SUPREME COURT OF THE STATE OF CALIFORNIA

Coordination Proceeding Special Title (Rule 1550(b)) **IN RE MARRIAGE CASES**	**Case No. S147999** ° Judicial Council Coordination Proceeding No. 4365 ° First Appellate District No. A110449 (consolidated on appeal with case nos. A110540, A110451, A110463, A110651, 110652) ° San Francisco Superior Court case no. 429539 (consolidated for trial with San Francisco Superior Court case no. 429548)

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

The Honorable Richard A. Kramer
Superior Court for the City and County of San Francisco

MONTE N. STEWART (State Bar No. 72824)
Marriage Law Foundation
1426 East 820 North
Orem, Utah 84097
801-227-7878 (office)
801-227-7882 (facsimile)

Attorney for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES.....iv

APPLICATION FOR PERMISSION TO FILE BRIEF *AMICI CURIAE*.....xi

I. INTRODUCTION AND SUMMARY OF ARGUMENT.....1

II. THE BROAD DESCRIPTION OF CONTEMPORARY CALIFORNIA MARRIAGE IS FACTUALLY SOUND, WHILE THE NARROW DESCRIPTION ADVANCED BY GENDERLESS MARRIAGE PROPONENTS IS CLEARLY ERRONEOUS..... 9

A. The broad description of contemporary California marriage is factually sound..... 9

B. The narrow description of marriage advanced by genderless marriage proponents is clearly erroneous..... 23

III. IN THIS CASE IT IS BOTH APPROPRIATE AND UNAVOIDABLE THAT THIS COURT ADDRESS AND RESOLVE THE CONTEST BETWEEN THE NARROW AND BROAD DESCRIPTIONS OF CONTEMPORARY CALIFORNIA MARRIAGE AND DO SO BY SELECTING THE BROAD DESCRIPTION..... 50

IV. MAN/WOMAN MARRIAGE IS CONSTITUTIONAL..... 56

A. Man/woman marriage is constitutional under any standard of review because society has compelling interests in perpetuating the valuable social goods produced materially and even uniquely by the man/woman meaning at the institution's core..... 56

B. Man/woman marriage is neither over-inclusive nor under-inclusive because, to sustain society's compelling interests in the perpetuation of the man/woman meaning's social goods, it must be only what it is – the source of institutional power to that meaning..... 65

C. Genderless marriage proponents are simply wrong when, in urging unconstitutionality, they assert (1) that the law is the creator of a separate institution called "civil marriage" rather than a facilitator of a single and meaningfully distinct marriage institution and (2) that religion is the source and sole perpetuator of the man/woman meaning constitutive of that institution..... 65

D. Resort to the so-called *Perez/Loving* analogy is fallacious because, in the context of marriage, that "analogy" masks a deep disanalogy and works to betray both *Perez* and *Loving*..... 70

V. CONCLUSION..... 74

CERTIFICATE OF COMPLIANCE..... 75

CERTIFICATE OF SERVICE..... 76

TABLE OF AUTHORITIES

Cases

Adams v. Howerton (9th Cir. 1980) 673 F.2d 1036 7

Andersen v. King County (Wash. 2006) 138 P.3d 963 .....7, 25-26, 66

Baehr v. Lewin (Haw. 1993) 852 P.2d 44.....7, 52

Baehr v. Miike (Haw. Cir. Ct. 1996) 1996 WL 694235 52

Baker v. Nelson (Minn. 1971) 191 N.W.2d 185 (appeal dismissed for want of a substantial federal question), 409 U.S. 810 (1972) 7

Baker v. Vermont (Vt. 1999) 744 A.2d 864.....7

Berman v. Downing (App. Dep't Sup. Ct. 1986) 184 Cal.App.3d Supp. 1, 229 Cal.Rptr.660.....53

Birkenfeld v. City of Berkeley (1976) 17 Cal.3d 129, 130 Cal.Rptr. 465....53

Brause v. Bureau of Vital Statistics (Alaska Super. 1998) 1998 WL 88743 8

Bishop v. Oklahoma (N.D. Okla. 2006) 447 F.Supp. 2d 1239 8

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah (1993) 508 U.S. 520 65

Conaway v. Deane (Md. 2007) ---- WL ------.....8

D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, 112 Cal.Rptr. 786 53-55

Dean v. District of Columbia (D.C. App. 1995) 653 A.2d 307 7

DeSanto v. Barnsley (Penn. Super. 1984) 476 A.2d 952.....7

Goodridge v. Dep't. of Pub. Health (Mass. 2003) 798 N.E.2d 941 ..... 7, 10, 18, 24, 27, 30, 40, 42, 62

Griset v. Fair Political Practices Com'n (1994)
8 Cal.4th 851, 35 Cal.Rptr.2d 659 48

Grutter v. Bollinger (2003) 539 U.S. 306.....48

Halpern v. Toronto (City), [2003] 65 O.R.3d 161
225 D.L.R. (4th) 529 (Ont. C.A.).....25

Hernandez v. Robles (N.Y. App. 2005) 805 N.Y.S.2d 3547, 17, 25, 29, 34, 44

Hernandez v. Robles (N.Y. 2006) 7 N.Y.3d 338 7

In re Kandu (Bkrptcy. W.D. Wash. 2004) 315 B.R. 123 8

In re Marriage Cases (Cal. App. 2006) 49 Cal. Rptr. 3d 675 .....8, 45-46, 56

In re Zeth S. (2003) 31 Cal.4th 396, 2 Cal.Rptr.3d 683.....50

Jones v. Hallahan (Ky. App. 1973) 501 S.W.2d 588.....7

Kane v. Marsolais (N.Y. App. 2006) 808 N.Y.S.2d 136.....7

Kerrigan v. Dep't. of Pub. Health (Conn. Super. 2006)
2006 WL 2089468 8

Lehr v. Robertson (1983) 463 U.S. 248.....46

Lewis v. Harris (N.J. App. 2005) 875 A.2d 259 7

Lewis v. Harris (N.J. 2006) 908 A.2d 196.....8

Li v. State (Or. Super. 2004) 2004 WL 1258167 8

Loving v. Virginia (1967) 388 U.S. 1 70

Morrison v. Sadler (Ind. App. 2005) 821 N.E.2d 15.....7, 20

Perez v. Lippold (1948) 32 Cal.2d 711.....70

Poe v. Ullman (1961) 367 U.S. 497 47

Quillion v. Walcott (1978) 434 U.S. 246 47

Samuels v. Dep't. of Pub. Health (N.Y. App. 2006) 7
811 N.Y.S.2d 136

Seymour v. Holcomb (N.Y. App. 2006) 811 N.Y.S.2d 134.....7

Singer v. Hara (Wash. App. 1974)
522 P.2d 1187 *review denied*, 84 Wash.2d 1008 (1974) 7

Smith v. Organization of Foster Families for Equality and Reform (1977)
431 U.S. 816 47

Standhardt v. Superior Court (Ariz. App. 2003) 77 P.3d 451.....7

Varnum v. Brien (Iowa District Court 2007) ---- WL ------.....8, 51

Warden v. State Bar (1999) 21 Cal.4th 628, 88 Cal.Rptr.2d 283 51

Williams v. North Carolina (1942) 317 U.S. 287, 303 (1942) 10, 47

Wilson v. Ake (M.D. Fla. 2005) 354 F.Supp. 1298 8

Zablocki v. Redhail (1978) 434 U.S. 374.....47

Other Authorities

Nicholas Bala, *The Debates About Same-Sex Marriage in Canada and the United States: Controversy Over the Evolution of a Fundamental Social Institution* (2006) 20 BYU J. PUB. L. 195 37

DAVID BLANKENHORN, THE FUTURE OF MARRIAGE (2007).....
..... 13, 19, 35, 37-39, 43. 66-69, 71

Dale Carpenter, *Giving away the (Iowa) farm* (August 31, 2007) in The Volokh Conspiracy, *available at*
http://volokh.com/archives/archive_2007_08_26-2007_09_01.shtml#1188597161 52

Andrew J. Cherlin, *The Deinstitutionalization of American Marriage* (2004) 66 J. MARRIAGE & FAM. 848..... 30, 64

RICHARD R. CLAYTON, THE FAMILY, MARRIAGE, AND SOCIAL CHANGE (1979) 22 (2d ed.) 10, 68

COMMISSION ON PARENTHOOD'S FUTURE (ELIZABETH MARQUARDT, PRINCIPAL INVESTIGATOR), THE REVOLUTION IN PARENTHOOD: THE EMERGING GLOBAL CLASH BETWEEN ADULT RIGHTS AND CHILDREN'S NEEDS (2006).....11-12

COUNCIL ON FAMILY LAW (DANIEL CERE, PRINCIPAL INVESTIGATOR), THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA (2005) 12-13. .....13, 27, 30, 35-37

Barbara J. Cox, *Are Same-Sex Marriage Statutes the New Anti-Gay Initiatives?* (1996) 2 NAT'L. J. OF SEX. ORIENT. L. 194 26

F.C. DeCoste, *The* Halpern *Transformation: Same-Sex Marriage, Civil Society, and the Limits of Liberal Law* (2003) 41 ALBERTA L. REV. 619, 625-27 .....13, 22

F.C. DeCoste, *Courting Leviathan: Limited Government and Social Freedom in* Reference re Same-Sex Marriage (2005) 42 ALBERTA L. REV. 1099.....67

MARY DOUGLAS, HOW INSTITUTIONS THINK (1986) 11,16

William C. Duncan, *The Litigation to Redefine Marriage: Equality and Social Meaning* (2004) 18 BYU J. PUB. L. 623.....7

William C. Duncan, *Marriage Amendments and the Reader in Bad Faith* (2005) 7 FLA. COASTAL L. REV. 234 33

RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? (2006) 31

David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation* (1991) 139 U. PA. L. REV. 541 50-51

Maggie Gallagher, *Does Sex Make Babies? Marriage, Same-Sex Marriage and Legal Justifications for the Regulation of Intimacy in a Post*-Lawrence *World* (2004) 23 QUINNIPIAC L. REV. 447 ..... 13,18,19, 41

Richard W. Garnett, *Taking* Pierce *Seriously: The Family, Religious Education, and Harm to Children* (2000) 76 NOTRE DAME L. REV. 109..... 67

Stephen E. Gottlieb, *The Paradox of Balancing Significant Interests* (1994) 45 HASTINGS L.J. 825 48

Bruce Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy: Balancing the Individual and Social Interests* (1983) 81 MICH. L. REV. 463 48

Peter A. Hall and Rosemary C.R. Taylor, *Political Science and the Three New Instituitonalisms* (1996) 44 POLITICAL STUDIES 936 10,16

BRADY E. HAMILTON ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, BIRTHS, MARRIAGES, DIVORCES, AND DEATHS: PROVISIONAL DATA FOR 2004 (June 28, 2005) 53 National Vital Statistics Reports No. 21 34

BRADY E. HAMILTON ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, BIRTHS: PRELIMINARY DATA FOR 2004 (Dec. 29, 2005) 54 National Vital Statistics Reports No. 8 35

Celia Kitzinger & Sue Wilkinson, *The Re-Branding of* Marriage*: Why We Got Married Instead of Registering a Civil Partnership* (2004) 14 FEMINISM & PSYCHOLOGY 127 67

LINDA C. MCCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY (2006) 25, 28, 37, 48

Linda McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channelling Function of Family Law* (2007) 28 CARDOZO L. REV. 101.... 41

M. Isabel Medina, *Of Constitutional Amendments, Human Rights and Same-Sex Marriages* (2004) 64 LA. L. REV. 459 27

Henry P. Monaghan, *Constitutional Fact Review* (1985) 85 COLUMBIA L. REV. 229 50

National Marriage Project, *The State of Our Unions 2005* (2005) 35

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

DAVID POPENOE, LIFE WITHOUT FATHER (1996) 13

Roscoe Pound, *A Survey of Social Interests* (1943) 57 HARV. L. REV. 1 48

HELEN REECE, DIVORCING RESPONSIBLY (2003) 11

W. RICHARD SCOTT, INSTITUTIONS AND ORGANIZATIONS (1991) 48-58 (2nd ed.).....10,11

JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY (1995).....21, 34

Margaret Somerville, *What About the Children?, in* DIVORCING MARRIAGE: UNVEILING THE DANGERS IN CANADA'S NEW SOCIAL EXPERIMENT (2005) (Daniel Cere & Douglas Farrow eds 12

Monte Neil Stewart, *Judicial Redefinition of Marriage* (2004) 21 CAN. J. FAM. L. 11, 41-99 .....12,13,18, 20, 22, 31, 37-38, 61, 63

Monte Neil Stewart, *Eliding in New York* (2006) 1 DUKE J. CONST. L. & PUB. POL'Y 221, 235-37 .....15,16, 31, 40, 44, 61, 63

Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision* (2006) 1 DUKE J. CONST. L. & PUB. POL'Y 1 ..... 10,11,12, 15,18, 21-23, 32, 38, 61, 63

Exchange with Monte Neil Stewart, Marriage Debates Conference, Williams Institute, University of California, Los Angeles (April 21-22, 2006).....39

Monte Neil Stewart, *Eliding in Washington and California* (2007) 42 GONZAGA L. REV. 501..... 11, 14, 21, 27, 31, 44, 49, 57, 63, 66

Monte Neil Stewart, *Dworkin, Marriage, Meanings – and New Jersey* (2007) 4 RUTGERS J. L. & PUB. POL'Y 271.....37

Monte Neil Stewart, *Marriage Facts and Critical Morality, available at* http://marriagelawfoundation.org/mlf/publications/Facts.pdf 13,16, 29, 33, 39, 41, 51, 56, 62

Seana Sugrue, *Soft Despotism and Same-Sex Marriage, in* THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, AND MORALS (2006) (Robert P. George & Jean B. Elshtain eds.).....22, 67

William M. Sullivan, *Institutions as the Infrastructure of Democracy*, in NEW COMMUNITARIAN THINKING: PERSONS, VIRTUES, INSTITUTIONS, AND COMMUNITIES (1995) (Amitai Etzioni ed.).....10,11, 67

W. BRADFORD WILCOX ET AL., WHY MARRIAGE MATTERS, SECOND EDITION: TWENTY-SIX CONCLUSIONS FROM THE SOCIAL SCIENCES (2005) 11,12,20

THE WITHERSPOON INSTITUTE, MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES (2006) 21–43.....12,13

Alan Wolfe, *The Malleable Estate: Is marriage more joyful than ever?* (May 17, 2005) SLATE, http://slate.msn.com/id/2118816/ 39

APPLICATION FOR PERMISSION TO FILE *AMICI CURIAE* BRIEF

TO THE HONORABLE CHIEF JUSTICE:

Pursuant to Rule 8.520(f), California Rules of Court, *amici curiae* United Families International, Family Watch International, and Family Leader Network respectfully request permission to file the accompanying brief in support of Respondent State of California.

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

Amicus curiae Family Watch International (FWI) is a non-profit organization working to solve social problems at the international, national, and local level by stemming and reversing the tide of family disintegration and fragmentation. In this effort, FWI recognizes the vital importance of defending and promoting fundamental social institutions such as man/woman marriage. FWI has members in California.

