
GENDERLESS MARRIAGE, INSTITUTIONAL REALITIES, AND JUDICIAL ELISION

MONTE NEIL STEWART*

elision, noun The act or an instance of omitting something.¹

elide, verb To eliminate or leave out of consideration.²

Premised on the uncontroversial notion that marriage is a social institution and then informed by social institutional studies, the social institutional argument for man/woman marriage is a sufficient response to the variety of constitutional challenges leveled at the laws sustaining that institution. That is so because of what the argument succeeds in demonstrating. It demonstrates that marriage, like all social institutions, is constituted by a web of shared public meanings; that these meanings teach, form, and transform individuals; and that in this way, these meanings provide vital social goods (which are

* © 2006 Monte Neil Stewart and Duke Journal of Constitutional Law and Public Policy. This article is available on-line at <http://www.law.duke.edu/journals> and at <http://www.manwomanmarriage.org>. This article considers developments through December 8, 2005.

The author acknowledges the valuable assistance of William C. Duncan, Richard Salgado, Sara Lucas, Brady Brammer, and Jeremy Blickenstaff in the preparation of this article.

Portions of this article were presented as a paper at the 12th World Conference of the International Society of Family Law, 19-23 July 2005, Salt Lake City, Utah; other portions, as a paper at A Federal Marriage Amendment Symposium, 9 September 2005, Brigham Young University, Provo, Utah.

With the author's allowance, portions of drafts of this article were used relative to the preparation of amicus briefs filed in the California marriage case, *State of California et al. v. City and County of San Francisco et al.*, Court of Appeal, First Appellate District, Division Three, No. A106760, and in the New Jersey marriage case, *Lewis v. Morris*, New Jersey Supreme Court, Docket No. A-224-03T5, including the briefs filed by United Families International and Family Leader Foundation.

1. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000).

2. *Id.*

(Cite as 1 DUKE J. CONST. L. & PUB. POL'Y 1)

described). The argument further demonstrates that, with its power to suppress social meanings, the law can radically change and even deinstitutionalize man/woman marriage, with concomitant loss of the institution's social goods; that genderless marriage is a radically different institution than man/woman marriage, as evidenced by the large divergence in the nature of their respective social goods; and that society can have at any time only one of those two institutions denominated marriage. Finally, the argument demonstrates that, although the law is potent to replace the man/woman marriage institution with the genderless marriage institution, it is powerless to allow same-sex couples into the privileged marriage institution we have always known; and that law-mandated genderless marriage will sweep in not only all couples who marry in the future but the man/woman couples who married into the old institution.

With its demonstration that the legal redefinition of marriage will in time (and probably sooner than later) result in the loss of the vital social goods uniquely provided by the man/woman marriage institution, the social institutional argument is thus an argument that society (and hence government) has a compelling interest in continuing to sustain that institution of betterment.

Yet to date, the courts mandating genderless marriage have chosen (consciously it appears) to elide rather than engage the argument. After making the social institutional argument, this Article examines in detail the elision phenomenon, as seen in such cases as Goodridge from Massachusetts, Halpern from Ontario, and EGALE from British Columbia. In this way, the Article identifies a number of manners of elision; it then critiques the judicial performance relative to each. Finally, the Article, anticipating that courts will eventually address them, evaluates two counter-arguments that engage to some extent the realities advanced by the social institutional argument.

(Cite as 1 DUKE J. CONST. L. & PUB. POL'Y 1, 2)

a man and a woman to the union of any two persons,³ each side's bundle of arguments has changed and is still changing. Much of the change entails a refinement of arguments, a wholly understandable phenomenon in a judicial/political engagement hard fought for many years now.⁴ But an important part of that change is the dropping and adding of entire arguments.

The dropping is invariably in response to a pattern of judicial rejection. Examples include the "definitional preclusion," "natural limits," and "marriage as supra-legal construct" arguments, each of which urged in its distinctive way that something essential to marriage precludes alteration by the law. In a triumph for the undiluted positivist view of law, the courts generally rejected these arguments, and consequently the proponents of man/woman marriage no longer use them.⁵ Likewise, the proponents of genderless marriage⁶ have largely abandoned, after judicial rejection, the

3. Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971).

4. The judicial/political engagement began in earnest with the decision of the Hawaii Supreme Court in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). For a descriptive overview of that engagement in the **United States**, see William C. Duncan, *The Litigation to Redefine Marriage: Equality and Social Meaning*, 18 BYU J. PUB. L. 623 (2004); in **Canada**, see F.C. DeCoste, *The Halpern Transformation: Same-Sex Marriage, Civil Society, and the Limits of Liberal Law*, 41 ALBERTA L. REV. 619, 625–26 (2003), and Nicholas Bala, *The Debates About Same-sex Marriage in Canada and the United States: Controversy over the Evolution of a Fundamental Social Institution* (2005) (paper presented at the Federal Marriage Protection Amendment Symposium, Brigham Young University, Sep. 9, 2005), available at http://www.law2.byu.edu/marriage_family/Sept9conference/draft%20papers/NBalaSame%20Sex%20Marr%20Can%20USA%202005drft.pdf (soon to be published in the Brigham Young University Journal of Public Law); and in **South Africa**, see J.A. Robinson, *The Evolution of the Concept of Marriage in South Africa: The Influence of the Bill of Rights* (2005) (paper presented at the 12th World Conference of the International Society of Family Law, Salt Lake City, Utah, July 19-23 2005).

5. Instead of denying the power of the law to radically alter a core constitutive meaning of marriage, proponents now focus instead on the wisdom of so using the law.

6. A word about terminology: Rather than use the more common phrase *same-sex marriage* or *gay marriage*, this article uses the phrase *genderless marriage* to refer to the form of civil marriage legally defined as the union of any two persons. The phrase *same-sex marriage* is subtly misleading; although the legal definition of civil marriage as the union of any two

argument premised on the federal constitution's eighth amendment that precluding same-sex couples from marrying constitutes cruel and unusual punishment.⁷

Proponents have also added new arguments that were not effectively or centrally a part of the earlier debate. There is now the "conservative" argument for genderless marriage, focusing on the beneficial effects entry into marriage may have on gay men.⁸ On the man/woman marriage side, new arguments arise from institutional studies⁹ and from critical review of genderless marriage proponents' use of personal relationship theory.¹⁰

persons allows same-sex couples to marry, it of course also allows a woman and a man to marry, and everywhere the debate focuses on *one* legally recognized relationship known as *marriage*, not *two*. The phrase *same-sex marriage* thus conveys the sense (erroneous) of a legally recognized marriage separate or different from the marriage of a man and a woman. This article refers to civil marriage defined as the union of a man and a woman as *man/woman marriage*.

Genderless is used instead of *non-gendered* and *man/woman* instead of *gendered* because, as a matter of contemporary language usage, to use the words *gendered* and *non-gendered* could be seen as an endorsement of certain versions of social constructionist thought. Although those versions may be valid, this article stands neutral on the validity question for reasons made clear elsewhere. See Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 CAN. J. FAM. L. 11, 35-36, 71, 75-85 (2004), available at <http://www.manwomanmarriage.org/jrm/pdf/jrm.pdf>, [hereinafter Stewart].

7. E.g., *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973).

8. E.g., WILLIAM ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE* (1996); Andrew Sullivan, *The Conservative Case for Gay Marriage*, TIME, June 30, 2003, at 76.

Maggie Gallagher suggests "that the arguments in favor of gay marriage, developed over the last thirty years, have largely stopped developing. These arguments have had a powerful impact on public opinion, particularly legal elites, over the same period. But to these now well-worn arguments, little new has been added in recent months or even years." Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 U. ST. THOMAS L. J. 33, 34 (2004).

9. E.g., Monte Neil Stewart & William C. Duncan, *Marriage and the Betrayal of Perez and Loving*, 2005 BYU L. REV. 555, 560-67, 589-595, [hereinafter Stewart & Duncan] available at http://manwomanmarriage.org/jrm/pdf/Marriage_Betrayal_of_Perez.pdf; Stewart, *supra* note 6; Daniel Cere, *War of the Ring*, in *DIVORCING MARRIAGE: UNVEILING THE DANGERS IN CANADA'S NEW SOCIAL EXPERIMENT* 9, 15 (Daniel Cere & Douglas Farrow eds., 2004) [hereinafter *DIVORCING MARRIAGE*].

10. E.g., DANIEL CERE, *THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA* (Council on Family Law, 2005), available at

(Cite as 1 DUKE J. CONST. L. & PUB. POL'Y 1, 5)

This article addresses one of the new arguments advanced in support of man/woman marriage and now drawing judicial attention, the argument from social institutional studies.¹¹ This argument teaches that the social institution of marriage, like all institutions, is constituted by a web of shared public meanings; that these meanings teach, form, and transform individuals; and that in this way, these meanings provide vital social goods. The argument further demonstrates that with its power to suppress social meanings, the law can radically change and even deinstitutionalize man/woman marriage, with concomitant loss of the institution's social goods; that genderless marriage is a radically different institution than man/woman marriage, as evidenced by the large divergence in the nature of their respective social goods; that society can have at any time only one of those two institutions denominated *marriage*; that although the law is potent to replace the man/woman marriage institution with the genderless marriage institution, it is powerless to allow same-sex couples into the privileged marriage institution we have always known; and that law-mandated genderless marriage will sweep in not only same-sex couples, and not only all couples who marry in the future, but the man/woman couples who married into the old institution. With its demonstration that the legal redefinition of marriage will in time and probably sooner than later result in the loss of the vital social goods uniquely provided by the man/woman marriage institution, the social institutional argument is thus an argument that society (and hence government) has a compelling interest in continuing to sustain that institution of betterment. In this way, the social institutional argument is a sufficient answer to the

http://www.marriagedebate.com/pdf/future_of_family_law.pdf; Stewart, *supra* note 6, at 85-86, 95-99.

11. See *infra* Part III; see also Lewis v. Harris, 875 A.2d 259 (N.J. Super. Ct. App. Div. 2005).

variety of constitutional challenges leveled against man/woman marriage. Yet to date, the courts holding for genderless marriage have chosen (consciously it appears) to elide rather than engage the argument.

This article sets forth the social institutional argument in some detail in Part II, then examines in Part III the phenomenon of judicial elision of the argument. Part IV, anticipating that courts will eventually address them, evaluates two counter-arguments that engage to some extent the realities advanced by the social institutional argument. Part V offers a brief conclusion.

II

MARRIAGE AS A SOCIAL INSTITUTION

Marriage is a social institution,¹² and, accordingly, what can be said accurately about all social institutions can be said accurately of the institution of marriage. Social institutional studies provide a wealth of explanation regarding social institutions: what constitutes them, how they provide various social goods, how they educate, form, and transform individuals, how society (especially through the law) reinforces, alters, or destroys (deinstitutionalizes) these institutions, and how such changes affect individuals and society.

Before setting forth those understandings and applying them to the legal definition of marriage, however, I relate a simple human experience that shows the real-life workings of the concepts that follow.

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

(Cite as 1 DUKE J. CONST. L. & PUB. POL’Y 1, 7)

A. Olympic Skaters and Brown Loafers

After winning a spot on the American team headed to the 1960 Olympic Winter Games in Squaw Valley, California, eighteen-year-old speed skater Barbara Lockhart decided to learn Russian.¹³ At that time, the Soviet Union's speed skaters were the best in the world, and Barbara wanted to become acquainted with them and even establish some friendships. She succeeded. Klara Guseva, who won the gold medal in the 1,000 meter race, and Barbara spent a fair amount of time together at Squaw Valley and became friends.

Near the end of the Games, Barbara and two American teammates were visiting in their Olympic Village dorm room. Klara entered, removed the slippers she was wearing, and began trying on the American athletes' shoes. She seemed particularly pleased with a pair of brown loafers. With the loafers on her feet, Klara walked out. The Americans watched dumbfounded. Klara kept the shoes for her own use, and the flummoxed Americans never could bring themselves to seek the shoes' return.

The profound differences in Barbara's and Klara's respective conducts regarding the brown loafers, and indeed their respective self-identities in that context, are readily explained by understandings of social institutions. I turn to those understandings now.

