 139–88 (1996); THE WITHERSPOON INST., *supra* note 27, at 21–27.

31. Stewart, *Redefinition*, *supra* note 5, at 52–57; Gallagher, *Does Sex Make Babies?*, *supra* note 5, at 451.

32. What is important for my purposes is that all six social goods described in the text are the product of the institutionalized man-woman meaning and that, exactly because those goods do much to meet certain basic human and social needs, our society has a compelling interest in their perpetuation. In this light, deciding which of these vital social goods is most valuable or whether perpetuation of each, separate and alone, qualifies as a compelling governmental interest—although certainly an interesting intellectual endeavor—would seem to serve no large practical purpose relative to resolution of the marriage issue.

only in Massachusetts has a court by legal mandate attempted to perform that task. "The union of a man and a woman" continues as a widely shared, public, and core meaning constitutive of the marriage institution across the nation. That is not to say that the man-woman meaning is universally shared. An alternate view of marriage (the "close personal relationship" model) makes that meaning dispensable, and that model's description of what marriage now *is*—after a process of evolution—is common in some American communities and in many Hollywood portrayals. But its description is inaccurate beyond those particular spheres because the man-woman meaning continues fully institutionalized as a widely shared public meaning in every state across the nation.[33]

With its power to suppress social meanings, however, the law can radically change and even deinstitutionalize man-woman marriage.[34] The consequence of such deinstitutionalization must necessarily be the loss of the institution's unique social goods.

Further, genderless marriage is a radically different institution than man-woman marriage. This does not mean, of course, that there is no overlap in formative instruction between the two possible marriage institutions; the significance is in the divergence. This significant divergence may be seen in the nature of the two institutions' respective social goods (in the case of genderless marriage, only promised, not yet delivered).[35] Nor should this divergence be surprising: fundamentally different meanings, when magnified by institutional power and influence, produce divergent social identities, aspirations, projects, or ways of behaving, and thus different social goods.[36] To use contemporary terminology, the man-woman marriage institution will construct a society different from that constructed by the genderless marriage institution.[37] It could not be otherwise

33. *See* Stewart, *New York*, *supra* note 5, at 236–37; *see also infra* Part II.C.1.b.

34. *See* Stewart, *Judicial Elision*, *supra* note 5, at 11–13.

35. *Id.* at 20–24. For example, the man-woman marriage institution makes meaningful the child's "bonding right"—a right to know and be reared by one's own biological parents. *Id.* at 21–22.

36. *Id.* at 20–21.

37. *See* DOUGLAS, *supra* note 21, at 108 ("First the people are tempted out of their niches by new possibilities of exercising or evading control. Then they make new kinds of institutions, and the institutions make new labels, and the label makes new kinds of people."); Hall & Taylor, *supra* note 19, at 948 ("Here, one can see the influence of social constructivism on the new institutionalism in sociology. . . . [I]nstitutions do not simply affect the strategic calculations of individu-

because the genderless marriage institution is radically different in its aims and teachings.[38] To say otherwise would be to ignore the undisputed effects that social institutions have in the formation and transformation of individuals.[39] Indeed, well-informed observers of marriage—regardless of their sexual, political, or theoretical orientations—uniformly acknowledge the magnitude of the differences between the two possible institutions of marriage.[40]

The contemporary social institution of marriage in America has evolved in important ways over the centuries and undoubtedly now includes the ideal of "a partnership of equals with equal rights, who have mutually joined to form a new family unit, founded upon shared intimacy and mutual financial and emotional support."[41] Nonetheless, enduring aspects of

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als, . . . but also their most basic preferences and very identity. The self-images and identities of social actors are said to be constituted from the institutional forms, images and signs provided by social life."); Stewart, *New York*, *supra* note 5, at 240–41.

38. *See* Stewart, *New York*, *supra* note 5, at 240.

39. *See id.*

40. *See* BLANKENHORN, *supra* note 28, at 167; Daniel Cere, *War of the Ring*, *in* DIVORCING MARRIAGE: UNVEILING THE DANGERS IN CANADA'S NEW SOCIAL EXPERIMENT 11–13 (Daniel Cere & Douglas Farrow eds., 2004); Douglas Farrow, *Canada's Romantic Mistake*, *in* DIVORCING MARRIAGE, at 1–5; LADELLE MCWHORTER, BODIES AND PLEASURES: FOUCAULT AND THE POLITICS OF SEXUAL NORMALIZATION 125 (1999); JOSEPH RAZ, THE MORALITY OF FREEDOM 393 (1986) ("I don't think there can be much doubt that this post-institutional view of marriage constitutes a radical redefinition. Prominent family scholars on both sides of the divide—those who favor gay marriage and those who do not—acknowledge this reality."); JUDITH STACEY, IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE 126–28 (1996); Katherine K. Young & Paul Nathanson, *The Future of an Experiment*, *in* DIVORCING MARRIAGE, at 48–56; Angela Bolt, *Do Wedding Dresses Come in Lavender? The Prospects and Implications of Same-Sex Marriage*, 24 SOC. THEORY & PRAC. 111, 114 (1998); Devon W. Carbado, *Straight Out of the Closet*, 15 BERKELEY WOMEN'S L.J. 76, 95–96 (2000); Gallagher, *Reply*, *supra* note 5, 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."); 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."); Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY REV. LESBIAN & GAY LEGAL ISSUES 9, 12–19 (1991); Andrew Sullivan, *Recognition of Same-Sex Marriage*, 16 QUINNIPIAC L. REV. 13, 15–16 (1996).

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

the institution go beyond that limited description of transformative meanings, and those enduring aspects are grounded in the man-woman meaning:

> Conjugal marriage [that is, man-woman marriage] has several characteristics. First, it is inherently normative. Conjugal marriage cannot celebrate an infinite array of sexual or intimate choices as equally desirable or valid. Instead, its very purpose lies in channeling the erotic and interpersonal impulses between men and women in a particular direction: one in which men and women commit to each other and to the children that their sexual unions commonly . . . produce.
>
> As an institution, conjugal marriage addresses the social problem that men and women are sexually attracted to each other and that, without any outside guidance or social norms, these intense attractions can cause immense personal and social damage.
>
> . . . [Conjugal marriage] provides an evolving form of life that helps men and women negotiate the sex divide, forge an intimate community of life, and provide a stable social setting for their children.
>
> . . . .
>
> Another characteristic of conjugal marriage is that it is fundamentally child-centered, focused beyond the couple towards the next generation. Not every married couple has or wants children. But at its core marriage has always had something to do with societies' recognition of the fundamental importance of the sexual ecology of human life: humanity is male and female, men and woman often have sex, babies often result, and those babies, on average, seem to do better when their mother and father cooperate in their care. Conjugal marriage attempts to sustain enduring bonds between women and men in order to give a baby its mother and father, to bond them to one another and to the baby.[42]

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42. COUNCIL ON FAMILY LAW, *supra* note 28, at 12–13. For more on the meanings and purposes of man-woman marriage beyond those comprising the close personal relationship model, see Gallagher, *Does Sex Make Babies?*, *supra* note 5, at 451–71; Gallagher, *Reply*, *supra* note 5, at 43–51; Stewart, *Judicial Elision*, *supra* note 5, at 16–20; Stewart, *Redefinition*, *supra* note 5, at 41–57.

Regarding this last-mentioned marriage fact—the institutionalized objective and practice of bonding a man, a woman, and the children that their sexual relation produces—one judge said:

> The institution of marriage provides the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other. The partners in a marriage are expected to engage in exclusive sexual relations, with children the probable result and paternity presumed. . . . Whereas the relationship between mother and child is demonstratively and predictably created and recognizable through the biological process of pregnancy and childbirth, there is no corresponding process for creating a relationship between father and child. Similarly, aside from an act of heterosexual intercourse nine months prior to childbirth, there is no process for creating a relationship between a man and a woman as the parents of a particular child. The institution of marriage fills this void by formally binding the husband-father to his wife and child, and imposing on him the responsibilities of fatherhood. . . . The alternative, a society without the institution of marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic.[43]

None of this is to assert that an institutionalized purpose of man-woman marriage is to mandate or even to promote procreation; rather, one of its purposes is to ameliorate the consequences of heterosexual coupling. The institution of marriage responds to two essential realities of man-woman intercourse: its procreative power and its passion. One purpose of marriage is to provide adequate private welfare to children. Man-woman

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43. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 995–96 (Mass. 2003) (Cordy, J., dissenting); *see also* Gallagher, *Does Sex Make Babies?*, *supra* note 5, at 451 ("[T]he justification for legal preferences for marriage for couples attracted to the opposite sex rests on three [factual] assertions: sex makes babies; society needs babies; and children need mothers and fathers. Marriage is about uniting these three dimensions of human social life."); BLANKENHORN, *supra* note 28, at 91 ("In all or nearly all human societies, marriage is socially approved sexual intercourse between a woman and a man, conceived both as a personal relationship and as an institution, primarily such that any children resulting from the union are . . . emotionally, morally, practically, and legally affiliated with both of the parents."). Blankenhorn notes that his definition of marriage "rests on a large and growing mountain of scholarly evidence. It incorporates widely shared conclusions about the meaning of marriage reached by the leading anthropologists, historians, and sociologists of the modern era." *Id.*

sexual intercourse, as an act of passion often leading to childbearing, has important implications for society. Societal interests are corroded when childbearing occurs in a setting of inadequate private welfare; such interests are advanced when childbearing occurs in a setting of adequate private welfare. Passion-based procreation militates against the latter circumstance and is conducive to the former. Although rationality considers consequences nine months thereafter, passion does not, to society's detriment.

A fundamental purpose of marriage, then, is to situate heterosexual passion within a social institution that will to the largest practical extent assure that the consequences of procreative passion (namely, 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 itself is the ultimate beneficiary.[44] The contemporary man-woman marriage institution advances, albeit imperfectly, this private welfare purpose. As a result, millions of Americans enjoy a significant incremental increase in happiness, health, and productivity.[45]

A society can have only one social institution denominated "marriage."[46] Society cannot simultaneously have as shared, core, constitutive meanings of the marriage institution *both* "the union of a man and a woman" *and* "the union of any two persons"; one meaning necessarily displaces the other. Thus, every society must choose either to retain man-woman marriage or, by force of law, replace it with a radically different genderless marriage regime.[47] It must be remembered that when public

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44. *See* Stewart, *Redefinition*, *supra* note 5, at 44–46; Morrison v. Sadler, 821 N.E.2d 15, 30 (Ind. Ct. App. 2005) ("The state of Indiana has a legitimate interest in encouraging opposite-sex couples to enter and remain in, as far as possible, the relatively stable institution of marriage.").

45. *See* INST. FOR AM. VALUES, *supra* note 6, at 12–32 (listing twenty-six positive social effects of marriage).

46. Stewart, *Judicial Elision*, *supra* note 5, at 24 ("Given the role of language and meaning in constituting and sustaining institutions, two 'coexisting' social institutions known society-wide as 'marriage' amount to a factual impossibility.").

47. A society actually has three options: man-woman marriage, genderless marriage, or no normative marriage institution at all. Stewart, *Washington and California*, *supra* note 5, at 510, n.40. Among elites worldwide, the third option has many effective advocates, and the Americans in their midst "came out of the closet" in July 2006 with the *Beyond Same-Sex Marriage* manifesto. *See* Beyondmarriage.org, Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families &

meanings and norms are insufficiently shared, the social institution constituted by those meanings and norms disappears—as do the social goods uniquely provided by that institution. When the social institution of marriage disappears, what remains is a motley crew of lifestyles. A lifestyle without institutional context is like Monopoly money: it resembles true currency, but lacks the essential shared meaning that provides its value.[48]

In addition, man-woman marriage is a pre-political institution; in contrast, genderless marriage is necessarily a post-political, law-constructed, and thus fragile institution.[49] Professor Raz captures the reality well when he observes that the law's role relative to man-woman marriage and other pre-political institutions is "to give them formal recognition, bring legal and administrative arrangements into line with them, facilitate their use by members of the community who wish to do so, and encourage the transmission of belief in their value to future generations."[50] Thus, when a same-sex couple successfully asserts a "right to marry," they are not imposing on the

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Relationships (July 26, 2006), *available at* http://www.beyondmarriage.org/BeyondMarriage.pdf. Although the contemporary American political reality is limited to the first two options, many of the most influential advocates of genderless marriage correctly and gladly see that as leading quite naturally to no normative marriage institution at all. *See* Stanley Kurtz, *The Confession*, NATIONAL REVIEW ONLINE, Oct. 31, 2006, http://author.nationalreview.com/ (follow "Stanley Kurtz Archive" hyperlink; then follow "The Confession" hyperlink); Stanley Kurtz, *The Confession II*, NATIONAL REVIEW ONLINE, Nov. 1, 2006, http://author.nationalreview.com/ (follow "Stanley Kurtz Archive" hyperlink; then follow "The Confession II" hyperlink). The prospect of having no normative marriage institution whatsoever, then, may well be nearer than now appears.