Amicus curiae Family Leader Foundation (FLF) is a non-profit organization that works in the public square to promote principles that support the family—with marriage between a man and a woman at its

heart—as central to the hope and future of nations, peoples and the rising generation. The Foundation supports educational and other efforts to secure support for principles that strengthen home and family. FLF has members in California.

Recognizing that the family is the natural and fundamental unit of society and that the vital social institution of man/woman marriage is the foundation of the family unit, UFI, FWI, and FLF are committed to supporting those measures that maintain and strengthen the family. They believe a decision requiring California to redefine marriage as the union of any two persons will change the vital social institution of marriage in a way that will be harmful to society in general and to children in particular.

The accompanying brief will aid this Court by addressing more pointedly and in depth than other submissions three matters of profound importance in this case. One involves the facts of contemporary California marriage – what marriage *is* in this State at this time, as a matter of fact and social reality. The second matter is the law governing this Court's approach to those facts. The third is the social institutional argument for man/woman marriage. It is that argument, because of what it succeeds in demonstrating, that establishes the compelling nature of the societal (and

hence governmental) interests in perpetuating, not jettisoning, the man/woman meaning at the core of California's marriage institution.

DATED: September 25, 2007

Respectfully submitted,

_____

MONTE N. STEWART
Attorney for *Amici Curiae*

AMICI CURIAE BRIEF
IN SUPPORT OF THE STATE OF CALIFORNIA

I.
INTRODUCTION AND SUMMARY OF ARGUMENT

This brief addresses the issue that, although fundamental to and even determinative of the ultimate constitutional question, has received no thorough and rigorous analysis in the other briefs. This brief addresses the contested facts of contemporary California marriage and the law governing this Court's approach to those facts. This Court's selection of those facts – the "marriage facts," or the answer to "What *is* contemporary California marriage?" – will in turn determine, we now know, this Court's ultimate ruling on the constitutionality of man/woman marriage. That determinative link between an appellate court's selection of the marriage facts and its resolution of the constitutionality of man/woman marriage is a reality in *every one* of the twenty-one American appellate cases that to date have ruled on that issue. Consequently, this brief, in a way and at a depth not found in the other briefs, critically examines both the contested facts of contemporary California marriage and the law governing this Court's approach to those facts.

Every American appellate judge –well over 100 to date – ruling on the constitutionality of man/woman marriage has done so on the basis of some conception of what marriage *is*, as a matter of fact and of social

reality. The conceptions have varied widely, and understandably so, because the opposing sides have repeatedly presented to the courts across the Nation two quite different "packages" of marriage facts. Each judge, in upholding man/woman marriage or mandating its redefinition to "the union of any two persons," has then to some degree both expressly premised her ultimate legal conclusion on the contents of the supportive package and attempted to counter the contents of the other package. That has certainly been true in this litigation.

Yet in *all* the appellate cases across the Nation addressing the constitutionality of man/woman marriage, including this one, the marriage facts before the appellate court had *not* been subjected to a trial. Thus, in this case, the law governing appellate-court determination of large social facts imbued with important public interests – the marriage facts being a preeminent example – is profoundly important. This brief addresses that law.

This brief's major and largely unique contribution, however, is its rigorous assessment of the competing packages of marriage facts and thus the answer it gives to this determinative factual issue: "What *is* marriage in contemporary America in general and in California in particular?" Those promoting the redefinition of marriage from the union of a man and a woman ("man/woman marriage") to the union of any two persons ("genderless marriage") present an answer aptly referred to in the literature

as “the narrow description” or “the close personal relationship model.” In contrast, man/woman marriage proponents present “the broad description,” which encompasses much but not all of what the narrow description depicts and then quite a bit more. This brief demonstrates that the broad description is quite certainly the much more accurate answer to the determinative factual issue. Although the narrow description is not wrong in some communities, it is wrong across California and the Nation generally. Genderless marriage proponents have simply failed to show otherwise, despite ample opportunity to do so, whereas the on-going accuracy of the broad description is now well established.

Certainly it is true that, after having adopted the narrow description as a full and accurate answer to the “what is marriage” question, a court *can* pass the blush test when holding man/woman marriage unconstitutional and thus mandating genderless marriage. But it is equally certain that a court *cannot* pass the blush test when adopting the narrow description in the first place. That is quite simply an indefensible intellectual and judicial performance.

Regarding the “quite a bit more” that the broad description depicts in contemporary marriage and that the narrow description denies, it is those *additional* meanings, purposes, identities, and social goods that compel this conclusion: Society has compelling interests in preserving the union of a man and a woman as a core meaning of the vital social institution of

marriage. And it is by showing the reality of those compelling interests that this brief establishes the constitutionality of the laws sustaining that core man/woman meaning, regardless of the standard of review used.

* * * * * * * *

Section II sets forth in a straightforward way both the narrow description and the broad description of contemporary marriage; highlights the reality that the latter encompasses much but not all of what the former depicts and then quite a bit more of importance; and marshals the evidence probative and disprobative of the two competing descriptions. That evidence reveals the broad description as the much more accurate description of contemporary California marriage.

On that factual basis, this brief in Section IV demonstrates the constitutionality of man/woman marriage. It shows how the man/woman meaning at the core of and constitutive of that vital social institution materially and even uniquely produces a number of valuable social goods – social goods initially to be diminished and ultimately to be lost if the law suppresses the man/woman meaning and mandates its replacement by the "union of any two persons" meaning. Because of the value of the social goods in jeopardy, society (and hence government) has compelling interests in seeing that those good are not lost but rather are perpetuated. That means in turn that society (and hence government) has compelling interests in keeping *institutionalized* the man/woman meaning that produces those

valuable social goods. Thus, it does not really matter what standard of review this Court selects – whether rational basis, intermediate scrutiny, or strict scrutiny. Although the arguments for a rational basis standard of review are the strongest, even if this Court selects strict scrutiny, it will hold constitutional against all challenges the laws sustaining the man/woman meaning at the core of this State's vital social institution of marriage. And again, that is because California society has compelling interests in preserving, not jettisoning, that meaning and because to preserve that meaning is really the *only* way available to serve those compelling governmental interests. Section IV further demonstrates that resort to the so-called *Perez/Loving* analogy is fallacious because, in the context of marriage, that "analogy" is actually a deep disanalogy and works to betray both *Perez* and *Loving*.

Section III demonstrates that it is both appropriate and unavoidable for this Court to sort through the two competing packages of marriage facts and to proceed on the basis of the package supportive of the impugned California laws (that is, on the basis of the broad description). Section III examines those reasons in detail; in summary, they are:

- The existence of "constitutional facts" – that is, the facts upon which the constitutional validity of the impugned marriage laws depend – is presumed in the absence of any showing to the contrary. And although the nonexistence of asserted constitutional facts can

properly be established by proof, that did not happen in this litigation.

- The Attorney General did not concede in this litigation either the validity of the narrow description or the invalidity of the broad description of contemporary marriage. (If he were deemed to have done either, then the marriage issue, imbued as it is with the greatest public interest, would have been decided by means of procedures ill-calculated to provide adequate representation of that interest, thus rendering ineffective any such concession.)
- All the parties and *amici* in this litigation premise their respective positions and legal arguments on some understanding of what marriage is as a matter of fact, and that is true however clear or obscure, however forthright or evasive, they are about their factual premise.
- It is not possible for this Court to resolve the constitutionality of man/woman marriage without taking some position – however clearly or obscurely, however forthrightly or evasively – on what contemporary California marriage *is* as a matter of fact; in other words, in resolving the ultimate constitutional issue, this Court will to some material extent adopt either the narrow or the broad description of marriage, unavoidably.

In light of these realities, it seems to us clear that the imperatives of the judicial role require, in this case and by this Court, an honest, explicit, and transparent assessment of the marriage facts. As the other sections of this brief show, such an assessment will lead to a holding that man/woman marriage is constitutional.

* * * * * * * *

Regarding terminology, *the marriage issue* is whether the laws sustaining the man/woman meaning at the core of the marriage institution are in harmony with constitutional norms of equality, liberty, privacy, human dignity, and so forth – or whether the man/woman meaning violates any of those norms. When we use in this brief the terms *the facts of marriage* or *marriage facts*, we mean those facts that almost fifteen years[1] of litigating the constitutionality of man/woman marriage in sixteen states and the District of Columbia[2] have shown to be relevant to that issue.

---

[1] Before the 1992 commencement of the marriage litigation in Hawaii, the marriage issue was raised in other states. *See infra* note 2. But the Hawaii case, *Baehr v. Lewin* (Haw. 1993) 852 P.2d 44, undoubtedly marks the beginning of the organized and strategic effort to redefine marriage by judicial mandate. *See* William C. Duncan, *The Litigation to Redefine Marriage: Equality and Social Meaning* (2004) 18 BYU J. PUB. L. 623, 630-42.

[2] In chronological order, all the American appellate court decisions on the marriage issue, including those pre-1992, are: **Minnesota**: *Baker v. Nelson* (Minn. 1971) 191 N.W.2d 185 (appeal dismissed for want of a substantial federal question), 409 U.S. 810 (1972); **Kentucky**: *Jones v. Hallahan* (Ky. App. 1973) 501 S.W.2d 588; **Washington**: *Singer v. Hara* (Wash. App. 1974), 522 P.2d 1187 *review denied*, 84 Wash.2d 1008 (1974); **Ninth Circuit**: *Adams v. Howerton* (9th Cir. 1980) 673 F.2d 1036; **Pennsylvania**:

Thus, we use the word *facts* in a narrow, lawyerly way; its referent are those matters disputable in litigation other than legal principles and procedures, a distinction seen in such oft-used phrases as *issue of fact,*

DeSanto v. Barnsley (Penn. Super. 1984) 476 A.2d 952; **Hawaii**: *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *id.* at 68 (Burns, J., concurring); *id.* at 70 (Heen, J., dissenting); **District of Columbia**: *Dean v. District of Columbia* (D.C. App. 1995) 653 A.2d 307; *id.* at 361 (Terry, J., concurring); *id.* at 362 (Steadman, J., concurring); **Vermont**: *Baker v. Vermont* (Vt. 1999) 744 A.2d 864; *id.* at 889 (Dooley, J., concurring); *id.* at 897 (Johnson, J., concurring & dissenting); **Arizona**: *Standhardt v. Superior Court* (Ariz. App. 2003) 77 P.3d 451; **Massachusetts**: *Goodridge v. Dep't. of Pub. Health* (Mass. 2003) 798 N.E.2d 941; *id.* at 970 (Greaney, J., concurring); *id.* at 974 (Spina, J., dissenting); *id.* at 978 (Sosman, J., dissenting); *id.* at 983 (Cordy, J., dissenting); **Indiana**: *Morrison v. Sadler* (Ind. App. 2005) 821 N.E.2d 15; *id.* at 35 (Friedlander, J., concurring); **New Jersey**: *Lewis v. Harris* (N.J. App. 2005) 875 A.2d 259; *id*. at 274 (Collester, J., concurring); *id*. at 278 (Collester, J., dissenting); **New York**: *Hernandez v. Robles* (N.Y. App. 2005) 805 N.Y.S.2d 354; *id*. at 364 (Catterson, J., concurring); *id*. at 377 (Saxe, J., dissenting); *Samuels v. Dep't. of Pub. Health* (N.Y. App. 2006) 811 N.Y.S.2d 136; *Seymour v. Holcomb* (N.Y. App. 2006) 811 N.Y.S.2d 134; *Kane v. Marsolais* (N.Y. App. 2006) 808 N.Y.S.2d 136; *Hernandez v. Robles* (N.Y. 2006) 7 N.Y.3d 338; *id.* at 366 (Graffeo, J., concurring); *id.* at 380 (Kaye, C.J., dissenting); **Washington**: *Andersen v. King County* (Wash. 2006) 138 P.3d 963; *id.* at 991 (Alexander, J., concurring); *id.* at 991 (J. Johnson, J., concurring); *id.* at 1027 (Bridge, J., dissenting); *id.* at 1040 (Chambers, J., dissenting); id. at 1012 (Fairhurst, J., dissenting); **California**: *In re Marriage Cases* (Cal. App. 2006) 49 Cal. Rptr. 3d 675; *id.* at 727 (Parilli, J., concurring); *id.* at 731 (Kline, J., dissenting); **New Jersey**: *Lewis v. Harris* (N.J. 2006) 908 A.2d 196; *id.* at 224 (Poritz, C.J., concurring & dissenting); **Maryland**: *Conaway v. Deane* (Md. 2007) ---- WL ------; *id*. at ---- (Raker, J., concurring & dissenting); *id.* at ---- (Bell, C.J., dissenting); *id* at ----- (Battaglia, J., dissenting).

In chronological order, here are the cases since 1992 that have not yet had an appellate court decision: *Brause v. Bureau of Vital Statistics* (Alaska Super. 1998) 1998 WL 88743; *Li v. State*, 2004 WL 1258167 (Or. Super. 2004); *In re Kandu* (Bkrptcy. W.D. Wash. 2004) 315 B.R. 123; *Wilson v. Ake* (M.D. Fla. 2005) 354 F.Supp. 1298; *Kerrigan v. Dep't. of Pub. Health* (Conn. Super. 2006) 2006 WL 2089468; *Bishop v. Oklahoma* (N.D. Okla. 2006) 447 F.Supp. 2d 1239; *Varnum v. Brien* (Iowa District Court 2007) ---- WL ------.

question of law, and *a mixed question of law and fact.* In this sense, a fact may well be what a judge, for the purpose of resolving a particular case, will accept as such – or will accept as something that a reasonable legislator (or, in the case of Proposition 22, a reasonable voter) could accept as such.

As an additional word on terminology: On one side of the marriage issue are those who want marriage legally redefined to "the union of any two persons," with the law treating the parties' gender as irrelevant to the meaning of marriage – hence, *genderless marriage*. On the other side are those who want to preserve "the union of a man and a woman" as a core meaning of the marriage institution – hence, *man/woman marriage*. 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, as in Massachusetts (at least legally), or as the union of a man and a woman, as in the other 49 states (both legally and socially). Second, when people confront the marriage issue, the *same-sex marriage* term and the others like it get those people thinking of a new, different, and separate marriage arrangement or institution that will co-exist 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 becomes the *sole* definitional basis for the *only* law-

sanctioned marriage any couple can enter, whether same-sex or man/woman. Thus, as will become even more clear later on, legally sanctioned genderless marriage (the not-misleading term for what is being proposed), rather than peacefully co-existing with the old man/woman marriage institution, actually displaces and replaces it.

II.
THE BROAD DESCRIPTION OF CONTEMPORARY CALIFORNIA MARRIAGE IS FACTUALLY SOUND, WHILE THE NARROW DESCRIPTION ADVANCED BY GENDERLESS MARRIAGE PROPONENTS IS CLEARLY ERRONEOUS.

A. The broad description of contemporary California marriage is factually sound.

Here is the broad description of contemporary marriage in California and, indeed, across the Nation:

Marriage is a vital social institution.[3] Like all social institutions, marriage is constituted by a unique web of shared public meanings.[4] For important institutions, again including marriage, many of those meanings

---

[3] *See, e..g., Williams v. North Carolina* (1942) 317 U.S. 287, 303 (1942) ("[T]he marriage relation [is] an institution more basic in our civilization than any other."); *Goodridge v. Dep't of Pub. Health* (Mass. 2003) 798 N.E.2d 941, 948 ("Marriage is a vital social institution.").