B. Understandings from Institutional Studies

One of the most important understandings is that social institutions are constituted in large measure by shared public

13. Barbara Lockhart related this experience orally to the author in September, 2005, and then reviewed and confirmed the accuracy of the written account appearing in the text. Dr. Lockhart has been a professor of exercise science at Temple University, the University of Iowa, and Brigham Young University.

meanings. Although in pedestrian use the word "institution" may conjure up an image of an edifice constructed of steel, concrete, and glass, a social institution is not that. Rather, it is "constituted by complex webs of social meaning."¹⁴ John Searle explains this social reality using the example of another social institution, money:

[W]e can say, for example, in order that the concept "money" apply to the stuff in my pocket, it has to be the sort of thing that people think is money. If everybody stops believing it is money, it ceases to function as money, and eventually ceases to be money. . . . [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.¹⁵

The shared meanings—both formal and informal—that constitute a social institution interact and are interdependent; each meaning affects and is dependent on all the others.¹⁶

Social institutions shape and guide individuals' identities, perceptions, aspirations, and conduct. An institution "supplies to the people who participate in it what they should aim for, dictates what is acceptable or effective for them to do, and teaches how they must relate to other members of the institution and to those on the outside."¹⁷ This profound influence ought not to be underestimated; institutions "shape[] what those who participate in [them] think of

14. Stewart, *supra* note 6, at 83. An important foundational work in contemporary social institutional theory is MARY DOUGLAS, *HOW INSTITUTIONS THINK* (1986).

15. JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 32 (1995) (emphasis added).

16. Victor Nee & Paul Ingram, *Embeddedness and Beyond: Institutions, Exchange, and Social Structure*, in *THE NEW INSTITUTIONALISM IN SOCIOLOGY* 19, 19 (Mary C. Brinton & Victor Nee eds., 1998) ("An institution is a *web of interrelated norms*—formal and informal—governing social relationships.").

17. Stewart, *supra* note 6, at 111.

themselves and of one another, what they believe to be important, and what they strive to achieve."¹⁸ Thus,

an institution guides and sustains individual identity in the same way as a family, forming individuals by enabling or disabling certain ways of behaving and relating to others, so that each individual's possibilities depend on the opportunities opened up within the institution to which the person belongs.¹⁹

But inasmuch as human societies create and sustain social institutions, a society can change its social institutions. "Institutions can be changed in the sense that they will necessarily change if sufficiently many individuals try to change them."²⁰ And because social institutions are constituted by shared public meanings, they are necessarily changed when those meanings are changed or no longer sufficiently shared. Indeed, that is the only way a social institution can be changed.

An individual may withdraw his deposit from a bank, or break the law, or the rules [of] a game, without causing the change or collapse of the institutions concerned. Such an action would not be possible for all individuals acting as a collective [without causing that change or collapse]. Conversely, there are acts which are possible only for all individuals, but not for any single individual. Changing, creating, maintaining or destroying institutions are examples of this.²¹

Just as social institutions can be changed by alteration of the constitutive shared public meanings, so they can be renewed and

18. *Id.*

19. HELEN REECE, *DIVORCING RESPONSIBLY* 185 (2003).

20. EERIK LAGERSPETZ, *THE OPPOSITE MIRRORS: AN ESSAY ON THE CONVENTIONALIST THEORY OF INSTITUTIONS* 28 (1995).

21. Eerik Lagerspetz, *On the Existence of Institutions*, in *ON THE NATURE OF SOCIAL AND INSTITUTIONAL REALITY* 70, 82 (Eerik Lagerspetz et al. eds., 2001).

strengthened by use consistent with those shared public meanings. Whereas frequent use wears out most things—a car or a shirt, for example—frequent use actually renews and strengthens social institutions.²² And just as social institutions can be changed or reinforced, social institutions can be entirely dismantled when members of the community fail to recognize or share their core constitutive meanings.²³

Society can use the law effectively to reinforce, to alter, or to dismantle a social institution. This is because the law has an expressive or educative function that is magnified by its authoritative voice.²⁴ And in actual practice, the law's authoritative voice is used to reinforce, to alter, or to dismantle the shared public meanings that constitute a social institution.²⁵

22. SEARLE, *supra* note 15, at 57:

[A]s several social theorists have pointed out, institutions 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, property, and universities. . . . [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. *Id.*

23. *Id.* at 117:

The secret of understanding the continued existence of institutional facts is simply that the individuals directly involved and a sufficient number of members of the relevant community must continue to recognize and accept the existence of such facts. . . . The moment, for example, that all or most of the members of a society refuse to acknowledge [the social institution of] property rights, as in a revolution or other upheaval, property rights cease to exist in that society.

24. *E.g.*, JOSEPH RAZ, *THE MORALITY OF FREEDOM* 162 (1986) (“Supporting valuable forms of life is a social rather than an individual matter. Monogamy, assuming that it is the only morally valuable form of marriage, cannot be practised by an individual. It requires a culture which recognizes it, and which supports it through the public’s attitude and through its formal institutions.”); Gallagher, *supra* note 8, at 51 (“Laws do more than incentivize or punish . . . They educate directly and indirectly.”); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 69–71 (1996); *Minister of Public Health v. Fourie*, CCT 60/04, slip op. at para. 138 (S. Afr. Const. Ct. Dec. 1, 2005), available at <http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT60-04> (“The law is . . . a great teacher [and] establishes public norms . . .”).

25. Regarding the reinforcing function, Joseph Raz observes:

(Cite as 1 DUKE J. CONST. L. & PUB. POL’Y 1, 11)

Use of the law to reinforce, alter, or extinguish the shared public meanings that constitute a social institution is a political act. As Edward Schiappa notes, "Definitions put into practice a special sort of social knowledge—a shared understanding among people about themselves, the objects of their world, and how they ought to use language."²⁶ He continues:

If we look hard enough, all definitions serve some sort of interests. ... Defining what is or is not part of our shared reality is a profoundly political act. The establishment of authoritative definitions by law or custom requires a political *process* involving persuasion or force that generates political *results* by advancing some views and interests and not others.²⁷

Schiappa's reference to "a shared understanding among people about . . . the objects of their world" illuminates the important distinction between a social institution and the objects or arrangements to which the institution relates most directly or intimately. They are not the same, although casual thought may

Perfectionist political action may be taken in support of social institutions which enjoy unanimous support in the community, in order to give them formal recognition, bring legal and administrative arrangements into line with them, facilitate their use by members of the community who wish to do so, and encourage the transmission of belief in their value to future generations. In many countries this is the significance of the legal recognition of monogamous marriage and prohibition of polygamy.

RAZ, *supra* note 24, at 161.

26. EDWARD SCHIAPPA, *DEFINING REALITY: DEFINITIONS AND THE POLITICS OF MEANING* 3 (2003).

27. *Id.* at 69–70 (citation omitted). Kitzinger and Wilkinson apply the reality articulated by Schiappa to the marriage context:

Marriage is a lynchpin of social organization: its laws and customs interface with almost every sphere of social interaction. Its foundational role in defining structures of social institution and citizenship means that definitional authority over what 'counts' as marriage, and who is allowed access to it, has always been intensely political.

Celia Kitzinger & Sue Wilkinson, *The Re-Branding of Marriage: Why We Got Married Instead of Registering a Civil Partnership*, 14 *FEMINISM & PSYCHOLOGY* 127, 132 (2004).

(Cite as 1 DUKE J. CONST. L. & PUB. POL'Y 1, 12)

mistake the latter for the former. A dollar bill is commonly referred to as *money*, but it is not the social institution of money. Likewise, a wheat farm or a phosphate mine or a marshmallow factory, although reflexively thought of in our society as *private property*, is not the institution of private property. The dollar bill and the marshmallow factory are only objects about which we may share understandings, meanings, and norms – depending on the social institutions in our particular society.

If the law affecting a social institution is "constitutional law," meaning the most fundamental law of the polity, the suppression of old meanings and/or replacement with radically different meanings operates across the entire public square. And it would seem that the more totalitarian the government, the more extensive the public square and therefore the more influential or even invasive the constitutional law in whatever remains of the private. Here is an example of "deinstitutionalization" by constitutional law; it is the first Soviet constitution's treatment of private property:

Pursuant to the socialization of land, private land ownership is hereby abolished, and all land is proclaimed the property of the entire people and turned over to the working people without any redemption, on the principles of egalitarian land tenure. All forests, mineral wealth and waters of national importance, as well as all live and dead stock, model estates and agricultural enterprises are proclaimed the property of the nation . . . [as well as] the complete conversion of factories, mines, railways and other means of production and transportation into the property of the Soviet Workers' and Peasants' Republic.²⁸

Finally, from these understandings of social institutions there

28. KONSTITUTSIJA RSFSR (1918) [Konst. RSFSR] [RSFSR Constitution] art. 3, *available at* http://www.politicsforum.org/documents/constitution_rsfsr_1918.php.

(Cite as 1 DUKE J. CONST. L. & PUB. POL'Y 1, 13)

necessarily follows this: To alter a social institution by altering the shared public meanings that constitute it is to also alter the individual identity, perceptions, aspirations, and conduct formed by reference to the old institution. The greater the alteration to the institution, the greater the changes in the individual. Likewise, the more influential the social institution changed, the greater the changes in the individual.²⁹

With these understandings, I return to the story of the Olympic skaters and the brown loafers. Clearly, Barbara and Klara had radically different relationships to and understandings of the same pair of brown loafers. Barbara had been taught, formed, and transformed by her society's strong social institution of private property, an institution reinforced by law and even enshrined in American constitutional law,³⁰ while Klara's society had no equivalent private property institution but rather another institution that, in radically different ways, taught, formed, and transformed individuals in relation to such things as marshmallow factories, wheat farms, and shoes, with, again, Soviet law and constitution reinforcing that different institution.³¹

The American private property institution formed an important part of Barbara's identity, or, more accurately, identities; she understood herself to be an "owner" relative to some objects and "not an owner" relative to other objects. Since her early childhood, the institution taught her the complex web of meanings, relationships, projects, and conducts comprising those two interrelated identities. Likewise, the Soviet property institution had, equally effectively,

29. See, e.g., RAZ, *supra* note 24, at 392.

30. E.g., U.S. CONST., amends. V, XIV, § 1.

31. Not until 1977 was there any Soviet constitutional reference to something akin to "private property." *Konstitutsiia SSSR (1977)* [Konst. SSSR] [USSR Constitution] ch. II, art. 13.

formed Klara's identities and hence her conducts relative both to various objects and to the various users of those objects. Except perhaps in an abstract fashion, Barbara's "property ways" were incomprehensible to Klara and to Klara's parents – but not to her grandparents, for they would have been taught and formed by an effective social institution of private property. The startled reaction of the American athletes that day in that Olympic Village dorm room evidences that they had a similar incomprehension of Klara's "property ways."

On the foundation of these understandings from social institutional studies, I now turn to the social institutional realities pertaining to the legal definition of marriage. It is those institutional realities that constitute the social institutional argument to preserve man/woman marriage, and an antecedent understanding of that argument is simply required to grasp adequately how the courts have performed relative to it. So, although the story of how the courts have handled the social institutional argument is extraordinarily interesting, spinach before dessert.

C. Institutional Studies and the Legal Definition of Marriage

Almost universally, an important shared public meaning is that marriage is the union of a man and a woman.³² Thus, that meaning has been a constitutive core of the institution. That core meaning has been and continues to be influential in forming individual identity, perceptions, aspirations, and conduct in a way and to an extent that common sense readily comprehends. Any word-picture of that influence seems doomed to incompleteness, but here is Daniel Cere's concise effort:

[M]arriage is an institution that interacts with a unique social-

32. See Gallagher, *supra* note 8, at 45-46.

(Cite as 1 DUKE J. CONST. L. & PUB. POL'Y 1, 15)

sexual ecology in human life. It bridges the male-female divide. It negotiates a stable partnership of life and property. It seeks to manage the procreative process and to establish parental obligations to offspring. It supports the birthright of children to be connected to their mothers and fathers.

....

Michael Foucault contends that marriage has fostered a particular type of human identity, namely, the "conjugal self." Be that as it may, marriage has always been the central cultural site of male-female relations. A rich history and a complex heritage of symbols, myths, theologies, traditions, poetry, and art have been generated by the institution of marriage, which encodes a unique set of aspirations into human culture along the axis of permanent opposite-sex bonding and parent-child connectedness.³³

As Cere's description suggests, man/woman marriage is deemed to provide well, and even uniquely, a number of social goods. Neither claiming completeness nor suggesting any significance to the order of appearance, the following subsection sets forth six of those valuable social goods gleaned from the literature and particularly relevant in the context of the current marriage debate. The six social goods set forth are particularly relevant exactly because the institution's man/woman meaning plays at least a powerful and usually an indispensable role in producing them.