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

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

49. *See, e.g.*, Seana Sugrue, *Soft Despotism and Same-Sex Marriage*, *in* THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, AND MORALS 172, 180–81, 186–91 (Robert P. George & Jean Bethke Elshtain eds., 2006) ("Being entirely a creation of the state [the genderless marriage institution] is an institution that needs to be coddled, and which demands cocooning to protect it. Its very fragility demands a culture in which it is protected.").

50. RAZ, *supra* note 40, at 161; *cf.* DeCoste, *Transformation, supra* note 5, at 635.

state a correlative duty to allow them into the existing man-woman marriage institution—which the law is impotent to do,[51] although it is sufficiently potent to deinstitutionalize man-woman marriage.[52] Instead, they are imposing on government a duty to construct and maintain in all its fragility the radically different genderless marriage institution, in which every couple that professes to be married (whether same-sex or man-woman) must participate if the marriage is to have legitimacy.[53]

Proponents of man-woman marriage have advanced other marriage facts,[54] but those discussed above are central to any intellectually serious resolution of the marriage issue. The next Part identifies marriage facts as presented by proponents of genderless marriage.

B. The Factual Basis of the Case for Genderless Marriage

Genderless marriage proponents assert that same-sex couples are just as capable as man-woman couples of forming and participating in loving, committed, enduring, and intimate relationships, and therefore of successfully entering into and continuing in marriage. Same-sex couples are likewise equally capable of being good parents. Moreover, committed same-sex couples—and the children they raise—need, just as much as do the adults and children now privileged by marriage, the many psychological, legal, economic, and wider social benefits that marriage provides in our society.

For all couples, same-sex and man-woman, "it is the exclusive and permanent commitment of the marriage partners to one another . . . that is the sine qua non of civil marriage."[55] Or stated in slightly different words, "[m]arriage, as it is understood today, is . . . a partnership of two loving equals who choose to commit themselves to each other . . . ."[56] Marriage is thus accurately viewed as an "exclusive commitment of two individuals to each other [that] nurtures love and mutual sup-

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51. *See* Stewart, *Redefinition*, *supra* note 5, at 84–85.

52. *See* Stewart, *Judicial Elision*, *supra* note 5, at 36–37.

53. *See id.* at 52 n.137.

54. *See id.* at 4.

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

56. Hernandez v. Robles, 794 N.Y.S.2d 579, 609 (Sup. Ct. 2005), *rev'd* 805 N.Y.S.2d 354 (App. Div. 2005), *aff'd*, 855 N.E.2d 1 (N.Y. 2006).

port . . . ."[57] and as "a unique expression of a private bond and profound love between a couple."[58]

Marriage, however, is more than merely a loving commitment between two adults; it is also a very public celebration of their commitment.[59] Same-sex couples thus seek "what their friends, relatives, co-workers and neighbors already enjoy—participation with the one person each loves in the central rite of passage in American family life,"[60] as well as access to "society's most significant public proclamation of commitment to another person for life."[61]

This blend of personal commitment and public celebration is the essence of modern marriage:

> Marriage is, without dispute, one of the most significant forms of personal relationships. . . . Through the institution of marriage, individuals can publicly express their love and commitment to each other. Through this institution, society publicly recognizes expressions of love and commitment between individuals, granting them respect and legitimacy as a couple. This public recognition and sanction of marital relationships reflect society's approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships.[62]

Hence, "critical reflection upon the functions and purposes that society associates with civil marriage and the individual needs and goods that it promotes" points to "love and friendship, security for adults and their children, economic protection, and public affirmation of commitment."[63]

Given their equal capacity for marriage, it is deeply hurtful to same-sex couples for the law to exclude them from that institution. On a psychological level, the exclusion communicates to

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57. *Goodridge*, 798 N.E.2d at 948.

58. Brief of Plaintiffs-Appellants at 21, Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006) (No. SJC-08860).

59. *Goodridge*, 798 N.E.2d at 954 ("Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family.").

60. Brief of Appellants at 3, Lewis v. Harris, 908 A.2d 196 (N.J. 2006) (No. 58,398).

61. Brief of Plaintiffs-Appellants, *supra* note 60, at 21.

62. Halpern v. Canada, [2003] 172 O.A.C. 276, 281–82, ¶ 5 (Ont. Ct. App.).

63. LINDA C. MCCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY 6 (2006).

same-sex couples and to society generally that their most important relationships and their very self-identity are less worthy than the corresponding relationships and self-identity of participants in man-woman marriage.[64] Contrariwise, allowing same-sex couples to marry "can only enhance [their] sense of self-worth and dignity."[65]

This harm of exclusion extends into the legal and economic spheres because various laws provide married people with hundreds of procedural and substantive benefits.[66] In the absence of genderless marriage, such benefits are available to committed same-sex couples only through expensive private ordering or, all too often, not at all.[67] Deprivation of these legal and economic benefits creates constant difficulties for committed same-sex couples that are not experienced by—or imaginable for—their married counterparts.[68]

Those in committed same-sex relationships are not the only individuals who suffer from such deprivations. Hundreds of thousands of children in the United States are currently being raised by same-sex couples.[69] Most of those children are the product of one partner's previous man-woman relationship, while some are the product of assisted reproductive technology.[70] Further, an increasing number of jurisdictions allow same-sex couples to adopt.[71] The exclusionary nature of the man-woman meaning embedded in our marriage laws blocks all children in homes headed by same-sex couples from the well-

64. *See* Tobin A. Sparling, *All in the Family: Recognizing the Unifying Potential of Same-Sex Marriage*, 10 LAW & SEXUALITY 187, 191–92 (2001).

65. *Halpern*, 172 O.A.C. at 281–82, ¶ 5.

66. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955–56 (Mass. 2003).

67. Gay & Lesbian Advocates & Defenders, Protections and Responsibilities of Marriage, http://www.glad.org/rights/OP2-protectionsbenefits.shtml (last visited Jan. 2, 2008).

68. Lambda Legal Defense & Education Fund, Why Marriage Equality Matters (May 10, 2004), http://www.lambdalegal.org/our-work/publications/facts-backgrounds/page.jsp?itemID=31988962.

69. *See* Liz Seaton, *The Debate Over the Denial of Marriage Rights and Benefits to Same-Sex Couples and Their Children*, 4 MD. L.J. RACE, RELIGION, GENDER, & CLASS 127, 136–37 (2004).

70. *See* Madeline Marzano-Lesnevich & Galit Moskowitz, *In the Interest of Children of Same-Sex Couples*, 19 J. AM. ACAD. MATRIMONIAL LAW 255, 268–70 (2005).

71. *See* Eleanor Michael, Note, *Approaching Same-Sex Marriage: How Second Parent Adoption Cases Can Help Courts Achieve the "Best Interests of the Same-Sex Family,"* 36 CONN. L. REV. 1439, 1440–41 (2004).

demonstrated psychological, legal, economic, physical, and other benefits accruing to children whose caregivers are married.[72]

In general, committed same-sex couples are as capable as married couples of being good parents.[73] Progressive adoption laws demonstrate political recognition of this fact. Moreover, a number of empirical studies show "no differences" in outcomes between the mother-lesbian partner child-rearing mode and the married mother-father child-rearing mode.[74] Accordingly, even if one views marriage as principally a child-centered and child-rearing institution, the demonstrated child-rearing capacity of committed same-sex couples makes them equally worthy of marriage's benefits and responsibilities.

Furthermore, marriage has long been understood as exerting a "gentling" or "civilizing" influence on husbands. Historically, unmarried men have engaged in a wide range of social pathologies more frequently than their married counterparts. Public policy should therefore encourage men to marry rather than block their access to this refining institution. Marriage will presumably benefit gay men, as it has straight men, in ways redounding to the benefit of society generally.[75]

Civil marriage is a legal construct. Its character as a creature of law gives it efficacy and influence in our society.[76] "[M]arriage draws its strength from the nature of the civil marriage contract itself and the recognition of that contract by the State."[77] Civil marriage, like all other legal constructs, must conform to constitutional norms of equality, liberty, autonomy, and

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72. *See* Lauren Schwartzreich, *Restructuring the Framework for Legal Analyses of Gay Parenting*, 21 HARV. BLACKLETTER L.J. 109 (2005); Michael S. Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 VA. J. SOC. POL'Y & L. 291 (2001).

73. William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America's Children*, 15 FUTURE CHILD. 97, 97 (2005).

74. *See* Press Release, American Civil Liberties Union, Maryland Psychologists, Social Workers, and Child Welfare Advocates Speak Out in Support of Marriage for Same-Sex Couples (Nov. 30, 2006), *available at* http://www.aclu.org/lgbt/relationships/27548prs20061130.html.

75. This is the rather famous "conservative case for gay marriage." *See* Andrew Sullivan, *The Conservative Case for Gay Marriage*, TIME, June 30, 2003, at 76; Andrew Sullivan, *Here Comes the Groom*, THE NEW REPUBLIC, Aug. 28, 1989, at 20; *see also* WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT (1996).

76. *See* Hernandez v. Robles, 805 N.Y.S.2d 354, 377 (App. Div. 2005) (Saxe, J., dissenting) ("Civil marriage is an institution created by the state . . . .").

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

human dignity.[78] What is more, civil marriage is fully amenable to the usual refining and improving mechanisms of the law, both legislative and judicial.[79] Indeed, marriage has always been an evolving institution, largely through the operation of law.[80]

Many legal changes important to the evolution of marriage logically support the next inevitable change in marriage law: the redefinition of marriage from the union of a man and a woman to the union of any two persons.[81] Most important are legal changes that move away from gender-based rights and roles towards legal equality of spouses;[82] away from "the procreation of children . . . as a central purpose of marriage, as . . . reflected in the common law concept of consummation" towards an emphasis on the close personal relationship between two committed individuals;[83] away from the denial of legal protection for (or even the imposition of penalties on) unwed, cohabiting couples and their offspring towards the provision of a variety of rights and protections to them;[84] and away from the recognition of biological parenthood towards the recognition of legal parenthood (that is, parenthood as

78. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) ("The question before us is whether, consistent with the Massachusetts Constitution, the Commonwealth may deny . . . civil marriage to two individuals of the same sex . . . . The Massachusetts Constitution affirms the dignity and equality of all individuals."); *id.* at 949 ("Barred access to . . . civil marriage, a person . . . is arbitrarily deprived of membership in one of our community's most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principle of respect for individual autonomy and equality under law."); *id.* at 959 ("The individual liberty and equality safeguards of the Massachusetts Constitution protect both 'freedom from' unwarranted government intrusion into protected spheres of life and 'freedom to' partake in benefits created by the State for the common good.").

79. *See id.* at 969 (noting that refining the common-law meaning of marriage through judicial remedy "is entirely consonant with established principles of jurisprudence empowering a court to refine a common-law principle" while still "leav[ing] intact the Legislature's broad discretion to regulate marriage.").

80. *See, e.g.*, Nicholas Bala, *The Debates About Same-Sex Marriage in Canada and the United States: Controversy Over the Evolution of a Fundamental Social Institution*, 20 BYU J. PUB. L. 195, 228 (2006) ("Marriage is one of the oldest, most universal and important of social and legal institutions. It has, however, dramatically changed over the course of recorded history, and today there is great variation around the world in the laws and mores of marriage in different countries.").

81. *See id.* at 202–03.

82. *See id.* at 201–02.

83. *Id.* at 198.