[4] *See* Peter A. Hall and Rosemary C.R. Taylor, *Political Science and the Three New Instituitonalisms* (1996) 44 POLITICAL STUDIES 936, 947-49; Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision* (2006) 1 DUKE J. CONST. L. & PUB. POL'Y 1, 8-9, *available at* http://www.manwomanmarriage.org/jrm/pdf/Duke_Journal_Article.pdf [hereinafter Stewart, *Judicial Elision*].

rise to the level of norms.[5] Consequently, important social institutions affect individuals profoundly; institutional meanings teach, form, and transform individuals, providing identities, purposes, practices, and projects.[6]

Those meanings, as the constituent stuff of social institutions, are therefore the source of the institutions' respective social goods. And it is those social goods that led to the institution's evolvement and that continue to give reason for its perpetuation.[7]

---

[5] Clayton provides a standard definition of *institution:* "An 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 (1979) 22 (2d ed.) (emphasis added). And from Nee and Ingram: "An institution is a *web of interrelated norms*—formal and informal—governing social relationships." Victor Nee & Paul Ingram, *Embeddedness and Beyond: Institutions, Exchange, and Social Structure*, in THE NEW INSTITUTIONALISM IN SOCIOLOGY (1998) 19, 19 (Mary C. Brinton & Victor Nee eds.) (emphasis in original). And from William M. Sullivan: "Institutions . . . are normative patterns that define purposes and practices, patterns embedded in and sanctioned by customs and law." William M. Sullivan, *Institutions as the Infrastructure of Democracy*, in NEW COMMUNITARIAN THINKING: PERSONS, VIRTUES, INSTITUTIONS, AND COMMUNITIES (1995) 175 (Amitai Etzioni ed.). For an "omnibus conception of institutions," see W. RICHARD SCOTT, INSTITUTIONS AND ORGANIZATIONS (1991) 48-58 (2nd ed.).

[6] *See* SCOTT, *supra* note 5, at 54-58; HELEN REECE, DIVORCING RESPONSIBLY (2003) 185; MARY DOUGLAS, HOW INSTITUTIONS THINK (1986) 108; Stewart, *Judicial Elision, supra* note 4, at 9-10; *see also* Sullivan, *supra* note 5, at 175.

[7] See Monte Neil Stewart, *Eliding in Washington and California* (2007) 42 GONZAGA L. REV. 501, 503 & n.9. *See also* Stewart, *Judicial Elision, supra* note 4, at 8-10.

Across time and cultures, a core meaning constitutive of the marriage institution has nearly always been "the union of a man and a woman."[8] This core man/woman meaning is powerful and even indispensable for the marriage institution's production of at least six of its valuable social goods.[9] The man/woman marriage institution is:

1. Society's best and probably only effective means to make real the right of a child to know and be brought up by his or her biological parents (with exceptions justified only in the best interests of the child, not those of any adult).[10]
2. The most effective means humankind has developed to maximize the private welfare provided to children conceived by passionate, heterosexual coupling (with "private welfare" meaning not just the

---

[8] *E.g.*, W. BRADFORD WILCOX ET AL., WHY MARRIAGE MATTERS, SECOND EDITION: TWENTY-SIX CONCLUSIONS FROM THE SOCIAL SCIENCES (2005) 15.

[9] *See* Stewart, *Judicial Elision*, *supra* note 4, at 16-20.

[10] *See, e.g.*, COMMISSION ON PARENTHOOD'S FUTURE (ELIZABETH MARQUARDT, PRINCIPAL INVESTIGATOR), THE REVOLUTION IN PARENTHOOD: THE EMERGING GLOBAL CLASH BETWEEN ADULT RIGHTS AND CHILDREN'S NEEDS (2006) 32 ("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."), *available at* http://www.marriagedebate.com/reg/pdf_secure.php?pdf=5; Margaret Somerville, *What About the Children?*, *in* DIVORCING MARRIAGE: UNVEILING THE DANGERS IN CANADA'S NEW SOCIAL EXPERIMENT (2005) 67 (Daniel Cere & Douglas Farrow eds.) [hereinafter DIVORCING MARRIAGE].

basic requirements like food and shelter but also education, play, work, discipline, love, and respect).[11]

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. [12]
4. Society's primary and most effective means of bridging the male-female divide. [13]

---

[11] *See* Stewart, *Judicial Elision*, *supra* note 4, at 17–18; Monte Neil Stewart, *Judicial Redefinition of Marriage* (2004) 21 CAN. J. FAM. L. 11, 41-99, *available at* http://manwomanmarriage.org/jrm/pdf/jrm.pdf [hereinafter Stewart, *Redefinition*].

[12] Putting aside for the moment the scientific adequacy of studies regarding the mother/lesbian partner child-rearing mode, it is now uncontroversial that the married mother/father child-rearing mode significantly correlates with the optimal outcomes deemed crucial for a child's—and therefore society's—well-being. *E.g.*, THE WITHERSPOON INSTITUTE, MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES (2006) 21–43, *available at* http://www.princetonprinciples.org/files/Marriage%20and%20the%20Public%20Good.pdf; *see also* WILCOX, ET AL., *supra* note 8, at 12–32.

Regarding the scientific (as opposed to political) adequacy of studies that attempt to compare the outcomes of the mother/lesbian partner child-rearing mode with the optimal outcomes of the married mother/father mode, see Monte Neil Stewart, *Marriage Facts and Critical Morality* 35-44, *available at* http://marriagelawfoundation.org/mlf/publications/Facts.pdf [hereinafter Stewart, *Long Version*], a shorter version of which publishes in October 2007 as Monte Neil Stewart, *Marriage Facts* (2007) 31 HARV. J.L. & PUB. POL'Y xx (forthcoming October 2007).

[13] *See, e.g.*, DAVID BLANKENHORN, THE FUTURE OF MARRIAGE (2007) 93 ("More than any other human relationship, marriage bridges the sexual divide in the human species."); COUNCIL ON FAMILY LAW (DANIEL CERE, PRINCIPAL INVESTIGATOR), THE FUTURE OF FAMILY LAW: LAW AND THE

5. Society's only means of conferring the identity and status of, and transforming a male into, husband/father, and a female into wife/mother,[14] statuses and identities particularly beneficial to society.[15]

6. Social and official endorsement of that form of adult intimacy – married heterosexual intercourse – that society may rationally value above all other such forms.[16]

Those are not all the social goods produced by the marriage institution, but for purposes of adjudicating the marriage issue they are the relevant ones. They are relevant exactly because they are the social goods produced materially and even uniquely by the man/woman *meaning* and that must therefore disappear when that *meaning* is de-institutionalized.

In contemporary America, the man/woman meaning has *not* been deinstitutionalized by broad social trends anywhere, and only Massachusetts has a legal mandate designed to perform that task. "The union of a man and a woman" continues as a widely shared, public, and

---

MARRIAGE CRISIS IN NORTH AMERICA (2005) 12-13, *available at* http://www.marriagedebate.com/pdf/future_of_family_law.pdf.

[14] *See* F.C. DeCoste, *The* Halpern *Transformation: Same-Sex Marriage, Civil Society, and the Limits of Liberal Law* (2003) 41 ALBERTA L. REV. 619, 625-27 [hereinafter DeCoste, *Transformation*].

[15] *See, e.g.*, DAVID POPENOE, LIFE WITHOUT FATHER (1996) 139–88; THE WITHERSPOON INSTITUTE, *supra* note 12, at 21–38.

[16] Stewart, *Redefinition*, *supra* note 11, at 52-57; Maggie Gallagher, *Does Sex Make Babies? Marriage, Same-Sex Marriage and Legal Justifications for the Regulation of Intimacy in a Post*-Lawrence *World* (2004) 23 QUINNIPIAC L. REV. 447 [hereinafter Gallagher, *Does Sex Make Babies*].

core meaning constitutive of the marriage institution across California and the Nation. That is not to say that the man/woman meaning is universally shared; an alternate view of marriage (the narrow description, or close personal relationship model) makes that meaning quite dispensable, and that model's description of what marriage now *is* – after a process of evolution – is not inaccurate in some American communities or in portions of that world created by Hollywood. But its description is inaccurate beyond those particular spheres, exactly because the man/woman meaning continues fully institutionalized as a widely shared public meaning across every state and therefore across the Nation.[17]

With its power to suppress social meanings, however, the law can radically change and even deinstitutionalize man/woman marriage.[18] The consequence of such deinstitutionalization must necessarily be loss of the institution's social goods. Further, genderless marriage is a radically different institution than man/woman marriage. (This does not mean, of course, that there is no overlap in formative instruction between the two

---

[17] *See* Monte Neil Stewart, *Eliding in Washington and California* (2007) 42 GONZ. L. REV. 501, 532-35, *available at* http://manwomanmarriage.org/jrm/pdf/Eliding_in_WA_and_CA.pdf [hereinafter Stewart, *Washington and California*]; Monte Neil Stewart, *Eliding in New York* (2006) 1 DUKE J. CONST. L. & PUB. POL'Y 221, 235-37, *available at* http://www.manwomanmarriage.org/jrm/pdf/ElidingInNewYork.pdf [hereinafter Stewart, *New York*]; *see also infra* notes 73-80 and accompanying text.

[18] *See* Stewart, *Judicial Elision*, *supra* note 4, at 11-13.

possible marriage institutions; the significance is in the divergence.) This significant divergence is seen in the nature of the two institutions' respective social goods (in the case of genderless marriage, only promised, not yet delivered).[19] Nor should this divergence be surprising: fundamentally different meanings, when magnified by institutional power and influence, do not produce the same social identities, aspirations, projects, or ways of behaving, and hence the same social goods.[20] Or to use popular contemporary terminology, the man/woman marriage institution will socially construct a people and hence a society different from the people and society socially constructed by the genderless marriage institution.[21] It could not be otherwise because the genderless marriage institution is radically different in what it aims for and in what it teaches.[22] To say that the result will be otherwise is to say that the core meanings constitutive of powerful social institutions do not matter in the formation and transformation of individuals, and no rational and informed observer

---

[19] *Id.* at 20-24.

[20] *Id.* at 20-21.

[21] *See* DOUGLAS, supra note 6, at 108 ("First the people are tempted out of their niches by new possibilities of exercising or evading control. Then they make new kinds of institutions, and the institutions make new labels, and the label makes new kinds of people."); Hall & Taylor, *supra* note 4, at 948 ("Here, one can see the influence of social constructivism on the new institutionalism in sociology. … [I]nstitutions do not simply affect the strategic calculations of individuals … but also their most basic preferences and very identity. The self-images and identities of social actors are said to be constituted from the institutional forms, images and signs provided by social life."); *see also* Stewart, *New York, supra* note 17, at 240.

[22] *See* Stewart, *New York, supra* note 17, at 240.

says that.[23] Indeed, the observers of marriage who are both rigorous and well-informed regarding the realities of social institutions uniformly acknowledge the magnitude of the differences between the two possible institutions of marriage, and this is so regardless of the observer's own sexual, political, or theoretical orientation or preference.[24]

Although the contemporary social institution of marriage in America has evolved in important ways over the centuries and undoubtedly now includes the ideal of "a partnership of equals with equal rights, who have mutually joined to form a new family unit, founded upon shared intimacy and mutual financial and emotional support,"[25] enduring aspects of the institution go far beyond that limited and limiting description of transformative meanings, and those enduring aspects are grounded in the man/woman meaning:

> Conjugal marriage [i.e., man/woman marriage] has several characteristics. First, it is inherently normative. Conjugal marriage cannot celebrate an infinite array of sexual or intimate choices as equally desirable or valid. Instead, its very purpose lies in channeling the erotic and interpersonal impulses between men and women in a particular direction: one in which men and women commit to each other and to the children that their sexual unions commonly (and even at times unexpectedly) produce.
>
> As an institution, conjugal marriage addresses the social problem that men and women are sexually attracted to

---

[23] *See id.* at 240-41.

[24] A long but still only partial list of citations is found at Stewart, *Long Version, supra* note 12, at 15 n.43.

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

> each other and that, without any outside guidance or social norms, these intense attractions can cause immense personal and social damage. . . . [Man/woman marriage] provides an evolving form of life that helps men and women negotiate the sex divide, forge an intimate community of life, and provide a stable social setting for their children. . . .
>
> Another characteristic of conjugal marriage is that it is fundamentally child-centered, focused beyond the couple towards the next generation. Not every married couple has or wants children. But at its core marriage has always had something to do with societies' recognition of the fundamental importance of the sexual ecology of human life: humanity is male and female, men and woman often have sex, babies often result, and those babies, on average, seem to do better when their mother and father cooperate in their care. Conjugal marriage attempts to sustain enduring bonds between women and men in order to give a baby its mother and father, to bond them to one another and to the baby.[26]

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

> The institution of marriage provides the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other. The partners in a marriage are expected to engage in exclusive sexual relations, with children the probable result and paternity presumed. . . . Whereas the relationship between mother and child is demonstratively and predictably created and recognizable through the biological process of

[26] COUNCIL ON FAMILY LAW, *supra* note 13, at 12–13. For further descriptions of the meanings and purposes inhering in contemporary man/woman marriage — meanings beyond those few comprising the close personal relationship model — , *see, e.g.*, Gallagher, *Does Sex Make Babies?*, *supra* note 16, at 451–71; Maggie Gallagher, (*How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman* (2004) 2 U. ST. THOMAS L. J. 33, 35-65; Stewart, *Judicial Elision*, *supra* note 4, at 16–20; and Stewart, *Redefinition, supra* note 11, at 41–57.

> pregnancy and childbirth, there is no corresponding process for creating a relationship between father and child. Similarly, aside from an act of heterosexual intercourse nine months prior to childbirth, there is no process for creating a relationship between a man and a woman as the parents of a particular child. The institution of marriage fills this void by formally binding the husband-father to his wife and child, and imposing on him the responsibilities of fatherhood. . . . The alternative, a society without the institution of marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic.[27]

Or, as Maggie Gallagher has cogently observed:

> [T]he justification for legal preferences for marriage for couples attracted to the opposite sex rests on three [factual] assertions: sex makes babies; society needs babies; and children need mothers and fathers. Marriage is about uniting these three dimensions of human social life: creating the conditions under which sex between men and women can make babies safely, in which the fundamental interests of children in the care and protection of their own mother and father will be protected, and so that women receive the protections they need to compensate for the high and gendered (*i.e.*, nonreciprocal) costs of childbearing.[28]

Or, in David Blankenhorn's words:

> In all or nearly all human societies, marriage is socially approved sexual intercourse between a man and a woman, 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 society to be — emotionally, morally, practically, and legally affiliated with both of the parents.
>
> That's what marriage is. It's a way of living rooted in the fundamental physiological and biochemical adaptations of our species, as developed over the course of our long prehistory. . . . It is constantly evolving, reflecting the

---

[27] *Goodridge v. Dep't of Pub. Health Mass.* (2003) 798 N.E.2d 941, 995-96 (Cordy, J., dissenting).

[28] Gallagher, *Does Sex Make Babies?*, *supra* note 16, at 451.