1. Six Social Goods Provided by Man/Woman Marriage

First, the institution of man/woman marriage is quite certainly society's best and probably its only effective means to make meaningful a child's right to know and be brought up by his or her biological parents (with exceptions being justified only in the best interests of the child, not those of any adult).³⁴ I take this to be what

33. Cere, *supra* note 9 at 11, 14 (footnote omitted).

34. Margaret Somerville, *What About the Children?*, in *DIVORCING MARRIAGE*, *supra* note

Cere had in mind when he said: "[Man/woman marriage] supports the birthright of children to be connected to their mothers and fathers."

Second, the institution almost certainly qualifies as the most effective means humankind has developed so far to maximize the level of private welfare provided to the children conceived by passionate, heterosexual coupling.³⁵ Indeed, the provision of this social good has been called "society's deep logic of marriage."³⁶ Two essential realities of man/woman intercourse are its procreative power and its passion.³⁷ Society's interest relative to those realities is in assuring the provision of adequate private welfare to children.³⁸ Child-bearing in a setting of inadequate private welfare corrodes societal interests while child-bearing in a setting of adequate private welfare actually advances those interests.³⁹ In passion-based procreation, it is passion rather than rationality that may dictate the terms of the procreative encounter.⁴⁰ Rationality considers consequences nine months hence, including the rearing of a child, but passion does not.⁴¹ Confining procreative passion to a social institution that will assure—to the largest practical extent—that passion's consequences (children) begin and continue life with

9, at 67.

35. Stewart, *supra* note 6, at 48.

36. *Id.* at 44.

37. Regarding the prevalence of unintended pregnancy even in the contraceptive culture of developed countries, see Maggie Gallagher, *Does Sex Make Babies? Marriage, Same-Sex Marriage and Legal Justifications for the Regulation of Intimacy in a Post-Lawrence World*, 23 QUINNIPIAC L. REV. 447, 454-56 (2004).

38. As used here, the phrase *private welfare* includes not just the provision of physical needs such as food, clothing, and shelter; it encompasses opportunities such as education, play, work, and discipline and intangibles such as love, respect, and security.

39. Stewart, *supra* note 6, at 45.

40. *Id.*

41. *Id.*

(Cite as 1 DUKE J. CONST. L. & PUB. POL'Y 1, 17)

adequate private welfare is thus a fundamental and originating purpose of marriage.⁴² The immediate beneficiaries of this private welfare purpose are the child and the often vulnerable mother, but society rationally sees itself as the ultimate beneficiary.⁴³

The third social good is related to the second. Man/woman marriage is the irreplaceable foundation of the child-rearing mode—that is, married mother/father child-rearing—that correlates (in ways not subject to reasonable dispute⁴⁴) with the optimal outcomes deemed crucial for a child's—and hence society's—well being. These outcomes include physical, mental, and emotional health and development; academic performance and levels of attainment; and avoidance of crime and other forms of self- and other-destructive behavior such as drug abuse and high-risk sexual conduct.⁴⁵

42. *Id.*

43. *Id.* See also *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 995-96 (Mass. 2003) (Cordy, J., dissenting) (articulating these understandings particularly well).

44. As Justice Sosman said in her dissenting opinion in *Goodridge*:

[S]tudies to date reveal that there are still some observable differences between children raised by opposite-sex couples and children raised by same-sex couples. Interpretation of the data gathered by those studies then becomes clouded by the personal and political beliefs of the investigators, both as to whether the differences identified are positive or negative, and as to the untested explanations of what might account for those differences. (This is hardly the first time in history that the ostensible steel of the scientific method has melted and buckled under the intense heat of political and religious passions.) . . . [T]he most neutral and strict application of scientific principles to this field would be constrained by the limited period of observation that has been available. . . . The Legislature can rationally view the state of the scientific evidence as unsettled on the critical question it now faces: Are families headed by same-sex parents equally successful in rearing children from infancy to adulthood as families headed by parents of opposite sexes?

Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 979-80 (Mass. 2003) (Sosman, J., dissenting) (citation omitted).

Regarding married mother/father as the optimal child-rearing mode when compared with all other adequately studied modes, see Maggie Gallagher and Joshua K. Baker, *Do Moms and Dads Matter? Evidence from the Social Sciences on Family Structure and the Best Interests of the Child*, 4 MARGINS L. REV. 161 (2004) (collecting references to and summarizing the literature).

45. Stewart, *supra* note 6, at 64-70; Gallagher, *supra* note 8, at 50-51.

Fourth, man/woman marriage serves as an effective bridge over the male-female divide. "[M]arriage has always been the central cultural site of male-female relations"⁴⁶ and society's primary and most effective means of bridging the male-female divide—that "massive cultural effort of every human society at all times and in all places."⁴⁷

Fifth, man/woman marriage is the only institution that can confer the status of *husband* and *wife*, that can transform a male into a husband or a female into a wife (a social identity quite different from "partner"),⁴⁸ and thus that can transform males into husband/fathers (a category of males particularly beneficial to society)⁴⁹ and females into wife/mothers (likewise a socially beneficial category).⁵⁰

Sixth, legally recognized and privileged man/woman marriage constitutes both social and official endorsement of that form of adult intimacy—married heterosexual intercourse—that society may rationally value above all other such forms. That rationality has been demonstrated elsewhere,⁵¹ and to date there has been no counter to that demonstration. Nor is there any sound basis for a constitutional challenge to a societal judgment valuing and on that basis privileging one form of adult intimacy above all others, although many uncritically assume that *Lawrence*⁵² prohibits society from making such a judgment. One or more of the many possible readings of *Lawrence* may well prohibit government from burdening a particular

46. Cere, *supra* note 9, at 14.

47. Katherine K. Young & Paul Nathanson, *The Future of an Experiment*, in *DIVORCING MARRIAGE*, *supra* note 9, at 43.

48. See, e.g., DeCoste, *supra* note 4, at 625–26.

49. See, e.g., DAVID POPENOE, *LIFE WITHOUT FATHER* 139–88 (1996).

50. See, e.g., Gallagher & Baker, *supra* note 44.

51. Stewart, *supra* note 6, at 52–57; Gallagher, *supra* note 37.

52. *Lawrence v. Texas*, 539 U.S. 558 (2003).

form of adult intimacy on no basis other than conventional morality, but no responsible reading to date takes *Lawrence* so far as to prohibit a government, acting on the basis of demonstrable rationality, from most highly valuing and on that basis privileging married heterosexual intercourse.

2. *Why Genderless Marriage Cannot Deliver the Same Social Goods*

A social institution defined at its core as the union of any two persons is unmistakably different from the historic marriage institution between a man and a woman.⁵³

Much has been and can be said about public meanings influencing, [or] constituting, social institutions, which in turn influence, even define, the human participants. All of that can be said, of course, about both man/woman marriage as an institution and genderless marriage as an institution. The point is the high likelihood that an institution defined at its core as the union of a man and a woman (with all that limitation implies and entails regarding

53. Observers of marriage who are both rigorous and well informed regarding the realities of social institutions uniformly acknowledge the magnitude of these differences between the two possible institutions of marriage. This is so regardless of the observer's own sexual, political, or theoretical orientation or preference. See, e.g., LADELLE MCWHORTER, BODIES AND PLEASURES: FOUCAULT AND THE POLITICS OF SEXUAL NORMALIZATION 125 (1999); RAZ, *supra* note 24, at 393; Cere, *supra* note 9, at 11-18; Douglas Farrow, *Canada's Romantic Mistake, in* DIVORCING MARRIAGE, *supra* note 9, at 1-5; Young & Nathanson, *supra* note 47, at 48-56; Gallagher, *supra* note 8, at 53 ("Many thoughtful supporters of same-sex marriage recognize that some profound shift in our whole understanding of the world is wrapped up in this legal re-engineering of the meaning of marriage."); Angela Bolt, *Do Wedding Dresses Come in Lavender? The Prospects and Implications of Same-Sex Marriage*, 24 SOCIAL THEORY AND PRACTICE 111, 114 (1998); Andrew Sullivan, *Recognition of Same-Sex Marriage*, 16 QUINNIPIAC L. REV. 13, 15, 17-18 (1996); Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 9, 12-19 (1991); E.J. Graff, *Retying the Knot*, 262 THE NATION 12 (June 24, 1996) ("The right wing gets it: Same-sex marriage is a breathtakingly subversive idea. . . . Marriage is an institution that towers on our social horizon, defining how we think about one another [S]ame-sex marriage . . . announces that marriage has changed shape.").

(Cite as 1 DUKE J. CONST. L. & PUB. POL'Y 1, 20)

purposes and activities) will intend and sustain "the social understandings, the practices, the goods, and the social selves" in large measure not intended or sustained by an institution defined at its core as any two persons in a close personal relationship.⁵⁴

The difference in constitutive meanings of necessity means that what the new institution teaches relative to individual identity, perceptions, aspirations, and conduct is substantially different from the formative instruction of the current institution of man/woman marriage. That does not mean, of course, that there is no overlap in formative instruction; the significance is in the divergence. One important divergence centers on the normativeness of married heterosexual relations and the normative exceptionality of all other forms of intimate human conduct.⁵⁵ Another centers on the relative pre-eminence or subordination of the interests and desires of adults, on one hand, and of the interests and needs of children, on the other hand.⁵⁶

That last point leads to a further evidence of the radical difference between the two possible marriage institutions, and that is the profound difference in social goods provided. For example, as noted man/woman marriage makes meaningful a child's right to know and

54. Stewart, *supra* note 6, at 77 (footnote omitted).

55. See Gallagher, *supra* note 37, at 448-49 (quoting Martha A. Fineman, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 230 (1995)).

56. See Hernandez v. Robles, Index No. 103434/04, 2005 NY Slip Op 09436 at *7 (N.Y. App. Div. Dec. 8, 2005) ("Marriage laws are not primarily about adult needs for official recognition and support, but about the well-being of children ..."), available at http://www.courts.state.ny.us/reporter/3dseries/2005/2005_09436.htm; Somerville, *supra* note 34, at 66-67, 78; Seana Sugrue, "Marriage: Inside and Out" at 14-15 (2005) (paper presented at Illuminating Marriage Conference, Kananaskis, Alberta, Canada, May 18-20 2005 ("Hence, same-sex marriage as well as a number of other marital reforms, . . . foster the vulnerability of children to advance the desires of adults."); Jane Adolphe, "The Same-Sex Marriage Debate in Canada: Promoting Adults and Ignoring Children," (2005) (paper presented at the 12th World Conference of the International Society of Family Law, Salt Lake City, Utah, July 19-23, 2005) abstract available at <http://www.law2.byu.edu/isfl/saltlakeconference/Abstracts.pdf>.

be reared by his or her biological parents (with exceptions being justified only in the best interests of the child, not those of any adult), hereafter referred to in shorthand as *the child's bonding right*. Governmental selection of genderless marriage in the place of man/woman marriage, and especially a constitutional mandate for such, further withdraws official recognition of the child's bonding right.⁵⁷ It could not be otherwise for a core part of the argument for genderless marriage is that same-sex couples have the power to bring donor-conceived children into their family and that both the same-sex couples and these donor-conceived children are entitled to the benefits of civil marriage. In this way genderless marriage is not just neutral towards the child's bonding right but actually undercuts it, while, in contrast, man/woman marriage has always provided powerful institutional support to that right. Margaret Somerville explains the radical difference, in this context, between the two institutions:

[A]ccepting same-sex marriage necessarily means accepting that the societal institution of marriage is intended primarily for the benefit of the partners to the marriage, and only secondarily for the children born into it. And it means abolishing the norm that children—whatever their sexual orientation later proves to be—have a prima facie right to know and be reared within their own biological family by their mother and father. Carefully restricted, governed, and justified exceptions to this norm, such as adoption, are essential. But abolishing the norm would have a far-reaching impact.⁵⁸

Another example pertains to the bridge over the male/female divide. The man/woman marriage institution ascribes a high value

57. I say "further" because government allowance, albeit regulated, of anonymous donor conception began the erosion of the child's right. As explained in the text, recognition of genderless marriage (especially as a constitutional mandate) would appear to render the right a complete nullity.

