

BYU Law Review

Volume 2012 | Issue 1

Article 4

3-1-2012


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Marriage, Fundamental Premises, and the California, Connecticut, and Iowa Supreme Courts

*Monte Neil Stewart, Jacob D. Briggs, and Julie Slater**

The highest courts in California, Connecticut, and Iowa recently held that the constitutional norm of equality requires the redefinition of marriage from “the union of a man and a woman” to “the union of any two persons.” The argument leading to that holding, like all arguments, proceeds from premises that the argument does not prove but that serve as the starting point for reasoning. Those premises range from the nature of contemporary American marriage to the equivalence of the pre- and post-redefinition marriage institutions, to the social costs, if any, resulting from redefinition, and to marriage’s relationship with other social institutions such as law and religion.

This Article critically examines the common fundamental premises underlying the California, Connecticut, and Iowa opinions. That critical examination leads to serious questions regarding those premises’ validity. Indeed, that examination demonstrates their falsity. At the same time, it clarifies their materiality; that is, it shows that, but for the cases’ fundamental premises, no line of judicial reasoning can lead to their holding.

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I. INTRODUCTION

Every argument proceeds from one or more premises that the argument does not prove. These “fundamental premises” serve as the starting point for reasoning. As every judicial opinion is an argument for a conclusion or holding, each has its own fundamental premises. That a judicial opinion’s fundamental premises are unproven is not necessarily a bad thing. Where their validity is universally (or perhaps even just widely) accepted in the relevant discourse community, these fundamental premises save time by focusing attention where sensibly it ought to be, on the court’s reasoning leading to its holding. Moreover, some premises are unprovable, as are their respective antitheses, and if litigation is to be the means of resolution, judicial reasoning must start somewhere in order for actual cases and controversies to be resolved.¹

False or otherwise invalid fundamental premises, however, are a bad thing. When an argument employs false fundamental premises there is very high probability that the reasoning proceeding from them, no matter how logical or coherent that reasoning may be

1. Where relevant and material premises and their antitheses are unprovable, an important question may be whether litigation, rather than democratic processes, is a defensible means of resolution. *See, e.g.*, Robert T. Miller, *Same-Sex Marriage, the Courts, and the People, On the Square*, FIRST THINGS (June 12, 2008), <http://www.firstthings.com/onthesquare/?p=1091>.

itself, will lead to false or otherwise invalid holdings, the kind of holdings that reasonable people cannot, indeed must not, respect.

This Article critically examines fundamental premises of three particular judicial opinions addressing the marriage issue²: the California Supreme Court's majority opinion in *In re Marriage Cases*,³ the Connecticut Supreme Court's majority opinion in *Kerrigan v. Commissioner of Public Health*,⁴ and the Iowa Supreme Court's unanimous opinion in *Varnum v. Brien*.⁵ These three cases answer the question of whether constitutional norms require the redefinition of marriage from the union of a man and a woman to the union of any two persons.

The plaintiffs in the three cases (all same-sex couples) invoked the liberty and equality provisions of their respective state constitutions in support of their claim to a right to a state-sanctioned marriage.⁶ Despite some variety in their approaches,⁷ all three opinions hold that their respective state constitutions mandate such a redefinition because of a constitutional norm of equality⁸ and do so with similar analyses.⁹ Following the federal model, each of the three opinions analyze the impugned laws' creation of suspect classifications,¹⁰ the adequacy of the state interests asserted in justification of the classifications,¹¹ and the appropriate level of

2. Although this Article does not discuss *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *Perry* is clearly built upon the same premises as the three decisions examined in depth.

3. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5 (Proposition 8), *as recognized in* *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

4. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

5. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

6. *Marriage Cases*, 183 P.3d at 403–04; *Kerrigan*, 957 A.2d at 412–13; *Varnum*, 763 N.W.2d at 872–73.

7. For example, the California court also based its mandate on a lengthy discussion of the fundamental right to marry. *Marriage Cases*, 183 P.3d at 419–35; *see also infra* Part III.B.2.b.

8. *Marriage Cases*, 183 P.3d at 435–52; *Kerrigan*, 957 A.2d at 481–82; *Varnum*, 763 N.W.2d at 906–07.

9. Only the California decision analyzed the personal liberty interest. *Marriage Cases*, 183 P.3d at 419–33. This Article addresses that analysis in some detail below in relation to the most consequential fundamental premise. *See infra* Part III.B.2.b.

10. *Marriage Cases*, 183 P.3d at 441–42; *Kerrigan*, 957 A.2d at 422–23; *Varnum*, 763 N.W.2d at 882–84.

11. *Marriage Cases*, 183 P.3d at 446–52; *Kerrigan*, 957 A.2d at 476–81; *Varnum*, 763 N.W.2d at 897–904.

judicial scrutiny.¹² Each held that the impugned laws did indeed create and treat differently two relevant classes: otherwise qualified man-woman couples who desire to marry versus otherwise qualified same-sex couples with the same desire. The Connecticut and Iowa opinions held that such a classification warranted heightened but not strict judicial scrutiny;¹³ the California opinion, however, held that strict scrutiny was warranted.¹⁴ All three opinions deemed the state interests proffered insufficient to justify the differently treated classes.¹⁵

Examination of the fundamental premises common to each of the three opinions, however, leads to serious questions regarding their validity and even demonstrates their falsity. It also reveals the materiality of these false premises; that is, it shows that, but for the fundamental premises, no line of judicial reasoning can lead to the redefinition holding.

These are bold claims but valid ones, as the following sections show. Part II begins with the first and most consequential fundamental premise—that marriage is nothing more than what the “narrow description” depicts it to be and therefore does not as a matter of fact have those characteristics ascribed to it by the competing “broad description.” This Part’s analysis demonstrates the defects of the narrow description and largely validates the broad description. Part III explores the fundamental premises underlying the three opinions’ various deployments of the “no-downside” argument. The no-downside argument is simply that the legal redefinition of marriage will have little or no adverse effects on important social goods and other valued interests. In the process, Part III demonstrates that those fundamental premises range from probably false to certainly false. Part IV summarizes the fundamental premises and shows their materiality to the three opinions’ mandate that marriage must be redefined from the union of a man and a woman to the union of any two persons. Part V concludes with

12. *Marriage Cases*, 183 P.3d at 436–44; *Kerrigan*, 957 A.2d at 426–76; *Varnum*, 763 N.W.2d at 885–96; see also Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 CAN. J. FAM. L. 11, 26–31 (2004), available at <http://marriagelawfoundation.org/publications/JRM.pdf> [hereinafter Stewart, *Redefinition*].

13. *Kerrigan*, 957 A.2d at 412; *Varnum*, 763 N.W.2d at 896.

14. *Marriage Cases*, 183 P.3d at 441–443.

15. *Id.* at 451; *Kerrigan*, 957 A.2d at 435; *Varnum*, 763 N.W.2d at 904.

thoughts on intellectual competence and honesty in the context of those three opinions.

II. THE FIRST AND MOST CONSEQUENTIAL FUNDAMENTAL PREMISE

To begin with, each of the California, Connecticut, and Iowa opinions inevitably runs up against and either directly or indirectly addresses or evades the question of what marriage actually is. The California majority opinion initially encounters the question in its discourse on the right to marry.¹⁶ The Connecticut majority opinion and the Iowa opinion deal briefly with the question during the threshold analysis of whether the plaintiffs are “similarly situated” for purposes of equal protection.¹⁷ This important question then repeatedly resurfaces throughout the California, Connecticut, and Iowa opinions. A fundamental premise underlies the analysis found in each opinion, a premise that may not be openly stated but is critically necessary to each opinion’s conclusions. That fundamental premise is this: contemporary American marriage is nothing more than what the “narrow description,” or “close personal relationship” model, depicts it to be.

A. The Narrow Description of Marriage

The narrow description is the description of contemporary American marriage advanced by virtually all proponents of the redefinition of marriage—whether judges, academics, lawyers, politicians, or otherwise. Certainly in the numerous cases since the beginning of the organized and strategic effort to redefine marriage by judicial mandate (which started in Hawaii in 1991¹⁸), proponents have uniformly advanced the narrow description as a complete and accurate depiction of contemporary marriage.¹⁹ Those proponents’

16. *See Marriage Cases*, 183 P.3d at 399–400.

17. *Kerrigan*, 957 A.2d at 424; *Varnum*, 763 N.W.2d at 882–84.

18. *Baehr v. Lewin*, 852 P.2d 44, 58 (Haw. 1993); *see* William C. Duncan, *The Litigation to Redefine Marriage: Equality and Social Meaning*, 18 *BYU J. PUB. L.* 623, 630–33 (2003) (discussing *Baehr*, 852 P.2d 44).

19. *E.g.*, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003) (“[I]t is the exclusive and permanent commitment of the marriage partners to one another . . . that is the sine qua non of civil marriage.”); *Hernandez v. Robles*, 794 N.Y.S.2d 579, 609 (N.Y. Sup. Ct. 2005), *rev’d and vacated*, 805 N.Y.S.2d 354 (N.Y. App. Div. 2005), *aff’d*, 855 N.E.2d 1 (N.Y. 2006) (“Marriage, as it is understood today, is . . . a partnership of two loving equals

narrow description is premised on the “close personal relationship” model of marriage.²⁰ As one commentator has described it, the narrow description views marriage as merely “one kind of close personal relationship,” a “subcategory” of a class of two-person relationships.²¹ Under this view, “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.”²² This perspective “tend[s] to strip marriage of the features that reflect its status and importance as a social institution.”²³

Some scholars believe that we are in fact “moving from a marriage culture to a culture that celebrates ‘pure relationship,’”²⁴ 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.”²⁵ Under the pure relationship model, marriage’s social goods are deemed to be “love and friendship, security for adults and their children, economic protection, and public affirmation of commitment.”²⁶

Without much question, California, Connecticut, and Iowa all adopt and construct their legal analysis on the foundation of the narrow description.²⁷ This foundation is demonstrated in the chart

who choose to commit themselves to each other”); *Andersen v. King Cnty.*, 138 P.3d 963, 1018 (Wash. 2006) (Fairhurst, J., dissenting) (“[M]arriage draws its strength from the nature of the civil marriage contract itself and the recognition of that contract by the State.”); *see also* Monte Neil Stewart, *Marriage Facts*, 31 HARV. J.L. & PUB. POL’Y 313, 319–20, 329–35 (2008) [hereinafter Stewart, *Marriage Facts*].

20. This model is discussed in detail in Monte Neil Stewart, *Eliding in Washington and California*, 42 GONZ. L. REV. 501, 508–09, 527–31 (2007), available at <http://marriagelawfoundation.org/publications/Gonzaga.pdf> [hereinafter Stewart, *Washington and California*].

21. COUNCIL ON FAMILY LAW, THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA 14 (2005), available at http://www.marriagedebate.com/pdf/future_of_family_law.pdf.

22. *Id.*

23. *Id.*

24. *Id.* at 15 (quoting ANTHONY GIDDENS, THE TRANSFORMATION OF INTIMACY: SEXUALITY, LOVE AND EROTICISM IN MODERN SOCIETIES 58 (1992)).

25. *Id.*

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

27. Although the California opinion focuses mostly on the right to marry, *infra* Part

below. Before the writing of any of the California, Connecticut, and Iowa opinions, the literature fully and fairly brought together the components of the narrow description.²⁸ There are many parallels between earlier scholarly summaries of the narrow description and each of the court decisions, which are also shown in the following chart.

<u>Scholarly Summary of Narrow Description</u>	<u>California, Connecticut, and Iowa Opinions</u>
<p>“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.’ 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’”²⁹</p>	<p><i>Marriage Cases</i>: To enter into marriage is “to establish a loving and long-term committed relationship with another person.”³⁰ To marry is for “two adults who share a loving relationship to join together to establish an officially recognized family of their own.”³¹</p> <p><i>Kerrigan</i>: Marriage “fulfills yearnings for security, safe haven, and connection that express our common humanity”³² and satisfies the desire for a “committed and loving relationship.”³³</p>

III.B.2.a, it is not completely silent or obscure on what marriage is. That is to be expected because it is not possible to address the marriage issue without discussing some view of what marriage is. Similar to the Connecticut and Iowa opinions, in the California opinion marriage is understood to be nothing more than what the “narrow description” depicts it to be. For example, the California court asserts that to marry is for “two adults who share a loving relationship to join together to establish an officially recognized family of their own” *In re Marriage Cases*, 183 P.3d 384, 399 (Cal. 2008).

28. *E.g.*, Stewart, *Marriage Facts*, *supra* note 19, at 329–35; COUNCIL ON FAMILY LAW, *supra* note 21, at 14.

29. Stewart, *Marriage Facts*, *supra* note 19, at 329 (alteration in original) (quoting *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003)).

30. *Marriage Cases*, 183 P.3d at 400.

31. *Id.* at 399.

32. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 417 (Conn. 2008) (quoting *Goodridge*, 798 N.E.2d at 955).

33. *Id.* at 424.

	<p><i>Varnum</i>: “[C]ivil marriage is ‘a partnership to which both partners bring their financial resources as well as their individual energies and efforts,’”³⁴ and fulfills the “deeply felt need for a committed personal relationship.”³⁵</p>
<p>“Marriage . . . is more than merely a loving commitment between two adults; it is also a very public celebration of their commitment.”³⁶</p>	<p><i>Marriage Cases</i>: Marriage is “the opportunity of an individual to establish—with the person with whom the individual has chosen to share his or her life—an <i>officially recognized and protected family</i>”³⁷ “[C]ivil marriage [is] the means available to an individual to establish, with a loved one of his or her choice, an <i>officially recognized</i> family relationship.”³⁸</p> <p><i>Kerrigan</i>: “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”³⁹ and is available to “pairs of individuals who wish to enter into a formal, legally binding and officially recognized, long-term family relationship.”⁴⁰</p>

34. *Varnum v. Brien*, 763 N.W.2d 862, 883 (Iowa 2009) (quoting *Baehr v. Lewin*, 852 P.2d 44, 58 (Haw. 1993)).

35. *Id.* at 885.

36. Stewart, *Marriage Facts*, *supra* note 19, at 330 (citing *Goodridge*, 798 N.E.2d at 954).

37. *In re Marriage Cases*, 183 P.3d 384, 399 (Cal. 2008).

38. *Id.* at 422 (emphasis added).

39. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 417 (Conn. 2008) (quoting *Goodridge*, 798 N.E.2d 941).

40. *Id.* at 424 (quoting *Marriage Cases*, 183 P.3d at 435 n.54).

	<i>Varnum</i> : Official recognition of the status of same-sex couples “provides an institutional basis for defining their fundamental relational rights and responsibilities, just as it does for heterosexual couples.” ⁴¹
“[T]he functions and purposes that society associates with civil marriage and the individual needs and goods that it promotes” include “love and friendship, security for adults and their children, economic protection, and public affirmation of commitment.” ⁴²	<p><i>Marriage Cases</i>: “The ability of an individual to join in a committed, long-term, officially recognized family relationship with the person of his or her choice is often of crucial significance The legal commitment to long-term mutual emotional and economic support that is an integral part of an officially recognized marriage relationship provides an individual with the ability to invest in and rely upon a loving relationship with another adult”⁴³</p> <p><i>Kerrigan</i>: Marriage has “solemn obligations of exclusivity, mutual support, and commitment to one another.”⁴⁴</p> <p><i>Varnum</i>: “Iowa’s marriage laws . . . are designed to bring a sense of order to the legal relationships of committed couples and their families in myriad ways”⁴⁵</p>
“Civil marriage is a legal construct. Its character as a creature of law gives it efficacy and influence in our	<i>Marriage Cases</i> : “[T]he legal institution of civil marriage” derives from early statutes providing “that marriage is ‘a personal relation

41. *Varnum v. Brien*, 763 N.W.2d 862, 883 (Iowa 2009).

42. *McCLAIN*, *supra* note 26, at 6.

43. *Marriage Cases*, 183 P.3d at 424.

44. *Kerrigan*, 957 A.2d at 474.

45. *Varnum*, 763 N.W.2d at 883–84.

<p>society. “[M]arriage draws its strength from the nature of the civil marriage contract itself and the recognition of that contract by the State.”⁴⁶</p>	<p>arising out of a civil contract.”⁴⁷</p> <p><i>Kerrigan</i>: Same-sex plaintiffs can meet the “statutory eligibility requirements applicable to persons who seek to marry.”⁴⁸</p> <p><i>Varnum</i>: “[The marriage laws] serve to recognize the status of the parties’ committed relationship.”⁴⁹</p>
<p>“[C]ivil marriage and religious marriage are two separate and distinct phenomena in our society . . . the state creates civil marriage by law and . . . religion is the source of the man-woman meaning found in civil marriage.”⁵⁰</p>	<p><i>Marriage Cases</i>: The legislature may see a need to “emphasize and clarify that this civil institution [of marriage] is distinct from the religious institution of marriage.”⁵¹</p> <p><i>Kerrigan</i>: “[M]arriage is a state sanctioned and state regulated institution” in which “religious objections to same sex marriage cannot play a role.”⁵²</p> <p><i>Varnum</i>: “The statute at issue in this case does not prescribe a definition of marriage for religious institutions. Instead, the statute declares, ‘Marriage is a civil contract’ and then regulates that civil contract.”⁵³</p>
<p>“Marriage is about the couple. If children arise from</p>	<p><i>Marriage Cases</i>: Marriage is “a relationship that is ‘the center of the</p>

46. Stewart, *Marriage Facts*, *supra* note 19, at 332 (quoting *Andersen v. King Cnty.*, 138 P.3d 963, 1018 (Wash. 2006) (Fairhurst, J., dissenting)).

47. *Marriage Cases*, 183 P.3d at 407 (citations omitted).

48. *Kerrigan*, 957 A.2d at 424.

49. *Varnum*, 763 N.W.2d at 883.

50. Stewart, *Marriage Facts*, *supra* note 19, at 361–62.

51. *Marriage Cases*, 183 P.3d at 400, 434.

52. *Kerrigan*, 957 A.2d at 475.

53. *Varnum*, 763 N.W.2d at 905 (quoting IOWA CODE § 595.1A (West 2011)).

<p>the union, that may be nice, but marriage and children are not really connected.”⁵⁴</p>	<p>personal affections that ennoble and enrich human life’ . . . a relationship that is ‘at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime.’ . . . The personal enrichment afforded by the right to marry may be obtained by a couple whether or not they choose to have children”⁵⁵</p> <p><i>Kerrigan</i>: “[E]ven though procreative conduct plays an important role in many marriages, we do not believe that such conduct so defines the institution of marriage that the inability to engage in that conduct is determinative of whether same sex and opposite sex couples are similarly situated.”⁵⁶</p> <p><i>Varnum</i>: “Plaintiffs are in committed and loving relationships, many raising families, just like heterosexual couples.”⁵⁷</p>
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54. COUNCIL ON FAMILY LAW, *supra* note 21, at 14.

55. *Marriage Cases*, 183 P.3d at 432 (quoting *De Burgh v. De Burgh*, 250 P.2d 598, 601 (Cal. 1952) (en banc) and *Marvin v. Marvin*, 557 P.2d 106, 122 (1976) (en banc)). In the adult relationship aspect of marriage, the California majority opinion does not go as far in minimizing the procreative aspects of marriage as does the first American appellate court decision to mandate redefinition. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). There, the Massachusetts Supreme Judicial Court said that “it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.” *Id.* at 961. In contrast, the California majority opinion acknowledges that “promoting and facilitating a stable environment for the procreation and raising of children is unquestionably one of the vitally important purposes underlying the institution of marriage,” although the opinion then immediately asserts that marriage “is not confined to, or restrictively defined by, that purpose alone.” *Marriage Cases*, 183 P.3d at 432.

56. *Kerrigan*, 957 A.2d at 424–425 n.19.

57. *Varnum*, 763 N.W.2d at 883.

Although the chart clearly demonstrates that the opinions rely on the narrow description, the strongest evidence that the narrow description constitutes the factual foundation of each opinion's discussion of the right to marry is this: each opinion's apparently careful avoidance of the rival "broad description" of contemporary American marriage.

B. The Broad Description of Marriage

The broad description centers on the reality that marriage is a social institution.⁵⁸ Consequently, it is informed by uncontroversial understandings regarding the nature and operation of social institutions. These understandings are the product of what is known as "the new institutionalism" in the social sciences.⁵⁹ This is not to say that the three opinions deny that marriage is a social institution; they do not and, indeed, could not while quoting from the numerous prior court decisions on marriage that they use for other purposes.⁶⁰ But the opinions do avoid numerous social institutional realities involving marriage and implicated by the decision to redefine marriage. Those "avoided" social institutional realities are very much a part of the broad description of contemporary American marriage.

An understanding of the broad description of marriage is thus important for a variety of reasons. It reveals that the narrow description is indeed the factual basis of the California majority opinion's analysis of the right to marry, of the Connecticut and Iowa opinions' analysis of whether same sex couples are similarly situated to opposite sex couples for the purpose of the statutes in question, and most importantly, of each opinions' analysis of whether state

58. *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."); *Goodridge*, 798 N.E.2d at 948 ("Marriage is a vital social institution."); Stewart, *Marriage Facts*, *supra* note 19, at 320–29. Despite the fact that *Goodridge* identified marriage as a vital social institution, it elided a wide array of social institutional realities. Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 DUKE J. CONST. L. & PUB. POL'Y 1, 32–39 (2006) [hereinafter Stewart, *Judicial Elision*].

59. See generally THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS (Walter W. Powell & Paul J. DiMaggio eds. 1991); Peter A. Hall & Rosemary C.R. Taylor, *Political Science and the Three New Institutionalisms*, 44 POL. STUD. 936 (1996); Victor Nee, *Sources of the New Institutionalism*, in THE NEW INSTITUTIONALISM IN SOCIOLOGY 1 (Mary C. Brinton & Victor Nee eds., 2001).

60. See, e.g., *infra* note 196 and accompanying text.

interests justify the challenged law. It also clarifies that, for each of the three opinions, the narrow description is a fundamental premise; that is, an unproven starting point for the legal reasoning leading to the opinion's holding. Further, bringing the rival broad description to the fore also provides a way to evaluate effectively that fundamental premise's validity; that is, to assess the factual accuracy of the narrow description. Finally, the broad description places the three opinions' other fundamental premises in a context that facilitates evaluation of their validity.