> complexity and diversity of human cultures. It also reflects one idea that does not change: For every child, a mother *and* a father.[29]

None of this is to assert that an institutionalized purpose is to mandate procreation; rather, it is to ameliorate the consequences of heterosexual coupling. The marriage institution in important part exists as a response to two essential realities of man/woman intercourse: its procreative power and its passion. And that institutional response's purpose is understood as the provision of adequate private welfare to children. Man/woman intercourse, as an act of compelling passion often leading to childbearing, has important implications for society. Societal interests are corroded when childbearing occurs in a setting of inadequate private welfare and are advanced when it occurs in a setting of adequate private welfare. Passion-based procreation militates against the latter and is conducive of the former. That is because passion, not rationality, may well dictate the terms of the encounter. While rationality considers consequences nine months hence and thereafter, passion does not, to society's detriment. Thus, this is understood to be a fundamental and originating purpose of marriage: to confine heterosexual passion to a setting, a social institution actually, that will assure, to the largest practical extent, that procreative passion's consequences (children) begin and continue life with adequate private welfare. Although the immediate

---

[29] BLANKENHORN, *supra* note 13, at 91 (emphasis in original).

objects of the protective aspects of this private welfare purpose are the child and the often vulnerable mother, society itself is rationally seen as the ultimate beneficiary.[30]

Because the contemporary man/woman marriage institution advances, albeit imperfectly, this private welfare purpose, many tens of millions in this Nation continue to enjoy the significant incremental increase in child and adult happiness, health, and productivity associated with that institution, something that social science has measured and stated in conclusions that are by now rather uncontroversial.[31]

A society can have, at any given time, only *one* social institution denominated *marriage*.[32] That is because a society, as a simple matter of reality, cannot, at one and the same time, 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." The one meaning necessarily displaces the other. Hence, every society must choose either to retain the man/woman marriage institution or, by force of law, to suppress it and put

---

[30] *See* Stewart, *Redefinition*, *supra* note 11, at 44-46; *see also Morrison v. Sadler* (Ind. App. 2005) 821 N.E.2d 15, 30-31.

[31] *See* WILCOX ET AL., *supra* note 8.

[32] Stewart, *Judicial Elision*, *supra* note 4, 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.").

in its place the radically different genderless marriage institution.[33] 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 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 $1,000 bill. And this analogy is apt because money is one of our most important social institutions.[34]

Another 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.[35] Joseph Raz captures the reality well and accurately when he

---

[33] For completeness, we need to say that a society really has three options: man/woman marriage, genderless marriage, or no normative marriage institution at all. *See* Stewart, *Washington and California*, *supra* note 17, at 510.

[34] JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY (1995) 32:

> [W]e can say, for example, in order that the concept "money" apply to the stuff in my pocket, it has to be the sort of thing that people think is money. If everybody stops believing it is money, it ceases to function as money, and eventually ceases to be money. . . . [I]n order that a type of thing should satisfy the definition, in order that it should fall under the concept of money, it must be believed to be, or used as, or regarded as, etc., satisfying the definition. . . . And what goes for money goes for elections, private property, wars, voting, promises, marriages, buying and selling, political offices, and so on.

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

observes that the law's role relative to man/woman marriage and other pre-political institutions is "to give them formal recognition, bring legal and administrative arrangements into line with them, facilitate their use by members of the community who wish to do so, and encourage the transmission of belief in their value to future generations."[36] Thus, when a same-sex couple successfully asserts a "right to marry," they are necessarily imposing on the state *not* a correlative duty to allow them into the existing man/woman marriage institution — which the law is impotent to do,[37] although it is sufficiently potent to de-institutionalize man/woman marriage[38] — *but* a correlative duty to construct and maintain in all its fragility the radically different genderless marriage institution, in which every couple who claims to be married (whether same-sex or man/woman) must participate if the couple's claim is to have legitimacy.[39]

Although it interacts with other vital social institutions such as private property, the law, and religion, contemporary California marriage is not a creation of any of them. This point is important, but we defer our analysis of it[40] until after setting forth the narrow description of marriage advanced by genderless marriage proponents.

---

[36] RAZ, *supra* note 24, at 161; *see* DeCoste, *Transformation*, *supra* note 14, at 635.
[37] *See* Stewart, *Redefinition*, *supra* note 11, at 84–85.
[38] *See* Stewart, *Judicial Elision*, *supra* note 4, at 11-13, 36–37.
[39] *See id*. at 52 n.137.
[40] *See infra* Section IV.C.

B. The narrow description of marriage advanced by genderless marriage proponents is clearly erroneous.

Here is a fair summary of the factual essence of the argument for genderless marriage: Same-sex couples are just as capable as man/woman couples of forming and participating in loving, caring, committed, enduring, and intimate relationships and therefore of successfully entering into and continuing in marriage. Same-sex couples are likewise equally capable of being good parents. Moreover, committed same-sex couples — and the children they are raising — need, just as much as do the adults and children now privileged by marriage, the many psychological, legal, economic, and wider social benefits that marriage provides in our society.

But note that embedded in this factual argument is this view of what marriage is as a matter of fact: 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."[41] Or stated in slightly different words, for all couples, "[m]arriage as it is understood today, is . . . a partnership of two loving equals who choose to commit themselves to each other . . . ."[42] Thus, in the narrow description, marriage is portrayed as – and *only as* – the "exclusive commitment of two

---

[41] *Goodridge v. Dep't of Pub. Health* (Mass. 2003) 798 N.E.2d 941, 961.
[42] *Hernandez v. Robles* (N.Y. Sup. Ct. 2005) 794 N.Y.S.2d 579, 609 *rev'd* 7 N.Y.3d 338 (N.Y. 2006).

individuals to each other [which] nurtures love and mutual support . . .,"[43] as "a unique expression of a private bond and profound love between a couple,"[44] and as a very public celebration of their commitment. "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."[45]

In the narrow description, this blend of personal commitment and public celebration is not just the essence but the totality of modern marriage:

> Marriage is, without dispute, one of the most significant forms of personal relationships. . . . Through the institution of marriage, individuals can publicly express their love and commitment to each other. Through this institution, society publicly recognizes expressions of love and commitment between individuals, granting them respect and legitimacy as a couple. This public recognition and sanction of marital relationships reflect society's approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships.[46]

Thus, under the narrow description, it is possible to assert that "critical reflection upon the functions and purposes that society associates with civil marriage and the individual needs and goods that it promotes" point to

---

[43] *Goodridge v. Dep't of Pub. Health* (Mass. 2003) 798 N.E.2d 941, 948.
[44] Brief for Plaintiffs-Appellants, *Hernandez v. Robles* (N.Y. 2006) 7 N.Y.3d 338 (No. 86) at 21.
[45] *Goodridge v. Dep't of Pub. Health* (Mass. 2003) 798 N.E.2d 941, 954.
[46] *Halpern v. Toronto (City)*, [2003] 65 O.R.3d 161, 225 D.L.R. (4th) 529 at ¶x (Ont. C.A.).

these – and *no more*: "love and friendship, security for adults and their children, economic protection, and public affirmation of commitment."[47]

The narrow description also portrays civil marriage as solely a legal construct; it is seen as a creature of law,[48] which gives it efficacy and influence in our society. "[M]arriage draws its strength from the nature of the civil marriage contract itself and the recognition of that contract by the State."[49] The narrow description also asserts that, to a very great extent, religion is the source of the man/woman limitation in our society's marriage laws; the narrow description portrays as religious not only the arguments advanced in support of that legal limitation but also the very meaning of man/woman marriage itself. Thus, that law-sanctioned limitation of marriage to the union of a man and a woman "stems, in substantial part, from . . . animosity that is rooted in moral and religious objections"[50] and from the intent both "to impose religious and moral restrictions on the state-regulated civil institution of marriage . . . [and] to impose religious sensibilities or religiously-based moral codes on others' most intimate life decisions."[51]

---

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

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

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

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

51 *Id.* at 1034.

Moreover, that law-sanctioned limitation "reflects a *religious* viewpoint [but] *religious* doctrine should not govern state regulation of *civil* marriage."[52] On this view of the "facts" of the matter, genderless marriage proponents argue that, although religious marriages certainly may continue to conform to whatever doctrines the sponsoring religions proclaim, civil marriage must be untainted by the religiously based man/woman limitation because a civil marriage regime so tainted "reflects an impermissible State religious establishment."[53]

Finally, the narrow description allows for *no* motivation for *any* opposition to genderless marriage *other than* a continuation of the historic social animus towards gay men and lesbians.[54] Because of the absence, in the narrow description, of any rational, non-religious justification for excluding same-sex couples from marriage, that exclusion is asserted to be, as a matter of fact, the present fruit of that same (still pervasive and still powerful) animus.[55]

---

[52] *Id.* at 1035 (emphasis in original).

[53] *Andersen v. King County* (Wash. 2006) 138 P.3d 963, 1027-28 (Bridge, J., dissenting).

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

[55] *See, e.g., Goodridge v. Dep't of Pub. Health* (Mass. 2003) 798 N.E.2d 941, 968; M. Isabel Medina, *Of Constitutional Amendments, Human Rights and Same-Sex Marriages* (2004) 64 LA. L. REV. 459.

The genderless marriage proponents' narrow description is premised on the "close personal relationship" model or theory of marriage.[56] This analytical approach

> focuses primarily on the nature of relationships between two people (or what is called "dyadic" relationships). For close relationship theorists, marriage becomes a subcategory of this core concept; marriage is simply one kind of close personal relationship. The structures of the discipline tend to strip marriage of the features that reflect its status and importance as a social institution.[57]

Consequently, "marriage is seen primarily as a private relationship between two people, the primary purpose of which is to satisfy the adults who enter it. Marriage is about the couple. If children arise from the union, that may be nice, but marriage and children are not really connected."[58] Some scholars believe that we are in fact moving from "a marriage culture to a culture that celebrates 'pure relationship,'"[59] with that term being 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."[60] Under this model, marriage's social goods are "love and friendship,

---

[56] *See* Stewart, *Washington and California*, *supra* note 17, at 508–09, 527–31.
[57] COUNCIL ON FAMILY LAW, *supra* note 13, at 14.
[58] *Id.*
[59] *Id.* at 15.
[60] *Id.*

security for adults and their children, economic protection, and public affirmation of commitment."[61]

This is certain: The man/woman marriage proponents' broad description encompasses a wide range of marriage-produced social goods; the genderless marriage proponents' much more narrow description, far fewer. And the same holds true relative to marriage's purposes, practices, formative powers, and interactions with other social institutions: the broad description encompasses much, while the narrow description excludes much. Hence, the fairness and accuracy of the "broad description" and "narrow description" labels. And equally certain is this: The man/woman marriage proponents' broad description *encompasses most but not all of what the narrow description, or close personal relationship model, describes.* It encompasses, for example, the social goods of "love and friendship, security for adults and their children, economic protection, and public affirmation of commitment"[62] and 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."[63] As seen above, however, the broad description encompasses much more; the institutionalized man/woman meaning is seen as the source

---

61 MCCLAIN, *supra* note 47, at 6.

62 *Id.*

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

of *additional* social goods, including provision of the most effective (or only) means of supporting a child's right to know and be reared by his or her mother and father (with exceptions only in the best interests of the child, not any adult), of maximizing the private welfare provided to the children conceived by heterosexual intercourse, of sustaining the optimal child-rearing mode (married mother/father), of bridging the male/female divide, and of furnishing the status and identity of *husband* or *wife*.

Acceptance of the broad description requires rejection of two salient aspects of the close personal relationship model of marriage. First, it requires rejection of the notion that as a matter of fact marriage is *only*, is *no more than*, what that narrow model describes. In the marriage debate, genderless marriage proponents rarely if ever expressly own that notion of "no more than," but the notion is *always* implicit in their arguments. (This phenomenon of an always implicit "no more than" notion is important and has been substantiated and examined in detail elsewhere.[64]) Second, the

---

[64] The examination and substantiation appear at Stewart, *Long Version*, *supra* note 12, at 35-44. This phenomenon of an always implicit "no more than" notion is important and merits close examination for two reasons. First, the notion itself goes to the heart of the factuality of the narrow and broad descriptions; if the "no more than" notion is factually accurate, it must follow that what the broad description depicts beyond the narrow description's depiction is false as a matter of fact. On the other hand, if the "no more than" notion is erroneous as a matter of fact, that error would be established exactly by validation of the broad description's *additional* depictions. Second, if — as is demonstrated elsewhere, *id.* — an aspect of the phenomenon is that the "no more than" notion is always or nearly always implicit and therefore not expressly stated *and* defended, that aspect

broad description also requires rejection of the notion that children — generativity, procreation, child-bearing, and child-rearing — are not "the sine qua non of civil marriage"[65] and that "marriage and children are not really connected."[66] That rejection is required because, as seen above, the broad description of marriage reveals marriage as primarily a child-protective and child-centered institution, with most of the institution's social goods pertaining to the quality of child-rearing. At the same time, the narrow description, or close personal relationship model, depicts an adult-centered arrangement. That adult-centered feature cannot be gainsaid; a genderless marriage proponent, Johns Hopkins University's Andrew Cherlin, traces the history of that model — "an intimate partnership entered into for its own sake, which lasts only as long as both partners are satisfied with the rewards (mostly intimacy and love) that they get from it"[67] — and reports both how the "pure relationship is not tied . . . to the desire to raise

---

is also important. It is important because it constitutes probative evidence, it seems to us, about how defensible the "no more than" notion really is.

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

[66] COUNCIL ON FAMILY LAW, *supra* note 13, at 14.

[67] Andrew J. Cherlin, *The Deinstitutionalization of American Marriage* (2004) 66 J. MARRIAGE & FAM. 848, 853.

children"[68] and how scholarly "attempts to incorporate children into the pure relationship are unconvincing."[69]

The following paragraphs demonstrate that, relative to marriage across this State and across this Nation, the broad description is defensible and accurate, while the narrow description is neither.

Genderless marriage proponents – in this litigation and everywhere else – either agree with or are silent regarding a number of understandings regarding man/woman marriage that emerge from social science and social institutional studies. In the briefs, opinions, and scholarly pieces where genderless marriage proponents engage the marriage facts, one does not find any denial that marriage is a vital social institution;[70] that marriage, like all social institutions, is constituted by widely shared social meanings; that these often normative institutionalized meanings teach, form, and transform individuals, providing identities, purposes, practices, and projects; and that, in this way, these meanings provide valuable social goods. Likewise, one does not find in those sources any denial that, across

---

[68] *Id.*

[69] *Id.* at 858.

[70] The judges who have either mandated genderless marriage or would if they had enough votes uniformly acknowledge this reality. Stewart, *Redefinition, supra* note 11, at 75; Stewart, *New York, supra* note 17, at 231; Stewart, *Washington and California, supra* note 17, at 517. In making his case for genderless marriage, Ronald Dworkin acknowledges: "The institution of marriage is unique; it is a distinct mode of association and commitment that carries centuries and volumes of social and personal meaning." RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? (2006) 86.

time and cultures, a core meaning constitutive of the marriage institution has nearly always been and still is "the union of a man and a woman." Nor is there a denial that the social institution premised on and constituted by that meaning promotes a number of social goods (beyond those provided by marriage as described in the close personal relationship model) pertaining to a child's right to know and be brought up by his or her biological parents; provision of private welfare to children conceived by heterosexual intercourse; a bridge over the male-female divide; and the identity and status of *husband* or *wife.* Consequently, there is also no express denial of a significant divergence in the nature of the two possible marriage institutions' social goods.[71] Thus, genderless marriage proponents – in this litigation and everywhere else – leave uncontested nearly all the key social institutional realities undergirding the social institutional argument for man/woman marriage and expressly accept the most fundamental one, that marriage is a vital social institution.[72]

Genderless marriage proponents – in this litigation and everywhere else – are also silent regarding other types of evidence supportive of the broad description. Those include recent, sophisticated demographic studies and other forms of analysis showing the predominating nature of the institutionalized man/woman meaning across the United States. Those

---

[71] That divergence is examined in some depth in Stewart, *Judicial Elision*, *supra* note 4, at 20-24.