58. Somerville, *supra* note 34, at 67.

to that endeavor and provides a host of supports for its accomplishment. With a core meaning of "the union of any two persons," the genderless marriage institution quite simply does neither. Moreover, as Camille Williams has shown, man/woman marriage "is the only important social institution in which women have always been necessary participants."⁵⁹ Displacement of that institution "may result in future generations with a decreased ability or desire for men and women to cooperate in families, and may ultimately contribute to a new form of gender hierarchy and a new variation of a sex-segregated society."⁶⁰ The reason is that man/woman marriage produces, indeed is, "the norm for cooperation between the sexes. While marriage patterns and practices have varied across cultures and over time, marriage has involved both sexes, and by doing so has set a pattern for cooperation between the sexes."⁶¹

The last example given here is the preparation for, conferral of, and sustenance in the status of *husband* or *wife*, with there being no need to belabor the large differences between the two possible marriage institutions relative to that social good.⁶²

This exercise is not meant to suggest that genderless marriage

59. Camille S. Williams, *Women, Equality, and the Federal Marriage Amendment*, at 1 (2005) (paper presented at the Federal Marriage Protection Amendment Symposium, Brigham Young University, Provo, Utah, Sep. 9, 2005) available at http://www.law2.byu.edu/marriage_family/Sept9conference/draft%20papers/williams (soon to be published in the Brigham Young University Journal of Public Law.)

60. *Id.*

61. *Id.* at 9.

62. See Gallagher, *supra* note 8, at 53:

One thing same-sex marriage indubitably does is displace certain formerly core public understandings about marriage; such as, that it has something to do with bringing together male and female, men with women, husbands and wives, mothers with fathers. Husband will no longer point to or imply wife. Mother no longer implies father.

may not provide unique and perhaps even valuable social goods. Proponents of that institution have predicted that it will, and this article takes up that issue later. The point is that man/woman marriage and genderless marriage are radically different social institutions as demonstrated by their wide divergence relative to important social goods.

3. *One or the Other: The Limit to One Marriage Institution*

Governmental selection of genderless marriage has other practical outcomes. For my purposes, perhaps the most important is found at the intersection of the law's authoritative role relative to marriage's meanings, and the unitary nature of the institution. By *unitary nature*, I mean simply that society can sustain one and only one marriage institution. Society cannot simultaneously tell people (especially 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. 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. Law's authoritative role relative to marriage's meaning refers to this: Once the law (on constitutional grounds no less) has taken a stand that the core meaning is the union of any two persons, the law will then be unrelenting and thoroughgoing in enforcement of that decision. The law's own internal logic and institutional mandates require no less. Thus, the intersection of the unitary nature of marriage and the law's authoritative role in marriage's meaning will result in the new meaning being mandated in texts, in schools, and in virtually every other part of the public square, and being voluntarily published by the media and other

(Cite as 1 DUKE J. CONST. L. & PUB. POL'Y 1, 24)

institutions.⁶³ Even linguistic, social, or religious enclaves dedicated to preserving the old meaning will struggle,⁶⁴ a matter I discuss at more length later.

One further comment on the unitary nature of the marriage institution: Not uncommonly, people confronted with the marriage debate think in terms of *homosexual marriage*, *gay marriage* or *same-sex marriage* as a separate but co-existing marriage institution. That uncritical thinking is no doubt due in part to the misleading power of the very phrase *same-sex marriage* and its equivalents like *homosexual marriage*. Those phrases are misleading because, although the legal definition of civil marriage as the union of any two persons allows same-sex couples to marry, it of course also allows a woman and a man to marry. Everywhere the debate focuses on one legally recognized relationship known as *marriage*, not two. The phrase *same-sex marriage* and its equivalents thus convey the sense (erroneous) of a legally recognized marriage separate or different from the marriage of a man and a woman.⁶⁵

63. Stewart, *supra* note 6, at 111.

64. Helen Reece explains:

When norms are socially contested, this can lead to the formation of diverse norm communities, such as religious organisations or feminist groups, so that people who are dissatisfied with the prevailing norms can enter a different and more congenial norm community. But this is not a complete solution because the social construction of choices runs too deep: the dissident community may seem unthinkable or may be too costly for someone raised in the dominant community; it may also be merely reactive to or even defined by the dominant norm community.

REECE, *supra* note 19, at 38.

65. Even people who should know better appear to fall into the analytical trap set by the misleading terminology. James Q. Wilson recently said:

Since the Supreme Court struck down laws against homosexual conduct many people have been preoccupied with either encouraging or resisting homosexual marriage. Whatever your views about homosexual marriage, were it adopted nationally it would affect only about 2 or 3 percent of the population.

James Q. Wilson, *The Ties That Do Not Bind: The Decline of Marriage and Loyalty*, IN CHARACTER (Fall 2005), available at <http://www.incharacter.org/article.php?article=46>.

4. *Inclusion and Exclusion: Limits on and Effects of the Law's Power*

Two other and related social institutional realities merit note. First, same-sex couples cannot enter the institution of marriage as it has existed to the present; in other words, it is not possible in reality for same-sex couples to enter the privileged and vital civil institution previously enjoyed only by opposite-sex couples. The very act of legal redefinition will radically transform the old institution and make it into a profoundly different institution, one whose meanings, value, and vitality are speculative. Some same-sex couples look to the law to let them into the privileged institution, and the law may want to, but it cannot; it can only give them access to a different institution of different value.⁶⁶

The second reality applies to already married opposite-sex couples. Redefinition and no act of their own removes them from the institution they voluntarily entered (man/woman marriage) into a markedly different one. To the extent that institutions are constituted by social meaning, and to the extent that the law dictates

The social institutional reality, of course, is that if “homosexual marriage” (meaning genderless marriage, meaning marriage legally and even constitutionally defined as the union of any two persons) were “adopted nationally[,] it would affect” not “2 or 3 percent of the population” but every married couple and even those in our society not presently married. See *infra* Part II.C.4-5. So, Homer nodded.

66. Brian Bix, *Reflections on the Nature of Marriage*, in REVITALIZING THE INSTITUTION OF MARRIAGE FOR THE TWENTY-FIRST CENTURY 111, 112-13 (Alan J. Hawkins et al. eds., 2002).

Marriage is an existing social institution. One might also helpfully speak of it as an existing “social good.” The complication in the analysis is that one cannot fully distinguish the *terms* on which the good is available from the *nature* of the good. As Joseph Raz wrote regarding same-sex marriage, “When people demand recognition of gay marriages, they usually mean to demand access to an existing good. In fact they also ask for the transformation of that good. For there can be no doubt that the recognition of gay marriage will effect as great a transformation in the nature of marriage as that from polygamous to monogamous or from arranged to unarranged marriage.” (emphasis in original)

(I would suggest a much greater transformation than that.)

(Cite as 1 DUKE J. CONST. L. & PUB. POL'Y 1, 26)

the social meaning of civil marriage, to redefine marriage as the union of any two persons is not to pull gay men and lesbians into marriage as our societies now know it but to pull married man/woman couples into what the media calls imprecisely "gay marriage" and this article calls genderless marriage.⁶⁷

5. *Society's Compelling Interests in Man/Woman Marriage*

All these social institutional realities regarding marriage bring into sharp focus the societal (and hence governmental) interests in preserving marriage as the union of a man and a woman. For it is that man/woman meaning, among the complex web of meanings constituting the marriage institution, that uniquely and materially provides the social goods described above and without which, therefore, society would be deprived of those vital social goods. This realization, illuminated by understandings of social institutions in general and marriage in particular, renders much less consequential the heated battle over the appropriate standard of judicial review of constitutional challenges to the legal definition of marriage – whether rational basis,⁶⁸ rational basis with bite,⁶⁹ intermediate,⁷⁰ heightened intermediate,⁷¹ or strict scrutiny.⁷² That is because society's interests in the perpetuation of those uniquely provided

67. This reality has been understood since before the marriage issue drew public attention. [Adoption of genderless marriage] has fascinating potential for denaturalizing the gender structure of marriage law for heterosexual couples. ... [T]he impact [of genderless marriage], if such ... prevails, will be to dismantle the legal structure of gender *in every marriage*.

Nan D. Hunter, *supra* note 53, at 16, 19 (emphasis added).

68. *Kotch v. Board of River Pilot Com'rs*, 330 U.S. 552 (1947).

69. *Lawrence v. Texas*, 539 U.S. 558 (2003).

70. *Craig v. Boren*, 429 U.S. 190 (1976).

71. *United States v. Virginia*, 518 U.S. 515 (1996).

72. *Palmore v. Sidoti*, 466 U.S. 429 (1984).

goods seem compelling indeed and because what ostensibly⁷³ is sought through this great contest – same-sex couple entry into that institution of marriage highly esteemed for so very long now – is simply not possible.

III

JUDICIAL ELISION OF THE SOCIAL INSTITUTIONAL ARGUMENT

Regarding the phenomenon of judges eliding the social institutional argument, an inquiry that aims to be helpful in the on-going marriage debate in the United States must necessarily look not just at domestic but also at Canadian and South African cases. That is so for several interrelated reasons. Most significantly, despite important differences in equality jurisprudence between the three nations,⁷⁴ certain fundamental concepts appear nearly universally in the equality jurisprudence of polities with judicial review and constitutional equality norms⁷⁵ —a category that includes Canada and South Africa as well as the United States. One of the universals in the equality equation is the weight of the societal interest advanced, or thought to be advanced, by the impugned state action. The social institutional argument aims to give a fair weight to the societal

73. I say “ostensibly” because of strong evidence that the movement to replace man/woman marriage with genderless marriage sees that project not as an end in itself but rather as a means to an essentially “nonmarriage” end. Lynn D. Wardle, *Tyranny, Federalism and the Federal Marriage Amendment*, 17 YALE J. L. & FEMINISM 221, 256 notes 181 & 182 (2005); Stewart & Duncan, *supra* note 9, at 556-58, 581-88; *see also* Sue Wise and Liz Stanley, *Beyond Marriage: “The Less Said About Love and Life-long Continuance Together the Better,”* 14 FEMINISM & PSYCHOLOGY 332, 335 (2004) (referencing the gay/lesbian rights movement’s advocacy of genderless marriage; “This position acknowledges the key, foundational properties of marriage as a social institution, for this is precisely why it is thought it will lead to social equality.”), available at <http://fap.sagepub.com/cgi/reprint/14/2/332>.

74. Stewart, *supra* note 6, at 28-31, 36-38, 100-119.

75. *Id.* at 27. The nearly universal concepts often carry different labels jurisdiction to jurisdiction.

interests implicated by the man/woman limitation in marriage. With the judiciary of all three countries having experience with equality-based demands for the redefinition of marriage,⁷⁶ the social institutional argument has been raised in all three countries – and elided in all three countries. Furthermore, manners of elision that have yet to appear in courts in the United States are already apparent in Canada and (perhaps) South Africa, providing a preview of potential future judicial action and elision stateside. Consequently, the foundation exists for a productive and even necessary comparative law approach, and indeed a U.S.-centric approach would seem to be doomed to inadequacy.

As of the first week of December 2005, a number of appellate courts in the three countries had adjudicated claims to genderless marriage. Of most interest here are the opinions issued by courts that had before them at the time, at least in rudimentary form, the social institutional argument and in some fashion considered the institutional nature of marriage. I count six cases resulting in such opinions: *EGALE v. Attorney General (Canada)*⁷⁷ from the British Columbia Court of Appeal in May 2003; *Halpern v. Toronto (City)*⁷⁸ from the Ontario Court of Appeal in June 2003; *Goodridge v. Department of Public Health*⁷⁹ from the Massachusetts Supreme Judicial Court in November 2003; *Morrison v. Sadler*⁸⁰ from the Indiana Court of Appeals in January 2005; *Lewis v. Harris*⁸¹ from New Jersey's Appellate Division in June 2005; and *Minister of Home*

76. See the cases discussed in the remainder of this Part.

77. [2003] 13 B.C.L.R. (4th) 1, [2003] 225 D.L.R. (4th) 472.

78. [2003] OJ No 2268, [2003] 225 D.L.R. (4th) 529.

79. 798 N.E.2d 941.

80. 821 N.E.2d 15 (Ind. App. 2005).

81. 875 A.2d 259.