84. *See id.* at 199, 202–09.

solely a status conferred by law).[85] As gender rights and roles are eliminated, "[i]t [becomes] more difficult to argue that marriage law should require two spouses of opposite gender if there are, in fact, no longer legally specified gender roles," particularly when "there is growing ambiguity about . . . the roles of 'husband' and 'wife.'"[86] The creation of marriage-like legal arrangements governing unwed, cohabiting couples, as well as the recognition of their legal parenthood, has laid "the ground work for a more flexible approach for the more recent recognition of same-sex relationships."[87]

To a great extent, religion is the source of the man-woman limitation in our society's marriage laws. Religion shapes not only the arguments advanced in support of that legal limitation but also the very meaning of man-woman marriage itself. Thus, the limitation of marriage to the union of a man and a woman "stems, in substantial part, from . . . animosity that is rooted in moral and religious objections,"[88] and from the intent both "to impose religious and moral restrictions on the state regulated civil institution of marriage" and "to impose religious sensibilities or religiously-based moral codes on others' most intimate life decisions."[89] This limitation, however, "reflects a *religious* viewpoint [and] *religious* doctrine should not govern state regulation of *civil* marriage."[90] Religious marriages certainly may continue to conform to whatever doctrines the sponsoring religions proclaim.[91] Civil marriage must be purged of religiously-based man-woman limitations because a civil marriage regime so tainted "reflects an impermissible State religious establishment."[92]

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85. BLANKENHORN, *supra* note 28, at 155–56. The Canadian parliamentary enactment mandating genderless marriage contains several provisions containing the term "legal parent" and, in that way, the statute replaces natural parenthood with legal parenthood. *See also* Civil Marriage Act, 2005 S.C., ch. 33, §§ 6(1), 10(1)–(3), 11, 12(1) (Can.).

86. Bala, *supra* note 80, at 202–03.

87. *Id.* at 209.

88. Andersen v. King County, 138 P.3d 963, 1032 (Wash. 2006) (Bridge, J., dissenting).

89. *Id.* at 1034.

90. *Id.* at 1035.

91. *See, e.g.*, Brief for Religious Organizations as Amici Curiae Supporting Plaintiffs-Appellants at 10–13, Samuels v. Dep't of Pub. Health, 811 N.Y.S.2d 136 (App. Div. 2006), *available at* http://www.aclu.org/FilesPDFs/samuels_religious.pdf.

92. Andersen v. King County, 138 P.3d 963, 1027–28 (Wash. 2006) (Bridge, J., dissenting) (quoting Brief for Libertarian Party of Washington State et al. as Amici Curiae Supporting Respondents at 11, *available at* http://marriagelaw.cua.edu/Law/states/Washington%20State/Amici%20Curiae%20Brief%20of%20the%20Libertaria

Same-sex couples in general have equal capacity to participate in modern marriage and equal capacity to be good parents. The ongoing refusal to include gay men and lesbians in civil marriage must therefore be understood as resulting from continuing social animus.[93] The absence of any rational, nonreligious justification for excluding same-sex couples from marriage shows that the exclusion is, as a matter of fact, the present fruit of that same pervasive and powerful animus.[94]

C. Responses—and a Critical Examination

1. The factual basis of the narrow and broad marriage descriptions

a. Is, ought, and the relationship between the two descriptions

The two competing packages of marriage facts provide much different descriptions of what marriage is in contemporary America. Before turning to the task of assessing factual accuracy, however, something must be said about *is* (as in what marriage *is*) and *ought* (as in what marriage *ought* to be). Discovering the facts of marriage has been made more difficult because of normative assertions about what marriage *ought* to be, disguised as positive descriptions of what marriage *is*. With more or less justification, each side accuses the other of failing to distinguish *is* from *ought*. Such failure may be understandable; motivated by its desires for society and its convictions about how things *ought* to be, each side views its particular version of marriage as essential to achieving its vision of the good

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n%20Party%20of%20Washington%20State;%20Log%20Cabin%20Republicans%20of%20Washington.pdf).

93. *See* Barbara J. Cox, *Are Same-Sex Marriage Statutes the New Anti-Gay Initiatives?*, 2 NAT'L. J. OF SEXUAL ORIENTATION L. 194 (1996), *available at* http://www.ibiblio.org/gaylaw/issue4/cox3.html.

94. *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 968 (Mass. 2003) ("The absence of any reasonable relationship between . . . an absolute disqualification of same-sex couples who wish to enter into civil marriage and . . . protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are . . . homosexual."); M. Isabel Medina, *Of Constitutional Amendments, Human Rights and Same-Sex Marriages*, 64 LA. L. REV. 459, 474 (2004) ("Ultimately, it is hard to argue that opposition to same-sex marriage is not about animus or moral disapprobation of lesbian and gay individuals and couples.").

society. With that said about the *is*/*ought* problem, this Article turns to the relationship between competing packages of marriage facts.

The two previous Parts demonstrate a divergence on a fundamental question of fact: What *is* marriage? Close examination, however, reveals not so much a divergence as a broad description encompassing most but not all of a much narrower description. The man-woman marriage proponents' broad description encompasses a wider range of marriage-produced social goods than the genderless marriage proponents' much more narrow description. The same holds true relative to marriage's purposes, practices, formative powers, and interactions with other social institutions: the broad description encompasses much that the narrow description excludes.

The genderless marriage proponents' narrow description is premised on the "close personal relationship" model of marriage.[95] As one commentator has described it:

> [The narrow description] focuses primarily on the nature of relationships between two people (or what is called "dyadic" relationships). For close relationship theorists, marriage becomes a subcategory of this core concept; marriage is simply one kind of close personal relationship. The structures of the discipline tend to strip marriage of the features that reflect its status and importance as a social institution.[96]

Consequently, "marriage is seen primarily as a private relationship between two people, the primary purpose of which is to satisfy the adults who enter it. Marriage is about the couple. If children arise from the union, that may be nice, but marriage and children are not really connected."[97] Some scholars believe that we are in fact "moving from a marriage culture to a culture that celebrates 'pure relationship,'"[98] which is understood as a relationship "that has been stripped of any goal beyond the intrinsic emotional, psychological, or sexual satisfaction which the relationship currently brings to the [two adult] individuals involved."[99] Under the pure relationship model, marriage's social goods are "love and friendship, security for adults and

95. *See* Stewart, *Washington and California*, *supra* note 5, at 508–09, 527–31.
96. COUNCIL ON FAMILY LAW, *supra* note 28, at 14.
97. *Id.*
98. *Id.* at 15.
99. *Id.*

their children, economic protection, and public affirmation of commitment."[100]

The man-woman marriage proponents' broad description encompasses most but not all of what the close personal relationship model describes. It encompasses, for example, the social goods of "love and friendship, security for adults and their children, economic protection, and public affirmation of commitment"[101] as well as the ideal of "a partnership of equals with equal rights, who have mutually joined to form a new family unit, founded upon shared intimacy and mutual financial and emotional support."[102] The broad description, however, encompasses much more. The institutionalized man-woman meaning is the source of *additional* social goods, which include provision of the most effective (or only) means of supporting a child's right to know and be reared by his mother and father (with exceptions only when in the best interests of the child), of maximizing the private welfare provided to the children conceived by heterosexual intercourse, of sustaining the optimal child-rearing mode (married mother and father), of bridging the male-female divide, and of furnishing the status and identity of "husband" or "wife."

Acceptance of the broad description requires rejection of two salient aspects of the narrow description of marriage. First, it requires rejecting the notion that marriage is *no more than* what the narrow model describes. Although genderless marriage proponents rarely, if ever, expressly state that notion of "no more than," the notion is always implicit in their arguments.[103]

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100. MCCLAIN, *supra* note 63, at 6.

101. *Id.*

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

103. The always implicit "no more than" notion is examined in detail in the longer version of this Article found online, Monte Neil Stewart, *Marriage Facts and Critical Morality* 35–44, http://marriagelawfoundation.org/mlf/publications/Facts.pdf [hereinafter Stewart, *Long Version*]. This phenomenon merits close examination for two reasons. First, the notion itself goes to the heart of the veracity of the narrow and broad descriptions; if the "no more than" notion is factually accurate, it must follow that what the broad description depicts beyond the narrow description's scope is factually false. Conversely, if the "no more than" notion is erroneous as a matter of fact, that error would be established by the validation of the broad description's *additional* depictions. Second, if—as demonstrated elsewhere—the "no more than" notion is always or nearly always implicit and therefore not expressly stated and defended, that aspect is also important. *Id.* It is im-

Second, the broad description also requires rejecting the idea that children are not "the sine qua non of civil marriage"[104] and that "marriage and children are not really connected."[105] The broad description portrays marriage as primarily a child-protective and child-centered institution, with most of the institution's social goods pertaining to the quality of child-rearing. Conversely, the narrow model describes an adult-centered "partnership entered into for its own sake, which lasts only as long as both partners are satisfied with the rewards (mostly intimacy and love) that they get from it."[106]

This understanding of the relationship between the broad and narrow descriptions of marriage does not, in itself, answer the questions of which description is more accurate as a matter of fact. This Article now turns to that question.

b. The weight of the evidence

Genderless marriage proponents either agree with or are silent about a number of findings that emerge from social institutional studies.[107] The briefs, opinions, and scholarly pieces in which genderless marriage proponents engage the marriage facts do not deny that marriage is a vital social institution.[108] Nor do they deny that marriage is constituted by widely

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portant because it constitutes probative evidence about how defensible the "no more than" notion is.

104. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003) ("While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.").

105. COUNCIL ON FAMILY LAW, *supra* note 28, at 14.

106. Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848, 853, 858 (2004) (reporting both that the "pure relationship is not tied . . . to the desire to raise children" and that scholarly "attempts to incorporate children into the pure relationship are unconvincing").

107. This Article does not deal with *all* marriage facts, but only those used by each side of the marriage debate in briefs, judicial opinions, and the scholarly pieces on the cases addressing this issue. It seems fair to limit the search for responses to the same sources.

108. The judges in favor of judicially-mandated genderless marriage uniformly acknowledge this reality. Stewart, *Judicial Redefinition*, *supra* note 5, at 75; Stewart, *New York*, *supra* note 5, at 231; Stewart, *Washington and California*, *supra* note 5, at 517. In making his case for genderless marriage, Ronald Dworkin acknowledges, "The institution of marriage is unique; it is a distinct mode of association and commitment that carries centuries and volumes of social and personal meaning." RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? 86 (2006).

shared social meanings, that these institutionalized meanings teach and transform individuals, and that these meanings provide valuable social goods. Likewise, they do not deny that, across different times and cultures, a core meaning constitutive of the marriage institution has nearly always been and still is "the union of a man and a woman." Nor do they deny that the social institution premised on and constituted by that meaning provides a number of social goods beyond those offered by the close personal relationship model. Thus, genderless marriage proponents leave uncontested nearly all of the key realities undergirding the social institutional argument for man-woman marriage. Moreover, they *expressly accept* the most fundamental fact—that marriage is a vital social institution.[109]

Genderless marriage proponents are also silent regarding other types of evidence that support the broad description. Such evidence includes recent demographic studies showing the predominant nature of the institutionalized man-woman meaning across the United States.[110] The findings of these studies suggest that it is erroneous as a matter of fact to assert that the close personal relationship model is now—after a process of evolution—*all* that marriage is.[111] Although such an assertion accurately describes the prevailing sentiment in some American communities, it does not apply to most of the nation. In no state has the trend away from man-woman marriage and towards the close personal relationship model achieved demographic dominance.[112]

Recent political and marriage practices are further proof that the union of a man and woman continues as a strongly shared public meaning, among the complex of other meanings, constitutive of the contemporary marriage institution. One such proof is that, within the past few decades, forty-one states and the federal government have enacted "defense of marriage" acts or constitutional amendments, and sometimes both, which

109. *See supra* note 108.

110. These demographic studies have been addressed elsewhere at some length. *See* Stewart, *Long Version*, *supra* note 103, at 45–47; Stewart, *Washington and California*, *supra* note 5, at 532–34.

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

112. *See supra* note 110.

express that shared meaning.[113] It bears repeating that these laws are very recent social expressions, not the vestiges of "long-accepted assumptions that . . . have eroded."[114] Furthermore:

> [I]nstitutions 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 . . . . [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.[115]

In 2004, more than 4.5 million Americans made renewing use of the man-woman marriage institution by marrying.[116] Over their lifetime, a substantial majority of Americans choose to enter man-woman marriage,[117] and a substantial majority of American births are legitimate.[118]

Although the preceding evidence supports the factual accuracy of the broad description of man-woman marriage, the evidence also shows (and proponents of the broad description do not deny) that a number of trends have diminished the force and influence of the man-woman marriage institution. The Council on Family Law describes the trends as follows:

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113. *See* William C. Duncan, *Marriage Amendments and the Reader in Bad Faith*, 7 FLA. COASTAL L. REV. 233, 233–34 nn.2–3 (2005) (collecting citations to statutes and amendments defining marriage as the union of a man and a woman).