[72] *See supra* note 70.

demographic studies have been addressed elsewhere at some length[73] and largely validate what was said earlier: In this State and Nation, it is erroneous as a matter of fact to assert that the close personal relationship model is *now* — after a process of evolution — *all* that marriage *is*. Although such an assertion is *not* wrong in some American communities, it is wrong generally speaking across California and the Nation. In *no* state has the trend away from man/woman marriage and towards the close personal relationship model achieved demographic dominance.[74]

Both recent political and marriage practices are further proof that "the union of a man and woman" continues as a strongly *shared* public meaning among the complex of other meanings constitutive of the contemporary institution. One such proof is the simple political fact that forty states and the federal government, within just the past decade or so, have enacted "defense of marriage" acts and/or constitutional amendments expressing that shared meaning and declining to deviate from it in cases of foreign genderless marriages.[75] That phenomenon is seen in California with Proposition 22, enacted by a popular vote of more than 60%. It bears repeating that these laws are very recent social expressions, not the vestiges

---

[73] *See* Stewart, *Long Version, supra* note 12, at 45-47; Stewart, *Washington and California, supra* note 17, at 532-34.

[74] *See supra* note 73.

[75] William C. Duncan, *Marriage Amendments and the Reader in Bad Faith* (2005) 7 FLA. COASTAL L. REV. 234, 234–35 nn. 2 & 3 (collecting citations to statutes and amendments defining marriage as the union of a man and a woman).

of "long-accepted assumptions that . . . have eroded."[76] And in the area of marriage practices, there are these interrelated realities:

> [I]nstitutions are not worn out by continued use, but each use of the institution is in a sense a renewal of that institution. Cars and shirts wear out as we use them but constant use renews and strengthens institutions such as marriage . . . . [I]n terms of the continued collective intentionality of the users, each use of the institution is a renewed expression of the commitment of the users to the institution.[77]

In 2004, more than 227,000 Californians (and nearly 24.5 million Americans) made such an intentional renewed expression of their commitment to the man/woman marriage institution by marrying and thereby becoming a husband or a wife.[78] Over their lifetime, a substantial majority Californians (and of Americans) choose to enter man/woman

---

[76] *Hernandez v. Robles* (N.Y. App. 2005) 805 N.Y.S.2d 354, 381 (Saxe, J., dissenting).

[77] SEARLE, *supra* note 33, at 57.

[78] The number of people who married in the United States in 2004 was 4,558,000. Subtracting the people who married in Massachusetts (83,098), the number would be 4,474,902. BRADY E. HAMILTON ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, BIRTHS, MARRIAGES, DIVORCES, AND DEATHS: PROVISIONAL DATA FOR 2004 (June 28, 2005) 53 National Vital Statistics Reports No. 21, at 1, 6, *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr53/nvsr53_21.pdf.

marriage,[79] and a substantial majority of births in California (and the United States) are legitimate.[80]

Although all this evidence supports the factual accuracy of the broad description advanced by man/woman marriage proponents, neither that evidence nor those proponents deny the presence in contemporary America of a number of trends diminishing the force and influence of the man/woman marriage institution.

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

---

[79] The National Marriage Project report for 2005 states, "For the generation of 1995, assuming a continuation of then current marriage rates, several demographers projected that 88 percent of women and 82 percent of men would ever marry." National Marriage Project, *The State of Our Unions 2005* (2005) at 16–17, http://marriage.rutgers.edu.

[80] The births to married women in 2004 were 64.3 percent of all births. BRADY E. HAMILTON ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, BIRTHS: PRELIMINARY DATA FOR 2004 (Dec. 29, 2005) 54 National Vital Statistics Reports No. 8, at 3.

For the key statistics (and a discussion of them) tracking the strength of the American marriage institution since 1970, see BLANKENHORN, *supra* note 13, at 217–22.

> mate are changing the way young people think about marriage.[81]

But the question of fact is "What is marriage?" — not "What will it be in twenty years?" or "Where do we guess current trends are taking marriage?" Regarding the relevant question of fact, the evidence quite strongly supports the conclusion that the man/woman meaning and hence the man/woman marriage institution have not been deinstitutionalized but continue powerful in forming and transforming individuals comprising the major portion of our State's and our Nation's population in ways productive of valuable and even unique social goods and in fulfillment of marriage's "classic purposes as a social institution."[82] Or, in short, the evidence quite strongly supports the factual accuracy of the broad description of marriage advanced by man/woman marriage proponents.

It is fair to say that the evidence advanced by genderless marriage proponents in support of the factual accuracy of their narrow description consists of robust (to say the least) descriptions of (1) changes in marriage ("the evolving marriage paradigm"); (2) references both to the absence of government requirements relative to procreation by married couples and to the lack in a portion of all married couples of procreative conduct or intentions; (3) bald assertions; and (4) a disguised argument of legal irrelevancy. Evaluation of each of these four proofs suggests that they

---

81 COUNCIL ON FAMILY LAW, *supra* note 13, at 14–15.

82 *Id.* at 14.

(singly or together) do not diminish the strength of the conclusion that the evidence supports the factual accuracy of the broad description.

It is both fair and helpful to position the "evolving marriage" response in the context of the present debate on "What is marriage?". Four features of that debate are particularly important. First, thoughtful and informed observers uniformly acknowledge that marriage is not a static institution but rather one that has evolved over the centuries in a number of ways, some dramatic.[83] They further uniformly acknowledge that a number of recent changes in society have facilitated the emergence of the close personal relationship (whether formalized by a marriage or not) as a way of living embraced by a not insignificant minority of the general population and that legal changes in the institution itself have rendered more plausible some arguments for the legal redefinition of marriage.[84] Second, the notion that something inherent (and static) in marriage precludes legal redefinition is *not* a part of the debate.[85] Third, the notion that something inherent in the

---

[83] *E.g.*, BLANKENHORN, *supra* note 13, at 91 (marriage "is constantly evolving, reflecting the complexity and diversity of human cultures."); MCCLAIN, *supra* note 47, at 21 ("The long history of the institution of marriage offers an evolving, rather than a static, answer to the question, 'What is marriage for?"*)* (emphasis in original).

[84] *E.g.*, MCCLAIN, *supra* note 47 at 22-23; COUNCIL ON FAMILY LAW, *supra* note 13, at 14–15; Nicholas Bala, *The Debates About Same-Sex Marriage in Canada and the United States: Controversy Over the Evolution of a Fundamental Social Institution* (2006) 20 BYU J. PUB. L. 195, 201-09; *see also* Stewart, *Judicial Redefinition*, *supra* note 4, at 86–95.

[85] Stewart, *Judicial Elision*, *supra* note 4, at 4; *see also* Monte Neil Stewart, *Dworkin, Marriage, Meanings – and New Jersey* (2007) 4

recent legal changes *compels* legal redefinition to genderless marriage is *not* a part of the debate — at least for the large majority of mainstream participants.[86] Fourth, the fundamental factual issue remains this: Is the man/woman meaning still institutionalized in the sense that it continues as a widely shared public meaning of marriage and that consequently it still produces an array of valuable social goods?

Once the "evolving marriage" response is positioned in the context of the "What is marriage?" debate, certain of the response's weaknesses emerge. Preeminent is that the response's recitation of the uncontested facts of institutional change is simply not helpful; those so reciting have no good answer to the question "So what?"[87] The vital question in the debate is the on-going institutionalized nature, or not, of the man/woman meaning.

RUTGERS J. L. & PUB. POL'Y 271, 302 n.121, *available at* http://manwomanmarriage.org/jrm/pdf/Dworkin.pdf [hereinafter Stewart, *Dworkin*].

[86] The large majority of the participants in the marriage debate do not (or do not publicly) embrace the radical social constructivist conclusions that there are no differences between men and women that matter (or should matter) in the eyes of the law; that the prior legal changes in marriage reflect and enshrine that first conclusion (rather than any number of competing, alternative explanations for those prior changes); and that, therefore, there is no defensible basis under equality jurisprudence for defining civil marriage as a man/woman relationship rather than a person/person relationship. *See* Stewart, *Redefinition*, *supra* note 11, at 86-95.

[87] The answer often implied and sometimes given expressly — "Because the changes show that genderless marriage is inevitable" — does not qualify as a good answer for several reasons set forth in Stewart, *Judicial Elision*, *supra* note 4, at 65-69. *See generally* BLANKENHORN, *supra* note 13, at 235-40, for a collection of examples of this "inevitably argument."

Recitation of *other* changes in the marriage institution may lead one up to that question but does nothing to answer it.[88] That the no-fault divorce laws of the 1970's suppressed "permanence" as an institutionalized meaning, with unforeseen and very painful personal and social consequences, may well be true,[89] but that says nothing about the on-going institutionalized status of the man/woman meaning. The same can be said of legal changes pertaining to gender equality in marriage, qualifications for adoptive parent status, disparate treatment of illegitimate children, and on and on. The same can even be said, albeit more guardedly, of social changes pertaining to rates of unmarried cohabitation, out-of-wedlock births, and pursuit of the close personal relationship model; although those social changes affect the force of the man/woman marriage institution and move it closer to the deinstitutionalization precipice, mere recitation of those changes does not answer "How much closer?" That is important because no responsible observer is saying that man/woman marriage is already over the precipice's brink[90] — although of course in Massachusetts it is unquestionably on that

---

88 *See id*. at 61–70.

89 *See id.* at 62–63. On the correlation/causation debate relative to enactment of no-fault divorce laws and the divorce revolution, see the scholarly articles collected at Stewart, *Long Version, supra* note 12, at 53 n. 185. On the ill-effects of the divorce revolution, see the scholarly works collected at *id.*

90 Stephanie Coontz of Evergreen State College asserts that marriage in America has been deinstitutionalized, that is, that no public meanings (formerly) constitutive of the institution are now shared sufficiently widely to have institutional force. Exchange with Monte Neil Stewart, Marriage Debates Conference, Williams Institute, University of California, Los

brink because four judicial votes positioned it there. The "evolving marriage" response is unhelpful because it fails to engage directly the factual conclusion that, in contemporary California and America, man/woman marriage remains institutionalized, with the man/woman meaning remaining a predominating shared public meaning productive of valuable social goods. Because of that failure to engage, the response simply does not undermine the factual accuracy of the broad description of marriage.[91]

Genderless marriage proponents also advance the facts that government requires of man/woman couples neither proof before marriage of procreative capacity and intention nor actual procreation after marriage and that a substantial minority of married couples do not bear children. These facts, it is argued, show that the child-bearing and child-rearing features of the broad description of contemporary American marriage are either false or are of such minimal importance as to leave the narrow description the much more factually accurate description.[92]

Angeles (April 21-22, 2006); *see also* BLANKENHORN, *supra* note 13, at 239. Not surprisingly, the across-the-spectrum criticism of Coontz's "scholarship" is sharp indeed. *Compare* Alan Wolfe, *The Malleable Estate: Is marriage more joyful than ever?* (May 17, 2005) SLATE, http://slate.msn.com/id/2118816/, *with* BLANKENHORN, *supra* note 13, at 235-40.

[91] *See* Stewart, *New York*, *supra* note 17, at 241-42, 247.

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

These facts regarding governmental requirements and actual conduct relative to marital procreation are true — but not probative. They are not probative because of three other and interrelated marriage facts that are equally accurate. First, marriage is society's mechanism to regulate and ameliorate the consequences of passionate and procreative heterosexual intercourse (children);[93] "the silly view of marriage as a mechanism *mandating* procreation"[94] is just that, silly. By normalizing and privileging marriage as the situs for man/woman intercourse and thereby seeking to channel all heterosexual intercourse there, society seeks to assure that when man/woman sex does make babies, those children receive from birth onward the maximum and optimal private welfare. And even in our contraceptive culture, passionate heterosexual intercourse makes lots of unintended babies.[95] "Almost a third of all [American] births between 1990 and 1995 were unintended. . . . Almost four in ten women aged 40–44 had had at least one unplanned birth."[96] So in important part what society and its marriage laws are aiming for is not that all married sex be procreative but that all man/woman sex occur in marriage, as a protection for when

---

93 *See* Stewart, *Redefinition*, *supra* note 11, at 44-52.
94 *Id.* at 62 (emphasis added).
95 *Id.* at 50-52; Gallagher, *Does Sex Make Babies?*, *supra* note 16, at 454-56.
96 *Id.* (emphasis removed).

such sex *is* procreative — a protection for the baby, the often vulnerable mother, and society generally.[97]

Second, although it is true to say that government does not require of man/woman couples proof of procreative capacity and intent before receipt of a marriage license and procreative conduct thereafter, it is almost certainly false to say that this policy emerges from a particular government-endorsed social reality — that the contemporary American marriage institution is nothing more than what the close personal relationship model describes and that therefore the broad description is erroneous when describing child-bearing and child-rearing meanings, purposes, practices, and social goods. The "don't-ask, don't-require" policy almost certainly emerges from something else:

> [O]ur societies have a long-standing sensibility against personalized governmental inquiries into marital procreative intentions and capacities . . . . It is troubling that the [the genderless marriage proponents have] identified a supposed societal lack of interest in procreation as the cause of the absence from the marriage laws of a procreation requirement, rather than identifying the much more plausible and robust explanation readily available: a strong social norm against government inquiry into marital procreative intentions and capacities.[98]

---

[97] In a very recent article, Linda McClain argues that certain legal and cultural changes in American society have eliminated, as a legal and social project, the channeling of sex into marriage. Linda McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channelling Function of Family Law* (2007) 28 CARDOZO L. REV. 101. Her argument's flaws are discussed at Stewart, *Long Version, supra* note 12, at 56 n. 93.

[98] Stewart, *Redefinition, supra* note 11, at 58-59.

Third, it is clear that the social institution of marriage as it existed for centuries, even millennia, did encompass — and quite centrally — child-bearing and child-rearing endeavors.[99] Yet during the centuries that laws did regulate entry into and continuance in the historic child-centered institution, the same (as today) "don't ask, don't require" governmental policy prevailed. The policy's existence *then* was certainly *not* probative that the institution's child-bearing and child-rearing endeavors were of minimal importance. Nor is it now.

At this stage in the debate, an intellectually honest genderless marriage proponent may concede (if only *arguendo*) the factual accuracy of the broad description of contemporary marriage[100] but then proceed to assert: Our society should nevertheless allow same-sex couples to enter into marriage because to do so will benefit them (and any children they raise) socially, psychologically, and economically and will not harm the

---

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

[100] "At this stage in the debate," genderless marriage proponents' only two options as a practical matter are either concession or silence. That is simply because of the impossibility as a matter of fact of sustaining the case for the completeness and therefore fundamental accuracy of the narrow description of contemporary California and American marriage.