*Affairs v. Fourie*⁸² from South Africa's Constitutional Court in December 2005.⁸³

The question I want to address is how the judicial opinions favoring genderless marriage handled the social institutional argument. Those include *EGALE's* three-judge decision mandating genderless marriage; *Halpern's* equivalent; *Goodridge's* three-justice plurality opinion; *Lewis's* one-judge dissenting opinion; and the *Fourie* decision, which, although not mandating the redefinition of marriage, leaving the task of specifying changes in marriage and family law to Parliament, nevertheless can be read under certain approaches as "favoring" genderless marriage. For reasons that will become clear, I am also interested in the opinion of the judge in *Pottle v. Attorney General (Canada)*⁸⁴ before the Supreme Court of Newfoundland and Labrador, Trial Division, an opinion mandating genderless marriage and one that qualifies as a "second-generation" judicial handling of the social institutional argument.

82. CCT 60/04, slip op. (S. Afr. Const. Ct. Dec. 1, 2005), available at <http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT60-04>. The lower appellate court hearing the South Africa marriage case apparently did not have before it in even rudimentary form the social institutional argument, and that court's opinion suggests no awareness of the argument. *Fourie v. Minister of Home Affairs*, 2005 (3) BCLR 241 (SCA) (S. Afr.).

83. Also in December 2005, New York's Supreme Court, Appellate Division, First Judicial Department, issued *Hernandez v. Robles*, Index No. 103434/04, 2005 NY Slip Op 09436 (N.Y. App. Div. Dec. 8, 2005), available at http://www.courts.state.ny.us/reporter/3dseries/2005/2005_09436.htm. The three-judge majority opinion and the one-judge concurring opinion, in rejecting a state constitutional claim for genderless marriage, acknowledge rudimentary aspects of the social institutional argument only to the extent that those two opinions, *id.* at *7, *23, cite and quote from Justice Cordy's articulation of the argument in *Goodridge*, 798 N.E.2d at 995-96. The one-judge dissenting opinion entirely ignores the social institutional argument, although that argument engages most points attempted by the dissent.

84. See Transcript of Record, *Pottle v. Attorney General (Canada)*, 2004 O1T 3964, available at http://www.manwomanmarriage.org/jrm/pdf/Pottle_transcript.pdf.

(Cite as 1 DUKE J. CONST. L. & PUB. POL'Y 1, 30)

A. The Dissenting Opinion in *Lewis*

Perhaps the most startling judicial performance was the one appearing in the dissenting opinion from New Jersey's *Lewis* case. It is startling exactly because the dissenting opinion assiduously refused to acknowledge or even allude to the social institutional argument when that argument was very much on the table. Both the majority opinion and the concurring opinion addressed the social institutional nature of marriage, and the concurring opinion sets out in fairly complete fashion the social institutional argument. Thus, the concurring opinion notes that marriage is a social institution comprised by shared public meanings, that those meanings extend beyond the constricted "close personal relationship" model of marriage (which "strips the social institution 'of any goal or end beyond the intrinsic emotional, psychological, or sexual satisfaction which the relationship brings to the individuals involved'"), that to eliminate the core constitutive meaning of the union of a man and a woman would be to render the institution "non-recognizable and unable to perform its vital function" and would be to "seriously compromise[, if not entirely destabilize[] . . . the durability and viability of this fundamental social institution," that the law "has a purpose and a power to preserve or change public meanings and thus a purpose and a power to preserve or change social institutions," and that "its opposite-sex feature makes it [the marriage institution] meaningful and achieves important public purposes," including the public and rational privileging of heterosexual intercourse in marriage and the advancement of marriage's "private welfare" purpose.⁸⁵ Yet from the dissenting opinion not a word about the social institutional argument, not a word about what was certainly a

85. *Lewis*, 875 A.2d at 275-78 (Parrillo, J., concurring).

central pillar of the majority's reasoning.

I do not suggest that a judge is somehow bound to address every possible argument bearing on his decision. But I do suggest that there is a hierarchy of sources of such arguments and that those sources at the top can be ignored only at a price of judicial and intellectual integrity. At the very top perhaps are arguments (reasons, if you will) appearing in binding precedent. Near the top would be reasons advanced in sources normally considered persuasive and authoritative. And at least that high would be reasons advanced by one's judicial colleagues in the very same case, especially if those reasons are material to the colleagues' decision. In *Lewis*, the social institutional argument was material to the decision of the majority. Yet the dissenting opinion chose to not engage that argument but rather to remain utterly silent regarding it, and in the circumstances that was no doubt a deliberate decision. In these respects, the judicial performance reflected in the *Lewis* dissenting opinion must be adjudged disappointing, if not worse.⁸⁶

B. *EGALE, Halpern, and Goodridge*

These three 2003 cases mandating genderless marriage are helpfully considered together. Despite the fact that *EGALE* and *Halpern* are Canadian Charter cases and *Goodridge* addressed claims based on the Massachusetts constitution, there is considerable similarity of analytic strategy between the three across a number of issues,⁸⁷ and that similarity is certainly present with respect to the

86. The three-judge plurality opinion and the one-judge concurring opinion in *Goodridge* partake of this same deficiency. The dissenting opinion of Justice Cordy sets forth the social institutional argument in considerable detail, *see Goodridge*, 798 N.E.2d at 995-97, but the plurality opinion in large measure ignores it and the concurring opinion ignores it completely. Perhaps those having enough votes to mandate a result are under less obligation to respond to the arguments advanced by their colleagues who do not.

87. Stewart, *supra* note 6, at 41-99.

social institutional argument.⁸⁸

The *EGALE*, *Halpern*, and *Goodridge* courts all proceeded with a full awareness of the social institutional nature of marriage. Indeed, the plurality opinion in *Goodridge* begins: "Marriage is a vital social institution."⁸⁹ The opinions in that case then go on to refer to *institution* in the context of marriage over 80 times. The *Halpern* decision has more than 40 such references; the decision in *EGALE*, more than 35. The *Halpern* court had the benefit of a cogent institutional argument from the Attorney General, which the court summarized like this:

Changing the definition of marriage to incorporate same-sex couples would profoundly change the very essence of a fundamental societal institution. The AGC points to no-fault divorce as an example of how changing one of the essential features of marriage, its permanence, had the unintended result of destabilizing the institution with unexpectedly high divorce rates. This, it is said, has had a destabilizing effect on the family, with adverse effects on men, women and children. Tampering with another of the core features, its opposite-sex nature, may also have unexpected and unintended results.⁹⁰

The *Goodridge* majority had the benefit of Justice Cordy's detailed treatment of the social institutional argument in his dissenting opinion.⁹¹ Moreover, the three courts repeatedly acknowledged both the large change they were mandating in the public meaning of marriage and the law's strong "educative" or "expressive" function in

88. *Id.* at 75-85.

89. 798 N.E. 2d at 948.

90. 225 D.L.R. (4th) 529 at para. 133.

91. 798 N.E.2d at 995-97.

cases such as this.⁹²

So the important question arises how these courts proceeded to reach a conclusion that mandated genderless marriage.

The first of several answers to that question is that they used what fairly may be called the "large change/no change" elision. As noted, the three courts did acknowledge the large change the courts' mandates would effect in the public meaning of marriage. *EGALE* states that "the relief requested, if granted, would constitute a profound change to the meaning of marriage, and would be viewed as such by a significant portion of the Canadian public, whether or not it supported the change."⁹³ The lower court in the *Halpern* case expressed the same view,⁹⁴ and the *Goodridge* plurality opinion stated: "Certainly our decision today marks a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries."⁹⁵ But juxtaposed with these assessments of "profound" and "significant" change of meaning are assertions that the genderless marriage decisions do not and will not change the institution of marriage. Thus, the *Goodridge* plurality opinion says, immediately after the sentence just quoted: "But it [the court's decision] does not disturb the fundamental value of marriage in our society."⁹⁶ And *EGALE* and *Halpern*, with their adoption of the no-downside argument, manifest a similar view. As just noted, in *Halpern* the Attorney General argued that "[c]hanging the definition of marriage to incorporate same-sex couples would profoundly change the very essence of a

92. Stewart, *supra* note 6, at 77-80 (collecting citations and quotes from the three cases).

93. 2003 BCCA 251 at para. 78.

94. [2002] OJ 2714, 215 D.L.R. (4th) 223 (Ont. Civ. Ct.) at paras. 97-98.

95. 798 N.E.2d at 965.

96. *Id.*

fundamental societal institution,"⁹⁷ but the court rejected this as "speculative."⁹⁸

These judicial assertions of "no change" in the institution of marriage, in light of the acknowledged "profound" and "significant" change in the public meaning of marriage, are flatly contradicted by social institutional realities. Social institutions are constituted by – are nothing other than, if you will – shared public meanings. To change those meanings is to change the institution, including the quantity and quality of its social goods. To change those meanings radically is to deinstitutionalize the old institution (and thereby lose its social goods) and to replace it with a new one.

And the argument advanced by *Halpern* and *Goodridge* to buttress the "no change" assertion is itself contradicted by social institutional realities. The *Goodridge* plurality opinion presents as proof of "no change" the intentions of the same-sex couples then before the court: "Here, the plaintiffs seek only to be married, not to undermine the institution of civil marriage,"⁹⁹ and: "That same-sex couples are willing to [enter civil marriage] . . . is a testament to the enduring place of marriage in our laws and in the human spirit."¹⁰⁰ *Halpern* takes the same tack: "The Couples are not seeking to abolish the institution of marriage; they are seeking access to it."¹⁰¹ Yet the probative value of such intentions and willingness is not at all apparent; it seems nonsensical that the intentions of a handful of people could insulate a vast social institution constituted by its public meanings from change resulting from a profound alteration in those

97. 225 D.L.R. (4th) 529 at para. 133.

98. *Id.* at para. 134.

99. 798 N.E.2d at 965.

100. *Id.*

101. 225 D.L.R. (4th) 529 at para. 129.

meanings. The social reality is that the intentions and conduct of an individual or even a small group of individuals can neither prevent nor effect institutional change. This bears repeating: "[T]here are acts which are possible only for all individuals, but not for any single individual. Changing, creating, maintaining or destroying institutions are examples of this."¹⁰²

The second answer to the key question of how these three courts handled the social institutional argument is that they used what fairly may be called the "selectively impotent law" elision. Again as noted, the three courts acknowledged the law's strong "educative," or "expressive," function and, indeed, make that function a lynchpin of many arguments. For example, the *Goodridge* plurality opinion speaks of an unchanged definition giving a "stamp of approval" to stereotypes.¹⁰³ And *Halpern* repeatedly speaks of the definition of man/woman marriage "perpetuating" "views" about the capacities of same-sex couples.¹⁰⁴ Yet the acknowledged educative function of law seems to reinforce the lessons of social institutional studies regarding civil institutions as webs of significance; law has a purpose and a power to preserve or change public meanings and thus a purpose and a power to preserve or change social institutions. More directly to the present context, the social institution of marriage is not at all immune, but rather is open, to fundamental change resulting from a profound change in the law's definition of marriage. The three cases manifest a quick readiness to acknowledge law's educative and hence society-changing power when some preferred value is being advanced, while manifesting a stubborn refusal to acknowledge that same power when its use places the goods of man/woman marriage

102. Lagerspetz, *supra* note 21, at 82.

103. 798 N.E.2d at 962.

104. *E.g.*, 225 D.L.R. (4th) 529.at para. 94.

at risk. Yet the law is not both potent and impotent in the very same endeavor.¹⁰⁵

It may or may not be a proper judicial role to weigh the societal costs against the societal benefits flowing from a profound change in the public meanings of marriage (a question addressed later), but the three cases' fundamental inconsistency of approach to benefits and costs cannot qualify as a defensible judicial performance.

The *Goodridge* plurality opinion contains another elision, one unique to itself. The Commonwealth had pled for the preservation of man/woman marriage by pointing to one of its valuable social goods: man/woman marriage provides for that child-rearing mode — married mother/father child-rearing — that correlates (in ways not subject to reasonable dispute¹⁰⁶) with the optimal outcomes deemed crucial for a child's (and hence society's) well being. The plurality opinion studiously avoided taking issue with the reality of that social good. 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,"¹⁰⁷ and, on that shifted basis, argued 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 orientation."¹⁰⁸

105. For a strong rejection of the "impotent law" argument by a leading scholar on historical and contemporary marriage in America, see Nancy F. Cott, *The Power of Government in Marriage*, 11 *THE GOOD SOCIETY* 88 (2002).

106. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 979–80 (Mass. 2003) (Sosman, J., dissenting).

107. 798 N.E.2d at 962.

108. *Id.* at 962-64.

This analysis is valid only to the extent that protecting the optimal child-rearing mode (man/woman marriage) is the same governmental endeavor as "protecting the welfare of children" (as the plurality opinion uses that phrase). But this is not at all clear. Reflection suggests that the two endeavors are substantially different. Protecting the present welfare of individual children found in varying circumstances is, in the way the plurality opinion addresses it, the provision of public assistance of some form or another to individuals (or their care-takers). By contrast, protecting the optimal child-rearing mode (man/woman marriage) entails the protection, sustenance, and perpetuation of a social institution. Thus understood, the two different governmental protective endeavors are just that, different. The plurality opinion disappoints in that it provides no demonstration of the equivalency or overlap of the two endeavors and thus provides no justification for its shift from one to the other. Nor does the difference the plurality opinion ignores seem much diminished by the common notion of "child welfare" even broadly conceived; that is because the endeavor to protect the optimal child-rearing mode, with its institutional focus, looks primarily to improve the private welfare received by future generations, whereas the personalized protective endeavor made the basis of the plurality opinion's argument is an exercise in the present provision of public welfare.

Simply put then, the *Goodridge* plurality opinion never honestly came to grips with important social institutional realities relative to man/woman marriage, because it chose yet again to elide those realities.

Finally, there is an elision unique to *Halpern*. With respect to the Attorney General's institutional argument, the *Halpern* court insisted that the government must prove with "cogent evidence" that the

redefinition of marriage would in the future result in any loss of valuable social goods or otherwise lead to societal harm. Ignoring the teachings of social institutional studies in general and the power of the Attorney General's specific demonstration – the no-fault divorce "reform" battered permanence as a core constitutive meaning of the marriage institution, resulting in a great upsurge in divorce with all that development's accompanying and now well-documented societal harm – the *Halpern* court labelled any evidence of adverse consequences from legal redefinition as "speculative."¹⁰⁹ It did this without acknowledging the obvious reason no historical (as opposed to "speculative") evidence exists in the genderless marriage context; genderless marriage is a new experiment, and it is the very pace of the genderless marriage advocates' march that leaves "unprovable" with historic evidence the experiment's outcomes. As to the uncontroversial teachings of social institutional studies and their illumination of the consequences of institutional exchange, the court was silent.

C. The Trial Court's Decision in Newfoundland's *Pottle* Case

The *Pottle* decision¹¹⁰ merits examination because it is a "second generation" case; the judge knew of the defects in *Goodridge*, *Halpern* and *EGALE* pointed out above but, apparently believing that he ought to reach the same result, nevertheless made an effort toward an original harmonizing of social institutional realities with the genderless marriage project. He failed, in ways that are instructive.

A person not trained in the law but representing himself, Pastor Gordon Young, sought to intervene in *Pottle* so as to provide a voice in favor of preserving man/woman marriage, and the court allowed a

109. 225 DLR (4th) 529 at para. 134.

110. Transcript, *supra* note 84.

limited intervention.¹¹¹ With a remarkable grasp of the social institutional realities, Pastor Young presented them in oral argument and added this original metaphor (which becomes important in understanding the court's decision): "If you have an orange and an apple side-by-side and scoop out the inside of the orange and replace it with the apple, you will end up with something that looks like an orange on the outside, but in fact its fundamental essence will have been changed. The metaphor, of course, aims to teach the different natures of man/woman marriage and genderless marriage."¹¹²

Immediately after Pastor Young had used the metaphor, the trial judge responded in words that merit full quote:

The metaphor you used, scooping out the orange and putting an apple inside, and therefore changing the fundamental character, is an intriguing one. I think what you were saying is that if you allow same-sex couples to, if you will, come under the umbrella of marriage, to do so you have to strip away some of the characteristics or the incidents of marriage, as they have been traditionally understood. Whilst that may be true, when you're looking at marriage as a cultural or a social institution, in so far as individuals are concerned, does it affect an opposite-sex couple who want to marry and who want to have a marriage relationship, if you will, in a traditional form, who subscribe to the values of . . . the cooperation between the sexes, procreation, and the provision of a mother and father. Would not an expanded definition of marriage still allow those who subscribe to the traditional notions of marriage, still to have a marriage relationship that involves those characteristics and those values?¹¹³

To which question Pastor Young replied that the new definition would not result in "the old institution enhanced" but would result in

111. *Id.* at 61.

112. *Id.* at 190-91.

113. *Id.* at 194-95.

the "whole institution [being] changed radically" exactly because "such profound characteristics are omitted from the existing institution."¹¹⁴

But the trial judge apparently did not want to leave the analytical work there. He went on to say, again in words that merit full quotation:

People choose to enter the state of matrimony for all sorts of reasons, and with varying intentions as to how that relationship will develop and be conducted thereafter. Those who believe that marriage is for promoting procreation and ensuring that children will have an opportunity for influence by both genders in their development, may continue to do so. In that sense, for them, the core of the orange has not changed. On the other hand, those who wish other benefits of marriage . . . may want to avail of the relationship of marriage for those other characteristics that are associated with it.¹¹⁵

He then asserted that the fundamental differences between the genderless marriage institution and the man/woman marriage institution "should not, in principle, matter."¹¹⁶ With that, the trial judge finally concluded that he preferred "not the metaphor of the apple inside the orange, but one instead of the apple and the orange co-existing side-by-side, under the umbrella of equality."¹¹⁷

The trial court's analysis, I suggest, does not adequately come to grips with at least four social institutional realities. The first elision is a common one in the popular debate, a shift from the macro to the micro. Genderless marriage proponents often deploy the language of autonomous individuality. By that, I mean a discourse focused solely

114. *Id.* at 195.

115. *Id.* at 208.

116. *Id.*

117. *Id.*

on individuals *qua* individuals, or couples *qua* couples, with no reference to their social context or to institutional realities. An example of this is actually an effective political tactic deployed by genderless marriage proponents. The tactic is to ask, "How can letting me and my [same-sex] partner marry in any way hurt your marriage?" Or, "How is Jim and John marrying going to have any effect on yours and your husband's relationship." By its very language, this question forces the issue into the micro framework, that is, it requires that the marriage issue be decided on the basis of benefits and harms to specific individuals or couples, as in "me and my partner" or "you and your husband." And by that same language, the question precludes consideration of the marriage issue in the macro framework, that is, the framework provided by social institutional studies. Moreover, it is precisely because of this "forcing" mechanism that the question is so often an effective political tactic. After all, not many lay people (besides the rare Pastor Young) are prepared to respond by saying, "Well, if Jim and John marry, that means that our society will have changed a core constitutive meaning of the vital social institution of marriage from the union of a man and a woman to the union of any two persons. With that radical change, the old institution will disappear and therefore, necessarily, its invaluable social goods will disappear. Those social goods have meant a great deal to my forebears and their society and to me and my society and I want my posterity to have those social goods down through their generations, because I don't think they can have a good society without them."

Nor, it seems to me, can the macro-to-micro shift be justified by the assertion that the constitutional rights at play, whether of equality or liberty, are individual rights and that therefore the legal analysis must operate at the micro level. Although the relevant equality and

(Cite as 1 DUKE J. CONST. L. & PUB. POL'Y 1, 42)

liberty rights are indeed individual (or personal) rights, the social institutional argument is not advanced to counter abstract notions of equality, liberty, or dignity but rather to give a clear understanding of the scope and power of the societal (and hence governmental) interests at stake in the decision to preserve or jettison the social institution of man/woman marriage. 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. At some point any rational equality or liberty jurisprudence must, to retain its rationality, give important societal interests their due. The equality and liberty jurisprudence of the federal judiciary and of each state judiciary do that.¹¹⁸ Certainly a 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, and, in the marriage cases, that is what the social institutional argument provides. The macro-to-micro shift is a mechanism to obscure that

118. It is less certain that Canadian and South African equality jurisprudence give important societal interests their due. Canadian equality jurisprudence requires analysis through two steps. The first step, or Section 15 analysis, determines, without any regard to societal interests, whether the impugned government action distinguishes between a rightholder and others and thereby burdens the former's sense of dignity in a way that, through the eyes of the rightholder but with a bit of objective perception thrown in, is just not right. If so, that is discrimination. *E.g.*, *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497, at paras. 21-88. The second step, or Section 1 analysis, determines whether the government can meet a heavy burden of justifying that discrimination; it is "the government's burden under s. 1 . . . to justify a breach of human dignity [i.e., to justify a judicially determined 'discrimination' made without any regard to societal interests]." *Halpern*, 225 D.L.R. (4th) 529 at para. 92 (*relying* on *Lavoie v. Canada*, [2002] 1 S.C.R. 769, at paras. 809-10). But that analysis must again measure and give full weight to the rightholder's affected interests and self-perceived wounded dignity. *Halpern*, 225 D.L.R. (4th) 529 at para. 119. In other words, when at last the societal interests are allowed onto the radar screen, they must be viewed through a particular filter, the filter of that already determined "breach of human dignity." South African equality jurisprudence requires a not dissimilar approach, *see* *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs*, 2000 (2) SALR 1 (CC), and indeed is responsive to developments in Canadian equality jurisprudence. *E.g.*, *President of the Republic of South Africa v. Hugo*, 1997 (4) SA 1 (CC), at para. 41.

(Cite as 1 DUKE J. CONST. L. & PUB. POL'Y 1, 43)

understanding and thereby preclude that fair measurement.

The *Pottle* trial judge rather expressly made the shift from macro to micro. "Whilst that [the macro social institutional argument] may be true, when you're looking at marriage as a cultural or a social institution, [shift to micro] in so far as individuals are concerned, does it affect an opposite-sex couple who want to marry and who want to have a marriage relationship . . ."119 This macro-to-micro shift elides, of course, the fundamental understanding that marriage is a social institution and that marriage therefore cannot be rationally or intelligently considered politically (in the broadest sense of the word) except on the basis of that understanding. The trial court could not get to where it seemingly wanted to go on the basis of that understanding; the court therefore simply shifted the discourse away from that macro understanding to the micro world of autonomous individuality. Confronted with the macro understanding, the trial court could not rationally deny the profound societal effects of the redefinition of marriage, but by shifting to the micro perspective, the court could comfortably ignore them.

The *Pottle* trial judge also appears to have slipped into an elision present in *Halpern* and *Goodridge* and discussed above, an avoidance of the reality that an individual or even small groups of individuals, by their life choices and conduct, can neither sustain nor alter nor unmake a vast social institution. A common and further component of this elision is the notion that ubiquitous variety in individuals' marriage customs, perceptions, and conduct somehow means that the whole institution is up for grabs. That the judge was laboring under this notion is suggested by this language from the bench: "People choose to enter the state of matrimony for all sorts of

119. Transcript, *supra* note 84, at 194.

(Cite as 1 DUKE J. CONST. L. & PUB. POL'Y 1, 44)

reasons, and with varying intentions as to how that relationship will develop and be conducted thereafter."¹²⁰ Yet this notion elides the virtually universal reality that a shared core and constitutive meaning of marriage is the union of a man and a woman.¹²¹ Although it is true that in our society the constitutive meanings of the marriage institution do not include a bride in a white wedding gown or a stay-at-home wife, those meanings most certainly include a bride and a groom, a wife and a husband. And of course it is that core meaning of the union of a man and a woman that must go in order for, in the judge's words, "those [that is, same-sex couples] who wish other benefits of marriage ... to avail of the relationship of marriage"¹²² And that is a reality the trial court evaded.

The *Pottle* court's "umbrella" metaphor, created as a counter to Pastor Young's "altered orange" metaphor, operates as the court's third elision of social institutional realities. Recall what the court said: "So I prefer, therefore, not the metaphor of the apple inside the orange, but one instead of the apple and the orange co-existing side-by-side, under the umbrella of equality."¹²³

This is an argument that society can indeed sustain at the same time two social institutions authoritatively called *marriage* but radically different in their core constitutive meanings. This is an argument that society, at one and the same time, can teach the people (especially the children) that marriage means the union of a man and

120. *Id.* at 208.

121. Gallagher, *supra* note 8, at 45 ("Marriage is a virtually universal social institution. ... [E]verywhere marriage has something to do with bringing together a man and a woman into a public – not merely private – sexual union, in which the rights and responsibilities of the husband and wife towards each other and any children their sexual union produces are publicly – not privately – defined and enforced.")