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

115. SEARLE, *supra* note 48, at 57.

116. 4,558,000 people married in the United States in 2004. Subtracting the people who married in Massachusetts (83,098), the number would be 4,474,902. CTRS. FOR DISEASE CONTROL & PREVENTION, BIRTHS, MARRIAGES, DIVORCES, AND DEATHS: PROVISIONAL DATA FOR 2004, 53 NAT'L VITAL STAT. REP. NO. 21, at 1, 6 (2005), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr53/nvsr53_21.pdf.

117. The National Marriage Project report for 2005 states: "For the generation of 1995, assuming a continuation of then current marriage rates, several demographers projected that 88 percent of women and 82 percent of men would ever marry." NAT'L MARRIAGE PROJECT, THE STATE OF OUR UNIONS 2005: THE SOCIAL HEALTH OF MARRIAGE IN AMERICA 16–17 (2005), *available at* http://marriage.rutgers.edu/publications/soou/soou2005.pdf.

118. The births to married women in 2004 were 64.2 percent of all births. JOYCE A. MARTIN ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, BIRTHS: PRELIMINARY DATA FOR 2004, 55 NAT'L VITAL STAT. REP. NO. 1, 11 (2006), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr55/nvsr55_01.pdf. For a discussion of the key statistics, tracking the strength of the American marriage institution since 1970, see BLANKENHORN, *supra* note 28, at 217–22.

> Of course close relationship theorists are not operating in a vacuum. Close relationship theory reflects real trends in society that are making marriage less connected to its classic purposes as a social institution. For example, while marriage remains a wealth-generating institution, other institutions of society (such as the market and government) have taken over large parts of the economic and social insurance functions marriage once had. While marriage remains a socially preferred context for sexual intercourse, the sexual revolution (including the growth in social acceptance for couples living together) has reduced the stigma for those who have sex outside of marriage. While marriage continues to have considerable connection to children in the public mind, large increases in unmarried childbearing have increased social acceptance of unwed parents and their children. In addition, high rates of divorce and the personal longings for a soul mate are changing the way young people think about marriage.[119]

But the question of fact is "What is marriage?," not "What will it be in twenty years?" or "Where do we guess current trends are taking marriage?" The man-woman meaning has not been deinstitutionalized but continues to be powerful in transforming the large portion of our nation's population in very productive ways. Man-woman marriage still produces unique social goods in fulfillment of marriage's "classic purposes as a social institution."[120]

The evidence advanced by genderless marriage proponents in support of the factual accuracy of the narrow description consists of four proofs: (1) robust descriptions of changes in marriage ("the evolving marriage paradigm"); (2) references both to the absence of any governmental requirements relative to procreation by married couples and to the absence among some married couples of any procreative intention or conduct; (3) bald assertions; and (4) a disguised argument of legal irrelevancy. Evaluation of each of these four proofs suggests that they, singly or together, do not undermine the broad description.

It is helpful to position the "evolving marriage" response in the context of the present debate on "What is marriage?" Four features of that debate are particularly important. First, thoughtful and informed observers uniformly acknowledge

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119. COUNCIL ON FAMILY LAW, *supra* note 28, at 14–15 (footnotes omitted).
120. *Id.* at 14.

that marriage is not a static institution; it has evolved over the centuries in many ways, some dramatic.[121] They further acknowledge that several recent societal changes have facilitated the emergence of the close personal relationship (whether formalized by a marriage or not) as a way of living embraced by a significant minority of the population, and that legal changes in the institution itself have rendered more plausible some arguments for the legal redefinition of marriage.[122] Second, the notion that something inherent and static in marriage precludes legal redefinition is *not* a part of the debate.[123] Third, the notion that recent legal changes automatically compel legal redefinition to genderless marriage is *not* a part of the debate, at least for the large majority of mainstream participants.[124] Fourth, the fundamental factual issue remains: Is the man-woman meaning still institutionalized in the sense that it continues as a widely shared public meaning of marriage productive of valuable social goods?

Once the "evolving marriage" response is positioned in the context of the "What is marriage?" debate, the response's weaknesses emerge. In particular, recitation of the uncontested fact of institutional change is unhelpful; "evolving marriage" proponents have no good answer to the question, "So what?"[125]

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121. *See, e.g.*, BLANKENHORN, *supra* note 28, at 91 ("[Marriage] is constantly evolving, reflecting the complexity and diversity of human cultures."); MCCLAIN, *supra* note 63, at 21 ("The long history of the institution of marriage offers an evolving, rather than a static, answer to the question 'What is marriage *for*?'").

122. *See, e.g.*, MCCLAIN, *supra* note 63, at 22–23; COUNCIL ON FAMILY LAW, *supra* note 28, at 14–15; Bala, *supra* note 80, at 201–09; *see also* Stewart, *Redefinition*, *supra* note 5, at 86–95.

123. *See* Stewart, *Judicial Elision*, *supra* note 5, at 4; *see also* Stewart, *Dworkin*, *supra* note 5, at 302 n.121.

124. Most participants in the marriage debate do not publicly embrace the radical social constructionist conclusions that the differences between men and women do not (or should not) matter in the eyes of the law, that the prior legal changes in marriage reflect and enshrine that first conclusion, and that, therefore, there is no defensible basis under equality jurisprudence for defining civil marriage as a man-woman relationship rather than a person-person relationship. *See* Stewart, *Redefinition*, *supra* note 5, at 86–95.

125. The answer often implied and sometimes given expressly—"Because the changes show that genderless marriage is inevitable"—is not a good answer, for several reasons (see BLANKENHORN, *supra* note 28, at 235–36, 239–40, for a collection of examples of the inevitability argument). First, that answer presupposes that a judge's constitutional duty is to perceive social trends and then to move the law in front of those trends. No serious student of constitutional law publicly champions such a formulation of the judicial duty, although a few judges have given hints of such a mandate. *See, e.g.*, Hernandez v. Robles, 855 N.E.2d 1, 34 (N.Y. 2006) (Kaye, C.J., dissenting) ("I am confident that future generations will

The vital question in the debate concerns the *present* institutionalized nature of the man-woman meaning. Reference to changes in the marriage institution may provide useful context in considering that question but such references do not answer it.[126] That the no-fault divorce laws of the 1970's suppressed "permanence" as an institutionalized meaning may well be true,[127] but this development says nothing about the ongoing institutionalized status of the man-woman meaning. The same can be said of legal changes pertaining to gender equality in marriage, qualifications for adoptive parent status, disparate treatment of illegitimate children, and so on. The same may even be said (albeit more guardedly) of social changes pertaining to rates of unmarried cohabitation, out-of-wedlock births, and pursuit of the close personal relationship model. Although these social changes directly affect the force of the man-woman marriage institution and move it closer to the deinstitutionalization precipice, mere recitation of such changes does not answer the question, "How much closer?" The answer is important because no responsible observer says that man-woman marriage is already deinstitutionalized.[128] The "evolving mar-

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look back on today's decision as an unfortunate misstep."). Second, the assertion of inevitability—founded on a confidently made reading of where social currents in history will certainly carry the marriage institution—is a dubious intellectual proposition; it would seem to be worthy of about the same level of respect due to another message of inevitability clearly to be perceived in powerful social currents revealed by history, the message preached by Karl Marx. Third, 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. In this context it merits mentioning that, but for *EGALE Canada Inc. v. Canada (Attorney General)*, [2003] 13 B.C.L.R. (4th) 1 (B.C. Ct. App.), and *Halpern v. Canada*, [2003] 172 O.A.C. 276 (Ont. Ct. App.), there would be no genderless marriage in Canada today, and but for *Goodridge*, there would be no genderless marriage anywhere in the United States today. *See* Stewart, *Judicial Elision*, *supra* note 5, at 63–64.

126. *See* Stewart, *Judicial Elision*, *supra* note 5, at 61–70.

127. *See id.* at 67–68; *see also* Stewart, *Long Version*, *supra* note 103, at 53 n.185 (collecting scholarly articles on the debate about whether no-fault divorce laws and the divorce revolution are causally related or simply correlated and examining the ill effects of the divorce revolution).

128. Professor Coontz asserts that marriage in America has been deinstitutionalized; that is, that no public meanings (formerly) constitutive of the institution are now shared sufficiently widely to have institutional force. Stephanie Coontz, Remarks at UCLA Williams Institute Marriage Debates Conference (Apr. 21–22, 2006); *see also* BLANKENHORN, *supra* note 28, at 239. Critics from across the spectrum have questioned Professor Coontz's work. *Compare* Alan Wolfe, *The*

riage" response is unhelpful because it fails to engage directly the factual conclusion that, in contemporary America, the man-woman aspect of marriage remains a predominantly shared public meaning that produces valuable social goods. Thus, the response does not undermine the factual accuracy of the broad description of marriage.[129]

Genderless marriage proponents also point out that government requires neither proof of procreative capacity and intention before marriage nor actual procreation after marriage and that a substantial minority of married couples do not ever bear children. These facts, it is argued, show that the child-centered nature of the broad description of contemporary American marriage is either false or is of such minimal importance as to make the narrow description more factually accurate.[130]

These facts regarding governmental requirements and actual conduct relative to marital procreation are true but not probative. They are not probative because of three interrelated marriage facts that are equally accurate. First, and most relevant, marriage is society's mechanism to regulate and ameliorate the consequences of passionate and procreative heterosexual intercourse (that is, children).[131] The "silly view of marriage as a mechanism *mandating* procreation"[132] is just that, silly. By normalizing and privileging marriage as the situs for man-woman intercourse and thereby seeking to channel all heterosexual intercourse within that institution, society seeks to assure that when man-woman sex does produce children, those children receive from birth onward the maximum amount of private welfare. Even in our contraceptive culture, passionate heterosexual intercourse results in many unintended births.[133] "Almost a third of all [American] births between 1990 and 1995 were unintended. . . . Almost four in ten women aged 40–44 had had at least one unplanned birth."[134] Marriage laws are not aimed at making all married sex procreative but only seek to

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Malleable Estate: Is marriage more joyful than ever?, SLATE, May 17, 2005, http://www.slate.com/id/2118816, *with* BLANKENHORN, *supra* note 28, at 236, 239–40.

129. *See* Stewart, *New York*, *supra* note 5, at 241–42, 247.

130. *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003).

131. *See* Stewart, *Redefinition*, *supra* note 5, at 44–52.

132. *Id.* at 62 (emphasis added).

133. *Id.* at 50–52; Gallagher, *Does Sex Make Babies?*, *supra* note 5, at 454–56.

134. Gallagher, *Does Sex Make Babies?*, *supra* note 5, at 454–55.

encourage that all man-woman sex occurs in marriage, as a protection for when such sex *is* procreative—a protection for the baby, the often vulnerable mother, and society generally.[135]

Second, although government does not require man-woman couples to prove procreative capacity and intent before receipt of a marriage license, or procreative conduct thereafter, the government does not, in neglecting to do so, endorse the close personal relationship model. The "don't-ask, don't-require" policy emerges from something else:

> [O]ur societies have a long-standing sensibility against personalized governmental inquiries into marital procreative intentions and capacities . . . . Certainly the development of American common law and constitutional law suggests that the aversion to public and certainly governmental inquiries into an individual's marital procreative intentions and capacities qualifies as a social norm of some antiquity. . . . [T]he norm has always been reinforced by certain pragmatic (and interrelated) considerations. These include sensible suspicion of the candour of responses regarding procreative intentions, equally sensible suspicion when it comes to responses about procreative capacities, the scientific (i.e., medical) difficulty or impossibility of securing evidence of such capacities, and the costs associated with that endeavour if attempted.
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> . . . .
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> The role of this social norm relative to man/woman marriage can be seen in this: Regulation of marriage, such as marriage licensure, stops short of any inquiry into procreative intentions and capacities. . . . It is troubling that the [the genderless marriage proponents have] identified a supposed societal lack of interest in procreation as the cause of the absence from the marriage laws of a procreation requirement, rather than identifying the much more plausible and robust explanation readily available: a strong social norm against

135. In a recent article, Professor McClain argues that certain legal and cultural changes in American society have eliminated, as a legal and social project, the channeling of sex into marriage. Linda McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channeling Function of Family Law*, 28 CARDOZO L. REV. 2133 (2007). For a critique of her argument, see Stewart, *Long Version, supra* note 103, at 56 n.193.