> The evidence shows overwhelmingly – I believe beyond any reasonable doubt – that marriage as a human institution is intrinsically connected to bearing and raising children. To argue otherwise is to argue like a lawyer looking for a loophole; it is not intellectually or morally serious, at least insofar as we actually care about the institution we are discussing.

BLANKENHORN, *supra* note 13, at 153.

institution; man/woman couples will still marry at the same rate and still do just as well raising their children. This is the ubiquitous "no-downside" argument, and it has serious factual defects of its own. But because of the importance of the argument, and because it does not engage directly the contest between the broad and narrow descriptions of contemporary marriage, we treat it separately later on.

Another approach used to defeat the broad description, primarily by appellate judges favorable to genderless marriage, is the bald assertion that contemporary American marriage is the close personal relationship — and no more. Among many possibilities,[101] here is just one example:

> It is fair to say that both the law and the population generally now view marriage, at least in the abstract ideal, as a partnership of equals with equal rights, who have mutually joined to form a new family unit, founded upon shared intimacy and mutual financial and emotional support. . . . [T]he gender of the two partners to a marriage is no longer critical to its definition.[102]

When viewed in their respective contexts, all judicial assertions of this kind share two features. First, the description of marriage is intended as complete, not partial. In other words, these are judicial adoptions of the close personal relationship model of marriage as a complete and therefore accurate description of the contemporary American marriage institution.

---

[101] For collections of these bald assertions, see Stewart, *Redefinition*, *supra* note 11, at 97-98; Stewart, *New York*, *supra* note 17, at 232, 247; Stewart, *Washington and California*, *supra* note 17, at 528-29.

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

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

Apparently recognizing two interrelated realities — that for the genderless marriage case to prevail in the courts the narrow description of marriage must also prevail but that the broad description as a matter of factual accuracy is much stronger — a judge supportive of genderless marriage in this very litigation devised an interesting strategy. That strategy is to characterize as *legally irrelevant* all the many social realities of the marriage institution beyond those encompassed by the narrow description. In this litigation, at the Court of Appeal, the dissenting opinion, unlike earlier opinions calling for genderless marriage, did not fall into the rather glaring factual error of simply asserting that marriage in our society is nothing more than a close personal relationship between two adults. Rather, it began with the task of identifying from the United States Supreme Court's marriage cases "the attributes of marriage that account for the fundamentality of the right to marry,"[103] with those attributes being intimacy,

---

[103] *In re Marriage Cases* (Cal. App. 2006) 49 Cal. Rptr. 3d 675, 737 (Kline, J., concurring and dissenting).

association, "a harmony in living," and "a bilateral loyalty,"[104] but nothing to do with child-bearing and child-rearing. Then the opinion silently sheds the link to the *right* to marry and begins speaking of "the attributes of marriage that are constitutionally significant."[105] Finally, it elevates those attributes to a high status indeed: "the constitutionally significant attributes of marriage identified by the [United States] Supreme Court . . . ."[106] Those honored attributes just happen to be the stuff of the close personal relationship model of marriage — love, intimacy, "bilateral loyalty" (commitment), and public celebration. All other attributes of the marriage institution are simply ignored; they are, after all, not among "the constitutionally significant attributes of marriage." In this way, all those other attributes of marriage — principally the institution's child-bearing and child-rearing meanings, purposes, practices, and social goods — are not really declared "unfactual" but rather become simply irrelevant.[107]

This strategy has two fatal defects. First, its list of "the constitutionally significant attributes of marriage identified by the [United States] Supreme Court,"[108] although coinciding nicely with the close

---

104 *Id.*

105 *Id.* at 740.

106 *Id.* at 748.

107 The mind behind this opinion seems to grasp firmly that a judge's power over facts — they being stubborn things — is much constrained, unlike her power to determine relevancy and irrelevancy.

108 *In re Marriage Cases* (Cal. App. 2006) 49 Cal. Rptr. 3d 675, 748

personal relationship model, is much too short; the United States Supreme Court has much more accurately described marriage than the Court of Appeal dissenting opinion would have one believe.[109] Second, fundamental principles of constitutional jurisprudence make the supposedly "irrelevant"

(Kline, J., concurring and dissenting).

[109] *See, e.g., Lehr v. Robertson* (1983) 463 U.S. 248, 257-58 ("The institution of marriage has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of our democratic society . . . and as part of their general overarching concern for serving the best interests of children, state laws almost universally express an appropriate preference for the formal family"); *Quillion v. Walcott* (1978) 434 U.S. 246, 256 ("legal custody of children is, of course, a central aspect of the marital relationship, and even a father whose marriage has been broken apart will have borne full responsibility for the rearing of his children during the period of the marriage," with his marriage thus reflecting his "commitment to the welfare of the child."); *Zablocki v. Redhail* (1978) 434 U.S. 374, 397 (Powell, J., concurring) ("On several occasions, the Court has acknowledged the importance of the marriage relationship to the maintenance of values essential to organized society."); *Smith v. Organization of Foster Families for Equality and Reform* (1977) 431 U.S. 816, 843-44 ("The basic foundation of the family in our society [is] the marriage relationship [and] . . . its importance has been strongly emphasized in our cases . . . . Thus the importance of the familial relationship, to the individuals involved and to the society, stems from … the role it plays in "promot(ing) a way of life" through the instruction of children . . . ."); *Poe v. Ullman* (1961) 367 U.S. 497, 546 (Douglas, J., dissenting: "The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis."); *Williams v. North Carolina* (1942) 317 U.S. 287, 298 ("The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of [the] commanding problems . . . .").

attributes of the marriage institution highly relevant. We focus on the second defect, leaving the first to its footnote.

In subjecting man/woman woman marriage to constitutional scrutiny, a beginning point is that the relevant equality, liberty, and privacy rights are individual (or personal) rights. But the broad description of marriage is not advanced to counter abstract notions of equality, liberty, privacy, or dignity. Rather, that description, with its factual accuracy, gives a clear understanding of the scope and power of the societal (and hence governmental) interests at stake in the decision to preserve or jettison the social institution of man/woman marriage.[110] That understanding matters very much — unless a court is prepared to hold that genderless marriage is an imperative of some absolute right, whether of equality or liberty or whatever. At some point any rational constitutional jurisprudence must, to retain its rationality, give important societal interests their due.[111] The constitutional jurisprudence both of this State and of

---

[110] The constitutional equation seeks to value and appropriately accommodate both individual rights and societal (governmental) interests, a task particularly crucial relative to marriage and family:

> As family law scholars observe, there are two sometimes conflicting vantage points from which to regard families: one looks at the individual's interest in family life, the other at society's interest in the family (and in marriage) as social institutions.

MCCLAIN, *supra* note 47, at 22. *See also* Bruce Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy: Balancing the Individual and Social Interests* (1983) 81 MICH. L. REV. 463, 469.

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

the United States Supreme Court does that.[112] Certainly rational constitutional jurisprudence requires, even demands, a clear-eyed understanding and fair measurement of the societal interests at stake in each case invoking personal constitutional rights. That is what the social institutional argument provides in the marriage cases, as seen in Section IV below. The strategy deployed by the Court of Appeal dissenting opinion, however, obscures that understanding and thereby precludes that fair measurement.[113]

In sum, regarding the question of fact "What is marriage?," the evidence quite decidedly favors the broad description. Much but not all of the narrow description — the close personal relationship model of marriage — is factually accurate and to that extent is encompassed by the broad description. But the narrow description's insistence that it is a complete description — and that the additional descriptions found in the broad delimitation portray things of the past and not important features of the contemporary California and American marriage institution — renders that narrow description profoundly misleading

---

[112] *See, e.g., Griset v. Fair Political Practices Com'n* (1994) 8 Cal.4th 851, 35 Cal.Rptr.2d 659, 665-69; *Grutter v. Bollinger* (2003) 539 U.S. 306 (although classifications based on race and ethnic origins are suspect and subjected to strict scrutiny, governmental interests in attaining a diverse student body at the university level are compelling and therefore university's "affirmative action" program is constitutional).

[113] The Court of Appeal dissenting opinion rather clearly refuses to acknowledge (and criticizes the majority opinion for acknowledging) the many attributes, meanings, norms, practices, and social goods inhering in the man/woman marriage institution and extending beyond what the close personal relationship model allows. *See* Stewart, *Washington and California*, *supra* note 17, at 530-31.

and a quicksand foundation for constitutional analysis and adjudication. The probative evidence sustains the accuracy of those additional descriptions — those encompassing the institution's functions relative to child-bearing and child-rearing, to the statuses, identities, and projects of *wife* and *husband*, to negotiation of the male/female divide, and to rational valuation of various forms of intimate, adult conduct and relations. That is not to say that the additional meanings, purposes, and practices seen in the broad description are universally shared, only that they are shared sufficiently widely in California and across the Nation that they continue to be institutionalized and therefore productive in fact of valuable social goods.

As to the relevancy for constitutional analysis and adjudication of that fact of continuing institutionalization, Section IV considers the matter. But first comes an analysis of why this Court in this case must unavoidably resolve the contest between the broad and the narrow descriptions of contemporary California marriage.

III.
IN THIS CASE, IT IS BOTH APPROPRIATE AND UNAVOIDABLE THAT THIS COURT ADDRESS AND RESOLVE THE CONTEST BETWEEN THE NARROW AND BROAD DESCRIPTIONS OF CONTEMPORARY CALIFORNIA MARRIAGE AND DO SO BY SELECTING THE BROAD DESCRIPTION.

The general rule that appellate courts do not "find the facts" is just that, a general rule and one subject to a number of well-established

exceptions.[114] The reality is that appellate courts make essentially factual determinations quite often, especially when addressing constitutional issues that implicate broad public interests and policies.[115] Indeed, in the realm of constitutional litigation, a common appellate exercise is to determine whether a set of facts might plausibly exist on which a reasonable legislator (or, in the case of something like Proposition 22, a reasonable voter) could have based an important public-policy decision.[116]

This pattern of appellate-court determination of the facts is seen in America's twenty-one appellate decisions resolving the marriage issue.[117] *In every one*, more or less explicitly, the appellate judges resolved that issue on the basis of some notion of what marriage is in our society – and did so where there had been *no* trial of that question of fact.[118] Moreover, only

---

[114] *See, e.g., In re Zeth S.* (2003) 31 Cal.4th 396, 405, 2 Cal.Rptr.3d 683, 690. Regarding appellate court determination of essentially factual questions under the "constitutional fact doctrine," *see generally* Henry P. Monaghan, *Constitutional Fact Review* (1985) 85 COLUMBIA L. REV. 229. Regarding the same endeavor relative to the concept of "constitutional fact-finding," *see generally* David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation* (1991) 139 U. PA. L. REV. 541. Both the Code of Civil Procedure § 909 and Rule 8.252 of the California Rules of Court expressly provide for appellate court determination of factual questions, although these provisions appear not to be directed at appellate court determinations of "legislative" or "constitutional" facts.

[115] *See, e.g.*, Faigman, *supra* note 114, and Monaghan, *supra* note 114.

[116] *See, e.g., Warden v. State Bar* (1999) 21 Cal.4th 628, 644, 88 Cal.Rptr.2d 283, 295.

[117] *See supra* note 2.

[118] "[T]he picture of the facts of marriage emerging from those [twenty-one American appellate court] cases [resolving the marriage issue] may be

one of those twenty-one appellate courts sought further findings of fact from the trial court; that was the Hawaii Supreme Court, which, after determining that the narrow description is a complete and therefore accurate description of marriage, sent the case back to the trial court to determine if the government had any compelling interests in limiting

---

fairly described as confused and even careless." Stewart, *Long Version, supra* note 12, at 4.

Regarding the pending appeal of Iowa's marriage case, on August 30, 2007, the trial court in *Varnum v. Brien* (Iowa District Court 2007) Iowa District Court for Polk County, Case No. CV 5965, held that the Iowa constitution mandated genderless marriage. ---- WL ------. Although the ruling was made on cross-motions for summary judgment, the trial court quite clearly made credibility and weight-of-evidence decisions relative to the expert testimony proferred by each side, labeled as "undisputed" facts that are quite clearly disputed, refused to acknowledge the institutional nature of marriage, and, on that basis, refused to allow any expert testimony from the field of sociological institutionalism. *Id.* at ----. The trial court's decision led even a strong genderless marriage proponent to predict reversal on appeal and to observe:

> The "undisputed" facts [in that decision] read like a gay-marriage advocate's dream brief. I don't want to go through them all, but suffice it to say that many of the "undisputed" facts — like the methodological validity of studies showing that gay parents are just as good as straight parents — have been hotly disputed in gay-marriage litigation. Indeed, the existence of disputes about parenting in particular have been used by some courts to argue that on rational basis review the state legislature is entitled to make its own conclusions about maintaining traditional marriage.

Dale Carpenter, *Giving away the (Iowa) farm* (August 31, 2007) in The Volokh Conspiracy, *available at* http://volokh.com/archives/archive_2007_08_26-2007_09_01.shtml#1188597161.

marriage (viewed in that shriveled way) to the union of a man and a woman.[119]

Several realities in this litigation make it both appropriate and unavoidable that this Court resolve the contest between the narrow and broad descriptions of contemporary California marriage – and do so in favor of the broad description.

First is this Court's doctrine of "constitutional facts." Constitutional facts are those "upon which the validity of an enactment [law] depends"[120] and which therefore bear an "intimate relation to the public interest."[121] "[T]he existence of 'constitutional facts' upon which the validity of an enactment depends … is presumed in the absence of any showing to the contrary …."[122] At the same time, the "nonexistence" of constitutional facts "can properly be established by proof."[123] But when a plaintiff fails to show "the nonexistence of those facts," that plaintiff on appeal is not

---

[119] *Baehr v. Lewin* (Haw. 1993) 852 P.2d 44. Given this appellate-court anointing of the narrow description, it is not surprising that the trial court "found" no compelling governmental interests. *Baehr v. Miike* (Haw. Cir. Ct. 1996) 1996 WL 694235. Hawaii's electorate then reserved to democratic processes determination of the public and legal meaning of marriage in that state. Haw. Const., Art. I, sec. 23 (1998).

[120] *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 160, 130 Cal.Rptr. 465, 488.

[121] *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 14, 112 Cal.Rptr. 786, 796.

[122] *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 160, 130 Cal.Rptr. 465, 488.

[123] *Id.*

allowed to argue their nonexistence or otherwise to proceed on the basis of a contrary view of the facts relevant to the impugned law.[124]

In this litigation, the plaintiffs did not establish by proof the nonexistence of the constitutional facts establishing the validity of the impugned man/woman marriage laws – that is, they did not falsify the broad description of contemporary California marriage by establishing in its place their proffered narrow description. Indeed, they did not even attempt to provide those necessary proofs, even though, under this Court's established jurisprudence, the opportunity was theirs to make the attempt. Consequently, now on appeal, the validity of the broad description will be presumed, and fairly so.

Second, the Attorney General did not concede in this litigation either the validity of the narrow description or the invalidity of the broad description of contemporary marriage. In certain circumstances, the Attorney General has the power to make concessions of constitutional facts[125]; that power flows from his roles as "the chief law officer of the state" and "guardian of the public interest."[126] But relative to the supposed validity of the narrow description or the supposed invalidity of the broad description, he has made no such concession.