122. Transcript, *supra* note 83, at 208.

123. *Id.*

a woman and that marriage means the union of any two persons. But of course society cannot do that; it is nonsensical to say that it can. This notion of two co-existing "arrangements" makes sense only if the court had in mind the de-institutionalization of marriage, for a society is capable of accommodating a number of alternative lifestyles. But it seems clear that the court had no such thing in mind. It began its decision by saying: "If there's one thing that everybody agrees on, in this courtroom and in our society today, I think is that marriage is a fundamental social institution."¹²⁴ Nor did the court's language anywhere suggest that it intended the loss of marriage's social goods, something that must happen when the institution providing those goods is deinstitutionalized. No, the thinking reflected in the "umbrella" metaphor is nothing other than an elision of uncontroversial social institutional realities.

The *Pottle* court's fourth elision is seen in its adoption of the "enclave" argument. The enclave argument holds that those in our society who do not agree with the teachings and formative influences of the genderless marriage institution and the interests genderless marriage advances can simply retreat to an enclave, whether it be a linguistic, social, and/or religious enclave. In their own enclave, such persons would be free to do their own marriage thing unaffected by the new social institution. The judge initially put the argument in these words:

Whilst that may be true, when you're looking at marriage as a cultural or a social institution, in so far as individuals are concerned, does it affect an opposite-sex couple who want to marry and who want to have a marriage relationship, if you will, in a traditional form, who subscribe to the values of . . . the cooperation between the sexes, procreation, and the provision of

124. *Id.* at 203.

a mother and father. Would not an expanded definition of marriage still allow those who subscribe to the traditional notions of marriage, still to have a marriage relationship that involves those characteristics and those values?¹²⁵

He reemphasized the enclave argument with these words: "Those who believe that marriage is for promoting procreation and ensuring that children will have an opportunity for influence by both genders in their development, may continue to do so. In that sense, for them, the core of the orange has not changed."¹²⁶

As I have noted elsewhere,¹²⁷ there are problems with the notion that resourceful people could still find ways to communicate to the next generations of children the unique goods of man/woman marriage and its value. Certainly some might; by private educational endeavor it is possible for families or other groups to establish a sort of linguistic enclave in the heart of a community that has no comprehension of what matters to them. But to the degree that members of the enclave were to adopt the speech of the community, they would lose the power to name and, in large part, the power to discern what once mattered to their forbears. To that degree, their forbears' ways would seem implausible to them, and probably even unintelligible. (This was Klara's experience relative to the social institution of private property.) The bare possibility that people could, with considerable difficulty and sacrifice, maintain the meanings for their children of man/woman marriage is therefore just that—a bare possibility.

The possibility becomes even less substantial upon realization that

125. *Id.* at 194-95.

126. *Id.* at 208.

127. Stewart, *supra* note 6, at 82-83.

[t]o change the core meaning of marriage from the union of a man and a woman. . . to the union of any two persons [will result in] . . . the new meaning [being] mandated in texts, in schools, and in many other parts of the public square and voluntarily published by the media and other institutions, with society, especially its children, thereby losing the ability to discern the meanings of the old institution.¹²⁸

I therefore think this picture to be misleading: the State of (fill in the blank: Massachusetts, California, etc.) as the happy home of many different marriage norm communities, each doing its own marriage thing, each equally valid before the law, each equally secure in its own space. There is reason to believe that the genuinely realistic picture as a matter of legal and social fact is far different: The state mandates by force of polity-wide law one and only one marriage institution and one and only one marriage norm, and that is genderless marriage. After all, the advocates of genderless marriage are not taking the position that the law should get out of the marriage business and leave the definition of marriage to private action or private enclaves. Quite the contrary, they are insisting that constitutional doctrine compels (or public policy makes wise) the polity-wide adoption of the genderless marriage institution. Consequently, the genderless marriage norm will be mandated in and reinforced by texts, mandated in and reinforced by schools, and mandated in and reinforced by many other parts of the public square and, furthermore, will be voluntarily published by the media and

128. *Id.* at 111. Helen Reece's observation merits repetition here:

When norms are socially contested, this can lead to the formation of diverse norm communities, such as religious organisations or feminist groups, so that people who are dissatisfied with the prevailing norms can enter a different and more congenial norm community. But this is not a complete solution because the social construction of choices runs too deep: the dissident community may seem unthinkable or may be too costly for someone raised in the dominant community; it may also be merely reactive to or even defined by the dominant norm community.

REECE, *supra* note 19, at 38.

(Cite as 1 DUKE J. CONST. L. & PUB. POL'Y 1, 48)

other institutions. One marriage norm community will be officially sanctioned and protected; all other marriage norm communities will be officially constrained, will be officially disdained and sharply curtailed.¹²⁹

To say otherwise is to say that the law, as an institution itself, would not be subject to strong institutional mandates—some sounding in logic and consistency, some in more elementary considerations—to be persistent and thoroughgoing in enforcing its newly declared "constitutional" norm. In the same vein, to say otherwise is to say that the law is impotent to reinforce, to alter, or to dismantle social institutions, and no rational, informed person says that.

In all these ways, the *Pottle* trial court's efforts to harmonize the genderless marriage project with social institutional realities must be adjudged inadequate.

D. The Constitutional Court's Decision in South Africa's *Fourie* Case

Before the Constitutional Court, the South African government presented its interests in preserving man/woman marriage by

129. Gallagher, *supra* note 8, at 67 ("If same-sex marriage is a right, powerful legal pressures will be brought to bear on religions and other organizations that fail to acknowledge this right. The capacity of schools and faith communities to transmit the marriage idea to the next generation will be sharply curtailed. People who believe that children need mothers and fathers will be treated like bigots in the public square."); *see also* Douglas Farrow, *Rights and Recognition*, in *DIVORCING MARRIAGE*, *supra* note 9, at 101-02 ("The preamble to this draft legislation [the Chrétien government's proposed genderless marriage bill of 2003] indicates that redefining marriage to make it accessible to same-sex couples will 'reflect values of tolerance, respect and equality' consistent with the *Charter*. But of course it follows that those who oppose redefinition do not reflect such values. This charge, publicly made and enshrined in law, can only diminish the respect in which such people are held . . ."); Darrel Reid & Janet Epp Buckingham, *Whose Rights? Whose Freedoms?*, in *DIVORCING MARRIAGE*, *supra* note 9, at 84 ("The fact is that millions of Canadians who are opposed to same-sex marriage have now been told by the courts that their view on marriage is contrary to the *Charter* and, by extension, un-Canadian.").

(Cite as 1 DUKE J. CONST. L. & PUB. POL'Y 1, 49)

referencing the social institutional argument. The court's opinion expressly mentioned that argument twice, once in the "Justification" section¹³⁰ and once in the "Remedy" section.¹³¹

In the former section, a less than careful reading of the opinion's key paragraph may lead to the belief that the court rejected the social institutional argument.¹³² The key language is this: "Granting access to same-sex couples would in no way attenuate the capacity of heterosexual couples to marry in the form they wished and according to the tenets of their religion." But this assertion may or may not constitute a rejection (by elision) of the social institutional argument. It does *not* if what same-sex couples are granted "access" to is a legal arrangement that does not operate to redefine marriage, and the court may well have been contemplating such a possibility because the immediately preceding sentence speaks of "enabling same-sex couples to enjoy the status and benefits coupled with responsibilities that marriage law affords to heterosexual couples."¹³³ If the court were contemplating the redefinition of marriage as the only possible outcome to its equality analysis, that language would almost certainly have been instead the more concise, direct "enabling same-sex couples to marry." Thus, it would seem that the key to what the court was contemplating in this regard is to be found in the opinion's "Remedy" section, and a few paragraphs later I examine that section to see what light it sheds on the question of the court's intent relative to the deinstitutionalization of man/woman marriage.

But returning to the "granting access" sentence, that language

130. *Minister of Public Health v. Fourie*, CCT 60/04, slip op. at paras. 110-111 (S. Afr. Const. Ct. Dec. 1, 2005), available at <http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT60-04>.

131. *Id.* at para. 123.

132. *Id.* at para. 111.

133. *Id.*

does constitute a rejection (by elision) of the social institutional argument *if* the opinion is mandating the redefinition of marriage prerequisite to same-sex couples having "access" to marriage. Under this reading, the opinion is not an engagement with the social institutional argument but an elision of it; the bald assertion, the *ipse dixit*, that the redefinition of marriage "would in no way attenuate the capacity of heterosexual couples to marry in the form they wished and according to the tenets of their religion" is without question a macro to micro shift because (under this reading), by speaking of heterosexual couples *qua* heterosexual couples and only in that way, the opinion is evading social context and thus social institutional realities.

Under this reading, the opinion must further be seen as adopting the discredited "no-downside" argument.¹³⁴ The classic statement of that argument goes something like this: "[R]ecognizing same-sex unions will not be likely to deter any heterosexual person from marrying or having children."¹³⁵ This language suggests, and no doubt intends to, that all the goods of man/woman marriage will still be available post-redefinition because men and women will continue to marry each other at an undiminished rate. But this suggestion misses the point. The point is what the straight men and women will be marrying "into." They will be marrying into a much different social institution than their parents married into simply because, undeniably, a constitutive core meaning will be radically different. And it is not state-sanctioned opposite-sex coupling that produces

134. See Stewart, *supra* note 6, at 35-36, 71-85.

135. Bala, *supra* note 4, at 21; see also Hernandez v. Robles, Index No. 103434/04, 2005 NY Slip Op 09436, at *36 (N.Y. App. Div. Dec. 8, 2005) (Saxe, J.P., dissenting) ("[I]t is not apparent how allowing same-sex couples to marry will have any effect on the continued survival of the [marriage] institution itself, or even its ongoing vitality among heterosexuals."), available at http://www.courts.state.ny.us/reporter/3dseries/2005/2005_09436.htm.

the old institution's social goods; it is the old institution's meanings that do that. So with the loss of those meanings comes the loss of the social goods and thus the collapse of the "no-downside" argument.

This realization of what opposite-sex couples will be marrying into illuminates a further inadequacy of the "no-downside" argument. Social institutions are renewed and strengthened by use consistent with the shared public meanings constituting them. "[E]ach use of the institution is in a sense a renewal of that institution. Cars and shirts wear out as we use them but constant use renews and strengthens institutions such as marriage. . . ."136 After redefinition, every use of the new institution by a man/woman couple will validate and reinforce it; after all, that couple will be invoking on their union the sanctioning power of a polity that rigorously views their union as one between "two persons." Because those "two persons" happen to be a man and a woman, the consequences may initially be misunderstood by many or even most, but the strengthening effect on the new institution is largely unavoidable.¹³⁷ Thus the argument—"just as many straight men and women will marry"—actually cuts against, not in favor of, genderless marriage once the social institutional realities are given their due.

Regarding the two possible readings of the *Fourie* opinion's

136. SEARLE, *supra* note 15, at 57.

137. I say "largely" because, as things now stand in Canada and Massachusetts, a man and a woman desiring to avoid complicity with the new institutional regime could fulfill that desire—but only by openly participating in a decidedly exclusive marriage ceremony sanctioned only by a decidedly exclusive norm community (in other words, by openly foregoing civilly sanctioned genderless marriage by means of a consciously political act). The price for doing so includes forfeiting the benefits of civil marriage and being officially labeled as bigoted (or at least "discriminatory")—that is, as hostile to the constitutional ideal of equality. Interestingly, *Fourie* summarizes a South African Law Reform Commission proposal that would allow for heterosexual couples as a matter of "personal choice" to opt for "opposite-sex specific marriages," legally existing parallel to a genderless marriage regime, without forfeiting the benefits of civil marriage. *Fourie*, CCT 60/04, slip op. at para. 143-46.

treatment of the social institutional argument in its "Justification" section, I believe that the more accurate reading clears the court of suspicion that it both elided that argument with the macro to micro shift and adopted the discredited "no-downside" argument. Analysis of the "Remedy" section provides strong support for that belief, and that analysis follows.