> government inquiry into marital procreative intentions and capacities.[136]

Third, it is clear that the social institution of marriage as it existed for centuries, even millennia, did encompass—quite centrally—child-bearing and child-rearing endeavors.[137] Yet during the centuries that laws regulated entry into and continuance in the historic child-centered institution of marriage, the same "don't ask, don't require" policy prevailed. The policy's existence then certainly did not indicate that the institution's child-bearing and child-rearing endeavors were of minimal importance. It does not do so now.

At this stage in the debate, a genderless marriage proponent may concede, if only *arguendo*, the factual accuracy of the broad description of contemporary American marriage[138]—but then proceed to assert that our society should nevertheless allow same-sex couples to enter into marriage, because doing so will benefit them (and any children they raise) socially, psychologically, and economically, and will not harm the institution, and because man-woman couples will still marry at the same rate and still raise their children equally well. This is the ubiquitous "no-downside" argument, and it has serious factual defects of its own. The argument does not engage directly the contest between the broad and narrow descriptions of contemporary marriage. Because of its importance, however, the argument is discussed separately below.[139]

Another approach, employed primarily by appellate judges favorable to genderless marriage, involves the bald assertion that contemporary American marriage consists solely of the

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136. Stewart, *Redefinition*, *supra* note 5, at 58–60.

137. *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961–62 n.23 (Mass. 2003).

138. Indeed, genderless marriage proponents must either concede the factual accuracy of the broad description or remain silent. It is impossible as a matter of fact to sustain the case for the completeness, and therefore fundamental accuracy, of the narrow description.

> The evidence . . . shows overwhelmingly—I believe beyond any reasonable doubt—that marriage as a human institution is intrinsically connected to bearing and raising children. To argue otherwise is to argue like a lawyer looking for a loophole; it is not intellectually or morally serious . . . .

BLANKENHORN, *supra* note 28, at 153.

139. *See infra* Part II.C.2.a.

close personal relationship. Among a number of possible examples of this phenomenon,[140] here is just one:

> It is fair to say that both the law and the population generally now view marriage, at least in the abstract ideal, as a partnership of equals with equal rights, who have mutually joined to form a new family unit, founded upon shared intimacy and mutual financial and emotional support. . . . [T]he gender of the two partners to a marriage is no longer critical to its definition.[141]

All these assertions are "bald" in that they are made without reference to any supporting authority and are presented in true *ipse dixit* fashion. But facts are stubborn things, and bald assertions (even those coming from appellate judges) hardly qualify as evidence probative of the idea that contemporary American marriage encompasses no more than a close personal relationship.

Apparently recognizing two interrelated realities—namely, that the success of genderless marriage in the courts depends on the factual accuracy of the narrow description of marriage and that the broader description is much more accurate than the narrow alternative—a genderless marriage proponent in the judiciary recently devised an interesting strategy. In a California Court of Appeal case upholding man-woman marriage against constitutional challenge, Judge Kline characterized as legally irrelevant all of the many social realities of the marriage institution beyond those encompassed by the narrow description. His dissenting opinion, unlike earlier opinions calling for genderless marriage, did not commit the factual error of asserting that marriage in our society is nothing more than a close personal relationship between two adults. Rather, it began by identifying from the United States Supreme Court's marriage cases "the attributes of marriage that account for the fundamentality of the right to marry."[142] Although the opinion identified intimacy, association, "a harmony in living," and "bilateral loyalty" as among those attrib-

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140. For collections of these bald assertions, see Stewart, *Redefinition, supra* note 5, at 97–98; Stewart, *New York, supra* note 5, at 232, 247; Stewart, *Washington and California, supra* note 5, at 528–29.

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

142. *In re* Marriage Cases, 49 Cal. Rptr. 3d 675, 737 (Ct. App. 2006) (Kline, J., concurring in part and dissenting in part).

utes, it did not refer to child-bearing or child-rearing. The opinion then silently shed the link between the enumerated attributes and the right to marry and began speaking of "the attributes of marriage that are constitutionally significant."[143] Finally, it elevated those attributes to a high status indeed: "the *constitutionally significant* attributes of marriage identified by the [United States] Supreme Court."[144] Those honored attributes just happen to be the elements of the close personal relationship model of marriage—love, intimacy, "bilateral loyalty," and public celebration. All other attributes of the marriage institution are simply ignored; they are, after all, not among "the constitutionally significant attributes of marriage." Those other attributes of marriage—principally the institution's child-bearing and child-rearing meanings, purposes, practices, and social goods—are not declared "unfactual" but rather become simply irrelevant.[145]

This strategy has two fatal defects. First, although the dissenting opinion's list of "the constitutionally significant attributes of marriage identified by the [United States] Supreme Court"[146] fits the close personal relationship model, it is far too short; the United States Supreme Court has more accurately described marriage than Judge Kline would have one believe.[147]

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143. *Id.* at 740.

144. *Id.* at 748 (emphasis added).

145. Judge Kline seems to grasp that a judge's power over facts is constrained, unlike her power to determine relevancy and irrelevancy. Professor Linda McClain seems to move toward a similar strategy in her recent book, *The Place of Families. See* MCCLAIN, *supra* note 63, at 21–22.

146. *In re* Marriage Cases, 49 Cal. Rptr. 3d at 748 (Kline, J., concurring in part and dissenting in part).

147. *See, e.g.*, Lehr v. Robertson, 463 U.S. 248, 256–57 (1983) ("The institution of marriage has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of our democratic society. . . . [A]s part of their general overarching concern for serving the best interests of children, state laws almost universally express an appropriate preference for the formal family."); Quillion v. Walcott, 434 U.S. 246, 256 (1978) ("[L]egal custody of children is, of course, a central aspect of the marital relationship, and even a father whose marriage has been broken apart will have borne full responsibility for the rearing of his children during the period of the marriage," with his marriage thus reflecting his "commitment to the welfare of the child."); Zablocki v. Redhail, 434 U.S. 374, 397 (1978) (Powell, J., concurring in judgment) ("On several occasions, the Court has acknowledged the importance of the marriage relationship to the maintenance of values essential to organized society."); Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 843–44 (1977) ("The basic foundation of the family in our society [is] the marriage relationship [and] . . . its importance has been strongly emphasized in our cases. . . . Thus the importance of

Second, fundamental principles of constitutional jurisprudence make the supposedly "irrelevant" attributes of the marriage institution highly relevant. This Article focuses on the second defect.

In subjecting man-woman marriage to constitutional scrutiny, an initial premise must necessarily be that the relevant equality, liberty, dignity, and privacy rights are individual rights. The broad description of marriage, however, is not advanced to counter abstract notions of equality, liberty, dignity, or privacy. Rather, that description is advanced 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.[148] Unless a court is prepared to hold that genderless marriage is an imperative of some absolute right, it must account for important societal interests when making its decision.[149] The constitutional jurisprudence of the United States Supreme Court rationally considers these important societal interests.[150] Certainly, rational constitutional decision making regarding the

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the familial relationship, to the individuals involved and to the society, stems from . . . the role it plays in 'promot[ing] a way of life' through the instruction of children . . . .") (quoting Wisconsin v. Yoder, 406 U.S. 205, 231–33 (1972)); Poe v. Ullman, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting) ("The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis."); Williams v. North Carolina, 317 U.S. 287, 298 (1942) ("The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of [the] commanding problems . . . .").

148. The constitutional equation seeks to value and appropriately accommodate both individual rights and societal (governmental) interests—a task that is particularly crucial relative to marriage and family. "As family law scholars observe, there are two sometimes conflicting vantage points from which to regard families: one looks at the individual's interest in family life, the other at society's interest in the family (and in marriage) as social institutions." MCCLAIN, *supra* note 63, at 22; *see also* HAFEN, *supra* note 7, at 469.

149. *See* Stephen E. Gottlieb, *The Paradox of Balancing Significant Interests*, 45 HASTINGS L.J. 825, 828, 866 (1994); Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 3–4 (1943).

150. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003) (holding that although classifications based on race and ethnic origins are suspect and therefore subject to strict scrutiny, governmental interests in attaining a diverse student body at the university level are sufficiently compelling to render the university's "affirmative action" program constitutional).

scope of personal rights requires a clear understanding and fair measurement of the societal interests at stake. As seen more fully below, in marriage cases that understanding is provided by the social institutional argument.[151] The strategy employed by Judge Kline's dissenting opinion in the California Court of Appeal, however, obscures that understanding and thereby improperly refuses to measure societal interests.[152]

In short, regarding the fact question "What is marriage?", the evidence decidedly favors the broad description. Much but not all of the narrow description—that is, the close personal relationship model of marriage—is factually accurate, and to that extent is encompassed by the broad description. The narrow description, however, errs in insisting that it is a complete description. The additional facts recognized by the broad description do not merely portray past relics; they reflect important features of the contemporary American marriage institution. The probative evidence sustains the accuracy of those additional descriptions: from those encompassing the institution's functions relative to child-bearing and child-rearing, to the statuses, identities, and projects of "wife" and "husband," to negotiation of the male-female divide, and to rational valuation of various forms of intimate, adult conduct and relations. That is not to say that the additional meanings, purposes, and practices seen in the broad description are universally shared, only that they are shared sufficiently widely in every state and across the nation that they continue to be institutionalized and therefore productive in fact of valuable social goods. In excluding those additional descriptions, the narrow description is profoundly misleading and supplies a quicksand foundation for constitutional analysis and adjudication.

The Article next examines the relevance of continuing institutionalization for constitutional analysis and adjudication.

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151. *See infra* Part II.C.2.c.

152. The dissenting opinion in the California Court of Appeal rather clearly refuses to credit, and criticizes the majority opinion for crediting, the many attributes, meanings, norms, practices, and social goods inhering in the man-woman marriage institution and extending beyond what the close personal relationship model allows. *See In re* Marriage Cases, 49 Cal. Rptr. 3d 675, 736–49 (Ct. App. 2006) (Kline, J., concurring in part and dissenting in part); *see also* Stewart, *Washington and California*, *supra* note 5, at 530–31.

2. Social institutional realities

a. The "no-downside" argument, or "what's the harm?"

As noted earlier, the "no-downside" argument concedes (or, more often, ignores) the factual accuracy of the broad description of contemporary American marriage. According to this argument, our society should nevertheless allow same-sex couples to enter into marriage because doing so will benefit them and any children they raise socially, psychologically, and economically without harming the institution: man-woman couples will still marry at the same rate and still raise their children equally well.[153] "The argument's conclusion is that it is irrational not to 'open' marriage to same-sex couples where there is no downside and such substantial upside."[154]

Social institutional realities, as set forth above,[155] point to a very different conclusion. It is sufficient to note that the currently institutionalized man-woman meaning produces unique and valuable social goods, that the law has the power to suppress that meaning and thereby eliminate those social goods, and that a society can have, at any one time, only one social institution denominated "marriage" (either genderless or man-woman). Officially recognizing genderless marriage, and thereby deinstitutionalizing man-woman marriage, will first diminish and then largely eliminate the latter institution's valuable and unique social goods. It is quite wrong to say, therefore, that such a change has no downside. Those attracted to the close personal relationship model of marriage may denigrate the value of those social goods uniquely produced by the man-woman marriage institution, most of which, after all, are child-centered and child-protective and not much concerned with the "individualization" of adult personal life. Nonetheless, society's interests in those endangered social goods are compelling, implicating as they do the quality of society's practices of self-perpetuation. The nearly universal reality of the man-woman marriage institution—that is, its presence in nearly all cultures across nearly all times since pre-history—qualifies as evidence strongly probative of that conclusion of compelling societal interests.

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153. Examples of the "no-downside" argument in judicial opinions are collected in Stewart, *Redefinition*, *supra* note 5, at 35–36; Stewart, *Washington and California*, *supra* note 5, at 519–25.