As noted, the broad description of contemporary American marriage begins with the reality that marriage is a vital social institution. Like all social institutions, marriage is constituted by a unique web of shared public meanings.⁶¹ For important institutions, including marriage, many of those meanings rise to the level of norms.⁶² Such social institutions affect individuals profoundly; institutional meanings and norms teach, form, and transform individuals, supplying identities, purposes, practices, and projects.⁶³ 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.⁶⁴

Across time and cultures, a core meaning constitutive of the marriage institution has nearly always been the union of a man and a

61. See Hall & Taylor, *supra* note 59, at 947–48; Stewart, *Judicial Elision*, *supra* note 58, at 9–10.

62. 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*, *supra* note 59, at 19 (“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* 48–50 (3d ed. 2008).

63. See SCOTT, *supra* note 62, at 54–58; MARY DOUGLAS, *HOW INSTITUTIONS THINK* 108 (1986); HELEN REECE, *DIVORCING RESPONSIBLY* 185 (2003); Stewart, *Judicial Elision*, *supra* note 58, at 9–10; Sullivan, *supra* note 62, at 175.

64. Stewart, *Washington and California*, *supra* note 20, at 503 n.9.

woman.⁶⁵ This core man-woman meaning is material in the production of a number of the marriage institution's valuable social goods; but for that meaning, the institution does not provide those goods to society.⁶⁶ As will be seen, proponents of redefinition attempt to challenge the nexus between the man-woman meaning and *some* of those goods. But as will also be seen, with respect to others of those social goods, the nexus is not rationally contestable, such as the child's bonding right.⁶⁷

Another social institutional reality encompassed by the broad description pertains to the law's power. The current legal contest, of course, is whether the institution in our society denominated *marriage* will have as its core meaning "the union of a man and a woman" or "the union of any two persons." The former we have been referring to as "man-woman marriage"; we will refer to the latter as "genderless marriage."⁶⁸ Without dispute, the law, within its own domain, has the power to replace the man-woman meaning with the any-two-persons meaning.⁶⁹ With the exercise of that power, the law's influence in the

65. See DAVID BLANKENHORN, *THE FUTURE OF MARRIAGE* 105–20 (2007); INST. FOR AM. VALUES, *WHY MARRIAGE MATTERS: TWENTY-SIX CONCLUSIONS FROM THE SOCIAL SCIENCES* 15 (2d ed. 2005) [hereinafter INST. AM. VALUES, *SOCIAL SCIENCES*]. Regarding the relative portion of humankind that since pre-history has lived in a society with a marriage institution lacking a core man-woman meaning, the academic debate is whether that is a very small portion or a very, very small portion. Compare BLANKENHORN, *supra* at 105–20 (2007) with William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1435–84 (1993). Prof. Eskridge's "expansive" view of "same-sex marriage" in history is critiqued and countered by Peter Lubin & Dwight Duncan, *Follow the Footnote or the Advocate as Historian of Same-Sex Marriage*, 47 CATH. U. L. REV. 1271 (1998).

66. For a detailed discussion of these goods, see Stewart, *Judicial Elision*, *supra* note 58, at 16–20.

67. See *infra* Parts III.B.2–4.

68. We 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, socially, or otherwise as the union of two persons of the same sex. It is defined either as the union of any two persons or as the union of a man and a woman. 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.

69. Stewart, *Judicial Elision*, *supra* note 58, at 11–12 (footnotes omitted):

Society can use the law effectively to reinforce, to alter, or to dismantle a social institution. This is because the law has an expressive or educative function that is

larger society operates to change and even deinstitutionalize man-woman marriage.⁷⁰ However, as will be discussed later, there is an undeniable limit on the law's power: the law is powerless to give same-sex couples access to the marriage institution we have always known.⁷¹ But the opinions ignore this social institutional reality.

Genderless marriage is indeed 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; but the significance is in the divergence. This significant divergence may be seen in the nature of the two institutions' respective social goods.⁷² 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.⁷³ To say otherwise would be to ignore the undisputed effects that social institutions have in the formation and transformation of individuals. Indeed, well-informed observers of marriage—regardless of their sexual, political, or theoretical orientations—repeatedly acknowledge the magnitude of the differences between the two possible institutions of marriage.⁷⁴

magnified by its authoritative voice. And in actual practice, the law's authoritative voice is used to reinforce, to alter, or to dismantle the shared public meanings that constitute a social institution.

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

See also *id.* at 7–15.

70. See Stewart, *Judicial Elision*, *supra* note 58, at 11–12.

71. *Infra* Section III.B.3.

72. See Stewart, *Judicial Elision*, *supra* note 58, 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.

73. See F.C. DeCoste, *The Halpern Transformation: Same-Sex Marriage, Civil Society, and the Limits of Liberal Law*, 41 ALTA. L. REV. 619, 625–26 (2003); see also *Marriage Facts*, *supra* note 19, at 320–21.

74. See BLANKENHORN, *supra* note 65, at 167 ("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."); Daniel Cere, *War of the Ring, in* DIVORCING MARRIAGE: UNVEILING THE DANGERS IN CANADA'S NEW SOCIAL EXPERIMENT 9, 11–13 (Daniel Cere & Douglas Farrow eds., 2004) [hereinafter *DIVORCING MARRIAGE*]; Douglas Farrow, *Canada's Romantic Mistake, in* DIVORCING MARRIAGE, *supra* 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); JUDITH STACEY, *IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN*

The broad description of the contemporary social institution of marriage in America also encompasses other social realities, everything from the institutional role of marriage relative to child-bearing and child-rearing to the contrast between the pre-political nature of man-woman marriage and the law-constructed nature of genderless marriage. This Article addresses a number of those additional social realities in later sections. Only one additional social reality merits mention here. It is that a society can have only one social institution denominated *marriage*.⁷⁵ 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.⁷⁶ It must be remembered that when public 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. Then we are left with merely a diversity of lifestyles, with that diversity being thin

THE POSTMODERN AGE 126–28 (1996); Katherine K. Young & Paul Nathanson, *The Future of an Experiment*, in *DIVORCING MARRIAGE*, *supra* note 74, 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); Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 ST. THOMAS L.J. 33, 53 (2004) [hereinafter Gallagher, *Reply*] (“Many thoughtful supporters of same-sex marriage recognize that some profound shift in our whole understanding of the world is wrapped up in this legal re-engineering of the meaning of marriage.”); E.J. Graff, *Retying the Knot*, THE NATION, June 24, 1996, at 12 (“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 9, 12–19 (1991); Andrew Sullivan, *Recognition of Same-Sex Marriage*, 16 QUINNIPIAC L. REV. 13, 15–16 (1996).

75. Stewart, *Judicial Elision*, *supra* note 58, 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.”).

76. A society actually has three options: man-woman marriage, genderless marriage, or no normative marriage institution at all. Stewart, *Marriage Facts*, *supra* note 19, at 327 n.47. 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 infra* note 117 and accompanying text.

gruel indeed compared with the productivity of thick (because they are institutionalized) meanings.⁷⁷

In sum, the broad description provides the factual basis for what may be called “the social institutional argument for man-woman marriage.” It is simply that, for the law (constitutional law, no less) to suppress the man-woman meaning by replacing it with the any-two-persons meaning is to cause the loss of the valuable social goods that the man-woman meaning, because institutionalized, has provided our society. Because of the value of those goods, society (and hence government) has a compelling interest in their perpetuation. The compelling nature of that governmental interest means that the laws sustaining the man-woman meaning should survive every constitutional attack, regardless of which standard of review a court may employ.⁷⁸

C. Comparing the Narrow and Broad Descriptions

As to the relationship between the narrow description and the broad description, the broad description encompasses most, but not all, of the narrow description. It encompasses, for example, the narrow description’s reference to the social goods of “love and friendship, security for adults and their children, economic protection, and public affirmation of commitment,”⁷⁹ 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.”⁸⁰ The broad description, however, also consists of much more. As noted, it sees the institutionalized man-woman meaning as the source of *additional* social goods.

The narrow description, in operation, insists that marriage is *no more than* what the narrow description depicts. Although genderless marriage proponents rarely, if ever, expressly state that notion of “no

77. Stewart, *Marriage Facts*, *supra* note 19, at 328 (“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.”).

78. See *id.* at 364–68 for a discussion on applying standards of review to the marriage question.

79. McCLAIN, *supra* note 26, at 6.

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

more than,” the notion is *always* implicit in their arguments,⁸¹ and the reasoning in the California, Connecticut, and Iowa opinions is no exception. This “no more than” notion goes to the heart of the veracity of the narrow and broad descriptions. If that 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.

All these understandings together shed a clarifying light on the three opinions’ first fundamental premise: contemporary American marriage is nothing more than what the narrow description depicts it to be. The key question, of course, is whether that premise is valid. It is not.

With respect to the contemporary marriage institution across these three states and the nation, the competent evidence strongly validates the broad description and strongly falsifies the narrow description. In contemporary America, “the union of a man and a woman” continues as a widely shared, public, and core meaning constitutive of the marriage institution, all across the nation; in other words, that meaning continues to be *institutionalized*.⁸² That meaning has *not* been *deinstitutionalized* by broad social trends anywhere, and only in Massachusetts and now California, Connecticut, and Iowa has a court by legal mandate attempted to perform that task.⁸³ That is not to say that the man-woman meaning is universally shared; a narrow view of marriage is common in some sections of the population.⁸⁴ But the narrow description is not subscribed to beyond those sections.

81. This is discussed in more detail in Monte Neil Stewart, *Marriage Facts and Critical Morality*, MARRIAGE LAW FOUNDATION, 35–44 (Fall 2007), <http://marriagelawfoundation.org/publications/Facts.pdf>.

82. This has been addressed elsewhere at some length. See Stewart, *Marriage Facts*, *supra* note 19, at 322–23, 339–50. Further, according to the Human Rights Campaign, twenty-nine states have constitutional amendments defining marriage as including one man and woman, while twelve states have defined marriage as such by statute. *Statewide Marriage Prohibitions*, HUMAN RIGHTS CAMPAIGN (Jan. 13, 2010), [http://www.hrc.org/files/assets/resources/marriage_prohibitions_2009\(1\).pdf](http://www.hrc.org/files/assets/resources/marriage_prohibitions_2009(1).pdf). The federal government has also passed a Defense of Marriage Act. 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006).

83. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

84. See Stewart, *Marriage Facts*, *supra* note 19, at 323.

Although much of the narrow description is accurate, it incorrectly asserts that it is a complete description. The additional elements of marriage recognized by the broad description (i.e., child-bearing and rearing, bridging the male-female divide, providing the identities of husband and wife, etc.) are integral features of the American marriage institution. While not always universally shared, they are shared sufficiently throughout the country to be considered institutionalized and thus should not be excluded from the marriage definition.

Although acknowledging, as it must, that marriage is a vital social institution,⁸⁵ each court ignores key institutional realities. Each ignores that marriage, like all social institutions, is constituted by widely shared social meanings and that these institutionalized meanings teach and transform individuals. They also ignore, perhaps most importantly, that the social institution premised on and constituted by the virtually universal man-woman meaning provides a number of social goods beyond those offered by genderless marriage. For example, the California majority opinion ignored the compelling governmental interests advanced by the institutionalized man-woman meaning and held that “retention of the traditional definition of marriage does not constitute a state interest sufficiently compelling, under the strict scrutiny equal protection standard,” to withstand constitutional attack.⁸⁶ The same analysis and conclusion is present in each of the Connecticut⁸⁷ and Iowa⁸⁸ opinions in substantially similar form. Each court’s flawed reasoning flows from use of a false fundamental premise—that contemporary California, Connecticut, Iowa, and American marriage is no more than what the narrow description depicts it to be.

85. *E.g.*, *Marriage Cases*, 183 P.3d at 398, 401, 421–24, 431–32, 445, 448, 451; *Kerrigan*, 957 A.2d at 412, 416–20, 424 n.19, 473–74, 474 n.75, 477–80; *Varnum*, 763 N.W.2d at 873, 875, 878, 883–84, 891, 897, 899 n.25, 901–02, 905–07.

86. *Marriage Cases*, 183 P.3d at 452.

87. *See Kerrigan*, 957 A.2d at 480 (heightened scrutiny) (“It is only because the state has not advanced a sufficiently persuasive justification for denying same sex couples the right to marry that the traditional definition of marriage necessarily must be expanded to include such couples. If the defendants were able to demonstrate sufficient cause to deny same sex couples the right to marry, then we would reject the plaintiffs’ claim and honor the state’s desire to preserve the institution of marriage as a union between a man and a woman.”).

88. *See Varnum*, 763 N.W.2d at 904 (“Having examined each proffered governmental objective through the appropriate lens of intermediate scrutiny, we conclude that sexual-orientation-based classification under the marriage statute does not substantially further any of the objectives.”).

The following sections will examine in more detail the consequences of the use of this and other flawed fundamental premises.

III. THE “NO-DOWNSIDE” ARGUMENT, LOSS OF SOCIAL GOODS, AND MORE FUNDAMENTAL PREMISES

Since the beginning of the debate over the marriage issue, proponents of genderless marriage, including judges, have consistently deployed one particular argument. It is that redefinition will have no downside; neither heterosexual couples, children, the marriage institution, other social institutions, nor society generally will experience any harm from the legal redefinition of marriage.⁸⁹ In popular discourse, the no-downside argument frequently appears in the form of a question intended to be rhetorical: “How will letting John and James marry hurt you or your marriage?”

The California majority opinion deploys the no-downside argument more frequently and advances it more strongly than any other judicial opinion favoring redefinition. For example, the opinion asserts that

permitting same-sex couples access to the designation of marriage will not deprive opposite-sex couples of any rights and will not alter the legal framework of the institution of marriage, because same-sex couples who choose to marry will be subject to the same obligations and duties that currently are imposed on married opposite-sex couples.⁹⁰

It also argues that recognizing genderless marriage will not “deprive any opposite-sex couple or their children of any of the rights and benefits conferred by the marriage statutes,”⁹¹ and will not “alter or

89. Examples of judicial use of the no-downside argument are collected in Stewart, *Washington and California*, *supra* note 20, at 519–25 and Stewart, *Redefinition*, *supra* note 12, at 35–36.

90. *Marriage Cases*, 183 P.3d at 401.

91. Instead, the opinion asserts that recognizing same-sex marriage simply will make the benefit of the marriage designation available to same-sex couples and their children. As Chief Judge Kaye of the New York Court of Appeals succinctly observed in her dissenting opinion in *Hernandez v. Robles*, “There are enough marriage licenses to go around for everyone.” Further, permitting same-sex couples access to the designation of marriage will not alter the substantive nature of the legal institution of marriage; same-sex couples who choose to enter into the relationship with that designation will be subject to the same duties and obligations to each other, to their children, and to third parties that the law currently imposes

diminish either the legal responsibilities that biological parents owe to their children or the substantial incentives that the state provides to a child's biological parents to enter into and raise their child in a stable, long-term committed relationship."⁹²

The Connecticut majority opinion both cites and directly quotes the California majority opinion,⁹³ and also employs its own variants of the no-downside argument, noting that a change to allow genderless marriage would "*expand* the right to marry without any adverse effect on those already free to exercise the right."⁹⁴ Not to be

upon opposite-sex couples who marry. Finally, affording same-sex couples the opportunity to obtain the designation of marriage will not impinge upon the religious freedom of any religious organization, official, or any other person; no religion will be required to change its religious policies or practices with regard to same-sex couples, and no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs.

Id. at 451–52 (internal citations omitted).

92. The court explains further:

Our recognition that the core substantive rights encompassed by the constitutional right to marry apply to same-sex as well as opposite-sex couples does not imply in any way that it is unimportant or immaterial to the state whether a child is raised by his or her biological mother and father. . . . Instead, such an interpretation of the constitutional right to marry simply confirms that a stable two-parent family relationship, supported by the state's official recognition and protection, is equally as important for the numerous children in California who are being raised by same-sex couples as for those children being raised by opposite-sex couples (whether they are biological parents or adoptive parents).

Id. at 433.

93. The direct quotation from *Marriage Cases* states:

[G]ranting same sex couples the right to marry "will not alter the substantive nature of the legal institution of marriage; same-sex couples who choose to enter into the relationship with that designation will be subject to the same duties and obligations to each other, to their children, and to third parties that the law currently imposes [on] opposite-sex couples who marry."

Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 473 (Conn. 2008) (quoting *Marriage Cases*, 183 P.3d at 451–52).

94. *Id.* at 474. The court employs the no-downside argument in several additional instances: "Nor will same sex marriage deprive opposite sex couples of any rights. In other words, limiting marriage to opposite sex couples is not necessary to preserve the rights that those couples now enjoy." *Id.* at 473.

We therefore agree with the Massachusetts Supreme Judicial Court that "broadening civil marriage to include same-sex couples . . . [will] not disturb the fundamental value of marriage in our society" and "[r]ecognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race."

Id. at 474 (quoting *Goodridge v. Dep't Pub. Health*, 798 N.E.2d 941, 965 (Mass. 2003)).

left out, the Iowa court treads methodically down all the well-worn paths of the no-downside argument, declaring that redefinition will not “transform civil marriage into something less than it presently is for heterosexuals.”⁹⁵ The similar and extensive employment of the no-downside argument by each of the California, Connecticut, and Iowa courts is striking, and as will be shown, is essential to the conclusion reached by these courts.

Ultimately, the no-downside argument is an argument about likely consequences. Rigorously considered, it is an argument about the likelihood of diminishing or losing valuable social goods provided by the marriage institution. Those goods fall into one of three categories. The first encompasses those goods produced by the marriage institution that are, at least at first glance, independent of the institution’s man-woman meaning. The second encompasses

“Religious freedom will not be jeopardized by the marriage of same sex couples because religious organizations that oppose same sex marriage as irreconcilable with their beliefs will not be required to perform same sex marriages or otherwise to condone same sex marriage or relations.” *Id.* at 475.

To whatever extent [the interest in regulating and privileging procreative conduct] might constitute a rational basis for limiting marriage to opposite sex couples, it certainly does not represent a strong or overriding reason for the classification because allowing same sex couples to marry in no way undermines any interest that the state may have in regulating procreative conduct between opposite sex couples.

Id. at 477 n.78.

95. *Varnum v. Brien*, 763 N.W.2d 862, 899 n.25 (Iowa 2009). The no-downside argument continues:

The preservation of traditional marriage could only be a legitimate reason for the classification if expanding marriage to include others in its definition would undermine the traditional institution. The County has simply failed to explain how the traditional institution of *civil* marriage would suffer if same-sex civil marriage were allowed.

Id. “Likewise, the exclusion of gays and lesbians from marriage does not benefit the interests of those children of heterosexual parents, who are able to enjoy the environment supported by marriage with or without the inclusion of same-sex couples.” *Id.* at 901. “While the institution of civil marriage likely encourages stability in opposite-sex relationships, we must evaluate whether *excluding* gay and lesbian people from civil marriage encourages stability in opposite-sex relationships. The County offers no reasons that it does, and we can find none.” *Id.* at 902.

Religious doctrine and views contrary to this principle of law are unaffected, and people can continue to associate with the religion that best reflects their views. A religious denomination can still define marriage as a union between a man and a woman, and a marriage ceremony performed by a minister, priest, rabbi, or other person ordained or designated as a leader of the person’s religious faith does not lose its meaning as a sacrament or other religious institution. The sanctity of all religious marriages celebrated in the future will have the same meaning as those celebrated in the past.

Id. at 906.

those goods produced by the marriage institution that may or may not be materially provided by the man-woman meaning; the nexus is contested. The third encompasses those goods clearly provided by the man-woman meaning; the nexus is not contested and, within the bounds of reason, cannot be. These three categories become important in the discussion of redefinition's consequences.

A. Marriage's Social Goods and the Man-Woman Meaning

Regarding the first category, the California majority opinion makes a clever⁹⁶ move. It emphasizes the social goods produced by the marriage institution by relying on the work of two of the most respected proponents of man-woman marriage, Mary Ann Glendon and Bruce Hafen.⁹⁷ The obvious purpose of this move is to bolster the no-downside argument by suggesting not only no loss of valuable social goods from redefinition, but also the new and laudable provision of those goods to same-sex couples and the children they are rearing.

For example, the California majority cites Hafen's findings that the family is a "principal source of moral and civic duty"⁹⁸ and has important roles in society "to nurture the young," "instill the habits required for citizenship in a self-governing community," to "teach us to care for others," and "to moderate . . . self-interest."⁹⁹ The opinion also quotes Glendon's assertions that "society still relies on families to play a crucial role in caring for the young, the aged, the sick, the severely disabled, and the needy. Even in advanced welfare states, families at all levels are a major resource for government, sharing the burdens of dependency with public agencies in various ways"¹⁰⁰ In support of these statements, the majority opinion again cites Hafen to explain how marriage helps a family to produce these social goods:

Marriage . . . carries with it a commitment toward permanence that places it in a different category of relational interests than if it were

96. The term "clever" here is in the American, not the British, sense of the word.

97. See *Marriage Cases*, 183 P.3d at 423–25 nn.36–40.

98. *Id.* at 424 n.36 (quoting Bruce Hafen, *The Constitutional Status of Marriage, Kinship and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 476–77 (1983)).

99. *Id.*

100. *Id.* at 424, n.37 (quoting Mary Ann Glendon, *THE TRANSFORMATION OF FAMILY LAW* 306 (1989)).

temporary. A “justifiable expectation . . . that [the] relationship will continue indefinitely” permits parties to invest themselves in the relationship with a reasonable belief that the likelihood of future benefits warrants the attendant risks and inconveniences.¹⁰¹

This aspect of the California majority opinion’s no-downside argument, however, is valid if, and only if, one condition is met. That condition is that the legal suppression of the man-woman meaning and its replacement with the any-two-persons meaning leaves the marriage institution just as healthy, robust, and productive as before. The California majority opinion presupposes that outcome.¹⁰² Thus, the majority opinion relies on a fundamental premise that is unproven and not clearly articulated but crucial to the validity of the judicial argument constructed on it.