---

[124] *See, e.g., Berman v. Downing* (App. Dep't Sup. Ct. 1986) 184 Cal.App.3d Supp. 1, 4, 229 Cal.Rptr.660, 661.

[125] *See D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 14-15, 112 Cal.Rptr. 786, 796-97.

[126] *Id.*

Moreover, even if the Attorney General were deemed to have made such a concession, in the circumstances of this case that concession would not be given effect. That is because, given the strong evidentiary basis of the broad description and, further, the compelling governmental interests illuminated by that description (see Section IV below), such a concession would not qualify as the requisite "adequate representation" of the public interest. As this Court has said in the context of Attorney General concessions of constitutional facts, there is a "necessity to insure that questions imbued with the public interest not be decided by means of procedures ill-calculated to provide adequate representation of that interest."[127] In that same context, this Court made clear the force of those words by conducting an independent review to determine whether "in the circumstances of this case such [adequate] representation has been … provided …."[128] And as to whether this litigation presents a question "imbued with the public interest," it is fair to say that this Court in its long history has not yet seen a question more imbued with the public interest.

The third reason why the factual question of contemporary California marriage should not and really cannot be avoided by this Court is simply this: *All* the parties and *amici* in this litigation premise their respective positions and legal arguments on some understanding of what

---

[127] *Id.*
[128] *Id.*

marriage is as a matter of fact. That is true however clear or obscure, however forthright or evasive, they are about their respective factual premises. Thus, for this Court to accept any one of those arguments is to accept the factual premises explicitly or implicitly underlying it and interwoven through it. So it is not possible for this Court to resolve the constitutionality of man/woman marriage without taking some position – however clearly or obscurely, however forthrightly or evasively – on what contemporary California marriage *is* as a matter of fact. In other words, in resolving the ultimate constitutional issue, this Court will to some material extent adopt either the narrow or the broad description of marriage, unavoidably. That has been the experience of the other twenty-one American appellate courts to address the marriage issue[129]; there is no reason to believe that it can be different for this Court.

---

[129] In this litigation, the Court of Appeal majority opinion says that "our task as an appellate court is not to decide who has the most compelling vision of what marriage is, or what it should be." *In re Marriage Cases* (Ct. App. 1st Dist. 2006) 143 Cal.App.4th 873, 49 Cal. Rptr. 3d 675, 685. But despite its disclaimer, the majority indeed proceeds on an understanding of what marriage "is"—and wholly appropriately. Thus, the majority accurately understands that marriage is "a public institution . . . valued . . . for its public role in organizing fundamental aspects of our society," *Id.* at 715. The opinion also notes that "[m]arriage is more than a 'law,' of course; it is a social institution of profound significance . . . ." *Id.* at 723. And the concurring opinion also acknowledges the child-centered and child-protective nature of the marriage institution. *Id.* at 728 (Parrilli, J., concurring) ("[M]arriage has historically stood for the principle that men and women who *may*, without planning or intending to do so, give life to a child should raise that child in a bonded, cooperative, and enduring relationship. . . . [T]o define marriage . . . in a way which recognizes that

IV.
MAN/WOMAN MARRIAGE IS CONSTITUTIONAL.

A. Man/woman marriage is constitutional under any standard of review because society has compelling interests in perpetuating the valuable social goods produced materially and even uniquely by the man/woman meaning at the institution's core.

Regarding the standard of review, the arguments for the rational basis standard are strongest,[130] but in the end the choice is not material in the adjudication of this case. That is because the man/woman meaning in marriage, the social goods that meaning provides, and the susceptibility to loss of both the meaning and the goods satisfies strict scrutiny review.

This reality is brought into sharp focus by examination of genderless marriage proponents' "no downside" argument. As noted earlier, that argument concedes (or, more often, ignores) the factual accuracy of the broad description of contemporary American marriage but then proceeds to assert something very much like this: Our society should nevertheless allow same-sex couples to enter into marriage because to do so will benefit them (and any children they raise) socially, psychologically, and economically and will not harm the institution; man/woman couples will

---

function of the institution is hardly irrational.") (emphasis in original).

[130] The standard-of-review position of each of the judges in the twenty-one appellate cases is set forth at Stewart, *Long Version*, *supra* note 12, at 96-97.

still marry at the same rate and still do just as well raising their children.[131] "The argument's conclusion is that it is irrational not to 'open' marriage to same-sex couples where there is no downside and such substantial upside."[132]

Social institutional realities point to a very different conclusion. Summarized, those realities (which are set out more fully in Section II above) are that the institutionalized man/woman meaning (and it does continue institutionalized across California and the United States) produces materially and even uniquely valuable social goods, that the law has the power to suppress that meaning and thereby bring about the loss of its unique social goods, that a society can have, at any one time, only one social institution denominated *marriage* (either genderless or man/woman), and that to choose genderless marriage by judicial fiat or legislative action necessarily leads (sooner rather than later) to de-institutionalization of man/woman marriage, a process that first diminishes and then largely eliminates that (former) institution's valuable and unique social goods.

Relative to genderless marriage proponents' no-downside argument, the import of these social institutional realities is clear. For same-sex couples to marry, the State must choose and implement genderless marriage, and that

---

131 The appearances of the "no-downside" argument in judicial opinions are collected at Stewart, *Redefinition, supra* note 11, at 35-36; Stewart, *Washington and California, supra* note 17, at 519-25.

132 Stewart, *Redefinition, supra* note 11, at 36.

means suppressing man/woman marriage. To suppress man/woman marriage is first to diminish and then to lose that (former) institution's valuable and unique social goods. To say, therefore, that such a change has no downside is to be very wrong indeed. Of course, a mindset much attracted to the close personal relationship model of marriage will naturally denigrate the value of those social goods, most of which, after all, are child-centered and child-protective and not much concerned with the "individualization" of adult personal life, including adult desires and self-identity. But society's interests in those endangered social goods are compelling ones, implicating as they do the quality of the society's practices of self-perpetuation. The nearly universal reality of the man/woman marriage institution – that is, its presence in nearly all cultures across nearly all times since pre-history – qualifies as strong evidence strongly probative of that conclusion of compelling societal interests.

The debate over child welfare relative to the marriage issue also underscores the compelling nature of society's interests in perpetuation of the man/woman meaning at the core of the marriage institution. Man/woman marriage proponents advance as a marriage fact that the man/woman marriage institution is best for children. They support this fact with references to the institution's child-centered and child-protective nature as seen in a number of its unique social goods. Genderless marriage proponents advance as a marriage fact that their model will be best for children. They support this fact with references to the increased health,

wealth, and achievement enjoyed by children in married households and to the not insignificant number of children in California and the United States being raised by same-sex couples and therefore presently outside married households. These referenced facts are proffered as probative of the proposition that government will advance child welfare (social, psychological, and economic) by giving those children and their two adult care-givers access to the marriage institution.

This particular battle of marriage facts is particularly hard fought because child welfare is probably the ultimate emotional and moral high ground. In any event, the following paragraphs show a disturbing deficiency in the genderless marriage proponents' approach to the question of child welfare. Those paragraphs describe government's two different child-welfare endeavors and then show the genderless marriage proponents' evasion both of one of those endeavors and also of some difficulties relative to child welfare inhering in their own close personal relationship model of marriage.

As already demonstrated, a number of the social goods materially or uniquely provided by the institutionalized man/woman meaning — and rather certainly to be lost when that meaning is de-institutionalized — focus on the welfare of children. For this reason, man/woman marriage is often understood (and accurately so) to be primarily a child-centered and child-protective institution. Government efforts to preserve that institution are thus rightly

perceived as a child-welfare endeavor. In California, government preserves that institution in important part by using the law to validate the core, constitutive man/woman meaning and thereby perpetuate the social goods associated with that meaning. But government also engages in another child-welfare endeavor — providing public assistance of some form or another (protective laws, access to resources, material resources themselves, etc.) to individual children or their caretakers.

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, the present provision to each child, regardless of his or her circumstances, of those resources that society deems minimally due to every child. By engaging in both endeavors simultaneously, government is trying to maximize, and understandably so, the well-being of all children, both those now among us and those of future generations.

Genderless marriage proponents, however, ignore – in this litigation and everywhere else – the institutionally protective nature of the first endeavor, which seeks to preserve the man/woman meaning. Indeed, those proponents characterize that endeavor as nothing other than an irrational and mean-spirited disregard for children being raised by same-sex couples. They allude to the second endeavor to suggest an ethos of government-assured equality of

circumstances for all children. The point of their exercise is to persuade that, for the sake of the children, government must suppress the man/woman marriage institution and enshrine in its place genderless marriage.

As has been shown elsewhere, the phenomenon just described looms particularly large in the opinions of American appellate judges favoring genderless marriage.[133] Here is just one example among several: In Massachusetts' *Goodridge* case, the Commonwealth had pled for the preservation of man/woman marriage by pointing to one of its valuable social goods, man/woman marriage providing the optimal child-rearing mode. The plurality opinion studiously avoided taking issue with the reality of that social good.[134] What it did rather was shift the asserted State interest from protecting the optimal child-rearing mode (man/woman marriage) to "[p]rotecting the welfare of children,"[135] and, on that shifted basis, then argue that limiting marriage to opposite-sex couples does not promote the present welfare of all children, is contrary to the Commonwealth's policy and practice of helping children whatever their family situation, and "penalize[s] children by depriving them of State benefits because the State disapproves of their parents' sexual

---

133 *See* Stewart, *Judicial Elision, supra* note 4, at 37-38; Stewart, *New York, supra* note 17, at 251-53; and Stewart, *Washington and California, supra* note 17, at 525-36.

134 *See* Stewart, *Long Version, supra* note 12, at 73-74.

135 *Goodridge v. Dep't of Pub. Health* (Mass. 2003) 798 N.E.2d 941, 962.

orientation."[136]

The judicial opinions of this sort well demonstrate what genderless marriage proponents must and do ignore in the "child welfare" context in order to achieve their objective. They ignore this reality: to mandate genderless marriage and thereby de-institutionalize man/woman marriage is to thwart quite completely the first of the two government child-welfare endeavors — protection, sustenance, and perpetuation of a social institution demonstrably good for the vast majority of our children, now and through the generations. They further ignore that the law is impotent to usher same-sex couples and their children into the child-centered and child-protective social institution of man/woman marriage,[137] although the law's power is certainly sufficient to de-institutionalize it.[138] Also ignored is the closely related reality that to legally redefine marriage, especially in the name of "constitutional" law, is to create a radically different social institution with no track record relative to child-rearing and then to usher into that institution *all* the children of *all* married couples, both same-sex and man/woman.[139] This last point merits further examination.

There are substantial reasons to believe that genderless marriage, by the very nature of its core constitutive meanings, is an adult-centered, adult-promoting institution unlikely to sustain those practices most beneficial to

---

[136] *Id*. at 962-64.
[137] *See* Stewart, *Redefinition, supra* note 11, at 83-85.
[138] *See* Stewart, *Judicial Elision, supra* note 4, at 11-13, 36-37.
[139] *See* Stewart, *Redefinition, supra* note 11, at 85; Stewart, *Judicial Elision, supra* note 4, at 46-49, 52 n. 137.

children. Genderless marriage is premised on, and infused with the ideology of, the close personal relationship model. (That connection is certain in the legal/constitutional sphere, with *every* American appellate court judge favoring genderless marriage also adopting the close personal relationship model.[140] That connection is also evident in the larger social/cultural sphere.[141]) Yet the close personal relationship model is preeminently about adult desires and interests.[142]

All this suggests something important about the quality of genderless marriage proponents' "child welfare" argument. That argument does two things. First, it ignores the institutionally protective nature of a vital government child-welfare endeavor, and when that endeavor, as rationally it must, calls for continuing legal support for — rather than legal suppression of — the man/woman meaning at the core of the child-centered and child-protective marriage institution, the argument disparages that institutionalized meaning as an expression of animus and as a tool of harm to children being raised by same-sex couples. Second, that argument would

---

[140] *See* Stewart, *Washington and California*, *supra* note 17, at 527-28; Stewart, *New York*, *supra* note 17, at 31-34; Stewart, *Redefinition*, *supra* note 11, at 97-98.

[141] *See* Stewart, *Washington and California*, *supra* note 17, at 532-34.

[142] To repeat Cherlin's conclusions: that model is of "an intimate partnership entered into for its own sake, which lasts only as long as both partners are satisfied with the rewards (mostly intimacy and love) that they get from it," Cherlin, *supra* note 67, at 853, the "pure relationship is not tied . . . to the desire to raise children," *id.*, and scholarly "attempts to incorporate children into the pure relationship are unconvincing. *Id.* at 858.

have government create and perpetuate the genderless marriage institution, which is legally and socially premised on a model of marriage ill-suited for — indeed, inimical to — successful fulfillment of humankind's child-bearing and child-rearing endeavors. The irony inhering in such an argument is, in our view, both inescapable and tragic.

In sum, when the factually accurate broad description of contemporary California marriage is given its due, society's compelling interests in perpetuation of the man/woman meaning at the core of its marriage institution cannot plausibly be denied. Thus, under any standard of review, man/woman marriage is constitutional.

B. Man/woman marriage is neither over-inclusive nor under-inclusive because, to sustain society's compelling interests in the perpetuation of the man/woman meaning's social goods, it *must be only what it is* — the source of institutional power to that meaning.

Notions of "over-inclusive" and "under-inclusive" [143] clearly do not lead to a conclusion that man/woman marriage is unconstitutional. That is because society, if it is to have a normative marriage institution, has *only* two choices: either it will choose genderless marriage or it will choose man/woman marriage.[144] To choose genderless marriage is to cause the

---

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

[144] *See supra* note 33.

loss of the man/woman meaning and therefore the loss of its valuable social goods. Man/woman marriage is neither over-inclusive nor under-inclusive because, to sustain society's compelling interests in the perpetuation of the man/woman meaning's social goods, it *must be only what it is* — the source of institutional power to that meaning.

C. Genderless marriage proponents are simply wrong when, in urging unconstitutionality, they assert (1) that the law is the creator of a separate institution called "civil marriage" rather than a facilitator of a single and meaningfully distinct marriage institution and (2) that religion is the source and sole perpetuator of the man/woman meaning constitutive of that institution.

Relative to man/woman marriage's constitutionality, some genderless marriage proponents – in this litigation and elsewhere – are insisting that civil marriage and religious marriage are two separate and distinct phenomena in our society, that the State (the law) created civil marriage, that religion is the source of the man/woman meaning found in civil marriage,[145] that for civil marriage to enshrine that meaning is to violate Establishment Clause jurisprudence and sensibilities,[146] and that after civil marriage is purged of that religiously based meaning, religious marriage can continue to exist in its own properly limited sphere.

---

[145] See the citations and quotes collected at Stewart, *Washington and California*, *supra* note 17, at 538.

[146] *E.g.*, *Andersen v. King County* (Wash. 2006) 138 P.3d 963, 1027-28, 1035 (Bridge, J., dissenting) (to "ban gay civil marriage because some . . . religions disfavor it, reflects an impermissible State religious establishment" and the impugned man/woman marriage law "reflects a *religious* viewpoint [and that] *religious* doctrine should not govern state regulation of *civil* marriage") (emphasis in original).