154. Stewart, *Redefinition*, *supra* note 5, at 36.

155. *See supra* text accompanying notes 18–56.

b. The optimal child-rearing mode

As previously discussed, man-woman marriage is the indispensible foundation for married mother-father child-rearing, the child-rearing mode that indisputably correlates with the optimal outcomes deemed crucial for a child's and society's well-being.[156] Genderless marriage proponents present evidence that the outcomes for same-sex couple child-rearing are just as good as those for married mother-father child-rearing.[157] The evidence is introduced to show that the particular social good just carefully described is *not* the product of the institutionalized man-woman meaning but of other factors—primarily two caring adults in a committed, loving relationship, serving as parents to the child; that to redefine marriage will thus not result in loss of this important social good; and that, indeed, to redefine marriage will maximize this social good by sustaining the relationship of the many same-sex couples engaged in child-rearing.[158]

The proffered evidence, however, is swimming upstream against an ever-stronger current of social science findings and is doing so unaided by conclusions from studies meeting usual standards for scientific validity. Regarding that ever stronger current, rigorous social science studies have ever more firmly established that family form matters and that children receive maximum private welfare when they are raised by a married mother and father in a low-conflict marriage.[159] The measures of private welfare in such studies encompass physical, mental, and emotional health and development, academic performance and levels of attainment, and avoidance of crime and other forms of destructive behavior such as drug abuse and high-risk

156. *See supra* text accompanying note 26.

157. *See supra* notes 73–74 and accompanying text.

158. Another purpose is to affirm the equal capacity of gay men and lesbians to perform a socially valued task—child-rearing—as part of a larger project to enhance social acceptance and self-regard.

159. *See, e.g.*, THE WITHERSPOON INST., *supra* note 27, at 21–43; INST. FOR AM. VALUES, RESEARCH BRIEF. NO. 1, FAMILY STRUCTURE AND CHILDREN'S EDUCATIONAL OUTCOMES (2005); Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, 15 FUTURE OF CHILD. 75 (2005); *see also* LORRAINE BLACKMAN ET AL., INST. FOR AM. VALUES, CONSEQUENCES OF MARRIAGE FOR AFRICAN AMERICANS: A COMPREHENSIVE LITERATURE REVIEW 4–5 (2005); William C. Duncan, *The Social Good of Marriage and Legal Responses to Non-Marital Cohabitation*, 82 OR. L. REV. 1001 (2003).

sexual conduct.[160] These studies compare married mother-father child-rearing with virtually all other long-present (and therefore adequately studied) modes of child-rearing.[161] This evidence has troubled many in the academy who believe that all family forms are normatively equal. Although this discomfort has caused some to downplay in various ways the mounting evidence indicating the superiority of man-woman marriage, all such attempts have proven unsuccessful.[162]

The assertion that same-sex couples have equal child-rearing success lacks support from studies meeting usual standards for scientific validity. A related difficulty is the paucity of studies related to child-rearing by two gay men; most of the studies of same-sex couple child-rearing only examine outcomes for the mother-lesbian partner mode. These studies are sometimes referred to as the "no differences" studies, because they conclude that same-sex couple child-rearing outcomes do not fall below the optimal outcomes of the married mother-father mode. In 2001, the University of Virginia's Steven Nock filed an affidavit in a Canadian court setting forth the threshold methodological requirements for a study's conclusions to be considered scientifically reliable.[163] He found that none of the "no differences" studies met these "good-science requirements."[164] Nor have any of the "no differences"

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160. *See supra* note 159 and accompanying text.

161. *See id.*

162. *See* NORVAL GLENN & THOMAS SYLVESTER, THE DENIAL: DOWNPLAYING THE CONSEQUENCES OF FAMILY STRUCTURE FOR CHILDREN, INST. FOR AM. VALUES (2005), *available at* http://www.familyscholarslibrary.org/content/readingrooms/denial. Although the correlations showing married mother-father child-rearing as the optimal mode are uncontroversial (except presently relative to same-sex couple child-rearing), inferences regarding causation and reasons are not; that is because of the difficulties of controlling for a rather long list of possible variables besides just the basic structure of the respective modes. But because the correlations established between various child-rearing modes and favorable outcomes (for two examples, high academic achievement and low crime) show the married mother-father mode as optimal, policy makers rationally can, with due caution, infer causation and, in turn, rationally privilege man-woman marriage.

163. Affidavit of Steven Lowell Nock, Halpern v. Attorney General, Ontario Superior Court of Justice, File 684/00, *available at* http://www.marriagewatch.org/Law/cases/Canada/ontario/halpern/aff_nock.pdf.

164. *Id.* Leading, qualified proponents of genderless marriage have acknowledged the validity of the good-science requirements, and also the validity of Professor Nock's conclusion regarding the failure of the "no differences" studies. *See* William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America's Children*, 15 FUTURE OF CHILD. 97, 104 (2005) ("We do not know how the *normative* child in a same-sex family compares with other children. . . . Those who say

studies published since Professor Nock filed his affidavit in 2001 met the good-science requirements.[165]

These shortcomings, however, have not prevented several professional organizations from formally opining that no differences in outcomes exist between the married mother-father child-rearing mode and the same-sex couple child-rearing mode. These organizations include the American Academy of Pediatrics,[166] the American Psychiatric Association,[167] the American Psychological Association,[168] and the American Academy of Child and Adolescent Psychiatry.[169] The prestige of professional organizations, however, cannot alter the deficiencies of the studies on which their endorsements are based.

The problematic nature of the "no differences" studies and, therefore, of the associations' endorsements, was illustrated in the only state appellate court decision to mandate genderless marriage, Massachusetts's *Goodridge* decision.[170] Although the "no differences" argument was fully briefed,[171] the four justices mandating genderless marriage did not write one word about it. In contrast, the three justices opposing the mandate wrote:

> Conspicuously absent from the court's opinion today is any acknowledgment that the attempts at scientific study of the ramifications of raising children in same-sex couple households are themselves in their infancy and have so far pro-

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the evidence falls short of showing that same-sex parenting is equivalent to opposite-sex parenting (or better, or worse) are . . . right."); Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 166 (2001).

165. *See* Declaration of Alan J. Hawkins as Expert Witness for Defendant at 8–9, Varnum v. Brien, No. CV 5965 (Iowa Dist. Ct. Mar. 15, 2007), *available at* http://manwomanmarriage.org/jrm/pdf/Alan_Hawkins.pdf.

166. Am. Acad. of Pediatrics, *Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 339 (2002), *available at* http://aappolicy.aappublications.org/cgi/reprint/pediatrics;109/2/339.pdf.

167. AM. PSYCHIATRIC ASS'N, APA DOC. REF. NO. 200214, ADOPTION AND CO-PARENTING OF CHILDREN BY SAME-SEX COUPLES POSITION STATEMENT 1, (2002), *available at* http://www.psych.org/edu/other-res/lib-archives/archives/200214.pdf.

168. AM. PSYCHOLOGICAL ASS'N, RESOLUTION ON SEXUAL ORIENTATION, PARENTS AND CHILDREN (2004), *available at* http://www.apa.org/pi/lgbc/policy/parentschildren.pdf.

169. *See* AM. ACAD. OF CHILD AND ADOLESCENT PSYCHIATRY, GAY, LESBIAN, AND BISEXUAL PARENTS POLICY STATEMENT (1999), http://www.aacap.org/cs/root/policy_statements/gay_lesbian_and_bisexual_parents_policy_statement.

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

171. *Id.* at 979–80 (Sosman, J., dissenting).

> duced inconclusive and conflicting results . . . . [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.) Even in the absence of bias or political agenda behind the various studies of children raised by same-sex couples, the most neutral and strict application of scientific principles to this field would be constrained by the limited period of observation that has been available. Gay and lesbian couples living together openly, and official recognition of them as their children's sole parents, comprise a very recent phenomenon, and the recency of that phenomenon has not yet permitted any study of how those children fare as adults and at best minimal study of how they fare during their adolescent years. 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? Our belief that children raised by same-sex couples *should* fare the same as children raised in traditional families is just that: a passionately held but utterly untested belief. The Legislature is not required to share that belief but may . . . wish to see the proof before making a fundamental alteration to [the marriage] institution.[172]

More than four years later, this still remains the best factual and legal analysis of the "no differences" debate. The *Goodridge* dissent's analysis effectively counters the "no-differences" position with the following marriage fact: there is insufficient evidence that any other mode can or will achieve the optimal outcomes associated with the married mother-father child-rearing mode.

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172. *Id.*

c. The "large differences" and the "law's power" marriage facts

A key marriage fact demonstrated by proponents of man-woman marriage is that the proposed genderless marriage institution differs radically from the old institution.[173] This can be called the "large differences" fact. In response, genderless marriage proponents offer little or nothing in the way of direct engagement.[174] They have, however, linked the "large differences" fact question with the "law's power" fact: that is, the law's power to suppress the man-woman meaning and, thus, the law's power to deinstitutionalize man-woman marriage.

That link appears rather starkly in the two Canadian and one American appellate court opinions mandating genderless marriage.[175] The authors of these three opinions had before them the "large differences" fact.[176] Moreover, the three courts acknowledged the large change their mandates would effect in the public meaning of marriage.[177] Contrary to the courts' assessment of "profound" and "significant" change of meaning is the same courts' contention that genderless marriage decisions do not and will not change the institution of marriage.[178] Thus, the *Goodridge* plurality opinion asserts that its redefining mandate "does not disturb the fundamental value of marriage in our society."[179] *EGALE* and *Halpern* manifest a similar view.[180]

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173. *See supra* notes 35–40 and accompanying text. Man-woman marriage proponents base their assertion on two arguments: (1) different institutionalized meanings intend and sustain different social selves; and (2) the genderless marriage institution cannot provide a number of social goods uniquely provided by man-woman marriage and, indeed, will effectively preclude some of them. *See* Stewart, *Judicial Elision*, *supra* note 5, at 15–24.

174. Genderless marriage proponents' presentations of the narrow description of contemporary marriage and of the "no differences" assertion regarding child-rearing are a form of indirect engagement. The absence of direct engagement may be because observers of marriage who are both rigorous and well-informed regarding the realities of social institutions (including some genderless marriage proponents) uniformly acknowledge the magnitude of the differences between the two possible institutions of marriage. *See supra* note 40 and accompanying text.

175. *See Goodridge*, 798 N.E.2d at 941; Halpern v. Canada, [2003] 172 O.A.C. 276 (Ont. Ct. App.); EGALE Canada Inc. v. Canada (Attorney General), [2003] 13 B.C.L.R. (4th) 1 (B.C. Ct. App.). The Quebec Court of Appeal also mandated genderless marriage but did so on grounds akin to the doctrine of collateral estoppel. Hendricks v. Quebec (Attorney General), [2004] 238 D.L.R. (4th) 577 (Que. C.A.).

176. *See* Stewart, *Redefinition*, *supra* note 5, at 77–78.

177. *Id.*

178. *Id.*

179. 798 N.E.2d at 965.

A troubling inconsistency plagues this judicial analysis. The *EGALE*, *Halpern*, and *Goodridge* courts all proceeded with a full awareness of the social institutional nature of marriage.[181] As noted, they also repeatedly acknowledged the large change the courts' mandates must effect in the public meaning of marriage. Furthermore, the opinions never deny that marriage, like all social institutions, is constituted by widely shared public meanings.[182] All this means that the opinions' assertions of "no change" to the institution of marriage are plainly contradicted by uncontroversial 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.[183]

In short, the opinions' factual assertion of no institutional change lacks evidentiary support.[184]

The *EGALE*, *Halpern*, and *Goodridge* courts acknowledged the law's strong "educative" (or "expressive") function and made that function a lynchpin of many of their arguments.[185] Yet the acknowledged educative function of law reinforces the lessons of social institutional studies showing that law has a purpose and a power to preserve or change public meanings and thus social institutions.[186] The social institution of marriage, in par-

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180. *See* Halpern v. Canada, [2003] 172 O.A.C. 276, 304, ¶¶ 133–34 (Ont. Ct. App.).

181. 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 marriage over 80 times. *Halpern* has more than 40 such references; *EGALE* has more than 35.

182. *See* BLANKENHORN, *supra* note 28, at 139. With respect to the importance of "marriage's public meaning . . . for people interested in institutions and social change, public meaning is everything. All the rest flows from it." *Id.*

183. Stewart, *Judicial Elision*, *supra* note 5, at 35.

184. For a critique of the evidence advanced in *Halpern* and *Goodridge* to support their "no change" conclusion, see *id.* at 35–36.

185. *See, e.g.*, *Goodridge*, 798 N.E.2d at 962; Halpern v. Canada, [2003] 172 O.A.C. 276, 298, ¶ 94 (Ont. Ct. App.).