In a similar, but perhaps more explicit fashion, the Connecticut and Iowa opinions posit that redefinition will not cause any loss of the valuable social goods resulting from the marriage institution but rather that it will extend those goods to same-sex couples. The Connecticut opinion clearly associates the right to marry with the benefits of marriage. It asserts that the freedom to marry is an important right because “children reared by married couples and married couples themselves benefit greatly from marriage—apart from any legal benefits conferred on the family. Benefits to the married couple include greater longevity, greater wealth, more fulfilling sexual relationships, and greater happiness.”¹⁰³ The opinion then explains that the marriage institution and its benefits will remain after redefinition because “the change would *expand* the right to marry without any adverse effect on those already free to exercise the right. . . . If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities.”¹⁰⁴ The Connecticut court clearly adopts the view that the legal suppression of the man-woman meaning and its replacement with the any-two-persons meaning will leave the marriage institution just as healthy, robust, and productive as before; the opinion even seems to imply that redefinition will strengthen the marriage institution.

101. *Id.* at 424, n.38 (quoting Hafén, *supra* note 98, at 485–86).

102. *See infra* Part III.B.2.a.

103. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 474 n.75 (Conn. 2008) (quoting amicus brief of Alliance for Marriage) (internal quotation marks omitted).

104. *Id.* at 474.

The Iowa opinion is likewise explicit about its assumption on redefinition. The court asserts, “The County has simply failed to explain how the traditional institution of *civil* marriage would suffer if same-sex civil marriage were allowed. There is no legitimate notion that a more inclusive definition of marriage will transform civil marriage into something less than it presently is for heterosexuals.”¹⁰⁵ The Iowa opinion then also asserts in various contexts throughout the opinion that the redefinition of marriage will bring the benefits of marriage to same-sex couples.¹⁰⁶

The authors of the California, Connecticut, and Iowa opinions thus each viewed their work as bringing the benefits of marriage to same-sex couples, all the while avoiding any adverse impact upon the institution of marriage and its benefits. The underlying fundamental premise, as identified earlier, is that redefinition leaves the marriage institution just as healthy, robust, and productive as before. There are good reasons to believe that this particular fundamental premise is false.

A salient social institutional reality is this: man-woman marriage is a pre-political institution, while genderless marriage must of necessity be a post-political, law-constructed, and hence fragile institution.¹⁰⁷ As to the nature of man-woman marriage, we turn to John Locke. Locke, like other Enlightenment thinkers, appreciated the value of forms of social order separate from the state, “institutions of civil society” or “civil institutions,” that, in Locke’s view, included what he called “conjugal society,” meaning marriage and family.¹⁰⁸ Locke viewed

105. *Varnum v. Brien*, 763 N.W.2d 862, 899 n.25 (Iowa 2009).

106. The court in *Varnum* framed the issue before it in terms of extending benefits to same-sex couples and made numerous references to this objective throughout the opinion. The court from the onset described Plaintiffs as seeking “to declare the marriage statute unconstitutional so they can obtain the array of benefits of marriage enjoyed by heterosexual couples” *Id.* at 872. Additional references to the benefits of marriage and their importance to same-sex couples are found throughout the opinion. *See id.* at 873, 884, 905.

107. *See* Seana Sugrue, *Soft Depotism and Same-Sex Marriage*, *THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, AND MORALS* 172, 180–81, 186–91 (Robert P. George & Jean B. Elshtain eds., 2006).

108. *See id.* at 172, 173, 175. Locke defined conjugal society as follows:

[Conjugal society] is made by a voluntary compact between man and woman; and though it consist[s] chiefly in such a communion and right in one another’s bodies, as is necessary to its chief end, procreation; yet it draws with it mutual support, and assistance, and a communion of interest too, as necessary not only to unite their care and affection; but also necessary to their common offspring, who have a right to be nourished and maintained by them, till they are able to provide for themselves.

JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 47 (Richard H. Cox ed., 1982) (1690).

conjugal society as one of those “forms of social order the existence of which are independent of the state,” referring to it as a “pre-political social order.”¹⁰⁹ Indeed, Locke’s philosophies (of large historical importance to the federal and many state constitutions) “stipulat[e] clearly that rights and responsibilities, including those pertaining to conjugal society, are not created by the state”¹¹⁰ but are “[n]ormative institutions . . . exist[ing] because they are compelling forms of social order that advance basic human goods.”¹¹¹ The natural strength of the man-woman marriage institution is seen in the fact that it has been present, and vitally so, in virtually all human societies since pre-history.¹¹² In contrast, “[b]eing 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.”¹¹³

The historic durability of the marriage institution, however, is not an adequate assurance that it will continue institutionalized after redefinition. After all, many vital social institutions, including marriage and private property, have been unmade by law and government policy at times in human history.¹¹⁴ As discussed

109. Sugrue, *supra* note 107, at 176.

110. *Id.*

111. *Id.*

112. See *infra* note 123 and accompanying text.

113. Sugrue, *supra* note 107, at 190.

114. Regarding the social institution of private property, see, for example, KONSTITUTSIJA R.S.R.S.R. [CONSTITUTION] July 10, 1918, art. 3 (Russia), available at http://www.politicsforum.org/documents/constitution_rsfsr_1918.php. The Russian Soviet Federative Socialist Republic declared

Pursuant to the socialization of land, private land ownership is hereby abolished, and all land is proclaimed the property of the entire people and turned over to the working people without any redemption, on the principles of egalitarian land tenure. All forests, mineral wealth and waters of national importance, as well as all live and dead stock, model estates and agricultural enterprises are proclaimed the property of the nation . . . [as well as] the complete conversion of factories, mines, railways, and other means of production and transportation into the property of the Soviet Workers’ and Peasants’ Republic.

Id. See also Katrina Miriam Wyman, *From Fur to Fish: Reconsidering the Evolution of Private Property*, 80 N.Y.U. L. REV. 117 (2005) (emphasizing the importance of political institutions, including law, in the development of property rights). Regarding the social institution of marriage, see Lynn D. Wardle, *The “Withering Away” of Marriage: Some Lessons from the Bolshevik Family Law Reforms in Russia, 1917-1926*, 2 GEO. J.L. & PUB. POL’Y 469 (2004). Professor Bowman’s criticism of Wardle’s account is flawed because it fails to acknowledge that some years after Soviet law deinstitutionalized marriage it re-institutionalized it because of the social costs of the earlier experiment. See Cynthia Grant Bowman, *Social Science and Legal*

earlier,¹¹⁵ a salient social institutional reality is the law's power to suppress the man-woman meaning and thereby deinstitutionalize marriage. The reach of that power should not be underestimated, especially when, after redefinition, the old meaning is deemed "unconstitutional" and the mandate imposing the new meaning is seen as vindicating a "fundamental right." To change the meaning of marriage to that of any two persons

is to transform profoundly the institution, if not immediately then certainly over time as the new meaning is mandated in texts, in schools, and in many other parts of the public square and voluntarily published by the media and other institutions, with society, especially its children, thereby losing the ability to discern the meanings of the old institution.¹¹⁶

Finally, the ability of law and policy to undermine even pre-political institutions is affirmed by this reality: many of the bright and informed people advocating for genderless marriage are doing so exactly because they see redefinition as leading surely and probably quickly to a society that has no normative marriage institution at all.¹¹⁷

Taken together, these realities raise serious concerns about the ongoing health and productivity of the marriage institution in California, Connecticut, and Iowa after redefinition. It must be remembered that, when public meanings and norms are insufficiently *shared*, the social institution constituted by those meanings and norms disappears—as do the social goods uniquely and previously

Policy: The Case of Heterosexual Cohabitation, 9 J. L. & FAM. STUD. 1, 41–42 (2007).

115. See *supra* note 66; see also Stewart, *Judicial Elision*, *supra* note 58, at 36 (The "law has a purpose and a power to preserve or change social institutions. . . . [T]he social institution of marriage is not at all immune, but rather is open, to fundamental change resulting from a profound change in the law's definition of marriage.").

116. Stewart, *Redefinition*, *supra* note 12, at 111.

117. See, e.g., *Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families & Relationships*, BEYONDMARRIAGE.ORG, July 26, 2006, <http://www.beyondmarriage.org/BeyondMarriage.pdf> (asserting that "[m]arriage is not the only worthy form of family or relationship, and it should not be legally and economically privileged above all others" and declaring that they "hope to move beyond the narrow confines of marriage politics . . . [and] reflect and honor the diverse ways in which people find and practice love, form relationships, create communities and networks of caring and support, establish households, bring families into being, and build innovative structures to support and sustain community"); Stanley Kurtz, *The Confession*, NATIONAL REVIEW ONLINE, Oct. 31, 2006, <http://www.nationalreview.com/articles/219092/confession/stanley-kurtz> (discussing the "Beyond Same-Sex Marriage" manifesto); Stanley Kurtz, *The Confession II*, NATIONAL REVIEW ONLINE, Nov. 1, 2006, <http://www.nationalreview.com/articles/219108/confession-ii/stanley-kurtz> (describing the "radical" movement to move beyond marriage); see also Stewart, *Marriage Facts*, *supra* note 19, at 327 n.47.

provided by that institution. When the disappearing social institution is marriage, what is left is a motley crew of lifestyles, and a lifestyle is to an institution what a plain sheet of paper is to a \$1000 bill. This analogy is apt because money is one of our most important social institutions.¹¹⁸ But perhaps another analogy is even more apt, the analogy of the California, Connecticut, and Iowa opinions' subscribing justices as surgeons. They have a living body on the operating table, have removed the heart (the man-woman meaning), which they deem diseased, have replaced it with a sanitized but untested and wholly artificial heart (the any-two-persons meaning), have sewn up the patient, and have done all this on the basis of an unproven assumption, a premise, that the body will get up and move forward as healthy and productive as before. Because credible evidence, fully avoided by the surgeons, raises serious concerns that the premise is false, caring onlookers may be forgiven for their deep fears about the outcome of the operation.

So what seemed initially an easy score for the California, Connecticut, and Iowa opinions—making the no-downside argument by emphasizing the importance of a number of the marriage institution's valuable social goods—on closer inspection is seen to be an argument constructed on a probably false fundamental premise and therefore one unworthy of respect. Moreover, the very value of the social goods cries out against a life-or-death, but nevertheless elective, heart operation thought reasonable and helpful only because strong contrary evidence is ignored.

B. Loss of Social Goods

The second (nexus contested) and third (nexus uncontestable) categories of man-woman marriage's social goods may helpfully be identified together. Here is one catalogue:

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

[I]n 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.

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).
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).
3. The indispensable foundation for that child-rearing mode—that is, married mother-father child-rearing—that correlates (in ways not subject to reasonable dispute) with the optimal outcomes deemed crucial for a child's, and therefore society's, well-being.
4. Society's primary and most effective means of bridging the male-female divide.
5. Society's only means of transforming a male into husband-father, and a female into wife-mother, statuses and identities particularly beneficial to society.
6. Social and official endorsement of the form of adult intimacy—married heterosexual intercourse—that society may rationally value above all other such forms.¹¹⁹

For some of these goods, the nexus between the man-woman meaning and the production of the good is contested. Of all the goods listed, the most contested is the third, that the married mother-father relationship is the optimal context for child-rearing. For others of these goods, however, this nexus cannot rationally be contested. For example, the first social good, that man-woman marriage is society's best and probably only effective means to secure

119. See Stewart, *Marriage Facts*, *supra* note 19, at 321–22 (internal citations omitted) for additional sources discussing these social goods.

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), is uncontested.¹²⁰ A related social good is found in man-woman marriage's nurturing of the norm that a biological parent "will not abandon, give away, or leave . . . to the public charge" his or her child.¹²¹ Two further examples are man-woman marriage's role as society's primary and most effective means of bridging the male-female divide¹²² and its only means of providing the statuses and identities of *husband* and *wife* (with all the meanings, practices, projects, and ways of relating to others that those entail).¹²³ Each of these goods will be discussed in turn.

1. *The optimal childrearing mode*

As noted, the third social good cataloged, that the married mother-father relationship is the optimal context for child-rearing, is most contested. To counter this social good, genderless marriage proponents have presented evidence that the outcomes for same-sex couple childrearing are just as good as those for married mother-father childrearing.¹²⁴ They use this evidence to argue that the third

120. 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*, *supra* note 74, at 67 ("[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.").

121. Margaret Liu McConnell, *Less Perfect Unions, The Argument Against Same-Sex Marriage That Hasn't Been Tried in the Courts*, *THE AMERICAN CONSERVATIVE*, May 19, 2008, at 23, 23, available at <http://www.theamericanconservative.com/article/2008/may/19/00023/>.

122. See, e.g., BLANKENHORN, *supra* note 74, at 93 ("More than any other human relationship, marriage bridges the sexual divide in the human species."); COUNCIL ON FAMILY LAW, *supra* note 21, at 12 (noting that marriage "provides an evolving form of life that helps men and women negotiate the sex divide").

123. See DeCoste, *supra* note 73, at 625-28.

124. See, for example, LESLIE COOPER & PAUL CATES, *TOO HIGH A PRICE: THE CASE AGAINST RESTRICTING GAY PARENTING* 38-73 (2d ed. 2005), available at http://www.aclu.org/files/images/asset_upload_file480_27496.pdf, for a review of 25 leading studies from 1981 to 2004 showing no difference between homosexual and heterosexual parenting. See also William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America's Children*, 15 *MARRIAGE & CHILD WELLBEING* 97, 97 (2005); Michael S. Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 *VA. J. SOC. POL'Y & L.* 291,

social good is not dependent on the man-woman meaning but results in when two caring adults in a committed, loving relationship act as parents for the child. Thus, redefining marriage will not eliminate this social good but will actually increase it because it will strengthen and support the relationship between same-sex couples, many of which are raising children. Man-woman marriage proponents counter by noting, and accurately, that such evidence does not meet the usual standards for scientific validity.¹²⁵ At the same time, those proponents note that the studies identifying married man-woman marriage as the optimal child-rearing model do meet those standards.¹²⁶

The two opinions making up the majority in the only prior American appellate court decision to mandate genderless marriage,

321 (2001) (“[T]he evidence shows that children raised by gay parents develop just as well as children raised by heterosexual couples”); Press Release, American Civil Liberties Union, Maryland Psychologists, Social Workers, and Child Welfare Advocates Speak Out in Support of Marriage for Same-Sex Couples, ACLU (Nov. 30, 2006), available at <http://www.aclu.org/lgbt/relationships/27548prs20061130.html>.

125. Stewart, *Marriage Facts*, *supra* note 19, at 52–55, cites the following sources, which assert that the “no differences” studies do not meet “good science requirements:” 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); 164 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 (discussing how none of the “no differences” studies meet “good-science” requirements). Numerous other scholars have similarly asserted that the “no differences” studies are flawed. *See, e.g.*, George Rekers & Mark Kilgus, *Studies of Homosexual Parenting: A Critical Review*, 14 REGENT U. L. REV. 343, 345, 382 (2002) (asserting that “the existing studies on homosexual parenting are methodologically flawed” in that most “are biased with regard to subject selection in that they generally report on a small group of research subjects which are not randomly selected and which do not constitute a scientifically representative sample of homosexual parents and their children”); ROBERT LERNER & ALTHEA K. NAGAI, NO BASIS: WHAT THE STUDIES DON’T TELL US ABOUT SAME-SEX PARENTING (2001), available at <http://www.marriagewatch.org/publications/nobasis.pdf> (reviewing 49 “no-differences” studies on same-sex parenting and finding flaws in their experiment design and conclusions); Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833 (1997).

126. Examples of these studies are discussed in detail in Stewart, *Marriage Facts*, *supra* note 19, at 52–55. Some of the studies cited showing the benefits of heterosexual parenting include: LORRAINE BLACKMAN ET AL., CONSEQUENCES OF MARRIAGE FOR AFRICAN AMERICANS: A COMPREHENSIVE LITERATURE REVIEW 4–5 (2005); THE WITHERSPOON INST., MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES 21–43 (2008), available at http://www.winst.org/family_marriage_and_democracy/WI_Marriage.pdf; INST. FOR AM. VALUES, 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); William C. Duncan, *The Social Good of Marriage and Legal Responses to Non-Marital Cohabitation*, 82 OR. L. REV. 1001 (2003).

Goodridge v. Department of Public Health,¹²⁷ were silent on this particular contest between scientific findings.¹²⁸ The California Supreme Court's majority opinion was not. It concluded that the scientific contest has already been resolved in favor of the genderless marriage position—by *political* action. Specifically, the majority opinion referenced legislation deemed to be premised on the judgment that the outcomes for same-sex couple parenting were as good as those associated with married mother-father parenting.¹²⁹

The Connecticut Supreme Court's majority opinion essentially avoided the contest between scientific findings by asserting that the defendants had abandoned the argument that man-woman marriage was essential to the optimal child-rearing mode.¹³⁰ The Connecticut court opinion did not identify how or when or why the attorney general abandoned the argument or, more importantly, why the court should not still grapple with it given that it was before the court in amicus briefs¹³¹ and was addressed in the dissenting opinion of Justice Zarella.¹³² It seems fair to say that the majority opinion elided this argument, even though it is, in Justice Zarella's words, "the *only* argument that other courts have found to be persuasive in

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

128. *See id.* at 979–80 (Sosman, J., dissenting).

129. *See In re Marriage Cases*, 183 P.3d 384, 400 (Cal. 2008) ("[O]ur state now recognizes that an individual's capacity . . . responsibly to care for and raise children does not depend upon the individual's sexual orientation"); *id.* at 428 ("This state's current policies and conduct regarding homosexuality . . . recognize that gay individuals are fully capable . . . of responsibly caring for and raising children."); *id.* at 452 n.72:

[T]he distinction in nomenclature between marriage and domestic partnership cannot be defended on the basis of an asserted difference in the effect on children of being raised by an opposite-sex couple instead of by a same-sex couple. Because the governing California statutes permit same-sex couples to adopt and raise children and additionally draw no distinction between married couples and domestic partners with regard to the legal rights and responsibilities relating to children raised within each of these family relationships, the asserted difference in the effect on children does not provide a justification for the differentiation in nomenclature set forth in the challenged statutes.

130. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 478 (Conn. 2008).

131. *Id.* Indeed, the Connecticut court's elision of the optimal child-rearing argument is all the more remarkable in light of this aspect of the procedural history: the Family Institute of Connecticut, which ultimately presented an amicus brief expounding this argument, initially sought to intervene to ensure adequate presentation of the argument but was denied by the trial court. The Connecticut Supreme Court affirmed that denial, concluding that the issues raised by amicus would be adequately presented by the attorney general and that at any rate, amicus would be free to file a brief with the court. *Id.*

132. *Id.* at 524 (Zarella, J., dissenting).

determining that limited marriage to one man and one woman is not unconstitutional.”¹³³

The Iowa Supreme Court’s opinion did what no other appellate opinion has presumed to do—arbitrate between the conflicting scientific studies and declare a winner. Its performance, however, was problematic.¹³⁴ The opinion briefly summarized the conflicting evidence placed before the court¹³⁵ and then, without serious discussion, opined that the research “strongly support[s] the conclusion that same-sex couples foster the same wholesome environment as opposite-sex couples.”¹³⁶ But it went even further, asserting that the research “suggests that the traditional notion that children need a mother and a father to be raised into healthy, well-adjusted adults is based more on stereotype than anything else.”¹³⁷ The opinion, however, cited no specific scientific studies. It highlighted that several well-known professional organizations have adopted statements favoring the conclusion that outcomes for children raised by same-sex couples do not differ significantly from outcomes for children raised by opposite-sex couples.¹³⁸ Yet the statements of professional organizations are not themselves scientific studies and, as a matter of good science, cannot substitute for otherwise underdeveloped or inadequate studies.¹³⁹ The Iowa opinion simply fails to overcome this reality reflected in the scientific studies: the evidence does not provide sufficient support for the

133. *Id.* at 524 n.15.

134. *Varnum v. Brien*, 763 N.W.2d 862, 899 n.26 (Iowa 2009).

135. *Id.* at 873–74.

136. *Id.* at 899 n.26.

137. *Id.*

138. *Id.* at 874 (“Many leading organizations, including the American Academy of Pediatrics, the American Psychiatric Association, the American Psychological Association, the National Association of Social Workers, and the Child Welfare League of America, weighed the available research and supported the conclusion that gay and lesbian parents are as effective as heterosexual parents in raising children.”). See *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>; Position Statement, Am. Psychiatric Ass’n, Doc. Ref. No. 200214, *Adoption and Coparenting by Same-Sex Couples* (2002), available at <http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200214.aspx>; Policy Statement, Am. Psychological Ass’n, *Sexual Orientation, Parents, & Children*, 60 AMERICAN PSYCHOLOGIST 499 (2004), available at <http://www.apa.org/about/governance/council/policy/parenting.aspx>.

139. 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).

conclusion that same-sex parenting produces the same outcomes as married man-woman childrearing.¹⁴⁰

The Iowa opinion then moves to another tactic. It broadens the relevant government interest from “promoti[ng] . . . child rearing by a father and a mother in a marital relationship which social scientists say with confidence is the optimal milieu for child rearing” to promoting “the best interests of children.”¹⁴¹ This is not the first time that a court favoring redefinition has deployed such a tactic.¹⁴² The tactic allows the court to lose sight of the institutional framework that supports the optimal child-rearing mode, focus instead on the needs of individual children, and then assert that limitation of marriage to one man and one woman does nothing to serve the interests of the children of same-sex couples. We address in some depth later in this Article the defects in this tactic.¹⁴³

2. “Responsible Procreation” and a Failure of Purpose

Each of the California, Connecticut, and Iowa opinions had to answer for a number of other social goods provided by the man-woman meaning and therefore subject to loss upon redefinition. One of those is the second social good cataloged above, maximizing the private welfare provided to children conceived by passionate, heterosexual intercourse.