These assertions negate the singularity of our society's marriage institution; they postulate two separate and different kinds of marriage ("civil" and "religious") and identify the law as the creator of the former. These assertions, however, simply cannot get past one uncontroversial fact: man/woman marriage is an ancient and nearly universal human social institution.[147] The institution's antiquity — the reality that it pre-dates governments and positive law — is particularly troubling for the notion that the law creates marriage, that the law is, if you will, the giver of institutional life. As John Locke saw, the institution's antiquity means that it is one of those "forms of social order the existence of which are independent of the state" because pre-dating the state.[148] And although there is debate about when the law (whether secular or ecclesiastical) began interacting with the marriage institution,[149] any good history of the Western marriage experience illuminates the marriage institution's pre-political nature.[150] In light of that reality, a fair conclusion is a paraphrase of Richard Garnett:

---

[147] Regarding the marriage institution's antiquity, see, *e.g.*, BLANKENHORN, *supra* note 13, at 9; regarding its universality, see, *e.g.*, *id.* at 105-106.

[148] Sugrue, *supra* note 35, at 172, 176.

[149] *See, e.g.*, BLANKENHORN, *supra* note 13, at 123-24.

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

Marriage law no more "creates" the marriage institution than the Rule Against Perpetuities "creates" dirt.[151]

Moreover, although the marriage institution interacts with other social institutions — the law, private property, religion — and thereby takes from each a certain hue,[152] social institutional studies see marriage as meaningfully distinct from those other institutions.[153] Typical is the work of Clayton, who identifies "at least five basic institutions": education, economics (which in our society would encompass private property, money, and markets), government

---

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

[152] It really is a commonplace that marriage is both a meaningfully distinct social institution and one that interacts with other important institutions. "Marriage is a lynchpin of social organization: its laws and customs interface with almost every sphere of social interaction." Celia Kitzinger & Sue Wilkinson, *The Re-Branding of* Marriage*: Why We Got Married Instead of Registering a Civil Partnership* (2004) 14 FEMINISM & PSYCHOLOGY 127, 132. "[T]he realm of civil society is itself deeply interconnected with market and state, both through the market processes that sustain the lives of families, organizations, and associations of all kinds and by the state in the form of law, regulation, and direct subsidy." Sullivan, *supra* note 5, at 173.

[153] *See*, *e.g.*, RAZ, *supra* note 24, at 161-62, 393; SEARLE, *supra* note 33, at 32. In David Blankenhorn's words:

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

BLANKENHORN, *supra* note 13, at 55 (emphasis added).

(encompassing the law), family (encompassing man/woman marriage), and religion.[154]

The import of these realities for the "law as giver of institutional life" proffer is clear. That proffer says that "civil marriage" is wholly a legal construct; that marriage, as experienced in our society, is something that the law gives to people; and that, therefore, marriage is something that, without the law, people would not have in any living or meaningful way. But that proffer cannot be taken seriously except by those who (for whatever reason) rather willfully ignore the man/woman marriage institution's pre-political origins and development and the law's actual role relative to the institution — not "creator" but "facilitator."[155] As to genderless marriage proponents' reason for eliding those realities, it is probably linked to a strategy to make marriage appear to be a more fit object of legal (judicial) alteration, no matter how radical.

Just as man/woman marriage's antiquity is a troublesome problem for the "law as giver of institutional life" view, so the institution's universality does much to falsify the notion that religion is the source of the man/woman meaning. Exactly because that meaning is found across nearly all societies since pre-history, "religion" can be its source only if religion has been omni-present in all societies since pre-history *and* has universally

---

[154] CLAYTON, *supra* note 5, at 19.

[155] *See supra* note 36 and accompanying text.

preached that meaning *and* with that preaching was not merely reinforcing an already existing social reality but initiating it. We are aware of no secular authorities sustaining those three requisites. Indeed, the literature rather consistently rebuts all three.[156]

In sum, the probative evidence rather thoroughly falsifies those arguments that reject the singularity of our society's marriage institution. Chief among those falsified are, first, that the law is the creator of a separate institution called "civil marriage" rather than a facilitator of a single and meaningfully distinct marriage institution and, second, that religion is the source and sole perpetuator of the man/woman meaning constitutive of that institution.

---

[156] *See, e.g.*, BLANKENHORN, *supra* note 13, at 159-61.

D. Resort to the so-called *Perez/Loving* analogy is fallacious because, in the context of marriage, that "analogy" masks a deep disanalogy and works to betray both *Perez* and *Loving*.

Genderless marriage proponents – in this litigation and everywhere else – repeatedly resort to the so-called *Perez/Loving* analogy to argue the unconstitutionality of man/woman marriage. In 1948, this Court in *Perez v. Lippold*[157] led the way for the Nation by holding that statutory prohibitions of interracial marriages violated constitutional protections of equality. Then in 1967, the United States Supreme Court in *Loving v. Virginia*[158] held the same. The argument of the *Perez*/*Loving* analogy, in its simplest form, goes like this: Because it is unconstitutional (as unequal and unfair) to prevent a black from marrying a white, it is likewise unconstitutional to prevent a man from marrying a man or a woman from marrying a woman.

Careful attention, however, to the social institutional realities implicated by the marriage issue shows the argument to be flawed by superficiality. But more gravely, that attention also shows that judicial adoption of the *Perez/Loving* argument amounts to a betrayal of those two landmark cases.

Here is that showing.[159]

---

157 (1948) 32 Cal.2d 711.

158 (1967) 388 U.S. 1.

159 The following paragraphs of this subsection summarize the work reported in Monte Neil Stewart and William C. Duncan, *Marriage and the Betrayal of* Perez *and* Loving, 2005 BYU L. REV. 555, and in

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

In the American past, two social movements temporarily succeeded in using marriage as a means to achieve ulterior ends: the white supremacist movement and the eugenics movement. In fact, the antimiscegenation laws were often found in the same legislative package as the laws calling for the sterilization of "idiots" and other so-called "genetic undesirables." (The common law had no racial limitation on marriage.) Central to the white supremacists' project was the alteration of the core meaning of marriage from the union of a man and a woman to the union of a man and a woman of the same "race." Laws that prohibited blacks from marrying whites were an ugly feature grafted onto the marriage institution—the very logic of which makes the graft a foreign object. The voice of those laws, however, greatly magnified by social institutional power, subtly but effectively inculcated throughout society the core dogma of white supremacy. The courts that gave us the *Perez* and *Loving* decisions apprehended the white

---

BLANKENHORN, *supra* note 13, at 172-83. Accordingly, those paragraphs appear without further footnotes.

supremacists' marriage project for what it was and rightly used constitutional equality norms to dismantle it. In the process, those courts restored to marriage the integrity of its institutional purposes and logic, an historic accomplishment. It is that accomplishment that is now being betrayed.

A goal of the gay/lesbian rights movement's marriage project, like that of the white supremacists, is to appropriate the institution and change it to achieve sociopolitical purposes unrelated to marriage. Again, that change entails an alteration in a core, constitutive meaning: from the union of a man and a woman to the union of any two persons. Granted that the respective objectives of the old and the new marriage projects are very different, still the projects in their appropriative strategy are of a kind. Thus, because *Perez* and *Loving* refused to allow the marriage institution to be appropriated for nonmarriage ends, to use those two cases to advance just such an appropriative project is to betray them. In other words, the *Perez*/*Loving* argument advances a superficial analogy that masks a deep disanalogy. That disanalogy is between the intention of *Perez* and *Loving* to protect marriage from appropriation for nonmarriage purposes and the intention of the present marriage project to make such an appropriation. Thus, those who deploy the *Perez*/*Loving* argument, whether advocates or judges, are misleading people, including perhaps themselves.

Nor is this betrayal cured by an appeal to *Perez*'s and *Loving*'s vindication of constitutional equality norms—that is, by the argument that whereas the white supremacist marriage project fostered inequality by the *exclusiveness* of the antimiscegenation laws, the new marriage project fosters equality by the *inclusiveness* of its different redefinition of marriage. This, of course, is an argument that the ends justify the means, but the argument steadfastly ignores certain realities regarding those means. One such reality is that an institution constituted by the core meaning of "the union of any two persons" is not a *modification* of the marriage institution but a radically different *alternative* to it. Another reality is that, backed by the force of constitutional law, the new institution will, in not many years, displace and, in that fashion, destroy (deinstitutionalize) the old institution. For it is clear that society cannot, at one and the same time, tell the people (and especially the children) that marriage, in its core meaning, is the union of any two persons and that marriage, in its core meaning, is the union of a man and a woman. Finally, when the marriage institution goes, its array of valuable social goods, many unique, goes also.

An "equality" enshrined at such a cost to human development and social welfare is not the equality vindicated by *Perez* and *Loving* or otherwise intended by our constitutional norms.

V.
CONCLUSION

It bears repeating in conclusion that the facts come first. The constitutional arguments advanced in this litigation by genderless marriage proponents fail not so much because of flaws of logic or flaws of coherence; they fail mostly because those arguments are premised on a quicksand foundation — the factually inaccurate narrow (or close personal relationship) description of contemporary California marriage. The successful constitutional arguments advanced in support of man/woman marriage succeed because they are ultimately premised on the factually accurate broad (or institutional) description of a complex whole — the marriage institution — that, albeit imperfectly but nevertheless, guides individual activity, sustains identity, gives sense and purpose to the lives of its participants, and thereby produces valuable social goods.

Dated: September 25, 2007

By: _____
MONTE N. STEWART
Attorney for *Amici Curiae*

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced, 13-point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief, from page 1 through and including the signature lines that follow the brief's conclusion, contains 13,420 words. I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on September 25, 2007.

By: _____
MONTE N. STEWART
Attorney for *Amici Curiae*

CERTIFICATE OF SERVICE

I CERTIFY that on September 26, 2007, a copy of the foregoing brief was served by first-class mail (postage prepaid) or electronic mail (as indicated) to the following:

By First-Class Mail

Dennis J. Herrera, City Attorney Sherri Sokeland Kaiser, Deputy City Attorney CITY AND COUNTY OF SAN FRANCISCO City Hall, Room 234 One Dr. Carlton B. Goodlett Pl. San Francisco, CA 94102	Bobbie Jean Wilson Howard Rice Nemerovski Canady Falk 3 Embarcadero Center, 7th Floor San Francisco, CA 94111-4024
Stephen Victor Bomse Heller, Ehrman, et al 333 Bush Street - Suite 3100 San Francisco, CA 94104	Shannon Minter National Center for Lesbian Rights 870 Market Street, Ste. 570 San Francisco, CA 94102
Christopher Edward Krueger Office of the Attorney General 1300 I Street, Suite 125 P.O. Box 944255 Sacramento, CA 94244-2550	Ross S. Heckmann 1214 Valencia Way Arcadia, CA 91006
Matthew D. Staver Liberty Counsel 1055 Maitland Center Commons, 2nd Floor Maitland, FL 32751-7214	Rena Lindvaldsen Mary McAlister Liberty Counsel 100 Mountain View Road, Ste. 2775 Lynchburg, VA 24502-2272
Glen Lavy Alliance Defense Fund 15333 North Pima Road, Ste. 165 Scottsdale, AZ 85260	Terry L. Thompson 199 East Linda Mesa - Suite 10 Danville, CA 94526

Robert Henry Tyler Advocates for Faith & Freedom 24910 Las Brisas Road, Suite 110 Murieta, CA 92562	Michael Maroko John S. West Allred, Maroko & Goldberg 6300 Wilshire Boulevard, Ste. 1500 Los Angeles, CA 90048-5217
Raymond G. Fortner County Counsel Judy W. Whitehurst Deputy County Counsel 648 Kenneth Hahn Hall of Administration 500 W. Temple Street Los Angeles, CA 90012-2713	Waukeen Q. McCoy, Esq. Law Offices of Waukeen Q. McCoy 703 Market Street, Suite 1407 San Francisco, CA 94103
California Court of Appeal First Appellate District, Division Three 350 McAllister Street San Francisco, CA 94102	Chair, Judicial Council of California Administrative Office of the Courts Attention: Appellate & Trial Court Judicial Services—Civil Case Coordination 455 Golden Gate Avenue San Francisco, CA 94102-3688
Honorable Richard A. Kramer Judge of the Superior Court, Dept. 304 400 McAllister Street San Francisco, CA 94102	Thomas J. Kuna-Jacob 103 Mill Street POB 398 Kane, IL 62054-0038

By Electronic Mail

Victor M. Hwang Asian Pacific Islander Legal Outreach 1188 Franklin Street, Suite 202 San Francisco, CA 94109 vmhwang@hotmail.com	Peter Obstler O'Melveny & Myers LLP 275 Battery Street San Francisco, CA 94111-3305 pobstler@omm.com

Julie Ann Su Asian Pacific American Legal Center 1145 Wilshire Blvd, 2nd Floor Los Angeles, CA 90017 jsu@apalc.org	Vicky Barker California Women's Law Center 6300 Wiltshire Boulevard, Suite 980 Los Angeles, CA 90048 vbarker@cwlc.org
Jon B. Eisenberg 1970 Broadway, Suite 1200 Oakland, CA 94612 jon@eandhlaw.com	Jennifer K. Brown Legal Momentum 395 Hudson Street New York, NY 10014 jbrown@legalmomentum.org
Elizabeth L. Rosenblatt Irell & Manella LLP 1800 Avenue of the Stars, Suite 900 Los Angeles, CA 90067 brosenblatt@irell.com	Noah Novogrodsky International Human Rights Clinic Univ. of Toronto Faculty of Law 84 Queen's Park Toronto, ON Canada M5S2C5 Noah.novogrodsky@utoronto.ca
Laurie Livingstone Cassels Brock & Blackwell LLP Suite 2100, Scotia Plaza 40 King Street West Toronto, ON Canada M5H 3C2 llivingtsone@casselsbrock.com	Jeffrey F. Webb Gibson, Dunn & Crutcher LLP 333 South Grand Avenue Los Angeles, CA 90071-3197 jwebb@gibsondunn.com
Jerome C. Roth Munger, Tolles & Olson LLP 560 Mission St., 27th Floor San Francisco, CA 94105 jerome.roth@mto.com	Raoul D. Kennedy Four Embarcadero Center, Ste. 3800 San Francisco, CA 94111 rkennedy@skadden.com
Eric Alan Isaacson 655 West Broadway, Suite 1900 San Diego, CA 92101 erici@lerachlaw.com	Rev. Silvio Nardoni 535 N. Brand Blvd., Suite 501 Glendale, CA 91203 silvionardoni@sbcglobal.net

Kenneth W. Starr 24569 Via De Casa Malibu, CA 90265 ken.starr@pepperdine.edu	John C. Eastman Chapman University School of Law One University Dr. Orange, CA 92866 jeastman@chapman.edu
Ann Marie Tallman Mexican American Legal Defense 634 South Spring Street Los Angeles, CA 90014 atallman@tallmanhomesllc.net	Kristina J. Wenberg American Center for Law & Justice P.O. Box 1629 8 South Main Street New Milford, CT 06776 kwenberg@aclj.org
Alexander Dushku Kirton & McConkie 60 East South Temple, Ste. 1800 Salt Lake City, UT 84145 adushku@kmclaw.com	Joshua K. Baker Institute for Marriage & Public Policy P.O. Box 1231 Manassas, VA 20108 joshua@imapp.org

By: _____
MONTE N. STEWART
Attorney for *Amici Curiae*