186. Lewis v. Harris, 875 A.2d 259, 278 (N.J. Super. Ct. App. Div. 2005) (Parrillo, J., concurring) (citing Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 CAN. J. FAM. L. 80 (2004)).

ticular, is open to fundamental change resulting from a profound legal redefinition of marriage. The *EGALE*, *Halpern*, and *Goodridge* courts manifested a readiness to acknowledge law's educative and hence society-changing power when some preferred value was, in their view, being advanced, but stubbornly refused to acknowledge that same power when its use places the goods of man-woman marriage at risk. The law, however, cannot be both potent and impotent in the very same endeavor.[187] The fundamental inconsistency of approach to the law's institution-changing power exhibited in these three cases is intellectually indefensible.

d. Child welfare

Its proponents assert, as a marriage fact, that the man-woman marriage institution is the best arrangement for children. They support this fact with references to the institution's child-centered and child-protective nature as seen in a number of its unique social goods. Genderless marriage proponents also advance, as a marriage fact, that their model is the best arrangement for children. They support this fact with references to the increased health, wealth, and achievement enjoyed by children in married households—benefits denied to the not insignificant number of children in the United States who are being raised by same-sex couples. Genderless marriage proponents proffer these facts in support of the proposition that government will advance child welfare by giving those children and their two adult caregivers access to the marriage institution.

This particular battle of marriage facts is particularly hard fought because child welfare is probably the ultimate emotional and moral high ground, and the side that captures it may well prevail. In any event, there is a disturbing deficiency in the genderless marriage proponents' approach to the question of child welfare. As shown below, government has two different child welfare endeavors. Genderless marriage proponents evade one of those endeavors and ignore difficulties relative to child welfare inhering in the close personal relationship model of marriage.

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187. 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).

As already discussed, a number of the unique social goods provided by the institutionalized man-woman meaning—which would almost certainly be lost if that meaning were deinstitutionalized—focus on the welfare of children.[188] For this reason, man-woman marriage is often understood (and accurately so) as primarily a child-centered and child-protective institution. Thus, government efforts to preserve that institution are child welfare endeavors. In contemporary America, government preserves the institution of marriage in large part by using the law to validate the core, constitutive man-woman meaning, thereby perpetuating the social goods associated with that meaning. But government also engages in another child welfare endeavor: providing public assistance in various forms (through protective laws, access to resources, material resources themselves, and so on) to individual children or their caregivers.

Reflection suggests that these two different governmental child welfare endeavors are just that, different. The former entails the protection, sustenance, and perpetuation of a social institution because that institution is good for children generally through the generations; the latter entails the present provision to each child, regardless of the child's circumstances, of those resources that society deems minimally due to every child. By engaging in both endeavors simultaneously, government attempts to maximize the well-being of all children, both those now among us and those of future generations.

Genderless marriage proponents, however, ignore the institutionally protective nature of the first endeavor, which seeks to preserve the man-woman meaning. Genderless marriage proponents allude to the second endeavor, which seeks to provide at least minimal resources to every child, to cultivate an ethos of government-assured equality of circumstances for all children. In doing so they seek to persuade society that, for the sake of all children, it must embrace genderless marriage.

The phenomenon just described looms particularly large in the opinions of American appellate judges favoring genderless marriage.[189] In *Goodridge*, for example, Massachusetts pled for the preservation of man-woman marriage by pointing to its

188. *See supra* Part II.A.

189. *See* Stewart, *Judicial Elision*, *supra* note 5, at 37–38; Stewart, *New York*, *supra* note 5, at 251–53; and Stewart, *Washington and California*, *supra* note 5, at 525–36.

status as the optimal child-rearing mode. The plurality opinion studiously avoided disputing the reality of that social good. The opinion instead shifted the asserted state interest from protecting the optimal child-rearing mode (man-woman marriage) to "[p]rotecting the welfare of children."[190] On that basis, the opinion argued that limiting marriage to opposite-sex couples would not promote the present welfare of all children, that it is contrary to the Commonwealth's policy and practice of helping children whatever their family situation, and that it "penalize[s] children by depriving them of State benefits because the State disapproves of their parents' sexual orientation."[191]

Judicial opinions of this sort demonstrate how those who favor genderless marriage ignore an important aspect of "child welfare" in order to achieve their objective. They ignore the following reality: To mandate genderless marriage and thereby deinstitutionalize man-woman marriage is to thwart the first of the two government child welfare endeavors—protection, sustenance, and perpetuation of a social institution demonstrably beneficial for the vast majority of our children, now and through the generations. They further ignore that the law is impotent to usher same-sex couples and their children into the child-centered and child-protective social institution of man-woman marriage,[192] although the law's power is certainly sufficient to deinstitutionalize it.[193] Also ignored is the reality that to legally redefine marriage, especially in the name of "constitutional" law, is to create a radically different social institution with no track record relative to child-rearing and then to usher into that institution *all* the children of *all* married couples, both same-sex and man-woman.[194]

There are good reasons to believe that genderless marriage, by the very nature of its core constitutive meanings, is an adult-centered, adult-promoting institution that is unlikely to sustain those practices most beneficial to children. One such reason is that genderless marriage is premised on, and infused with, the

190. *Goodridge*, 798 N.E.2d at 962.

191. *Id.* at 964.

192. *See* Stewart, *Redefinition, supra* note 5, at 83–85.

193. *See supra* notes 175–87 and accompanying text.

194. *See* Stewart, *Redefinition, supra* note 5, at 85; Stewart, *Judicial Elision, supra* note 5, at 46–49, 52 n.137.

ideology of the close personal relationship model,[195] which is preeminently about adult desires and interests.[196]

All of this suggests two deficiencies in the "child welfare" argument made by genderless marriage proponents. First, the argument ignores the institutionally protective nature of a vital government child welfare endeavor. Moreover, when that endeavor calls for continuing legal support for, rather than legal suppression of, the man-woman meaning at the core of the child-centered and child-protective marriage institution, the argument disparages that institutionalized meaning as an expression of animus. Second, the child welfare argument would have government create and perpetuate the genderless marriage institution, which is legally and socially premised on a model of marriage ill-suited for—indeed, inimical to—the successful fulfillment of society's child-bearing and child-rearing endeavors. The irony in such an argument is inescapable and tragic.

3. Religion, law, and the singularity of the marriage institution

Competing marriage facts are also at the center of another important element of the debate over marriage: the singularity, or not, of the marriage institution. Genderless marriage proponents argue that civil marriage and religious marriage are two separate and distinct phenomena in our society,[197] that the state creates civil marriage by law,[198] and that religion is the source

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195. In fact, every American appellate court judge who has ruled in favor of genderless marriage has also adopted the close personal relationship model. *See* Stewart, *Washington and California*, *supra* note 5, at 527–28; Stewart, *New York*, *supra* note 5, at 246–47. In addition, that connection is also evident in the larger social-cultural sphere. *See supra* notes 110–18 and accompanying text.

196. To repeat Professor Cherlin's conclusions: the close personal relationship model describes "an intimate partnership entered into for its own sake, which lasts only as long as both partners are satisfied with the rewards (mostly intimacy and love) that they get from it." Cherlin, *supra* note 106, at 853. "The pure relationship is not tied . . . to the desire to raise children," *id.*, and scholarly "attempts to incorporate children into the pure relationship are unconvincing," *id.* at 858.

197. *E.g.*, Brief for Religious Organizations as Amici Curiae Supporting Plaintiffs-Appellants at 10–13, Samuels v. Dep't of Pub. Health, 811 N.Y.S.2d 136 (App. Div. 2006), *available at* http://www.aclu.org/FilesPDFs/samuels_religious.pdf; *see* DeCoste, *Leviathan*, *supra* note 5, at 1102–03.

198. *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 954 (Mass. 2003) ("We begin by considering the nature of civil marriage itself. Simply put, the government creates civil marriage. . . . [C]ivil marriage is . . . precisely what its name implies: a wholly secular institution."); Hernandez v. Robles, 805 N.Y.S.2d 354, 377 (App. Div. 2005) (Saxe, J., dissenting) ("Civil marriage is an institution

of the man-woman meaning found in civil marriage.[199] They also contend that for civil marriage to enshrine that meaning violates the Establishment Clause,[200] and that after civil marriage is purged of that religiously-based meaning, religious marriage can continue to exist in its own limited sphere.[201]

These assertions overlook the singularity of our society's marriage institution; they postulate two separate and different kinds of marriage ("civil" and "religious") and identify the law as the creator of the former. These assertions, however, simply cannot overcome one uncontroversial fact: man-woman marriage is an ancient and nearly universal human social institution.[202] The institution's antiquity—it pre-dates governments and positive law—is particularly devastating for the notion that the law creates marriage. As John Locke noted, the institution's antiquity means that it is one of those "forms of social order the existence of which are independent of the state" because it originated before the state.[203] Although there is an ongoing debate about when the law—whether secular or ecclesiastical—began interacting with the marriage institution,[204] histories of Western marriage illuminate the institution's prepolitical nature.[205] In light of that reality, it is fair to conclude that

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created by the state . . . ."); Andersen v. King County, 138 P.3d 963, 1018 (Wash. 2006) (Fairhurst, J., dissenting) ("[T]he exclusionary language [that is, a man-woman meaning] . . . does not lend the institution of marriage its power. Rather, marriage draws its strength from the nature of the civil marriage contract itself and the recognition of that contract by the State."); *id.* at 1034 (Bridge, J., dissenting) ("Civil marriage is a state-conferred legal status, the existence of which gives rise to benefits and burdens reserved exclusively to the citizens engaged in the marital relationship."); *see also* DeCoste, *Leviathan*, *supra* note 5, at 1102–04; Stewart, *New York*, *supra* note 5, at 243–46; Stewart, *Washington and California*, *supra* note 5, at 536.

199. *See* Stewart, *Washington and California*, *supra* note 5, at 537–38.

200. *E.g.*, Andersen v. King County, 138 P.3d 963, 1027–28, 1035 (Wash. 2006) (Bridge, J., dissenting) ("To ban gay civil marriage because some . . . religions disfavor it, reflects an impermissible State religious establishment. . . . The impugned man-woman marriage law reflects a *religious* viewpoint [and that] *religious* doctrine should not govern state regulation of *civil* marriage.") (internal quotation marks omitted).

201. *See, e.g.*, *supra* note 197.

202. For a discussion of the antiquity of the marriage institution, see BLANKENHORN, *supra* note 28, at 9. For a discussion of its universality, see *id*. at 105–06.

203. *See* SUGRUE, *supra* note 49, at 176.

204. *See, e.g.*, BLANKENHORN, *supra* note 28, at 123–24.

205. *See, e.g.*, DeCoste, *Leviathan*, *supra* note 5, at 1113.

marriage law no more "creates" the marriage institution than the Rule Against Perpetuities "creates" dirt.[206]

Moreover, although the marriage institution interacts with other social institutions—such as the law, private property, and religion—and thereby takes from each a certain hue,[207] social institutional studies depict marriage as meaningfully distinct from those institutions.[208] For example, Professor Clayton identifies "at least five basic institutions": (1) education; (2) economics, which in our society encompasses private property, money, and markets; (3) government, which encompasses the law; (4) family, which encompasses man-woman marriage; and (5) religion.[209]

The import of these realities for the "law as giver of institutional life" proffer is clear. That proffer says that "civil marriage" is wholly a legal construct; that marriage, as experienced in our society, is something that the law gives to people; and that, therefore, marriage is something that, without the law, people would not have in any living or meaningful way. But that proffer cannot be taken seriously, except by those who ignore the man-woman marriage institution's pre-political origins and development, as well as the law's actual role relative to the institution—not as "creator" but as "facilitator."[210] The genderless marriage proponents' reason for eliding those realities is probably linked to a

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

207. It is a commonplace that, although marriage interacts with other important social institutions, it remains meaningfully distinct from them. *See, e.g.*, Celia Kitzinger & Sue Wilkinson, *The Re-branding of* Marriage*: Why We Got Married Instead of Registering a Civil Partnership*, 14 FEMINISM & PSYCHOL. 127, 132 (2004) ("Marriage is a lynchpin of social organization: its laws and customs interface with almost every sphere of social interaction."); Sullivan, *supra* note 20, at 173 ("[T]he realm of civil society is itself deeply interconnected with market and state, both through the market processes that sustain the lives of families, organizations, and associations of all kinds and by the state in the form of law, regulation, and direct subsidy.").

208. *See, e.g.*, SEARLE, *supra* note 48, at 32. In David Blankenhorn's words:

> No one denies that property and social status (and many other big realities as well) affect all spheres of human social life, from education to medicine to, yes, marriage. *But what affects something is different from the thing itself.* For almost all of humanity, marriage has always and in all places been "really" about the male-female sexual bond and the children that result from that bond.

BLANKENHORN, *supra* note 28, at 55 (emphasis added).