[M]arriage is society’s mechanism to regulate and ameliorate the consequences of passionate and procreative heterosexual intercourse (that is, children). . . . 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

140. See *supra* note 122. Even leading, qualified proponents of genderless marriage have acknowledged the validity of the good-science requirements and the conclusion that studies showing “no differences” between child-rearing modes do not meet the good-science requirements. See William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America’s Children*, 15 MARRIAGE AND CHILD WELLBEING 97, 104 (2005) (“We do not know how the *normative* child in a same-sex family compares with other children. . . . Those who say the evidence falls short of showing that same-sex parenting is equivalent to opposite-sex parenting (or better, or worse) are . . . right.”); Judith Stacey & Timothy J. Biblarz, (*How*) *Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 166 (2001).

141. *Varnum*, 763 N.W.2d at 899 (internal quotation marks omitted).

142. See, e.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 96–63 (Mass. 2003); see also Stewart, *Redefinition*, *supra* note 12, at 67–68 (discussing *Goodridge*).

143. See *infra* Section III.B.2.a.

produce children, those children receive from birth onward the maximum amount of private welfare. . . . Marriage laws are not aimed at making all married sex procreative but only seek to 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.¹⁴⁴

The responses of the California, Connecticut, and Iowa opinions to the argument that the man-woman marriage institution is necessary to promote responsible procreation varied widely, from complete elision of the argument to a wild mischaracterization of the argument to the use of previously discredited counterarguments.¹⁴⁵

a. The uses of elision, mischaracterization, and discredited arguments. The Connecticut majority opinion elided the argument by noting that “the defendants expressly have disavowed any claim that the legislative decision to create a separate legal framework for committed same sex couples was motivated by the belief that . . . prohibiting same sex couples from marrying promotes responsible heterosexual procreation.”¹⁴⁶ Just as before, the dissenting opinion of

144. Stewart, *Marriage Facts*, *supra* note 19, at 344–45.

145. There is a rigorous and intellectually honest, although ultimately unsatisfactory, counter-argument. Linda McClain has contended that certain changes in American society, popularly called “the sexual revolution,” have eliminated 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). We will not repeat the critique made of McClain’s argument, *see* Monte Neil Stewart, *Marriage Facts and Critical Morality*, *supra* note 81, at 56 n.193, because the California, Connecticut, and Iowa opinions do not use McClain’s argument directly. Moreover, the California majority opinion itself seems to suggest that channeling continues to be a productive purpose of marriage. *See In re Marriage Cases*, 183 P.3d 384, 431 (Cal. 2008) (“[A]n important purpose underlying marriage may be to channel procreation into a stable family relationship . . .”). The courts likely avoid McClain’s argument because they do not want to be seen as bringing the sexual revolution, with its extremely uneven report card relative to social ills, into their redefinition project. *See, e.g.*, W. Bradford Wilcox, *Suffer the Little Children: Marriage, the Poor, and the Commonweal*, in *THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, AND MORALS* 242–54 (Robert George & Jean Bethke Elshtain eds., 2006); George A. Akerlof, Janet L. Yellen, & Michael L. Katz, *An Analysis of Out-of-Wedlock Childbearing in the United States*, 111 Q.J. ECON. 277–317 (1996).

146. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 478 (Conn. 2008). Elsewhere, however, the Connecticut majority opinion did address the argument, in relation to defendants’ assertion that plaintiffs are not similarly situated because of their inability to procreate. There, the Connecticut majority opinion acknowledged that “the state’s interest in regulating procreative conduct constitutes a rational basis for limiting marriage to opposite sex couples,” but asserted that this interest was not determinative because: “we do not believe that [procreative] conduct so defines the institution of marriage that the inability to engage in that

Justice Zarella directly addressed the court's elision, and through several pages of analysis and review of case law and relevant principles, concluded that the regulation of procreative conduct was a compelling interest that justified the perpetuation of the institution of man-woman marriage.¹⁴⁷ In light of the detailed analysis by Justice Zarella, the substance of which was before the Connecticut court in amicus briefs, the decision to not even address this argument seems telling.

The Iowa opinion addressed *some* argument relating to procreation but did so by use of a previously discounted counterargument. That counterargument begins by mischaracterizing the relevant social goods as being the promotion of *more* procreation: "government endorsement of traditional civil marriage will result in more procreation," that procreation being necessary "to the continuation of the human race."¹⁴⁸ In similar fashion, the California majority opinion attempts to discount the importance of the social good by stating that "the *promotion of procreation* is not the sole or defining purpose of marriage."¹⁴⁹ But no responsible student of the marriage institution has said that it is. As just noted, the defensible understanding is that the man-woman marriage institution aims to "regulate and ameliorate the consequences" of heterosexual intercourse by channeling all such into that institution in an effort "to assure that when man-woman sex does produce children, those children receive from birth onward the maximum amount of private welfare."¹⁵⁰ The view that marriage's purpose is to mandate or even promote procreation is "silly."¹⁵¹ Yet it is on the basis of that silly view that, at least in part, both the Iowa opinion and the California majority opinion seek to obscure the potential loss of the second social good. But rather obviously, the meaningful question for the courts to grapple with is whether deinstitutionalizing man-woman marriage will further diminish provision of the second social good, honestly described.

conduct is determinative of whether same sex and opposite sex couples are similarly situated for equal protection purposes, especially in view of the fact that some opposite sex couples also are unable to procreate, and others choose not to do so." *Id.* at 424–25 n.19.

147. *Id.* at 528–32 (Zarella, J., dissenting).

148. *Varnum v. Brien*, 763 N.W.2d 862, 901 (Iowa 2009).

149. *In re Marriage Cases*, 183 P.3d 384, 432 (Cal. 2008) (emphasis added).

150. Stewart, *Marriage Facts*, *supra* note 19, at 344.

151. *Id.*

Although there is good reason to believe that it will,¹⁵² the California, Connecticut, and Iowa courts do not address that question.

The California majority opinion relied primarily on another well-worn counterargument but with a twist—a twist that illuminates the most essential flaw in the entire opinion. The opinion argued that government does not require man-woman couples to prove procreative capacity and intent before receipt of a marriage license or procreative conduct thereafter, so the inability of same-sex couples to procreate should not be for them, any more than for an infertile man-woman couple, a bar to marriage.¹⁵³ The usual purpose of this counter-argument, at the superficial level, is to invoke a sense of injustice that similarly situated infertile couples are treated dissimilarly.¹⁵⁴ At a more serious and a deeper level, this argument suggests that the second social good is of small importance to society and therefore that, even if the man-woman meaning is productive of the second social good, changing that meaning comes at little or no cost.¹⁵⁵ This suggestion, however, is clearly false,¹⁵⁶ and the California majority opinion did not adopt it. Indeed, the California majority stated that “promoting and facilitating a stable environment for the procreation and raising of children is unquestionably one of the vitally important purposes underlying the institution of marriage.”¹⁵⁷

152. Compare Stewart, *Judicial Elision*, *supra* note 58, at 20–28, with INST. AM. VALUES, SOCIAL SCIENCES, *supra* note 65, at 12–32.

153. *Marriage Cases*, 183 P.3d at 431. The Iowa opinion also seems to reference this point, in at least some form, with the following statement, added as an afterthought to its main discussion of the illogic of promoting more procreation by excluding same-sex couples from the definition of marriage: “the statute is significantly under-inclusive with respect to the objective of increasing procreation because it does not include a variety of groups that do not procreate for reasons such as age, physical disability, or choice.” *Varnum*, 763 N.W.2d at 902.

154. See, e.g., City and County of San Francisco’s Consolidated Reply Brief at 36–37; *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999).

155. See, e.g., Stewart, *Redefinition*, *supra* note 12, at 41–42, 58–60.

156. See, e.g., INST. AM. VALUES, SOCIAL SCIENCES, *supra* note 65, at 12–32; see also INST. AM. VALUES, MARRIAGE AND THE LAW: A STATEMENT OF PRINCIPLES 6–19 (2006); THE WITHERSPOON INST., MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES 21–43 (2006), available at http://www.lulu.com/items/volume_23/330000/330163/3/print/8-2-06_update_-_Princeton_Principles_BW_header_print_layout_final_6x9_desktop.pdf; 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).

157. *Marriage Cases*, 183 P.3d at 432.

What the majority opinion does is switch attention from “the vitally important purposes underlying the institution of marriage” (including provision of the second social good) to the court’s notion of “the scope of the constitutional right to marry.”¹⁵⁸ This is a new and different project and is sufficiently important that it warrants separate treatment, which comes in the next subsection. For now, it suffices to say that the California, Connecticut, and Iowa opinions, though varying in the candor of their analysis, are equally unsuccessful in establishing the no-downside argument relative to the second social good, that of maximizing the private welfare provided to children conceived by heterosexual sex. Only the California opinion directly addresses the relevant social good, and that opinion acknowledges that “promoting and facilitating a stable environment for the procreation and raising of children is unquestionably one of the vitally important purposes underlying the institution of marriage,”¹⁵⁹ while failing to give plausible reason why redefinition will not place that valuable social good in jeopardy.

b. The “right to marry” versus access to the marriage institution. As just noted, the California majority opinion does not adopt the argument that, even if the man-woman meaning is productive of the second social good, suppression of that meaning comes at little or no cost. Indeed, that opinion places a high value on the second social good. What the majority opinion does—and this is the illuminating twist—is switch attention from “the vitally important purposes underlying the institution of marriage” (including provision of the second social good) to the court’s notion of “the scope of the constitutional right to marry.”¹⁶⁰ Suddenly, the court is no longer seeking to bolster its no-downside argument by somehow minimizing or otherwise explaining away the second social good; rather, it is now focusing on what it deems to be the great upside of its holding—by extending to same-sex couples the “right to marry,” that holding is granting them access to the historically valued and valuable marriage institution.

158. *Id.*

159. *Id.*

160. *Id.* (noting that the state “undeniably has a legitimate interest in promoting ‘responsible procreation’” but then concluding that this “interest cannot be viewed as a valid basis for defining or limiting the class of persons who may claim the protection of the fundamental constitutional right to marry”).

That switch leads to these arguments, which require a rather full quotation:

Whether or not the state's interest in encouraging responsible procreation properly can be viewed as a reasonably conceivable justification for the statutory limitation of marriage to a man and a woman . . . this interest clearly does not provide an appropriate basis for defining or limiting the scope of the constitutional right to marry. None of the past cases discussing the right to marry—and identifying this right as one of the fundamental elements of personal autonomy and liberty protected by our Constitution—contains any suggestion that the constitutional right to marry is possessed only by individuals who are at risk of producing children accidentally, or implies that this constitutional right is not equally important for and guaranteed to responsible individuals who can be counted upon to take appropriate precautions in planning for parenthood. Thus, although the state undeniably has a legitimate interest in promoting “responsible procreation,” that interest cannot be viewed as a valid basis for defining or limiting the class of persons who may claim the protection of the fundamental constitutional right to marry.

. . . The personal enrichment afforded by the right to marry may be obtained by a couple whether or not they choose to have children, and the right to marry never has been limited to those who plan or desire to have children.¹⁶¹

In their context, these arguments shine a bright light on “the right to marry” repeatedly referenced by the California majority opinion.¹⁶² These arguments, unavoidably it seems, raise several questions: If “vitaly important purposes underlying the institution of

161. *Id.*

162. In the opinion's relatively short introductory section, “the right to marry” appears thirteen times. *Id.* at 399–402. In the first substantive section on the constitutional issue it appears eighty-three times, with at least that many references to the right by other language. *Id.* at 419–34 (Section IV.A). Moreover, the majority opinion itself identifies its “first” task as “determin[ing] the nature and scope of the ‘right to marry.’” *Id.* at 399. In some respects, this extensive early focus is understandable for reasons beyond the obvious relevance of the nature and scope of the right to marry. For one, the right to marry is a legal construct and, as such, something within the control of judges. Although elementary, it bears repeating that but for use of the formal amendment process, a state's highest court's exercise of that control is absolute with respect to rights seen to arise in the state constitution, just as the United States Supreme Court's control is absolute with respect to federal constitutional rights. Quite simply, such control *is* the practical meaning of *Marbury v. Madison's* famous declaration that it is for the courts to “say what the law is.” 5 U.S. (1 Cranch) 137, 177 (1803).

marriage” do not serve, indeed cannot be allowed to serve, as a “basis for defining or limiting the scope of the constitutional right to marry,”¹⁶³ what exactly can and does so serve? Is it really “the right to marry” that “afford[s]” “personal enrichment,” or is it something bigger, richer, and deeper than that legal construct, such as participation in the social institution of marriage itself? The most important question, however, is simply: What does the California majority opinion mean when it refers to the “right to marry”?

As to that most important question, the California majority opinion gives this answer:

[T]he constitutionally based right to marry . . . encompass[es] the core set of basic *substantive* legal rights and attributes traditionally associated with marriage that are so integral to an individual’s liberty and personal autonomy that they may not be eliminated or abrogated by the Legislature or by the electorate through the statutory initiative process. These core substantive rights include, most fundamentally, the opportunity of an individual to establish—with the person with whom the individual has chosen to share his or her life—an *officially recognized and protected family* possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage.¹⁶⁴

That ponderous answer can be fairly shortened to this: *The right to marry is the right to enter into the social institution of marriage.* After all, as the California majority opinion asserts elsewhere,¹⁶⁵ the only way for a couple to get “the same respect and dignity accorded a union traditionally designated as marriage” is to be a part of the same large social endeavor productive of such respect and dignity, and that is the social institution of marriage. The majority opinion

163. *Marriage Cases*, 183 P.3d at 432.

164. *Id.* at 399.

165. *Id.* at 434 (“[O]ne of the core elements of this fundamental right is the right of same-sex couples to have their official family relationship accorded the same dignity, respect, and stature as that accorded to all other officially recognized family relationships.”); *id.* at 434–35 (asserting that legislation creating domestic partnerships, or civil unions, “pose[s] a serious risk of denying the official family relationship of same-sex couples the equal dignity and respect that is a core element of the constitutional right to marry”); *id.* at 444 (“[O]ne of the core elements embodied in the state constitutional right to marry is the right of an individual and a couple to have their own official family relationship accorded respect and dignity equal to that accorded the family relationship of other couples.”); *id.* at 446 (speaking of “the fundamental interest of same-sex couples in having their official family relationship accorded dignity and respect equal to that conferred upon the family relationship of opposite-sex couples”).

itself makes clear this nexus between equal dignity and entry into the institution:

[A]ffording same-sex couples access only to the separate institution of domestic partnership, and *denying such couples access to the established institution of marriage*, properly must be viewed as impinging upon the right of those couples to have their family relationship accorded respect and dignity equal to that accorded the family relationship of opposite-sex couples.¹⁶⁶

Although that “established institution” is pre-political, in our society the law is the gatekeeper to it; the law does not create the institution but does say who may enter. The constitutional right to marry is what polices the gatekeeper’s decisions, requiring compliance with constitutional norms.

The opinion’s enthusiasm, however, to discuss the *right* to marry—what it is, its nature, and its scope—is paired with its rather startling lack of enthusiasm to thoughtfully address *marriage*—what *it* is. Of course, what marriage *is* is a question of fact, and facts are stubborn things. Unlike rights, they are not subject to nearly the same level of judicial control, and the complex web of facts comprising the phenomenon of contemporary American marriage is not within the comfort zone of those trained only in the law.¹⁶⁷ But still, an analysis of the right to marry, if severed from the phenomenon of marriage, can be considered neither serious nor honest—unless the phenomenon of marriage is nothing more than the legal construct of the right itself. But neither the California majority opinion (nor the Connecticut or Iowa opinions, for that matter) nor any serious marriage scholar plainly asserts that the phenomenon of contemporary American marriage is nothing more

166. *Id.* at 445 (emphasis added). The majority opinion reaffirms that nexus elsewhere:

Although past California cases emphasize that marriage is an institution in which society as a whole has a vital interest, our decisions at the same time recognize that the legal right and opportunity *to enter* into such an officially recognized relationship also is of overriding importance to the individual and to the affected couple.

Id. at 424 (emphasis added).

167. *See* Gallagher, *Reply, supra* note 74, 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.”); Stewart, *Marriage Facts, supra* note 19, at 315 (“[T]he treatment of constitutional facts in recent American appellate court decisions addressing the marriage issue has been confused and even careless.”) (footnote omitted).

than such a legal construct. The California opinion does discuss what marriage is to a small extent, but, as noted earlier, when it does it follows the narrow description or close personal relationship model.¹⁶⁸

The Connecticut and Iowa opinions more clearly manifest the attempt to bring plaintiffs within the institution of marriage, not merely grant them an abstract right to marry. Plaintiffs in both cases framed their arguments around entrance into the social institution. The Connecticut opinion stated that plaintiffs contend that “marriage is not simply a term denominating a bundle of legal rights [I]t is an institution of unique and enduring importance in our society, one that carries with it a special status.”¹⁶⁹ Similarly, the Iowa opinion described plaintiffs as “complaining of their exclusion from the institution of civil marriage.”¹⁷⁰ Both opinions recognized (even if only in this one instance) the institutional nature of marriage, it having a “long and celebrated history,” bolstered by “the widespread understanding that this word describes a family relationship unreservedly sanctioned by the community.”¹⁷¹ The institution was described as being a “social resource of irreplaceable value to those to whom it is offered” (Connecticut opinion)¹⁷² and as “providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society” (Iowa opinion).¹⁷³ It was clear in both cases that the court and the plaintiffs believed that the right to marry meant the right to enter the institution of marriage. Both courts aimed to allow “gay and lesbian people full access to the institution of civil marriage.”¹⁷⁴

The concept of *value* also reinforces the understanding that the right to marry is the right to enter into the social institution of

168. *See supra* Part II.

169. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 416 (Conn. 2008). The Connecticut opinion also cited favorably Connecticut law: “Marriage, therefore, is not merely shorthand for a discrete set of legal rights and responsibilities but is ‘one of the most fundamental of human relationships’” *Id.* at 417 (citing *Davis v. Davis*, 175 A. 574, 577 (Conn. 1934)).

170. *Varnum v. Brien*, 763 N.W.2d 862, 897 (Iowa 2009).

171. *Kerrigan*, 957 A.2d at 474.

172. *Id.* at 418 n.15 (quoting Ronald Dworkin, *Three Questions for America*, N.Y. REV. BOOKS, Sept. 21, 2006, at 24, 30).

173. *Varnum*, 763 N.W.2d at 883 (quoting *Laws v. Griep*, 332 N.W.2d 339, 341 (Iowa 1983)).

174. *Varnum*, 763 N.W.2d at 907.

marriage. Regardless of their position on the marriage issue, informed observers of marriage agree that both the societal and the personal value, rewards, and benefits of marriage are to be found in its *institutional* nature.¹⁷⁵ Here is genderless marriage proponent Ronald Dworkin's explanation:

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. We can no more create an alternative mode of commitment carrying a parallel intensity of meaning than we can create a substitute for poetry or for love. The status of marriage is therefore a social resource of irreplaceable value to those to whom it is offered; it enables two people together to create value in their lives that they could not create if that institution had never existed.¹⁷⁶

It is those “centuries and volumes of social and personal meaning,” of course, that make the marriage institution, for its participants, a font of the respect and dignity central to the notion of the right to marry.¹⁷⁷ Likewise, it is those same “centuries and volumes of social and personal meaning” that produce the social goods articulated by Bruce Hafen and Mary Ann Glendon,¹⁷⁸ as well as those catalogued earlier in this section.¹⁷⁹

Indeed, the California majority opinion puts its own imprimatur on this nexus between value and entry into the institution and does so by favorably quoting Bruce Hafen, who spoke of the institutions of marriage and family as “mediating structures.”¹⁸⁰ The California majority opinion quotes him thus: “Mediating structures are ‘the value-generating and value maintaining agencies in society.’”¹⁸¹ An analysis of mediating structures reveals that the family is “the major institution within the private sphere, and thus for many people *the most valuable thing in their lives.*”¹⁸² In short, the value, both societal

175. Compare Stewart, *Judicial Elision*, *supra* note 58, at 8–10, 15–20, with RONALD DWORKIN, *IS DEMOCRACY POSSIBLE HERE?* 86 (2006).

176. DWORKIN, *supra* note 175, at 86; see also *Kerrigan*, 957 A.2d at 418 (quoting similarly from Dworkin).

177. See DWORKIN, *supra* note 175, at 86.

178. See *supra* notes 98–101 and accompanying text.

179. See *supra* note 119 and accompanying text.

180. Hafen, *supra* note 98, at 479.

181. *In re Marriage Cases*, 183 P.3d 384, 424 n.38 (Cal. 2008) (quoting Hafen, *supra* note 98, at 479).

182. *Marriage Cases*, 183 P.3d at 424 n.38 (emphasis added) (quoting Hafen, *supra* note

and personal, is in the institution. The right to marry is valuable only because participation in the social institution is valuable and the right facilitates that participation. As an abstraction, that right has no value in itself. If all the legal incidents of marriage were otherwise available and marriage had ceased to be a social institution but had become merely one among many coequal lifestyles, no rational person would spend a penny on lawyers' fees to vindicate a "right to marry."

It is only in the context of this concept of *value* that the California majority opinion seems at times to suggest that the right to marry is something other than the right to enter into, and participate equally in, the social institution of marriage. As noted, the majority opinion's twist on the well-worn procreative capacity/intention argument is to say that procreative capacity/intention has nothing to do with the right to marry, although, admittedly, the regulation of procreativity (the second social good) has very much to do with the marriage institution extant in our society. Yet this severance of *right* from *institution* raises an important question regarding the locus of *value*: Whether it is the right to marry or really the institution that affords to the individual "personal enrichment"¹⁸³ and the "opportunity to live a happy, meaningful, and satisfying life as a full member of society."¹⁸⁴ The California majority opinion in one place says that it is the right to marry¹⁸⁵ and in another place strongly suggests that it is.¹⁸⁶ But that notion is clearly wrong, for the reasons just given. A right to enter a dead institution affords precious little personal enrichment. Rather, the valued personal enrichment comes from participation in the "vital social institution"¹⁸⁷ itself. And elsewhere, contrary to its other suggestions but quite clearly, the California majority opinion

98, at 480). Regarding the nexus between value and the marriage institution, the California majority opinion also speaks of "the long and celebrated history of the term 'marriage' and the widespread understanding that this term describes a union unreservedly approved and favored by the community." *Id.* at 445.

183. *Id.* at 432.

184. *Id.* at 427.

185. *Id.* at 432 ("The personal enrichment afforded by the right to marry may be obtained by a couple whether or not they choose to have children . . .").

186. *See id.* at 427 ("In light of the fundamental nature of the substantive rights embodied in the right to marry—and their central importance to an individual's opportunity to live a happy, meaningful, and satisfying life as a full member of society—the California Constitution properly must be interpreted to guarantee this basic civil right to *all* individuals and couples, without regard to their sexual orientation.").

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

acknowledges as much. After describing the various social goods which civil marriage can provide, it notes that

although past California cases emphasize that marriage is an institution in which society as a whole has a vital interest, our decisions at the same time recognize that the legal right and opportunity to enter into such an officially recognized relationship also is of overriding importance to the individual and to the affected couple.¹⁸⁸

Something else reinforces the understanding that the California majority opinion's right to marry is correctly understood as the right to enter into, and equally participate in, the social institution of marriage. That "something else" consists of the very cases on which the majority opinion relies to justify its right to marry. In the process of being so used, those cases make clear that, first, the law does not create the marriage institution but merely facilitates its functioning and perpetuation and, second, both the societal and the personal value is to be found in the institution. Thus, those cases reference

- "the public interest in the institution of marriage" with its link to "[t]he family [as] the basic unit of our society, the center of the personal affections that ennoble and enrich human life," which "channels biological drives that might otherwise become socially destructive"; "ensures the care and education of children in a stable environment"; "establishes continuity from one generation to another"; and "nurtures and develops the individual initiative that distinguishes a free people";¹⁸⁹

188. *Marriage Cases*, 183 P.3d at 424. Other language in the majority opinion reinforces this understanding that the right to marry is the right to enter into the marriage institution. *See, e.g., id.* at 401 (referring to "denying such couples access to the familiar and highly favored designation of marriage"); *id.* at 402 (arguing that "excluding same-sex couples from the legal institution of marriage is likely to be viewed as reflecting" negatively on them); *id.* at 426 n.42 (referring to "a right of access to the expressive and material benefits that the state affords to the institution of marriage" (emphasis removed) (quoting Cass R. Sunstein, *The Right to Marry*, 26 *CARDOZO L. REV.* 2081, 2083–84 (2005))); *id.* at 445 (referring to "denying such couples access to the established institution of marriage").

189. *DeBurgh v. DeBurgh*, 250 P.2d 598, 601 (Cal. 1952), *quoted in Marriage Cases*, 183 P.3d at 422.

- “the well-established public policy to foster and promote the institution of marriage”;¹⁹⁰
- the understanding both that “the structure of society itself largely depends upon the institution of marriage” and that “marriage is at once the most socially productive and individually fulfilling relationship”;¹⁹¹
- a view of “marriage [as] an institution which the State not only must allow, but which always and in every age it has fostered and protected”;¹⁹² and
- the nexus between the law’s promotional role relative to marriage, on one hand, and, on the other hand, marriage’s institutional nature, not being “based on anachronistic notions of morality” but “rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society.”¹⁹³

As already seen, the California majority opinion’s most focused language is consistent with these references from the cases on which it relies. And tellingly, the majority opinion never makes the silly assertion found in other judicial opinions favorable to genderless marriage—that the law is the creator of the vital social institution of marriage.¹⁹⁴ Nor do the Connecticut and Iowa opinions make this

190. *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976), cited in *Marriage Cases*, 183 P.3d at 422.

191. *Id.*, quoted in part in *Marriage Cases*, 183 P.3d at 422.

192. *Poe v. Ullman*, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting), quoted in *Marriage Cases*, 183 P.3d at 426.

193. *Elden v. Sheldon*, 758 P.2d 582, 587 (Cal. 1988), quoted in *Marriage Cases*, 183 P.3d at 422.

194. 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 (N.Y. App. Div. 2005) (Saxe, J., dissenting) (“Civil marriage is an institution 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.”); *Andersen*, 138 P.3d at 1034 (Bridge, J., dissenting) (“Civil marriage is a state-conferred legal status, the existence of which gives rise to benefits and burdens

mistake. In these ways, the approach taken by these courts is consistent with Joseph Raz's insight into the role of the law relative to pre-political social institutions such as marriage—that is the role of facilitator, not creator.¹⁹⁵

In short, both to be meaningful and to be consistent with its own logic and language and that of the cases on which it relies, the right to marry repeatedly referenced by the California majority opinion must be understood as simply the right to enter into the social institution of marriage, as was explicitly stated by the Connecticut and Iowa opinions. And everywhere implicit in these opinions' discussion of the right to marry is the unproven assumption that, by decreeing same-sex couples possessed of that right, the law thereby ushers them into the institution “traditionally designated as marriage.”¹⁹⁶ That is a fundamental premise in all three opinions, and it is almost certainly false.

A number of social institutional realities falsify the fundamental premise that giving same-sex couples the right to marry will also provide them the right to the institution of marriage, many of which have been discussed previously but are summarized here. First, a social institution is constituted by, and really only by, a complex web of widely shared public meanings, including understandings and norms.¹⁹⁷ A core meaning constitutive of the contemporary California, Connecticut, Iowa, and American institution of marriage (as in virtually all other societies at all other times since pre-history) is “the union of a man and a woman.”¹⁹⁸ Although denominated “marriage,” a regime or institution constituted by the competing and supplanting meaning of “the union of any two persons” must of necessity be a radically different institution.¹⁹⁹ As noted earlier, the law has the power to suppress the man-woman meaning, thereby destroying its ubiquitous nature, and consequently to unmake (deinstitutionalize) the institution “traditionally designated as marriage.”²⁰⁰ The law also has the power to force the any-two-

reserved exclusively to the citizens engaged in the marital relationship.”) (citing *Baehr v. Lewin*, 852 P.2d 44, 58 (Haw. 1993)).

195. RAZ, *supra* note 74, at 161.

196. *Marriage Cases*, 183 P.3d at 399.

197. *See supra* notes 61–63 and accompanying text.

198. *See supra* note 65 and accompanying text.

199. *See supra* notes 72–74 and accompanying text.

200. *Marriage Cases*, 183 P.3d at 399; *see also supra* notes 69–70 and accompanying text.

persons meaning into many, probably most, sectors of society.²⁰¹ But the law is powerless to usher same-sex couples into the institution “traditionally designated as marriage” and thus is powerless to afford them the respect and dignity and other social goods uniquely provided by the man-woman marriage institution. This powerlessness is a function of fact and reality. John and James cannot enter into the institution of marriage unless and until the law suppresses its core man-woman meaning and replaces it with the any-two-persons meaning, but this very act of replacement results in a radically different institution.

This reality has been clear for some time now. Professor Bix has argued that “[m]arriage is an existing social institution” and an “existing ‘social good.’”²⁰² The “complication” in the analysis, such as that used in the California, Connecticut, and Iowa opinions, “is that one cannot fully distinguish the *terms* on which the good is available from the *nature* of the good.”²⁰³ He also quotes Joseph Raz who asserted that

When people demand recognition of gay marriages, they usually mean to demand access to an existing good. In fact they also ask for the transformation of that good. For there can be no doubt that the recognition of gay marriage will effect as great a transformation in the nature of marriage as that from polygamous to monogamous or from arranged to unarranged marriage.²⁰⁴

With due deference to the estimable Professor Raz, the transformation will be greater than even he suggests. As noted elsewhere,

The very act of legal of legal redefinition will radically transform the old institution and make it into a profoundly different institution, one whose meanings, value, and vitality are speculative. Some same-sex couples look to the law to let them into the privileged institution, and the law may want to, but it cannot; it can only give them access to a different institution of different value.²⁰⁵

201. See Stewart, *Judicial Elision*, *supra* note 58, at 47–49.

202. Brian Bix, *Reflections on the Nature of Marriage*, in REVITALIZING THE INSTITUTION OF MARRIAGE FOR THE TWENTY-FIRST CENTURY 111, 112 (Alan J. Hawkins et al. eds., 2002).

203. *Id.*

204. *Id.* at 112–13 (quoting RAZ, *supra* note 74, at 161).

205. Stewart, *Judicial Elision*, *supra* note 58, at 26.

These realities falsify the fundamental premise at the core of the three opinions' central project. The purpose of that central project, of course, is to give to same-sex couples the same right to enter the same valued and valuable social institution of marriage that man-woman couples have historically had the right to enter. And that central project's means is to expand the "constitutional right to marry" to include same-sex couples. The false fundamental premise is that the court can, by those means, accomplish that purpose. But the court cannot do so, by those or any other means. Although potent to destroy the institution "traditionally designated as marriage," the law, as a matter of social reality, is impotent to do what the three opinions purport to be doing. It is in this way that the use of a false fundamental premise leads not just to a holding unworthy of respect but to a breathtaking failure of the central project of the California, Connecticut, and Iowa opinions.

The one effort to counter this conclusion of failure does not succeed. Each of the three opinions asserts, in some form or another, that its actions will not work any change on the institution of marriage. Speaking of the same-sex couples who, as plaintiffs in the case, are asking for the "constitutional right to marry," the California opinion says "that we recognize they are not seeking to create a new constitutional right—the right to 'same-sex marriage'—or to change, modify, or (as some have suggested) 'deinstitutionalize' the existing institution of marriage."²⁰⁶ It is of course accurate to say that the plaintiffs were not seeking "the right to 'same-sex marriage.'" Such a right does not exist anywhere in the world, because nowhere is marriage defined as "the union of two persons of the same sex." Rather, it is defined either as "the union of a man and a woman" or as "the union of any two persons." What the plaintiffs were seeking, without cavil, is the right to genderless marriage, the only form of marriage actually available to them. To repeat the obvious: John and James cannot enter into marriage unless and until the law suppresses its man-woman meaning and replaces it with the any-two-persons meaning. That act of replacement creates a genderless marriage regime, and, again, that is exactly what the plaintiffs were seeking.

Similarly, the Connecticut majority opinion follows the same path by quoting approvingly of similar language from Massachusetts's *Goodridge* opinion: "[B]roadening civil marriage to

206. *In re Marriage Cases*, 183 P.3d 384, 421 (Cal. 2008).

include same-sex couples . . . [will] not disturb the fundamental value of marriage” Neither will it “diminish the validity or dignity of opposite-sex marriage If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities.”²⁰⁷ It also quotes the California opinion in stating that redefinition “will not alter the substantive nature of the legal institution of marriage.”²⁰⁸ The Iowa opinion adopts the belief that “[t]here is no legitimate notion that a more inclusive definition of marriage will transform civil marriage into something less than it presently is.”²⁰⁹ Each of these opinions’ assertions attempts to establish the innocuous nature of redefinition.

These assertions track, and in the case of the Connecticut majority opinion, directly quote,²¹⁰ virtually identical assertions in Massachusetts’s *Goodridge* opinion²¹¹ and Ontario’s *Halpern* decision,²¹² both of which mandate redefinition. In *Goodridge* the Massachusetts Supreme Judicial Court argues that the institution of marriage will not change because “the plaintiffs seek only to be married, not to undermine the institution of civil marriage.”²¹³ Further, the court explained that the fact that “same-sex couples are willing to embrace marriage’s solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.”²¹⁴ *Halpern* follows the same path: “The Couples are not seeking to abolish the institution of marriage; they are seeking access to it.”²¹⁵

However, the intentions of same-sex couples not to undermine marriage are irrelevant to the outcome; “it seems nonsensical that the intentions of a handful of people could insulate a vast social institution constituted by its public meanings from change resulting

207. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 474 (Conn. 2008) (quoting *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003)).

208. *Id.* at 473 (citing *Marriage Cases*, 183 P.3d at 451).

209. *Varnum v. Brien*, 763 N.W.2d 862, 899 n.25 (Iowa 2009) (citing Benjamin G. Ledsham, Note, *Means to Legitimate Ends: Same-Sex Marriage Through the Lens of Illegitimacy-Based Discrimination*, 28 CARDOZO L. REV. 2373, 2388 (2007)).

210. *Kerrigan*, 957 A.2d at 474.

211. *Goodridge*, 798 N.E.2d 941.

212. *Halpern v. Toronto (City)* (2003), 225 D.L.R. 4th 529 (Can. Ont. C.A.).

213. *Goodridge*, 798 N.E.2d at 965.

214. *Id.*

215. *Halpern*, 225 D.L.R. 4th at 566.

from a profound alteration in those meanings.”²¹⁶ Further, as noted earlier, the truth of this argument can also be challenged in that many of those supporting genderless marriage *do* intend to undermine the institution.²¹⁷

The opinions’ argument of “no change in the marriage institution,” cast in terms of the intent of the plaintiffs, thus cannot be taken seriously. Nor, for the same reasons, can it be taken seriously when made in the slightly different form adopted by the California majority opinion: “[P]ermitting same-sex couples access to the designation of marriage . . . will not alter the legal framework of the institution of marriage.”²¹⁸ To be plain, changing the law so that it no longer sustains but rather suppresses a core meaning constitutive of “the institution of marriage” and then replaces that meaning with a meaning so radically different as to create an essentially different social institution does indeed alter the institution’s “legal framework.”

In sum, the three opinions not only fail to negate the downside of loss of the marriage institution’s second catalogued social good (maximizing the private welfare provided to children conceived by passionate, heterosexual sex), they fail to achieve their promised but illusory upside (access of same-sex couples to the historically valuable and valued marriage institution).

3. The child’s bonding right

The first social good catalogued earlier is the child’s bonding right. That is the right of every child to know and be reared by his or her own biological parents, with exceptions made only in the best interests of the child, not in the interests of any adult. This social good is one for which the nexus between the man-woman meaning at the core of the marriage institution and the social good cannot rationally be contested.²¹⁹ Indeed, but for the institutionalization of

216. Stewart, *Redefinition*, *supra* note 12, at 79.

217. *Id.*

218. *In re Marriage Cases*, 183 P.3d 384, 401 (Cal. 2008).

219. *See, e.g.*, BLANKENHORN, *supra* note 74, at 201:

[S]ame-sex marriage would require us in both law and culture to deny the double origin of the child. . . . It would require us to change or ignore our basic human rights documents, which announce clearly, and for vitally important reasons, that every child has a birthright to her own two natural parents. . . . But a society that embraces same-sex marriage can no longer collectively embrace this norm [embedded in the child’s bonding right] and must take specific steps to retract it.

the man-woman meaning, what is now an internationally recognized human right will become merely a fortuitous accident.²²⁰ Moreover, to legally redefine marriage as the union of any two persons is to officially retract that right.²²¹ For these reasons, the child's bonding right stands as the single strongest refutation of the no-downside argument. Importantly for present purposes and as noted earlier, the prevailing California, Connecticut, and Iowa opinions advance the no-downside argument more forcefully and frequently than any other judicial opinion favorable to genderless marriage,²²² so the key question becomes how these opinions deal with the child's bonding right.

A good first step in answering that question is to examine the nexus between the institutionalized man-woman meaning and the child's bonding right. The word *right* is key. Many use the word as a grand way to summarize a preferred public policy: "Every child has a right to be immunized against polio." Or as a grand way to advocate for a desired political outcome: "No government should stand in the way of a capable, loving adult's right to a child." We do neither. Rather, relative to the child's bonding right, we are speaking of something that already-existing positive law recognizes not only as a right but one with corresponding duties in at least some actors. The literature identifies such a right both in international human rights documents²²³ and in domestic law supportive of what is aptly called "bionormativity"—the norm that parental rights and obligations align with biological parenthood.²²⁴ Both sources treat the child as a right-holder or, at least, as a possessor of significant affected interests.²²⁵

Yet even such legal recognition, alone, cannot be sufficient to make the right meaningful in the lives of real children. There must be something that we call "social predicates." The following thought

One can believe in same-sex marriage. One can believe that every child deserves a mother and a father. One cannot believe both.

220. For analysis of the child's bonding right as an internationally recognized human right, see *id.* at 180–83, 188–90.

221. See *id.* at 201.

222. See *supra* notes 90–92.

223. See, e.g., BLANKENHORN, *supra* note 74, at 180–83, 188–90; Convention on the Rights of the Child art. 7, Nov. 20, 1989, 1577 U.N.T.S. 3 ("The child shall . . . [have] the right to know and be cared for by his or her parents.").

224. See, e.g., Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 653–54 (2008).

225. See BLANKENHORN, *supra* note 74, at 188–202; Baker, *supra* note 224, at 682–91.

experiment helps explain: Imagine an island queendom where all the inhabitants view every form of property, both tangible and intangible, as belonging to all equally. In other words, they hold all property in common. Thus, there is no social institution of private property; indeed, the language available to the inhabitants is rather ill-equipped to convey the notion of private property. One day, however, a bit of parchment washes up on the beach and is taken to the queen. She correctly interprets the legible portion to say: “nor shall private property be taken for public use, without just compensation.” Acting on the intuition that this statement is the product of a wise and just society, she duly and formally elevates those words to positive law in her own queendom. And life goes on unchanged, for although the law now recognizes the “right,” it is a meaningless “right” because an essential social predicate is missing. That missing predicate, of course, is the social institution of private property.

The predicate required for the child’s bonding right to be meaningful must be some social mechanism or institution that, with some effectiveness, channels “the erotic and interpersonal impulses between men and women in a particular direction: one in which men and women commit to each other and to the children that their sexual unions commonly (and even at times unexpectedly) produce.”²²⁶ Or stated slightly differently, there must be some social mechanism or institution that “sustain[s] 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.”²²⁷ Without such a social institution, a law conveying to every child in the polity the bonding right is a law recognizing something that is, quite literally, meaningless. Such a law would seem to be the product of either delusion or fraud.

That essential social predicate to the child’s bonding right has been present in virtually all cultures since prehistory. It is, of course, marriage as a vital social institution.

In all or nearly all human societies, marriage is socially approved sexual intercourse between a woman and a man, conceived both as a personal relationship and as an institution, primarily such that any children resulting from the union are—and are understood by the

226. COUNCIL ON FAMILY LAW, *supra* note 21, at 12.

227. *Id.* at 13.

society to be—emotionally, morally, practically, and legally affiliated with both of the parents.²²⁸

Marriage provides this social good in the same fundamental way that any important social institution provides any of its unique social goods: The complex web of widely shared public meanings constituting the institution teaches, forms, and transforms individuals, providing to them “identities, purposes, practices, projects[,]” and, importantly, possibilities.²²⁹ In this this way, the institution guides behavior.²³⁰ As marriage is “[s]ociety’s best and perhaps only effective means to secure the right of a child to know and be raised by his or her biological parents,”²³¹ the marriage institution constructs the only social reality wherein the child’s bonding right can be both comprehensible and meaningful.

Of necessity, then, a society without the man-woman marriage institution will be devoid of any law-recognized “right” like the child’s bonding right—not because of the enactment or repeal of some law but because, at a more fundamental level, the social reality precludes the very notion of such a right. To say that marriage defined as the union of a man and a woman is the only social mechanism that can put the first breath of life into the child’s bonding right is not to say that such marriage’s presence in a society in itself compels consent to full vindication of the child’s bonding right. But it is to say, quite emphatically, that the man-woman marriage institution is the essential social predicate to the right’s existence.

Regarding these understandings from the new institutionalism and their application to the marriage institution, real-life experience

228. BLANKENHORN, *supra* note 74, at 91. Blankenhorn notes that the quoted definition “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.*

229. Stewart, *Marriage Facts*, *supra* note 19, at 320–21; *see also* DeCoste, *supra* note 73, at 625–26; *supra* notes 59–63 and accompanying text (providing further discussion of this theory of the “new institutionalism”).

230. *See, e.g.*, SCOTT, *supra* note 62, at 50:

Many treatments of institutions emphasize their capacity to control and constrain behavior. Institutions impose restrictions by defining legal, moral, and cultural boundaries, setting off legitimate from illegitimate activities. However, it is essential to recognize that institutions also support and empower activities and actors. Institutions provide guidelines and resources for taking action as well as prohibitions and constraints on action.

231. Stewart, *Marriage Facts*, *supra* note 19, at 321.

validates them. Where marriage is a strong social institution, it is much more likely that a child knows and is raised by the man and the woman whose sexual union created her, exactly because the parents are married.²³² Where the institution is weaker, such an outcome is less likely.²³³ Where the marriage ethos is weak or nonexistent, whenever a child does know and is raised by his mother and father, such is a mere fortuity—unless the society has expended resources in a way effective to otherwise involve the father in the child’s life, a problematic undertaking.²³⁴

These realities regarding the nexus between the marriage institution, with its core meaning of the union of a man and woman, and the child’s bonding right lead to an important understanding, one having to do with legal recognition of that right. The law’s role relative to 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.”²³⁵ Although the law has power to suppress the man-woman meaning,²³⁶ the law does not create pre-political institutions like marriage but facilitates them,²³⁷ and historically the law has facilitated the marriage institution by reinforcing the man-woman meaning at its core. Because that institutionalized meaning is the essential social predicate to, and actualizes as a practical matter, the child’s bonding right, *each law sustaining such marriage operates to recognize that right*. To say

232. See, e.g., INST. AM. VALUES, SOCIAL SCIENCES, *supra* note 65, at 12–15 (“Marriage, and a normative commitment to marriage, foster high-quality relationships between . . . parents and children.”).

233. See, e.g., Patrick Heuveline et al., *Shifting Childrearing to Single Mothers: Results From 17 Western Countries*, 29 POPULATION AND DEV. REV. 47 (2003) (collecting evidence that the spread of cohabitation results in more family instability and more single parenthood).

234. Generally speaking, Sweden’s experience is one of “the deliberate political elimination of marriage as a meaningful legal and social institution” coupled with some state initiatives to involve the father in the lives of his children. See Allan Carlson, *Deconstruction of Marriage: The Swedish Case*, 44 SAN DIEGO L. REV. 153, 154 (2007).

235. RAZ, *supra* note 74, at 161; see DeCoste, *supra* note 73, at 635.

236. See *supra* notes 69–70.

237. RAZ, *supra* note 74, at 161 (noting that political action can be taken to support political institutions “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”).

otherwise is to say that the law has for centuries been oblivious to its own consequences or that the law is irrational or both.