209. CLAYTON, *supra* note 20, at 22.

210. *See supra* note 50 and accompanying text.

strategy to make marriage appear to be an appropriate object of legal—that is to say, judicial—alteration, no matter how radical.

Just as man-woman marriage's antiquity is a troublesome problem for the "law as giver of institutional life" view, so the institution's universality does much to falsify the notion that religion is the source of the man-woman meaning. Because the man-woman meaning is found across nearly all societies since pre-history, "religion" can be its source only if religion has been omnipresent in all societies since pre-history *and* has universally preached that meaning *and* with that preaching was not merely reinforcing an already existing social reality but initiating it. No secular authorities sustain those three requisites, and, indeed, the literature consistently rebuts all three.[211]

In sum, the probative evidence falsifies those marriage facts that reject the singularity of our society's marriage institution. Chief among those falsified facts are two notions: first, that the law is the creator of a separate institution called "civil marriage" rather than a facilitator of a singular marriage institution; and, second, that religion is the source and sole perpetuator of the man-woman meaning constitutive of that institution.

II. THE FACTS OF MARRIAGE AND THE STANDARD OF REVIEW

The most contentious legal question relative to the marriage issue has been the standard of review—rational basis, heightened (but not strict) scrutiny, or strict scrutiny.[212] Some have

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211. For a rejection of the idea that religion is the source of the man-woman meaning of marriage, see BLANKENHORN, *supra* note 28, at 159–60.

212. The rational basis standard of review requires a judge to sustain a law (or other form of state action) against constitutional challenge if there is any conceivable basis which might support it; "empirical support is not even necessary." Nguyen v. INS, 533 U.S. 53, 76 (2001) (O'Connor, J., dissenting). Moreover, "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Id.* at 75 (internal quotation marks omitted). Under heightened scrutiny, a state seeking "to defend a statute . . . must carry the burden of showing an exceedingly persuasive justification" and can meet this burden "only by showing at least that the classification serves important governmental objectives and that the . . . means employed are substantially related to the achievement of those objectives." *Id.* at 74–75 (internal quotation marks omitted). Under strict scrutiny, the government has the burden of proving that the challenged law "[is] narrowly tailored . . . [to] further [a] compelling governmental interest." Johnson v. California, 543 U.S. 499, 505 (2005) (internal question marks omitted). The concept of

posited that if judges would consistently adopt and apply strict scrutiny, or perhaps merely heightened scrutiny, then the resulting decisions would necessarily mandate genderless marriage. Although Professor Gunther's description of strict scrutiny as "strict in theory and fatal in fact"[213] remains true as a general proposition,[214] a judge applying strict scrutiny will nevertheless sustain man-woman marriage against all constitutional attacks—if she accepts the factual accuracy of the broad description and the social institutional argument emerging from that description. At the same time, a judge applying the rational basis test will declare man-woman marriage unconstitutional—if he accepts the factual accuracy of the narrow description and the close personal relationship ideology from which that description emerges. The last suggestion is not exceedingly brave; a number of American appellate judges have already done just that.

The man-woman meaning in marriage, the social goods that meaning provides, and the susceptibility to loss of both the meaning and the goods—as described by the broad description of contemporary American marriage and analyzed by the social institutional argument—satisfy strict scrutiny review. Those social goods, especially the ones pertaining to childbearing, child-rearing, and child welfare, qualify as compelling societal, and thus governmental, interests; "a society without the institution of [man-woman] marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic."[215] The compelling nature of the societal interests at stake are not diminished by the

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narrow tailoring is also expressed in terms of what would be "overinclusive" or "underinclusive." *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 578 (1993) (Blackmun, J., concurring) ("A State may no more create an underinclusive statute, one that fails truly to promote its purported compelling interest, than it may create an overinclusive statute, one that encompasses more protected conduct [or burdens more people] than necessary to achieve its goal.").

213. Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

214. *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346–49 (1995); Richmond v. J. A. Croson Co., 488 U.S. 469, 506–08 (1989); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 298–303 (1978). *But see* Adarand Constructors v. Pena, 515 U.S. 200, 237 (1995) ("Finally, we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'").

215. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 996 (Mass. 2003) (Cordy, J., dissenting).

growth of the close personal relationship ideology and the concomitant increase in unmarried cohabitation and births out of wedlock. The interests remain compelling because the social goods derived from man-woman marriage are even more central to societal well-being the scarcer that they become. One of the principal benefits of these social goods is children grown to adulthood blessed with significant increases in educational attainments and in physical, mental, and emotional health,[216] with a complete sense of who they are and from whom they came,[217] and not hampered by the consequences of significant incremental increases in criminal conduct and other forms of destructive behavior.[218] Another benefit is adults secure as "husband" or "wife,"[219] with all the significant incremental increases in health, happiness, and productivity associated with those statuses.[220]

Nor do notions of "overinclusive" and "underinclusive" lead to a conclusion of unconstitutionality.[221] That is because society, if it is to have a normative marriage institution, has *only* two choices. Either it will choose genderless marriage or it will choose man-woman marriage. To choose genderless marriage is to cause the loss of the man-woman meaning and therefore the loss of its valuable social goods. Man-woman marriage is neither overinclusive nor underinclusive because, to sustain society's compelling interests in the perpetuation of the man-woman meaning's social goods, it *must be only what it is*—the source of institutional power to that meaning.

Through twenty cases,[222] only three American appellate judges have concluded that the constitutionality of man-woman marriage should be decided under the strict scrutiny standard. In voting for the unconstitutionality of man-woman

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216. *See supra* notes 159–161 and accompanying text.

217. *See supra* note 25.

218. *See supra* notes 159–161 and accompanying text.

219. *See* DeCoste, *Transformation*, *supra* note 5, at 625–27.

220. *See* Blankenhorn, *supra* note 28, at 145; *see also* INST. FOR AM. VALUES, *supra* note 6; LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY (2000).

221. *See generally* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 578 (1993) (Blackmun, J., concurring) ("A State may no more create an underinclusive statute, one that fails truly to promote its purported compelling interest, than it may create an overinclusive statute, one that encompasses more protected conduct [or burdens more people] than necessary to achieve its goal.").

222. *See supra* note 4 and accompanying text.

marriage, all of these judges ignored the broad description of marriage and the social institutional argument.[223] Only two American appellate judges have argued for the application of heightened (but not strict) scrutiny. Although both of these judges ignored the broad description of marriage and the social institutional argument, one said that man-woman marriage could continue if civil unions were provided;[224] the other insisted on genderless marriage.[225] All of the other American appellate judges to address the issue have held either that rational basis review was appropriate,[226] that rational basis review could be applied because man-woman marriage was unconsti-

223. *See* Conaway v. Deane, 2007 WL 2702132, at *51 (Md. Sept. 18, 2007) (Battaglia, J., dissenting); *id.* at *81 (Bell, C.J., dissenting); Baehr v. Lewin, 852 P.2d 44 (Haw. 1993); *id.* at 68 (Burns, J., concurring in the judgment).

224. Baker v. Vermont, 744 A.2d 864, 889 (Vt. 1999) (Dooley, J., concurring).

225. *Id.* at 898 (Johnson, J., concurring in part and dissenting in part).

226. *See* Adams v. Howerton, 673 F.2d 1036, 1042 (9th Cir. 1980); Standhardt v. Superior Court, 77 P.3d 451, 457 (Ariz. Ct. App. 2003); *id*. at 727 (Parilli, J., concurring); *In re* Marriage Cases, 49 Cal. Rptr. 3d 675 (Ct. App. 2006); Dean v. District of Columbia, 653 A.2d 307 (D.C. 1995); *id*. at 361 (Terry, J., concurring); *id*. at 362 (Steadman, J., concurring); Morrison v. Sadler, 821 N.E.2d 15, 35 (Ind. Ct. App. 2005); *id*. at 36 (Friedlander, J., concurring); Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973); Conaway v. Deane, 2007 WL 2702132 (Md. Sept. 18, 2007); *id*. at *40 (Raker, J., concurring in part and dissenting in part); Goodridge v. Dep't. of Pub. Health, 798 N.E.2d 941, 974 (Mass. 2003) (Spina, J., dissenting); *id*. at 978 (Sosman, J., dissenting); *id*. at 983 (Cordy, J., dissenting); Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971), *appeal dismissed for want of a federal question*, 409 U.S. 810 (1972); Lewis v. Harris, 875 A.2d 259, 274 (N.J. Super. Ct. App. Div. 2005); *id.* at 274 (Parrillo, J., concurring); Hernandez v. Robles, 7 N.Y.3d 338 (N.Y. 2006); *id.* at 366 (Graffeo, J., concurring); *id*. at 380 (Kaye, C.J., dissenting); Hernandez v. Robles, 805 N.Y.S.2d 354 (App. Div. 2005); *id*. at 363 (Catterson, J., concurring); *id*. at 377 (Saxe, J., dissenting); Seymour v. Holcomb, 811 N.Y.S.2d 134 (App. Div. 2006); Kane v. Marsolais, 808 N.Y.S.2d 566 (App. Div. 2006); Samuels v. Dep't. of Pub. Health, 811 N.Y.S.2d 136 (App. Div. 2006); DeSanto v. Barnsley, 476 A.2d 952 (Pa. Super. Ct. 1984); Andersen v. King County, 138 P.3d 963 (Wash. 2006); *id*. at 991 (Alexander, J., concurring); *id*. at 991 (J. Johnson, J., concurring); *id*. at 1028 (Bridge, J., dissenting); *id*. at 1040 (Chambers, J., dissenting); *id*. at 1012 (Fairhurst, J., dissenting); Singer v. Hara, 522 P.2d 1187, 1196 (Wash. Ct. App. 1974), *review denied*, 84 Wash. 2d 1008 (1974).

tutional under even that lenient standard,[227] or did not address the standard of review at all.[228]

That history of those twenty cases makes clear two salient points. First, no American appellate judge has yet subjected man-woman marriage to strict scrutiny while simultaneously accepting the broad description of contemporary marriage and the social institutional argument. Second, only by accepting the narrow description as a complete and therefore accurate picture of marriage (a judicial act that cannot pass the blush test[229]) can a judge say, without making herself immediately ridiculous, that there is no rational basis for the legally sanctioned man-woman meaning in our marriage institution. A third salient point is this Article's earlier demonstration of the man-woman meaning's constitutionality even when subjected to strict scrutiny. Together those three points lead quite certainly to the following conclusion: it is the choice of marriage facts, not the choice of a standard of review, that ultimately determines the outcome of man-woman marriage cases. The corollary to that conclusion is that man-woman marriage will comport with American constitutional norms of equality and liberty for as long as: (1) the man-woman meaning remains institutionalized as a core, constitutive meaning of the American marriage institution; and (2) the man-woman marriage institution continues to produce social goods related to child and adult health, happiness, and achievement.

CONCLUSION

It bears repeating in conclusion that the facts come first. The constitutional arguments advanced by genderless marriage proponents fail not so much because of flaws of logic or coherence but primarily because those arguments are premised on a

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227. *See In re* Marriage Cases, 49 Cal. Rptr. 3d 675, 731 (App. 2006) (Kline, J., dissenting); Goodridge v. Dep't. of Pub. Health, 798 N.E.2d 941 (Mass. 2003); *id*. at 970 (Greaney, J., concurring); Lewis v. Harris, 908 A.2d 196 (N.J. 2006); Lewis v. Harris, 875 A.2d 259, 278 (N.J. Super. Ct. App. Div. 2005) (Collester, J., dissenting); Hernandez v. Robles, 805 N.Y.S.2d 354, 377 (App. Div. 2005) (Saxe, J., dissenting); Andersen v. King County, 138 P.3d 963, 1027 (Wash. 2006) (Bridge, J., dissenting); *id.* at 1040 (Chambers, J., dissenting); *id*. at 1012 (Fairhurst, J., dissenting).

228. *See* Lewis v. Harris, 908 A.2d 196 (N.J. 2006); Baker v. Vermont, 744 A.2d 864 (Vt. 1999).

229. *See supra* notes 110–53 and accompanying text.

quicksand foundation—that is, the factually inaccurate narrow (or close personal relationship) description of contemporary American marriage. The successful constitutional arguments advanced in support of man-woman marriage succeed because they are ultimately premised on the factually accurate broad (or institutional) description of a complex whole—the marriage institution—that guides individual activity, sustains identity, gives sense and purpose to the lives of its participants, and thereby produces valuable social goods.