The current legal reality across the United States, and especially in Canada, is that some law sustains the child's bonding right and some law undermines it. The present situation in Canada provides perhaps the starkest example of this legal schizophrenia. On one hand, Canada is signatory to the United Nation's Convention on the Rights of the Child.²³⁸ Although other international human rights instruments reference and are protective of the child's bonding right,²³⁹ the Convention is probably the single most potent instrument in that respect.²⁴⁰ On the other hand, Canadian law not only has withdrawn legal support for the man-woman meaning but has become affirmatively hostile to that meaning, insisting on the any-two-persons meaning for all public purposes.²⁴¹ The simple fact is that Canada has not yet grappled with and resolved this conflict in its own laws.²⁴² All this sustains the understanding that, in both the United States and Canada in the coming years, the great human rights contest, at both the legal and the larger social level, will be over the fate of the child's bonding right. Certainly that fate has not yet been finally determined in either country.

Be that as it may, it is clear that in California, Connecticut, and Iowa, at least up until issuance of the recent opinions, the man-woman marriage institution was productive of the social good here called the child's bonding right. The no-downside argument fails in the face of that reality, yet each of these opinions rely heavily on that argument.²⁴³ In doing so, they do not expressly deny that such a right exists; to the authors' knowledge, no genderless marriage proponent ever has, publicly. Nor could these opinions plausibly

238. Convention on the Rights of the Child art. 7, Nov. 20, 1989, 1577 U.N.T.S. 3 ("The child shall . . . [have] the right to know and be cared for by his or her parents."). All member states except the United States and Somalia have ratified the Convention. See Johan D. van der Vyver, *American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness*, 50 EMORY L.J. 775, 778 (2001).

239. See BLANKENHORN, *supra* note 74, at 179–83.

240. See *id.* at 188–89.

241. Civil Marriage Act, S.C. 2005, c. 33 (Can.).

242. It is also true that marriage as the union of a man and a woman is still institutionalized in Canada. Those unhappy with that social fact, and it is a fact, may murmur about "institutional lag," how an essential component of the institution (legal support) has been destroyed but the momentum of the institution's vast historic and social weight nevertheless carries it forward for at least a while longer.

243. See *supra* Part III.

make such a denial; the whole body of laws reinforcing the man-woman meaning and sustaining the social institution is protective of the right. Surprisingly, only the California majority opinion attempted to defend redefinition in relation to the child's bonding right.²⁴⁴ The Connecticut and Iowa opinions assert generally—as already mentioned—that redefinition will not work any appreciable harm on the institution of marriage, but these opinions do not address the child's bonding right.²⁴⁵ The California majority, however, does recognize the concern that genderless marriage would “sever the link . . . between procreation and child rearing and would ‘send a message’ to the public that it is immaterial to the state whether children are raised by their biological mother and father.”²⁴⁶ Although it notes that it “appreciate[s] the genuine concern for the well-being of children,” the court ultimately “conclude[s]” that this assertion “lacks merit.”²⁴⁷ It explains:

Our recognition that the core substantive rights encompassed by the constitutional right to marry apply to same-sex as well as opposite-sex couples does not imply in any way that it is unimportant or immaterial to the state whether a child is raised by his or her biological mother and father. By recognizing this circumstance we do not alter or diminish either the legal responsibilities that biological parents owe to their children or the substantial incentives that the state provides to a child's biological parents to enter into and raise their child in a stable, long-term committed relationship. Instead, such an interpretation of the constitutional right to marry simply confirms that a stable two-parent family relationship, supported by the state's official recognition and protection, is equally as important for the numerous children in California who are being raised by same-sex couples as for those children being raised by opposite-sex couples (whether they are biological parents or adoptive parents). This interpretation also guarantees individuals who are in a same-sex relationship, and who are raising children, the opportunity to obtain from the state the official recognition and support accorded a family by agreeing to take on the substantial and long-term

244. *In re Marriage Cases*, 183 P.3d 384, 432–33 (Cal. 2008).

245. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

246. *Marriage Cases*, 183 P.3d at 432.

247. *Id.* at 433.

mutual obligations and responsibilities that are an essential and inseparable part of a family relationship.²⁴⁸

This analysis is deeply flawed. It launches from the unproven premise that no productive nexus exists between the man-woman marriage institution and the child's bonding right. Because the falsity of that fundamental premise has already been demonstrated, what is important here is to show that this is a fundamental premise of the California majority opinion. We proceed sentence by sentence, with the reminder that what is said of marriage in California most definitely also applies to marriage in Connecticut, Iowa, and across America.

The first sentence asserts that

Our recognition that the core substantive rights encompassed by the constitutional right to marry apply to same-sex as well as opposite-sex couples does not imply in any way that it is unimportant or immaterial to the state whether a child is raised by his or her biological mother and father.²⁴⁹

The opening phrase down to "opposite-sex couples" is a euphemism for "our act of redefining marriage." The California majority opinion is saying that the act of redefining marriage does not deny the state's interest in the child's bonding right. Yet the act of redefining marriage unmakes the very social institution the existence and vitality of which stand as the essential provider and protector of that right. Thus, to say that to unmake that institution is not to "deny" the state's interest in that right is to say something beyond nonsensical; to say that is to engage in the evil of Orwellian double-speak.

The court continues: "By recognizing this circumstance we do not alter or diminish either the legal responsibilities that biological parents owe to their children or the substantial incentives that the state provides to a child's biological parents to enter into and raise their child in a stable, long-term committed relationship."²⁵⁰ What "this circumstance" refers to is unclear; it is probably referring to the new circumstance that, because of redefinition, same-sex couples can now marry. If so, it is true, as the California majority opinion says, that redefinition "does not alter or diminish . . . the legal responsibilities that biological parents owe to their children." But the

248. *Id.*

249. *Id.*

250. *Id.*

narrow scope of those “legal responsibilities” should not be overlooked. In California, a biological parent’s only specifically enforceable legal responsibility is financial support.²⁵¹ California compels no unable or adamantly unwilling parent to supervise, protect, or otherwise care for his or her child, for the simple reason that to do so would be contrary to the best interests of the child.²⁵² There are indeed “natural limits on what parents can be ‘made’ to do,”²⁵³ and “[m]uch of what family members . . . ‘owe’ one another cannot be enforced in a court of law”²⁵⁴ So the reference to “no diminution in legal responsibilities” is a mirage. That reference evades the question of legal protection, or not, for the social predicate to the child’s bonding right, the man-woman marriage institution.

In contrast, to enshrine genderless marriage is to say something very important about protection, or not, of the child’s bonding right. In a very practical way, redefinition withdraws that protection,²⁵⁵ and that is to “alter” and “diminish” indeed.

The California majority opinion commits an even more serious error of analysis when it asserts that redefinition does “not alter or diminish . . . the substantial incentives that the state provides to a child’s biological parents to enter into and raise their child in a stable, long-term committed relationship.”²⁵⁶ Far and away the most powerful “incentive” any parent has to nurture and rear his child is within; it is the sense or the understanding that he ought, as a matter of the quality of his own humanity, to do so and that, if he does not, he will be (or will be seen to be) a less worthy person. Where it

251. *See, e.g.*, *County of Yolo v. Francis*, 224 Cal. Rptr. 585, 590 (Cal. Ct. App. 1986) (“Federal law requires that states enforce parental support obligations or face a reduction in federal funding of their AFDC programs. . . . ‘[T]he primary reason underlying the public enforcement of support rights is to insure that the monies disbursed by the county for aid of a needy child be returned to the public source from which they were disbursed.’”).

252. CAL. WELF. & INST. CODE § 300 (West 2006). This section provides that a child may be adjudged to be a dependent child of the court if the child comes within any of the descriptions set forth in its subsections (a) through (j). Subsections (b), (c), (g), and (h) address, in one context or another, the unwilling parent. The overall intent of the dependency scheme is to protect children from abuse or neglect and to provide permanent, stable homes if those children cannot be returned home within a set period of time. *See In re Celine R.*, 71 P.3d 787, 791–92 (Cal. 2003).

253. Hafen, *supra* note 98, at 473.

254. *Id.* at 476.

255. *See supra* notes 222–224 and accompanying text.

256. *In re Marriage Cases*, 183 P.3d 384, 433 (Cal. 2008).

exists, that inner sense is the product of socialization.²⁵⁷ It is the product of at least one social institution's teaching, forming, and transforming power. It is the fruit of the individual's positive response to a strong social norm. Thus, "[d]espite the natural limits on what parents can be 'made' to do, the conditions that optimize 'a home environment which enables [a child] to develop into a mature and responsible adult' are clearly encouraged by cultural patterns and reinforced by legal expectations,"²⁵⁸ that is, the cultural patterns and legal expectations historically embedded in the man-woman marriage institution. Accordingly, it seems fair to say that in our society the man-woman marriage institution has played an important role in the creation of that inner sense of parental duty. Surely that institution does much, along with other socializing influences, to generate the duty of a man and a woman not to abandon, sell, give away, or leave their child to the state. To fulfill that duty is a promise that, across cultures, the man and the woman make in a public way when they marry.²⁵⁹

257. See Hafen, *supra* note 98, at 476–79 (speaking of “socialization” as the source of “obedience to the unenforceable”).

258. *Id.* at 473.

259. A recent review of government efforts to strengthen marriage notes this link between the strength of the institution and the personal sense of parental duty: “[W]hen an externalized culture is actively supportive of an internalized individual sense of obligation to perform what one has promised in one’s marriage vows, we see the possibility of a substantially stronger institution of marriage that supports the well-being of children, women, and men.” Alan Hawkins et al., *Recent Government Reforms Related to Marital Formation, Maintenance, and Dissolution in the United States: A Primer and Critical Review*, 8 J. COUPLE & RELATIONSHIP THERAPY 264, 277–78 (2009). Parental duty is part of the “template” provided by marriage that Steven Nock described:

The institutional perspective argues that marriage changes individuals in positive ways, both to the extent that others treat them differently and to the extent that they come to view themselves differently. The marital relationship carries with it legal, moral, and conventional assumptions about what is right and proper. It is, in other words, institutionalized and defined by social norms. It is culturally patterned and integrated into other basic social institutions like education, the economy, and politics. In this sense, married individuals have a tradition of solutions to rely on when they confront problems. For many matters in domestic life, marriage supplies a template.

....

[The ideology underlying that template historically] associated the prevailing family principles of marriage, childbearing, motherhood, commitment, and sacrifice for family with a sense of sacredness. It stressed sexual fidelity in marriage, chastity before marriage, *intensive child-rearing*, a commitment to a lifelong marriage, and high levels of expressive interaction among family members.

Steven L. Nock, *Marriage as a Public Issue*, 15 THE FUTURE OF CHILDREN 13, 18–19, 22

In contrast, every married same-sex couple with legal rights to a child conceived with assisted reproductive technologies becomes the genderless marriage regime's clear announcement that such abandonment by at least one biological parent, without careful and independent consideration of the best interests of the child, is legally, and therefore socially, acceptable.²⁶⁰ So the California majority opinion's assertion that redefinition does not diminish the "incentives" to fulfillment of parental duties is plainly wrong. Redefinition unmakes the very social institution productive of the most powerful incentives and replaces it with a radically different marriage regime teaching a radically different message.

One other aspect of this assertion merits attention. The assertion speaks of parental obligations and of the state's interests in assuring fulfillment of those obligations. But nowhere is there a reference to any rights or interests of the child relative to the child's connection with biological parents. This silence is telling and troublesome. Professor Baker's brilliant analysis of bionormativity—that is, of the norm that parental rights and obligations align with biological parenthood—teaches that the interests served by that norm must be analyzed separately for the state, parents, and children.²⁶¹ Children's interests in bionormativity differ from the state's and from parents'; children "seem to have what is potentially the strongest interest in the biology of biological parenthood."²⁶² Professor Baker explains that this may be because there are "psychological benefits associated with being raised by one's biological parents."²⁶³ These considerations are luminous of some of the deep roots of the child's bonding right in our domestic and international legal regimes. It is after all the *child's* bonding right, a fact that the majority opinion never addresses. Of course, however, the majority opinion cannot acknowledge that the right at issue belongs to children, particularly those of future

(2005) (emphasis added).

260. See COMM'N ON PARENTHOOD'S FUTURE (ELIZABETH MARQUARDT, PRINCIPAL INVESTIGATOR), THE REVOLUTION IN PARENTHOOD: THE EMERGING GLOBAL CLASH BETWEEN ADULT RIGHTS AND CHILDREN'S NEEDS 32 (2006), available at http://www.marriagedebate.com/reg/pdf_secure.php?pdf=5 (requires login) ("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.")

261. Baker, *supra* note 224, at 682.

262. *Id.*

263. *Id.* at 686.

generations, without sabotaging its own no-downside argument. That is because redefinition is such a blow to bionormativity and to the laws protective of that norm and therefore to the child's bonding right made meaningful by it.

The California court proceeds to assert that

Instead, such an interpretation of the constitutional right to marry *simply* confirms that a stable two-parent family relationship, supported by the state's official recognition and protection, is equally as important for the numerous children in California who are being raised by same-sex couples as for those children being raised by opposite-sex couples (whether they are biological parents or adoptive parents).²⁶⁴

"[S]uch an interpretation" refers, of course, to redefinition. The error in this sentence resides in the word "simply." The no-downside argument requires that redefinition "simply" or *only* confirm the value of stable homes for all children. But it does not do "simply" or only that. Redefinition has a dark, destructive side that suppresses the now-institutionalized man-woman meaning and thereby unmakes the social institution essential for the child's bonding right to be not just meaningful but also comprehensible. This sentence also contains another analytical error, but that error is best addressed in the context of the majority opinion's next sentence.

Before proceeding, however, it is worth noting similar assertions made in the Connecticut and Iowa opinions. The Connecticut opinion states:

Both [same sex and opposite sex couples] consist of pairs of individuals who wish to enter into a formal, legally binding and officially recognized, long-term family relationship that affords the same rights and privileges and imposes the same obligations and responsibilities. Under these circumstances, there is no question but that these two categories of individuals are sufficiently similar to bring into play equal protection principles²⁶⁵

In the Iowa opinion:

Official recognition of [same-sex couples'] status provides an institutional basis for defining their fundamental relational rights

264. *In re Marriage Cases*, 183 P.3d 384, 433 (Cal. 2008) (emphasis added).

265. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 424 (Conn. 2008) (quoting *Marriage Cases*, 183 P.3d at 831 n.54).

and responsibilities, just as it does for heterosexual couples. Society benefits, for example, from providing same-sex couples a stable framework within which to raise their children and the power to make health care and end-of-life decisions for loved ones, just as it does when that framework is provided for opposite-sex couples.²⁶⁶

The Connecticut opinion elsewhere affirmed its desire to provide to children of same-sex couples, through redefinition, certain benefits not currently enjoyed, inasmuch as “[e]xcluding same-sex couples from civil marriage . . . prevent[s] children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which children will be reared, educated, and socialized.”²⁶⁷ Thus, what we say in the following paragraphs about the California majority opinion applies not just to it but to all three opinions.

The California majority opinion next says:

This interpretation also guarantees individuals who are in a same-sex relationship, and who are raising children, the opportunity to obtain from the state the official recognition and support accorded a family by agreeing to take on the substantial and long-term mutual obligations and responsibilities that are an essential and inseparable part of a family relationship.²⁶⁸

For purposes of the no-downside argument, this analysis fails because it evades the fact that government engages in two different child welfare endeavors; this analysis addresses only the endeavor congenial to a no-downside conclusion while ignoring the endeavor fatal to that conclusion.

As discussed, a number of the unique social goods provided by the institutionalized man-woman meaning focus on the welfare of children, including the child’s bonding right. Man-woman marriage is thus often understood (and accurately so) as primarily a child-centered and child-protective institution.²⁶⁹ Accordingly, government efforts to preserve that institution are child welfare endeavors, as has also already been discussed, though the point bears repetition. In

266. *Varnum v. Brien*, 763 N.W.2d 862, 883 (Iowa 2009).

267. *Kerrigan*, 957 A.2d at 474–75 (quoting *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003)).

268. *Marriage Cases*, 183 P.3d at 433.

269. *See, e.g.*, COUNCIL ON FAMILY LAW, *supra* note 21, at 12–13; BLANKENHORN, *supra* note 74, at 91, 99–105.

contemporary America, the government thus engages in two fundamental child-welfare endeavors. In the first endeavor, the government protects marriage as an institution both by using the law to protect its core man-woman meaning and the pro-child social goods associated with that meaning. In the second, the government provides public assistance “through protective laws, access to resources, material resources . . . to individual children or their caregivers.”²⁷⁰ 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.

The California majority opinion ignores the institutionally protective nature of the first endeavor, which seeks to preserve the man-woman meaning. Instead, it speaks only in the language of the second endeavor, which seeks to provide at least minimal resources to every child; hence, this language: that a parental unit caring for children should be “supported by the state’s official recognition and protection” and have “the opportunity to obtain from the state the official recognition and support accorded a family.”²⁷¹ Such an approach cultivates an ethos of government-assured equality of circumstances for all children, but because it ignores the preeminent government child-welfare endeavor it is intellectually indefensible.

In short, the nature and value of the child’s bonding right are fatal to the three opinions’ no-downside argument. That argument fails because the opinions construct the argument on a false fundamental premise—that no productive nexus exists between the man-woman marriage institution and the child’s bonding right.

4. *Husband and wife*

Just as it is with the child’s bonding right, so it is with the statuses and identities of *husband* and *wife*: without reasonable

270. See Stewart, *Marriage Facts*, *supra* note 19, at 359.

271. *Marriage Cases*, 183 P.3d at 433.

dispute, they are the product of the man-woman meaning at the core of the marriage institution. Those statuses and identities also qualify as valuable social goods, both for individuals and for society. To use Dworkin's description, *husband* "is a distinct mode of association and commitment that carries centuries and volumes of social and personal meaning."²⁷² So is *wife*, and each of those two statuses exists in association with and by reference to the other. The thick, deep meanings of *husband* pertain to relationship with *wife* (and vice versa) and, relative to that relationship, shape and inform a wide range of projects, purposes, and possibilities.²⁷³ As one consequence of this, "marriage has always been the central cultural site of male-female relations"²⁷⁴ and society's primary and most effective means of bridging the male-female divide—that "massive cultural effort of every human society at all times and in all places."²⁷⁵ And despite issues relative to selection and causation factors, it is clear that those who enjoy the status and identity of *husband* or *wife* are healthier, wealthier, and happier than those who do not.²⁷⁶

In contrast, to the extent (which may be very small indeed) that a genderless-marriage regime even allows the words *husband* and *wife*, it shrivels their meanings all the way down to a mere biological description. Indeed, it is fair to say that, in a genderless-marriage regime, *husband* means "a marriage partner with a penis"; *wife*, "a marriage partner with a vagina." Such a regime must jettison and suppress the "centuries and volumes of social and personal meaning"²⁷⁷ inhering in those words because, to the extent it does not, it is reinforcing the man-woman meaning of marriage, and that is something a genderless-marriage regime cannot do without jeopardizing its own supremacy and perpetuation.²⁷⁸ Remember, a

272. DWORKIN, *supra* note 175, at 86.

273. See DeCoste, *supra* note 73, at 625–26.

274. Daniel Cere, *War of the Ring*, in *DIVORCING MARRIAGE*, *supra* note 74, at 14.

275. Katherine K. Young & Paul Nathanson, *The Future of an Experiment*, in *DIVORCING MARRIAGE*, *supra* note 74, at 43.

276. See, e.g., Nock, *supra* note 259, at 17 ("The accumulated research shows that married people are typically healthier, live longer, earn more, have better mental health, have better sex lives, and are happier than their unmarried counterparts."). See *id.* at 18–21, where Nock addresses the selection and causation factors.

277. DWORKIN, *supra* note 175, at 86.

278. The California majority opinion itself makes clear that the statuses and identities of *husband* and *wife* are hallmarks of the man-woman marriage institution and that to speak of *husband* or *wife* is to acknowledge the man-woman meaning in marriage. See *In re Marriage Cases*, 183 P.3d 384, 407–09 (Cal. 2008).

society can have only one marriage institution at a time, either one constituted by the man-woman meaning or the alternative constituted by the any-two-persons meaning.²⁷⁹ Moreover, because it must of necessity limit *husband* and *wife* to mere biological description, a genderless marriage regime simply cannot perform in this context the fundamental task of any valuable social institution—empowering and enabling people to do and become what they could not do and become without the institution.²⁸⁰

These understandings lead to an “other side of the coin” reality of profound importance. Section III.B.2.b, which discussed access for same-sex couples into the marriage institution, asserted the twin social realities that (1) in response to redefinition the law can and will suppress the man-woman meaning and thereby unmake the man-woman marriage institution and (2) the law has no power to usher same-sex couples into the institution “traditionally designated as marriage”²⁸¹ but only the power to usher them into a post-political, law-constructed, genderless marriage regime. Relative to those realities, the earlier section focused on consequences for same-sex couples. What these realities mean for *man-woman couples* is the other side of the coin. For man-woman couples, these realities mean that no matter how much man-woman couples might desire the man-woman marriage institution’s unique social goods, they cannot have them because the law has unmade—deinstitutionalized—that institution. Yes, they can marry, but the point is what the straight men and women will be marrying “into.” They will be marrying into a much different social institution than their parents married into simply because, undeniably, a constitutive core meaning will be radically different.

Moreover, by marrying they will be reinforcing the new regime. Social institutions are renewed and strengthened by use consistent with the shared public meanings constituting them.²⁸² “[E]ach use of the institution is in a sense a renewal of that institution. Cars and shirts wear out as we use them but constant use renews and strengthens institutions such as marriage. . . .”²⁸³ After redefinition,

279. See *supra* notes 77–79 and accompanying text.

280. See DeCoste, *supra* note 73, at 625–27; see also Monte Neil Stewart, *Dworkin, Marriage, Meanings – and New Jersey*, 4 RUTGERS J.L. & PUB. POL’Y 271, 302–05 (2007).

281. *Marriage Cases*, 183 P.3d at 399.

282. See SEARLE, *supra* note 118, at 57.

283. *Id.*

every use of the new institution by a man-woman couple will validate and reinforce it; after all, that couple will be invoking on their union the sanctioning power of a polity that rigorously views their union as one between “two persons.” Because those “two persons” happen to be a man and a woman, the consequences may initially be misunderstood by many or even most,²⁸⁴ but the strengthening effect on the new institution is largely unavoidable. We use the word “largely” advisedly. In a genderless marriage regime, such as in Canada or Massachusetts, a man and a woman desiring to avoid complicity with the new institutional regime could fulfill that desire—but only by openly participating in a decidedly exclusive marriage ceremony sanctioned only by a decidedly exclusive norm community—in other words, by openly foregoing civilly sanctioned genderless marriage by means of a consciously political act. The price for doing so includes forfeiting the benefits of civil marriage and being officially labeled as bigoted (or at least “discriminatory”)—that is, as hostile to the constitutional ideal of equality.

All these consequences for conscientious man-woman couples make the California majority opinion’s conclusions seem remarkable. It concludes that constitutional law imposes on the state the affirmative obligation to recognize and sustain the marriage institution; in other words, it is constitutionally impermissible for a state “to get out of the marriage business.” The key language merits quotation in full:

If civil marriage were an institution whose *only* role was to serve the interests of society, it reasonably could be asserted that the state should have full authority to decide whether to establish or abolish the institution of marriage (and any similar institution, such as domestic partnership). In recognizing, however, that the right to marry is a basic, *constitutionally protected* civil right—“a fundamental right of free men [and women]”—the governing California cases establish that this right embodies fundamental interests of an individual that are protected from abrogation or elimination by the state. Because our cases make clear that the right

284. A common error is to confuse the social institution, a complex web of widely shared public meanings, with the physical objects on which the institution operates. The very same train locomotive may have existed in Russia in 1915 and in 1925, but the same social institution of property most certainly did not. The train locomotive in 1915 was a subject of the social institution of private property; in 1925 it was the subject of the radically different social institution of communal property. The phenomenon is similar relative to George and Martha’s marriage before and after the genderless marriage revolution is fully implemented.

to marry is an integral component of an individual's interest in *personal autonomy* protected by the privacy provision of [the California constitution] . . . and of the *liberty* interest protected by the due process clause of [the same] . . . , it is apparent under the California Constitution that the right to marry—like the right to establish a home and raise children—has independent *substantive* content, and cannot properly be understood as simply the right to enter into such a relationship *if (but only if)* the Legislature chooses to establish and retain it. (Accord, *Poe v. Ullman* (1961) 367 U.S. 497, 553, 81 S.Ct. 1752, 6 L.Ed.2d 989 (dis. opn. of Harlan, J.) [“the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, *an institution which the State not only must allow*, but which always and in every age it has fostered and protected”]).

One very important aspect of the substantive protection afforded by the California constitutional right to marry is, of course, an individual's right to be free from undue governmental intrusion into (or interference with) integral features of this relationship—that is, the right of marital or familial privacy. The substantive protection embodied in the constitutional right to marry, however, goes beyond what is sometimes characterized as simply a “negative” right insulating the couple's relationship from overreaching governmental intrusion or interference, and includes a “positive” right to have the state take at least some *affirmative action* to acknowledge and support the family unit.

. . . .

[T]he right to marry does obligate the state to take *affirmative action* to grant official, public recognition to the couple's relationship as a family, as well as to protect the core elements of the family relationship from at least some types of improper interference by others. This constitutional right also has the additional *affirmative* substantive effect of providing assurance to each member of the relationship that the government will enforce the mutual obligations between the partners (and to their children) that are an important aspect of the commitments upon which the relationship rests.²⁸⁵

By the repeated references to the marriage institution, this language rather clearly makes three points:

285. *Marriage Cases*, 183 P.3d at 425–27 (emphasis added) (footnotes and citations omitted).

1. In fulfillment of an affirmative obligation constitutionally imposed on it, the state must sustain that marriage institution that “always and in every age it has fostered and protected”; it is constitutionally impermissible for the state to abolish that institution.
2. This constitutional protection of the institution arises from the “fundamental interests of [the] individual” served by that institution; we are dealing with a personal right to ongoing state support of the marriage institution. (This conclusion is reinforced by the understanding, already addressed,²⁸⁶ that the right to marry is simply the right to enter into, and be an equal participant in, the institution of marriage.)
3. This individual (or personal) right includes both the right “to be free from undue governmental intrusion into (or interference with) integral features of this relationship” made possible by the marriage institution and the right to have the state fulfill its affirmative obligation to sustain the institution.

Yet in advancing these points, the California majority opinion has a large blind spot: the majority acts as if it is dealing with one and the same marriage institution, whether its core meaning is “the union of a man and a woman” or “the union of any two persons.” But the social reality is that the opinion is dealing with two radically different and mutually exclusive marriage institutions.²⁸⁷ So the key question becomes which of the two the state is constitutionally obligated to sustain, and the answer must be, on the California majority opinion’s own terms, the man-woman marriage institution. After all, that is the one that “always and in every age [the state] has fostered and protected” and that is the one that uniquely provides a number of valuable social goods and that empowers and enables people to do and become, in important respects, what they could not do and become without the institution. Moreover, the key precedents on which the majority opinion relies for its holding of “a constitutional right to marry” quite clearly address a personal right

286. *See supra* Part III.B.2.b.

287. *See supra* notes 74–77 and accompanying text.

to enter the man-woman marriage institution; it is the right to enter *that* institution that is among “those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”²⁸⁸

The California majority opinion’s blind spot is coextensive with another false fundamental premise. It is that a marriage institution or regime constituted by the core any-two-persons meaning is essentially the same as the man-woman marriage institution. Or, stated negatively, it is that the any-two-persons marriage regime and the man-woman marriage institution are not radically different and mutually exclusive. And on that false fundamental premise, all three opinions construct the no-downside argument detailed earlier, that permitting genderless marriage will not alter the institution of marriage or deprive man-woman couples of any rights they now enjoy.²⁸⁹ This is perhaps seen most clearly in the Iowa opinion, which states:

While the institution of civil marriage likely encourages stability in opposite-sex relationships, we must evaluate whether *excluding* gay and lesbian people from civil marriage encourages stability in opposite-sex relationships. The County offers no reasons that it does, and we can find none. The stability of opposite-sex relationships is an important governmental interest, but the exclusion of same-sex couples from marriage is not substantially related to that objective.²⁹⁰

Each of these arguments is founded on the fundamental premise that a marriage institution or regime constituted by the core any-two-persons meaning is essentially the same as the man-woman marriage institution. It is not difficult to see how that no-downside argument fails. It fails exactly because “[o]pposite-sex couples will [*not*] continue to enjoy precisely the same constitutional rights they traditionally have possessed”²⁹¹ Traditionally, man-woman couples had the constitutional right to enter into the man-woman marriage institution, enjoy its unique social goods, and be enabled and empowered by it to become what they could not become

288. *Marriage Cases*, 183 P.3d at 422 (quoting *Perez v. Sharp*, 198 P.2d 17, 18 (Cal. 1948)).

289. *Supra* Part III.

290. *Varnum v. Brien*, 763 N.W.2d 862, 902 (Iowa 2009) (emphasis added).

291. *Marriage Cases*, 183 P.3d at 430.

without the institution, including *husband* and *wife*. Yet the unavoidable effect of redefinition is to (1) suppress the man-woman meaning and (2) thereby unmake the man-woman marriage institution, which (3) causes the loss of its unique social goods, including provision of the statuses and identities of *husband* and *wife* with their “distinct mode of association and commitment that carries centuries and volumes of social and personal meaning,” and (4) replaces all that with a radically different marriage regime hostile to, indeed destructive of, that particular “social and personal meaning.” Because of redefinition, now “[t]here are enough marriage licenses to go around for everyone”²⁹² who wants to enter the genderless marriage regime and *none at all* for those desiring to enter, with state sanction, the man-woman marriage institution.²⁹³

C. Loss of Religious Liberty as a Downside

Proponents of man-woman marriage, especially those from faith communities that highly value the man-woman marriage institution, have asserted that legal redefinition of marriage will lead to loss of religious liberty and that this will constitute yet another downside of the redefinition project. The California, Connecticut, and Iowa opinions discuss religious liberty only briefly, employing the lines of the standard no-downside argument in this context, namely, that redefinition will not hurt religion because civil marriage and religious marriage are two separate and distinct phenomena. This subsection critically examines this aspect of the three opinions.

The religious liberty issue was initially brought to the forefront by the Becket Fund for Religious Liberty. The Becket Fund is the preeminent public-interest law firm in the nation relative to the

292. *Hernandez v. Robles*, 855 N.E.2d 1, 23 (2006) (Kaye, C.J., dissenting).

293. The California majority opinion makes clear, by the sources it cites, that the right to marry is a right guaranteed by both the state constitution and the federal constitution, although the state right and the federal right may not be coextensive. *See Marriage Cases*, 183 P.3d at 425–27 & nn.41–42. Because, as seen in the text, that right is a right to enter into the man-woman marriage institution, the California majority opinion gets things exactly wrong relative to the state constitutional right to marry. The federal courts, however, may get things exactly right relative to the federal constitutional right to marry, with large implications for the resolution of the marriage issue across the entire nation. *But see* Sunstein, *supra* note 188, at 2084 (“[S]tates may abolish marriage without offending the [federal] Constitution . . .”). Sunstein’s conclusion, however, is based on the narrowest of narrow descriptions of contemporary American marriage: “marriage is a government-operated licensing scheme, no less and no more.” *Id.* at 2086. Sunstein does not at all come to grips with the broad description of contemporary marriage and its factual accuracy.

defense of religious liberties, and it represents a wide range of churches and faith communities, some of which favor and some of which oppose the redefinition of marriage.²⁹⁴ In December 2005, the Becket Fund hosted a gathering of distinguished scholars, some favoring and some opposing redefinition.²⁹⁵ Those scholars considered the ways and the extent to which redefinition would affect religious liberties in the United States. At the risk of oversimplifying these scholars' deliberations, they can be summarized like this: Those opposed to redefinition concluded that redefinition would very much hurt American religious liberties, while those favoring redefinition concluded that it would very, very much hurt those liberties but this was an acceptable price to pay to advance the civil rights of gay men and lesbians.²⁹⁶ The issue of redefinition's adverse impacts on religious liberties has been much and seriously debated since.²⁹⁷ The Becket Fund now files *amicus* briefs raising that religious-liberty issue in each appellate case considering the marriage issue,²⁹⁸ and did so in *In re Marriage Cases*, *Kerrigan*, and *Varnum*.²⁹⁹

294. See BECKET FUND FOR RELIGIOUS LIBERTY, *Our Mission*, <http://www.becketfund.org/our-mission/> (last visited Oct. 15, 2011).

295. See Maggie Gallagher, *Banned in Boston: The Coming Conflict Between Same-Sex Marriage and Religious Liberty*, THE WEEKLY STANDARD (May 15, 2006), available at <http://weeklystandard.com/Content/Public/Articles/000/000/012/191kgwgh.asp>.

296. *Id.* The papers presented at the conference are available at <http://www.becketfund.org/index.php/article/494.html>.

297. See, e.g., Roger Severino, *Or for Poorer: How Same-Sex Marriage Threatens Religious Liberty*, 30 HARV. J.L. & PUB. POL'Y 939 (2007); Vikram David Amar & Alan Brownstein, *Does Recognition of the Right of Same-Sex Couples to Marry Impose Undue Burdens on People Who Reject Same-Sex Marriage on Account of Religious Convictions? An Evaluation of This Objection to the Massachusetts and California Same-Sex Marriage Decisions*, FINDLAW (July 8, 2008), available at <http://writ.lp.findlaw.com/amar/20080801.html>; 152 CONG. REC. S5422 (daily ed. June 5, 2006) (statement of Sen. Brownback):

It is becoming increasingly apparent that same-sex marriage poses a significant threat to religious liberties. Scholars on both the left and the right agree that same-sex marriage has raised the specter of the massive and protracted battle over religious freedom. Where courts impose the same-sex marriage regime as a constitutionally guaranteed right, a multitude of new religious liberty conflicts will inevitably arise at every point where the law touches marriage and is applied to individuals, businesses, nonprofits, and even churches and synagogues.

298. The Becket Fund describes its *amicus* brief activity on its website at <http://www.becketfund.org/category/cases/>.

299. Application and Proposed Brief for The Becket Fund for Religious Liberty as Amicus Curiae Supporting State Defendants, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999) [hereinafter California Becket Fund brief]; Brief for The Becket Fund for Religious Liberty as Amicus Curiae Supporting Defendants-Appellees, *Kerrigan v. Comm'r of*

As part of the thorough-going deployment of the no-downside argument, the three opinions address this religious-liberty issue, albeit briefly. Before examining that performance, however, two other aspects of the three opinions, consequential for the religious-liberty issue, merit attention. First is the constant treatment of the redefinition-of-marriage endeavor as historically, legally, socially, and morally equivalent to earlier battles for the civil rights of blacks and women.³⁰⁰ Only once does the California majority opinion deviate

Pub. Health, 957 A.2d 407 (Conn. 2008) (No. 17716); Brief for The Becket Fund for Religious Liberty as Amicus Curiae Supporting Defendant-Appellee, *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (No. 07-1499).

300. See *Marriage Cases*, 183 P.3d at 401-02, 430, 442-44, 445, 451. This “grand equivalence” strategy comes to the fore in the California majority opinion’s choice of the strict scrutiny standard of review, a standard historically reserved for “suspect classifications” based on race and, in California, gender. See *id.* at 442-44. Here is one example of the majority opinion’s deployment of that strategy:

Although the understanding of marriage as limited to a union of a man and a woman is undeniably the predominant one, if we have learned anything from the significant evolution in the prevailing societal views and official policies toward members of minority races and toward women over the past half-century, it is that even the most familiar and generally accepted of social practices and traditions often mask an unfairness and inequality that frequently is not recognized or appreciated by those not directly harmed by those practices or traditions. It is instructive to recall in this regard that the traditional, well-established legal rules and practices of our not-so-distant past (1) barred interracial marriage, (2) upheld the routine exclusion of women from many occupations and official duties, and (3) considered the relegation of racial minorities to separate and assertedly equivalent public facilities and institutions as constitutionally equal treatment. As the United States Supreme Court observed in its decision in *Lawrence v. Texas*, the expansive and protective provisions of our constitutions, such as the due process clause, were drafted with the knowledge that “times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.” For this reason, the interest in retaining a tradition that excludes an historically disfavored minority group from a status that is extended to all others—even when the tradition is long-standing and widely shared—does not necessarily represent a compelling state interest for purposes of equal protection analysis.

Id. at 451 (footnotes omitted) (citations omitted).

The court in *Kerrigan* employed the same strategy in establishing an intermediate scrutiny level. See 957 A.2d at 412, 433, 444-45, 449 (legislative indicators of disfavored status). In addition, the *Kerrigan* court quoted the first half of the paragraph from *Marriage Cases* excerpt above to establish that its decision was just one among a long list of reputable expansions of rights. *Id.* at 481-82. After quoting the California majority opinion, *Kerrigan* made clear that it saw its current work as one more step toward equality: “Like these once prevalent views, our conventional understanding of marriage must yield to a more contemporary appreciation of the rights entitled to constitutional protection.” *Id.* at 482. In his dissent, Justice Zarella strongly disagreed with the grand equivalence strategy, stating that the majority’s error was primarily based on (1) assumptions surrounding the narrow definition of marriage, and (2) overemphasis on discrimination faced by gay persons. *Id.* at 515 (Zarella,

from that “grand equivalence” strategy, and that is when in a footnote it expressly declines to “suggest that the current marriage provisions were enacted with an invidious intent or purpose.”³⁰¹ One similar disclaimer is also found in the Connecticut majority opinion.³⁰² Otherwise, the redefinition project is cast as one more step in the expansion of human rights to previously disfavored groups, with this step being essentially no different from the earlier ones.³⁰³

This “grand equivalence” strategy has the effect, if not the purpose, of framing and trumpeting the three messages communicated by a genderless marriage regime. The three interrelated messages are: (1) men and women are interchangeable, (2) children do not need a mother and a father, and (3) those who believe otherwise are bigoted.³⁰⁴ The “bigoted” message is unavoidable given the constant equation of the current cases with those cases that struck down anti-miscegenation laws: California’s *Perez v. Sharp* and the federal counterpart of *Loving v. Virginia*.³⁰⁵

J., dissenting).

The Iowa opinion outlined the history of the expansion of rights in Iowa, the court obviously priding itself on being a frontrunner in rights expansion: “These cases . . . reflect this court has, for the most part, been at the forefront in recognizing individuals’ civil rights. The path we have taken as a state has not been by accident, but has been navigated with the compass of equality firmly in hand, constructed with a pointer balanced carefully on the pivot of equal protection.” *Varnum*, 763 N.W.2d at 877 n.4.

301. *Marriage Cases*, 183 P.3d at 452 n.73.

302. *Kerrigan*, 957 A.2d at 477 n.79. No such disclaimer is found in the Iowa opinion, and in fact that opinion leaves the reader with the strong impression that the exclusion of same-sex persons from traditional marriage arises solely from the animus held against these persons and their lifestyles. See *Varnum*, 763 N.W.2d at 901, 904, 907.

303. See *supra* note 293.

304. The starkest judicial deployment of those three messages appears in the district court’s decision striking down on federal constitutional grounds California’s Proposition 8. *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010).

305. *Loving v. Virginia*, 388 U.S. 1 (1967); *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948). The California majority opinion references the *Perez* case by name 33 times. The Connecticut majority opinion references the *Loving* case by name five times, with substantial reliance on that case in no less than three instances. See *Kerrigan*, 957 A.2d at 416, 473–74, 480, 481–82. Especially telling is the Connecticut majority opinion’s following language:

[R]emoving the barrier to same sex marriage is no different than the action taken by the United States Supreme Court in *Loving v. Virginia*, when it invalidated laws barring marriage between persons of different races. Although it is true that authorizing same sex couples to marry represents a departure from the way marriage historically has been defined, the change would *expand* the right to marry without any adverse effect on those already free to exercise the right.

Id. at 473–74 (citation omitted).

In *Perez*, in one of its finest achievements, the California Supreme Court became the first American appellate court to strike down as unconstitutional anti-miscegenation statutes, that is, laws limiting and prohibiting interracial marriages.³⁰⁶ Proponents of those laws sought to withhold from non-whites the full measure of their civil rights and human dignity by limiting their choice of partner when entering into the man-woman marriage institution. Those laws were clearly the product of a white supremacist ideology; they were expressions of racism, of bigotry.³⁰⁷ The equivalents in our day, one is to understand, are the laws sustaining the man-woman meaning of marriage and the proponents of those laws.³⁰⁸

In tandem with the analogies made to discriminatory laws, the opinions assert that “religious sentiment” is what drives opposition to genderless marriage. Clearly, dangers lurk for religious liberty when a purported civil right clashes with religious beliefs and practices. After concluding, on the basis of the fundamental premises

306. See *Perez*, 198 P.2d 17; see also Monte Neil Stewart & William C. Duncan, *Marriage and the Betrayal of Perez and Loving*, 2005 BYU L. REV. 555, 570–72.

307. Stewart & Duncan, *supra* note 306, at 567 (“The history of antimiscegenation laws in the United States shows their purpose to be the promotion of white supremacy.”).

308. Besides repeatedly referencing *Perez* by name, see *supra* note 299, the California majority opinion emphasizes the invidious discrimination and bigotry that case opposed. “The court in *Perez* rejected that demeaning and unsubstantiated characterization [i.e., “the alleged inferior nature of all non-Caucasian persons”], and found there was no justification for the racially discriminatory restriction on the right to marry.” *In re Marriage Cases*, 183 P.3d 384, 428 n.45 (Cal. 2008).

[T]he antimiscegenation statutes at issue in those cases [*Perez* and *Loving v. Virginia*] plainly treated members of minority races differently from White persons, prohibiting only intermarriage that involved White persons in order to prevent (in the undisguised words of the defenders of the statute in *Perez*) “the Caucasian race from being contaminated by races whose members are by nature physically and mentally inferior to Caucasians.” . . . [S]ee also *Loving* . . . 388 U.S. at p. 11, (“The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.”).

Id. at 437. By emphasizing the completely unjustified discrimination exhibited by the anti-miscegenation statutes and citing them repeatedly as if to draw the comparison to laws prohibiting same-sex couples from marrying, the California majority opinion evinced its belief that similar motivations stand behind both laws. Similarly, when the Connecticut majority opinion uses the miscegenation analogy, and states that the distinction drawn by the marriage laws is of the same nature, the implication is clear: “[r]ecognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race.” *Kerrigan*, 957 A.2d at 474 (quoting *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 965 (Mass. 2003)) (internal quotation marks omitted).

catalogued above, that no state interests justify exclusion of same-sex from civil marriage, the Iowa opinion said this:

[U]nexpressed[] religious sentiment most likely motivates many, if not most, opponents of same-sex civil marriage and perhaps even shapes the views of those people who may accept gay and lesbian unions but find the notion of same-sex marriage unsettling. . . . Whether expressly or impliedly, much of society rejects same-sex marriage due to sincere, deeply ingrained—even fundamental—religious belief.³⁰⁹

The Iowa opinion also declares that “[t]he belief that the ‘sanctity of marriage’ would be undermined by the inclusion of gay and lesbian couples bears a striking conceptual resemblance to the expressed secular rationale for maintaining the tradition of marriage as a union between dual-gender couples, but better identifies the source of the opposition.”³¹⁰ The accusation is not explicit, but as the Iowa opinion equates the “sanctity of marriage” with the “expressed secular rationale for maintaining the tradition of marriage,” the message is clear: the Iowa opinion states, and this seems to be another of its fundamental premises, that all the proffered secular justifications for preserving the man/woman institution of marriage are really based upon a set of fundamental beliefs that have no place in the public sphere. The Connecticut majority opinion is no less forceful in identifying the source of opposition against genderless marriage,³¹¹ and the proposition likely runs in the minds of other courts favoring redefinition.

309. *Varnum v. Brien*, 763 N.W.2d 862, 904 (Iowa 2009).

310. *Id.*

311. The Connecticut majority opinion’s identification of the source of discriminatory views against gay persons is even more blatant than its grand equivalence strategy. It asserts that “[t]he predominating purpose motivating the exclusion of gay persons from state-recognized marriages is religious.” *Kerrigan*, 957 A.2d at 433, 444–45 & 445 n.36 (internal quotation marks omitted). It also explains:

That prejudice against gay persons is so widespread and so deep-seated is due, in large measure, to the fact that many people in our state and nation sincerely believe that homosexuality is morally reprehensible. Indeed, homosexuality is contrary to the teachings of more than a few religions. In its amicus brief submitted to this court, the Becket Fund for Religious Liberty, which represents “the interests . . . of religious persons and institutions that conscientiously object to treating [same] sex and [opposite] sex unions as moral equivalents,” notes that “many religious groups do not accept [a sexual relationship] among same sex couples as a matter of conscience” and that “probably [the] majority . . . [of] religious groups . . . oppose same sex marriage.”

If the only real basis for denying civil rights to a protected class really derives from religious beliefs, how can those beliefs withstand attack when placed in the arena of myriad laws that protect and privilege the newfound civil right? Upon the tails of such unequivocal condemnation of religious beliefs comes the understanding by many perceptive and religious Americans that, in the contest over the marriage issue, the proposition really on the table is that their religious faith is a form of bigotry.³¹²

The fate of that proposition matters. Our society treats harshly those perceived to be bigots and affords scant protection to the endeavors perceived to advance their bigotry. *Bob Jones University v. United States*³¹³ is an instructive example. In that case, the United States Supreme Court upheld, against claims based in the First Amendment's free exercise of religion clause, IRS action stripping a private educational institution of its tax-exempt and charitable status because it prescribed and enforced racially discriminatory admissions standards on the basis of religious doctrine. Similar examples abound.³¹⁴ Because they do, the list of religiously motivated activities likely to collide in some fashion with state choice and promotion of a genderless marriage regime, and with the corresponding state suppression of the man-woman meaning, is a long list indeed.³¹⁵

The second aspect of the California, Connecticut, and Iowa opinions consequential for the religious-liberty issue and thus meriting attention here is this: the opinions incorporate, with varying degrees of subtlety, the common argument of genderless marriage proponents that civil marriage and religious marriage are two separate and distinct phenomena in our society. Twice the California majority opinion uses these words: "in order to emphasize and clarify that this civil institution [of marriage] is distinct from the religious institution of marriage."³¹⁶ Then in a footnote to the phrase "the legal institution of civil marriage," the California majority opinion

Id. at 444–45 (footnote omitted).

312. *See, e.g.*, Gallagher, *supra* note 295.

313. 461 U.S. 574 (1983).

314. *See, e.g.*, Smith v. Fair Emp't & Hous. Comm'n, 913 P.2d 909 (Cal. 1996) (holding that landlord did not have First Amendment rights to deny housing to cohabitating unmarried couple). *But see, e.g.*, Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010) (holding that a law school did not violate the First Amendment when it denied recognition to a Christian students' group that refused membership to gays).

315. *See* Severino, *supra* note 297, at 957–79.

316. *In re* Marriage Cases, 183 P.3d 384, 400, 434 (Cal. 2008).

asserts, with its own emphasis, that “[f]rom the state’s inception, California law has treated the legal institution of *civil* marriage as distinct from *religious* marriage.”³¹⁷ A quotation of long-standing California law follows and appears intended to prove that assertion but does not: “No contract of marriage, if otherwise duly made, shall be invalidated for want of conformity to the requirements of any religious sect.”³¹⁸ That language is not probative of distinct marriage institutions (civil vs. religious) but only of the undisputed social reality that both the social institution of law and the social institution of religion interact with and influence yet another social institution, marriage.³¹⁹ That language simply does not operate to deny “the singularity of our society’s marriage institution.”³²⁰ So again, we have an unproven assumption serving as a fundamental premise in the majority opinion, namely that there are in our society two distinct marriage institutions, one denominated *civil marriage* and the other denominated *religious marriage*.

The Connecticut and Iowa opinions separate civil and religious marriage in a more subtle manner. The Connecticut majority opinion asserts that “religious autonomy is not threatened by recognizing the right of same sex couples to marry *civilly*,”³²¹ and further develops the distinction by drawing a line between the “state sanctioned and state regulated institution” of marriage and “religious

317. *Id.* at 407 n.11.

318. CAL. FAM. CODE § 420(c) (West 2011).

319. See Stewart, *Marriage Facts*, *supra* note 19, at 361–64 for a more detailed discussion.

320. *Id.* at 362. The California majority opinion’s own language relative to this question of one- versus two-marriage institutions is wildly inconsistent. See, e.g., *Marriage Cases*, 183 P.3d at 402 (“excluding same-sex couples from the legal institution of marriage”); *id.* at 423 (“Society is served by the institution of civil marriage in many ways.”); *id.* at 424 (“Although past California cases emphasize that marriage is an institution in which society as a whole has a vital interest”); *id.* at 431 (describing “the legal institution of civil marriage”); *id.* at 432 (“[P]romoting and facilitating a stable environment for the procreation and raising of children is unquestionably one of the vitally important purposes underlying the institution of marriage. . . .”); *id.* at 445 (“denying such couples access to the established institution of marriage”); *id.* at 447 (“[T]hroughout this state’s history the Legislature . . . has effected numerous fundamental changes in the institution of marriage. . . .”). The common speech of the people is perhaps the best evidence regarding the singularity of our society’s marriage institution. Thus, one simply does not hear talk like this: “Honey, did you hear that David and Allison are getting civilly [or religiously] married.” “I do wish my boy, who is now 31, would settle down and get civilly [or religiously] married.” “This news of their divorce really comes as a shock. I thought they had such an exemplary civil [or religious] marriage.”

321. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 475 (Conn. 2008) (emphasis added).

objections” to genderless marriage.³²² The same undercurrent is seen in the Iowa opinion: “The only difference [after redefinition] is *civil* marriage will take on a new meaning” while “religious marriages celebrated in the future will have the same meaning as those celebrated in the past.”³²³ Of course, if religious beliefs and practices can be cleanly separated from the substance of civil marriage, then the no-downside argument in relation to religious liberty is much easier to swallow. Indeed, the language quoted above seems to be aimed directly at increasing the palatability of the no-downside argument. The success of that endeavor, however, depends upon the truth of this fundamental premise.

Social institutional realities falsify quite thoroughly this fundamental premise. Although the institution of marriage is influenced by its interaction with other social institutions, such as law, private property, and religion, and “takes from each a certain hue,”³²⁴ the social science scholarship identifies marriage as a single institution.³²⁵ As Blankenhorn explains,

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.³²⁶

However, regardless of these social institutional realities, the opinions use the fundamental premise that civil marriage and religious marriage are distinct as a necessary step in building their no-downside argument relative to religious liberty. Citing to the California constitution’s religious liberty provision, the California majority opinion asserts that allowing genderless marriage

will not impinge upon the religious freedom of any religious organization, official, or any other person; no religion will be

322. *Id.*

323. *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009) (emphasis in original).

324. See Stewart, *Marriage Facts*, *supra* note 19, at 363.

325. 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. CLAYTON, *supra* note 62, at 22.

326. BLANKENHORN, *supra* note 74, at 55; see also SEARLE, *supra* note 118, at 32.

required to change its religious policies or practices with regard to same-sex couples, and no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs.³²⁷

The Connecticut opinion also declares,

[R]eligious autonomy is not threatened by recognizing the right of same sex couples to marry civilly. Religious freedom will not be jeopardized by the marriage of same sex couples because religious organizations that oppose same sex marriage as irreconcilable with their beliefs will not be required to perform same sex marriages or otherwise to condone same sex marriage or relations.³²⁸

Similarly, the Iowa majority opinion asserts that

[r]eligious doctrine and views contrary to this principle of law [will be] unaffected, and people can continue to associate with the religion that best reflects their views. A religious denomination can still define marriage as a union between a man and a woman, and a marriage ceremony performed by a minister, priest, rabbi, or other person ordained or designated as a leader of the person's religious faith does not lose its meaning as a sacrament or other religious institution. The sanctity of all religious marriages celebrated in the future will have the same meaning as those celebrated in the past. The only difference is *civil* marriage will now take on a new meaning that reflects a more complete understanding of equal protection of the law.³²⁹

327. *In re Marriage Cases*, 183 P.3d 384, 451–52 (Cal. 2008).

328. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 475 (Conn. 2008).

329. *Varnum v. Brien*, 763 N.W. 2d 862, 906 (Iowa 2009) (emphasis in original). The Iowa opinion made clear that it thought that state constitutional provisions were sufficient to protect religious autonomy, while at the same time asserting that the separation of church and state all but required the court to mandate redefinition:

We, of course, have a constitutional mandate to protect the free exercise of religion in Iowa, which includes the freedom of a religious organization to define marriages it solemnizes as unions between a man and a woman. *See Iowa Const. art. I, § 3* (“The general assembly shall make no law . . . prohibiting the free exercise [of religion] . . .”). This mission to protect religious freedom is consistent with our task to prevent government from endorsing any religious view.

Id. at 905. As to the first assertion, that state constitutional provisions are sufficient to protect religious practices, the Iowa opinion makes no effort to support that assertion and does not address the serious problems religious autonomy may encounter, as detailed hereafter. The second assertion is difficult to take seriously given that the court on one hand asserts that civil and religious marriage are separate and distinct (implying that a change in the former will not affect the latter), but on the other hand states that it must not endorse a particular religious

This is a stunning argument. It is built entirely on the implicit notion that state constitutional protections are sufficient to protect religious liberties in the only realms where the forthcoming genderless marriage regime might collide with them—the formulation of “religious policies or practices” and the solemnization of marriage. That implicit notion, however, is unproven and qualifies as yet another fundamental premise of the California, Connecticut, and Iowa opinions. It cannot be gainsaid that the new marriage regime will jeopardize religious liberties in a whole host of other areas.³³⁰ The jeopardy includes litigation attacking religiously motivated policies and practices in employment (employment and anti-discrimination laws), housing (fair housing laws), public services and facilities (public accommodation laws), and even sermons and proselyting materials (hate-speech and hate-crimes laws).³³¹ The jeopardy also includes the risk of losing tax-exempt status, exclusion from competition for government-funded social service contracts, exclusion from state-regulated and state-licensed service opportunities such as adoption services, and exclusion from government facilities and fora.³³² As to those areas, the opinions are not only silent but also silent in a way suggesting the absence of any other imminent conflicts. This tactic is particularly remarkable not only because the Becket Fund brief brought those other areas to the courts’ attention but because of the high level of media attention paid to other instances of a genderless marriage regime treading heavily on religious liberties.

One example is the Catholic Charities case in Massachusetts.³³³ This Catholic sponsored and directed adoption entity had, for many decades, been uniquely successful in placing hard-to-place children.³³⁴ After the advent of Massachusetts’s genderless marriage regime, however, the state insisted that Catholic Charities, on pain of losing its license, serve same-sex couples seeking to adopt, even though other competent secular adoption entities were available to help them (including on referral by Catholic Charities).³³⁵ The

view (implying that its change in the former will affect the latter).

330. See Severino, *supra* note 297, at 957–79.

331. See, e.g., California Becket Fund brief, *supra* note 299, at 7–17.

332. *Id.* at 17–26.

333. See Gallagher, *supra* note 295.

334. *Id.*

335. *Id.*

Catholic Church concluded that, in fidelity to its religious beliefs, it could not comply with the state's demands; consequently, Catholic Charities ceased its adoption work.³³⁶

In short, the no-downside argument relative to religious liberty, as employed by the California, Connecticut, and Iowa opinions, barely seeks respect and does not earn it. Although many of the imminent burdens on religious liberty and conscience can reasonably be foreseen, these opinions build their approach on a false fundamental premise and, in the process, give evidence that is suggestive of a certain willful blindness.

If this Article has succeeded in sustaining its core propositions, then it has certainly established that preservation of the man-woman institution of marriage has much less to do with fundamental religious beliefs than the three opinions assert and everything to do with the preservation of social goods that are essential to the orderly functioning of society. The social goods discussed herein are of such compelling nature that they command official state support, even if religious belief happened to call for a different result.

IV. THE MATERIALITY OF THE FUNDAMENTAL PREMISES

The fundamental premises examined above range from “probably false” to “certainly false.” Thus, at this point, the key question is whether the California, Connecticut, and Iowa opinions’ fundamental premises are material, that is, whether, but for those premises, judicial reasoning could lead to a holding that constitutional norms mandate a genderless marriage regime. The following analysis strongly supports the conclusion that the false fundamental premises are material; but for them, no line of judicial reasoning that is both logical and coherent can lead to a holding that man-woman marriage is unconstitutional.

We begin with a listing of the falsified fundamental premises (FFP) and their verified antitheses (VA).

- FFP: Contemporary American marriage is nothing more than what the “narrow description” depicts it to be. VA: The “broad description,” with its inclusion of a broad range of

336. *Id.*

social institutional realities, much more accurately depicts contemporary American marriage.³³⁷

- FFP: The legal suppression of the man-woman meaning and its replacement with the any-two-persons meaning will leave the marriage institution just as healthy, robust, and productive as before. VA: Redefinition probably will lead, sooner rather than later, to a society with no normative marriage institution at all.³³⁸
- FFP: By decreeing same-sex couples possessed of the constitutional right to marry, the law thereby ushers them into the institution “traditionally designated as marriage” because a marriage institution constituted by the core any-two-persons meaning is essentially the same as the marriage institution constituted by the core man-woman meaning. VA: A genderless marriage regime is radically different from the man-woman marriage institution, and it could not be otherwise because the two different core meanings will both construct individuals and societies differently and play radically different, even conflicting, roles relative to valuable social goods historically provided by the marriage institution.³³⁹
- FFP: No productive nexus exists between the man-woman marriage institution, on one hand, and the child’s bonding right, on the other hand. VA: The core man-woman meaning in the marriage institution is the essential social predicate for the child’s bonding right to be recognized and meaningful in the lives of children.³⁴⁰
- FFP: Man-woman couples will lose nothing as a result of redefinition because a marriage institution or regime constituted by the core any-two-persons meaning is essentially the same as the man-woman marriage institution. VA: Exactly because the any-two-persons marriage regime and the man-

337. *See supra* Part II.

338. *See supra* Part III.A.

339. *See supra* Part III.B.2.b.

340. *See supra* Part III.B.3.

woman marriage institution are radically different and mutually exclusive, as a result of redefinition man-woman couples will lose immediately their historic (and constitutional) right to enter, with state sanction, into the man-woman marriage institution and thereafter their ability to enter into that institution at all—because it will no longer exist.³⁴¹

- FFP: In our society there are two distinct marriage institutions, one denominated *civil marriage* and the other denominated *religious marriage*. VA: Our society has one marriage institution; this is the reality even though the marriage institution interacts with other distinct social institutions—such as the law, private property, and religion—and thereby takes from each a certain hue.³⁴²
- FFP: State constitutional protections are sufficient to protect religious liberties only in the realms where the forthcoming genderless marriage regime might collide with them—the formulation of “religious policies or practices” and the solemnization of marriage. VA: The forthcoming genderless marriage regime will collide, and destructively so, with the religious liberties of faith communities and individuals across a wide range of social practices and endeavors.³⁴³

The falsified fundamental premises found in the California, Connecticut, and Iowa opinions are all material to these opinions’ central argument—the no-downside argument. But for use of those premises, redefinition would stand undisguised as a legal project that will jeopardize many valuable social goods and other important interests, diminish others, and eliminate still others—and that is a large downside indeed. The question then becomes whether the no-downside argument itself is essential to a judicial decision to mandate genderless marriage. One phenomenon strongly suggests that it is, and further analysis confirms this suggestion.

341. *See supra* Part III.B.4.

342. *See supra* Part III.C.

343. *See supra* Part III.C.

The suggestive phenomenon is that genderless marriage proponents uniformly advance the no-downside argument. That is certainly true of the American (and Canadian) appellate court opinions (majority, plurality, dissenting) favoring redefinition. Although the California majority opinion—and at times the Connecticut and Iowa opinions as well—deploy the no-downside argument more aggressively and thoroughly than any predecessor opinion,³⁴⁴ these opinions are not breaking new ground but rather are following a well-worn path. Now given (and it is a given) that among the ranks of genderless marriage proponents, including judges, are some of the brightest legal minds in the country, it seems only safe to conclude that keen legal intelligence, after rigorous engagement with the question, sees the no-downside argument as essential to the success of the redefinition project.³⁴⁵ Certainly, the literature is devoid of arguments that, despite quite certain heavy social costs, courts and legislatures should nevertheless redefine marriage. So the very ubiquity of the no-downside argument strongly suggests that the argument is indeed material to the redefinition project.

Constitutional analysis confirms that the argument is material, and does so in a negative way. When these opinions' falsified fundamental premises are set aside and replaced with their verified antitheses, man-woman marriage is seen to withstand all constitutional attacks, regardless of the judicial standard of review used.

That analysis proceeds like this: The man-woman meaning at the core and constitutive of the contemporary American marriage institution is materially productive of a number of valuable social goods. Those include the child's bonding right, increased private welfare for the children (the vast majority) conceived by heterosexual intercourse, and provision of the deep, rich statuses and identities of *husband* and *wife*. The law has the power to suppress the man-woman meaning, that is, to unmake (deinstitutionalize) the man-woman marriage institution. When the law exercises that power rigorously and effectively, it results in diminution and loss of the

344. See *supra* Part III.

345. See, e.g., *Varnum v. Brien*, 763 N.W.2d 862, 899 n.25 (Iowa 2009) (“The preservation of traditional marriage could only be a legitimate reason for the classification if expanding marriage to include others in its definition would undermine the traditional institution.”).

now-institutionalized man-woman meaning's valuable social goods. The law does just that when it opts for a genderless marriage regime over the man-woman marriage institution; those two institutions are radically different and mutually exclusive. Moreover, the competing any-two-persons meaning does not cause loss of valuable social goods only by displacing the man-woman meaning, but also by affirmatively retracting such goods, most especially the child's bonding right and the rich, deep statuses and identities of *husband* and *wife*. Thus, the laws now sustaining the man-woman meaning in marriage are well calculated to serve compelling societal (and, hence, governmental) interests, that is, to preserve and perpetuate the valuable social goods historically provided by the marriage institution. Consequently, even when subjected to the "strict scrutiny" standard of review, those laws must be deemed constitutional.³⁴⁶

In sum, but for the California, Connecticut, and Iowa opinions' falsified fundamental premises, no line of judicial reasoning can lead logically and coherently to the holding that constitutional norms require the redefinition of marriage.

V. CONCLUSION: QUESTIONS OF INTELLECTUAL COMPETENCE AND HONESTY

The judicial performance reflected in these opinions falls well below minimally acceptable standards. The assessment of that performance could not be otherwise; the opinions rely repeatedly on demonstrably false fundamental premises and, but for that reliance, could not have reached their profoundly consequential decisions. So the opinions are riddled with material errors of judicial analysis.

Beyond the matter of errors, there are also questions of intellectual competence and honesty. Both those questions, it seems, turn on availability to and actual awareness by the courts of the social institutional argument for man-woman marriage and the factual foundation of that argument. It is that factual foundation that provides the verified antitheses to the falsified fundamental premises (and, indeed, falsifies those premises), and it is that argument that connects the facts to the conclusion of compelling governmental

346. See discussion in Stewart, *Marriage Facts*, *supra* note 19, at 364–68.

interests and, hence, of the constitutionality of man-woman marriage.³⁴⁷

Each of the California, Connecticut, and Iowa supreme courts had full access to the social institutional argument for man-woman marriage and its factual foundation. These were before the courts in briefs,³⁴⁸ in cited journal articles and books,³⁴⁹ and in other judicial opinions addressing the marriage issue.³⁵⁰ The opinions' non-engagement with the argument and its factual foundation, in light of their relevance to the opinions' own fundamental premises, rather plainly cannot qualify as a minimally competent judicial performance. The level of negligence in that nonengagement is akin to the negligence of a motorist who drives through a well-functioning red light on a clear day, causes a serious wreck, and then asserts that he did not see the traffic signal.

The respective opinions are guilty of intellectual dishonesty if their authors were in fact aware of the red light, apprehended its meaning, but nevertheless elected to proceed as if the red light did not exist—and did so because that was the only way to get where they were intent on going. There are obvious limits on our ability to

347. Although once the facts are adequately apprehended, that connection is virtually self-evident.

348. *E.g.*, Application for Leave to File Amici Curiae Brief and Amici Curiae Brief of The Church of Jesus Christ of Latter-day Saints, California Catholic Conference, National Association of Evangelicals, and Union of Orthodox Jewish Congregations of America in Support of Respondent State of California, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999); Application for Permission to File Amici Curiae Brief and Amici Curiae Brief of United Families International, Family Watch International, and Family Leader Foundation in Support of Respondent State of California, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999); Brief Amicus Curiae of United Families Connecticut in Support of Defendants-Appellees, *Kerrigan v. Comm'n of Pub. Health*, 957 A.2d 407 (Conn. 2008) (No. 17716); Brief of Amici Curiae United Families International, Family Watch International, and Family Leader Foundation in Support of Defendant-Appellant, *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (No. CV 5965).

349. *E.g.*, BLANKENHORN, *supra* note 74 (cited by the California majority opinion at *Marriage Cases*, 183 P.3d at 431, 432); Maggie Gallagher, *What Is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773 (2002) (cited by the California majority opinion at *Marriage Cases*, 183 P.3d at 433). Such citations are not easily found in the Connecticut and Iowa opinions, though this does not mean that the justices were not aware of the relevant materials. To the contrary, given the many citations to such literature found in the briefs before these courts, and their otherwise intimate acquaintance with the California majority opinion, it is nearly impossible to conclude that those courts were not aware of the social institutional argument as it is described in the relevant literature.

350. *E.g.*, *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 983 (Mass. 2003) (Cordy, J., dissenting); *Lewis v. Harris*, 875 A.2d 259, 274 (N.J. Super. Ct. App. Div. 2005) (Parrillo, J., concurring).

know such things. What we can know for sure, however, is that a majority of three respected state supreme courts otherwise observant of the standards of intellectual honesty drove through a well-functioning red light on a clear day.