The *Fourie* opinion's "Remedy" section, in a lengthy discussion,¹³⁸ never mandates the redefinition of marriage, does reject the urgings of one member of the court¹³⁹ and of the plaintiff parties (applicants)¹⁴⁰ that the court do so now, and expressly gives Parliament, for at least one year,¹⁴¹ "a free hand . . . within the framework established"¹⁴² by the opinion to fashion a legislative scheme that brings same-sex couples "in from the legal cold."¹⁴³

Regarding "the framework established" by the opinion, the court repeatedly makes clear that Parliament's arrangement need not be a redefinition of marriage. Thus:

The simple textual change pleaded for by the Equality Project [redefining marriage] and the comprehensive legislative project being finalised by the [South Africa Law Reform Commission, creating parallel man/woman marriage and genderless marriage legal regimes], do not, however, necessarily exhaust the legislative paths which could be followed to correct the defect.¹⁴⁴

More:

Thus a legislative intervention which had the effect of enabling

138. *Id.* at paras. 115-55.

139. *Id.* at paras. 163-73 (O'Regan, J., concurring and dissenting).

140. *E.g., id.* at para. 123.

141. *Id.* at paras. 156-61.

142. *Id.* at para. 155.

143. *Id.* at para. 138.

144. *Id.* at para. 147.

same-sex couples to enjoy the status, entitlements and responsibilities that heterosexual couples achieve through marriage, would without more override any discriminatory impact flowing from the common law [man/woman] definition standing on its own. . . . The effect would be that formal registration of same-sex unions [note "unions," not "marriages"] would automatically extend the common law and statutory legal consequences to same-sex couples that flow to heterosexual couples from marriage.¹⁴⁵

As a final example, the opinion speaks of "leaving Parliament free, if it chose, to amend the law so as to provide an *alternative* statutory mechanism to enable same-sex couples to enjoy their constitutional rights . . ."¹⁴⁶

145. *Id.* at para. 122.

146. *Id.* at para. 135 (emphasis added). In considering what South African constitutional norms *require* for same-sex couples (as opposed to *allow*), in at least sixteen instances the *Fourie* opinion uses careful language that stops short (no doubt consciously) of requiring that marriage be redefined as the union of any two persons. *Id.* at paras. 44 ("Are gay and lesbian people unfairly discriminated against because they are prevented [not from marrying but] from achieving the status and benefits coupled with responsibilities which heterosexual couples acquire from marriage?"); 62 (speaking of "the consequences of total exclusion of same-sex couples from [not marriage but] the solemnities and consequences of marriage"); 71 (after a long description of the incidents of civil marriage, stating that the "exclusion of same-sex couples [not from marriage but] from the benefits and responsibilities of marriage" renders such couples "outsiders"); 72 (noting "intangible damage" to same-sex couples, including their present inability "to celebrate their commitment to each other [not in a marriage ceremony but] in a joyous public event recognized by the law," and stating that "[i]f heterosexual couples have the option of deciding whether to marry or not, so should same-sex couples have the choice as whether to seek to achieve [not marital status but] a status and a set of entitlements and responsibilities [not identical to but] on a par with those enjoyed by heterosexual couples."); 75 ("It is clear that the exclusion of same-sex couples [not from marriage but] from the status, entitlements and responsibilities accorded to heterosexual couples through marriage, constitutes a denial to them of their right to equal protection and benefit of the law."); 77 ("The problem is that the Marriage Act simply makes no provision for them [i.e., same-sex couples] [not to marry but] to have their unions recognized and protected in the same way as it does for those of heterosexual couples."); 78 (the unconstitutional defect is that "the law in the past failed to secure for same-sex couples [not marriage but] the dignity, benefits and responsibilities that it accords to heterosexual couples."); 79 (the impugned laws constitute "unfair discrimination . . . to the extent that the law makes no provision for them [i.e., same-sex couples] [not to marry but] to achieve the dignity, status, benefits and responsibilities available to heterosexual couples through marriage."); 81 (to be constitutional sufficient, the law "would also have to accord to same-sex couples [not entry into marriage but] a public and private

This conclusion – that the *Fourie* opinion leaves Parliament free to provide a legal arrangement for same-sex couples that does not redefine marriage – is supported, not undermined, by three other portions of the opinion that in some way take up the concept of redefinition.

First is the portion where the opinion addresses the contention of the government and amici that "whatever remedy the state adopts cannot include altering the definition of marriage" contained in the impugned laws, that is, the union of a man and a woman.¹⁴⁷ The opinion rejects the four arguments advanced in support of this contention¹⁴⁸ and, in doing so, of course rejects the contention. But note carefully what the contention is. The contention is simply that "the state," meaning each branch of the government, is powerless to alter the man/woman definition. The opinion here rejects this contention, as it must to validate what it does later – declare that, by judicial act, marriage will be redefined if, within one year, Parliament does not provide an adequate legal arrangement for same-sex

status equal to that which heterosexual couples achieve from being married."); 82 (the impugned laws are "unconstitutional to the extent that they make no appropriate provision for gay and lesbian people [not to marry but] to celebrate their unions in the same way that they enable heterosexual couples to do so."); 87 (the "procreation argument ... cannot prevail in the face of the claim of same-sex couples to be accorded [not marriage but] the status, entitlements, and responsibilities which heterosexual couples receive through marriage."); 98 (speaking of "the right of same-sex couples [not to marry but] to enjoy the same status, entitlements and responsibilities as marriage law accords to heterosexual couples"); 105 (same as just quoted); 114 (the failure of the impugned laws, not to redefine marriage as the union of any two persons but, "to provide the means whereby same-sex couples can enjoy the same status, entitlements and responsibilities accorded to heterosexual couples through marriage, constitutes an unjustifiable violation of their" constitutional rights); 117 (the law relative to marriage vows is deficient not because same-sex couples cannot take those vows but because the law does not allow "for an equivalent [not the same] public declaration being made by same-sex couples"); 118 (the impugned laws are unconstitutional to the "extent that they make no provision for same-sex couples [not to marry but] to enjoy the status, entitlements and responsibilities it accords to heterosexual couples.").

147. *Id.* at para. 83.

148. *Id.* at paras. 84-109.

couples.¹⁴⁹ In short, nothing in this portion of the opinion amounts to a holding that Parliament *must* redefine marriage, only that it may.

The second portion addresses the question of what is to be done with the old common law definition of marriage. The opinion says that "the common law definition of marriage is inconsistent with the Constitution and invalid to the extent that it fails to provide to same-sex couples the status and benefits coupled with responsibilities which it accords to heterosexual couples."¹⁵⁰ But the "question then arises whether, having made such a declaration, the Court itself should develop the common law so as to remedy the consequences of the common law's under-inclusive character."¹⁵¹ The court's answer is "no,"¹⁵² at least for the year that Parliament is given to enact comprehensive legislation. This is because the court could

take account of the impact that any correction to the [Marriage] Act, or enactment of a separate statute, would automatically have on the common law. Thus a legislative intervention which had the effect of enabling same-sex couples to enjoy the status, entitlements and responsibilities that heterosexual couples achieve through marriage, would without more override any discriminatory impact flowing from the common law definition standing on its own.¹⁵³

With these words regarding "a separate statute" and "enabling same-sex couples to enjoy the status, entitlements and responsibilities that heterosexual couples achieve through marriage," the court yet again¹⁵⁴ made clear that an acceptable Parliamentary

149. *Id.* at para. 161. The court, unlike Parliament, has available to it of course only the blunt tool of the redefinition of marriage.

150. *Id.* at para. 120.

151. *Id.*

152. *Id.* at paras. 122, 135, 139.

153. *Id.* at para. 122.

154. *Id.*

solution need not be the redefinition of marriage. And equally clearly, the *Fourie* opinion did not alter the common law definition of marriage to the union of any two persons.

The third portion covers the opinion's firm rejection of a "separate but equal" legal arrangement flowing from discriminatory animus.¹⁵⁵ That portion does not support the notion that Parliament must redefine marriage because the separate-but-equal rejection is immediately followed by these careful words:

It is precisely sensitivity to context and impact that suggest that equal treatment does not invariably require identical treatments. . . . Differential treatment in itself does not necessarily violate the dignity of those affected. It is when separation implies repudiation, connotes distaste or inferiority and perpetuates a caste-like status that it becomes constitutionally invidious."¹⁵⁶

Those careful words rather plainly allow rather than reject a Parliamentary solution that does not redefine marriage.

The interesting question arising from all this – that is, from the *Fourie* opinion's forceful and at times moving language calling for equality, dignity, and respect for gay men and lesbians, on one hand, and, on the other hand, the opinion's refusal to judicially redefine marriage to achieve that equality, dignity, and respect coupled with its deference to Parliament to select a solution, including one that does not redefine marriage – is whether there is a way to plausibly and rationally harmonize those two fundamental aspects of the opinion. I suggest that there is a way. That way is to understand that the justices comprehended and respected the social institutional

155. *Id.* at paras. 150-51.

156. *Id.* at para. 152. Of course, Parliamentary action that accommodates same-sex couples but does not redefine marriage, when taken on the basis of the social institutional argument, would partake of no discriminatory animus. The purpose of that argument, its animus if you will, is to preserve the vital social goods provided uniquely by man/woman marriage; the argument is devoid of animus towards gay men and lesbians in our society. *See infra* Section V.

argument. Reflection sustains this understanding.

First, there is the *Fourie* opinion's very curious approach to the social institutional argument in the "Remedy" section. The government and pro-marriage amici had "argued forcibly against" judicial redefinition of marriage as a remedy because such a remedy "would not merely modify a well-established institution" but "would completely restructure and possibly even destroy it as an institution."¹⁵⁷ The court saw this as a "three-fold" argument:

[F]irst, that time should be given for the public to be involved in an issue of such great public interest and importance; second, that it was neither competent nor appropriate for the Court itself to restructure the institution of marriage in such a radical way; and third, that only Parliament had the authority to create such a radical remedy¹⁵⁸

The court followed by saying that it would "start"¹⁵⁹ with the public involvement component, a component the opinion rejects because of the substantial public involvement relative to the South Africa Law Reform Commission endeavor.¹⁶⁰ After that "start," however, the opinion does not expressly signal that it is next addressing the second and third components of the government's argument, the respective competence of the court and of Parliament to "radically restructure and possibly even destroy" the man/woman marriage institution. Indeed, the opinion thereafter never counters or even questions the government's argument about adverse institutional impacts. What the opinion does do, in those following paragraphs, is defer to Parliamentary competence and, as shown above, give Parliament the leeway to provide to same-sex couples a

157. *Id.* at para. 123.

158. *Id.*

159. *Id.* at para. 124.

160. *Id.* at paras. 124-31.

legal arrangement that does not redefine marriage, an arrangement that thus would avoid all the ill effects to result from deinstitutionalization of man/woman marriage. That deference reflects respect for rather than repudiation of the social institutional argument.

It is true that, in providing for judicial redefinition if Parliament does not act within one year,¹⁶¹ the opinion validates the court's raw power to so act. But one senses the court's belief that Parliament will act timely and adequately; to deny that belief is to ascribe a deep cynicism to the court. And a court with a grasp of the social institutional realities will want, for reasons of the court's own institutional interests, any redefinition, if it is to happen, to be a legislative rather than a judicial act. In that way, adverse consequences of deinstitutionalization can plausibly be labelled the responsibility of another branch of government; after all, the court can always say truthfully, as demonstrated above, that it gave Parliament the leeway to provide a legal arrangement for same-sex couples that did not require the redefinition of marriage.¹⁶²

Finally, there is this: The *Fourie* opinion was authored by Justice Albie Sachs. He is a brilliant person of vast learning.¹⁶³ It is therefore virtually certain that he has, and probably has had for a long time, a firm grasp of the understandings and insights emerging from social institutional studies and comprising the building blocks of the social institutional argument for the preservation of man/woman marriage;

161. *Id.* at para. 161.

162. Relatedly, the court certainly must have recognized that only Parliament had the tools to craft a sophisticated legal arrangement accommodating and reconciling the many social interests at stake, the court by contrast having only a blunt tool, the redefinition or not of marriage.

163. My positive authority for that assertion is my careful reading over a number of years of his judicial opinions; my negative authority, no knowledgeable person will deny the assertion.

those understandings and insights are uncontroversial among those who have seriously attended to the subject.¹⁶⁴ This is not to say that Justice Sachs accepts all aspects of the social institutional argument as set forth here or that argument's ultimate conclusion in favor of preservation, but it is to say with some confidence that his would not be a mind that would lightly dismiss (or dismiss at all) the reality that changing core meanings constitutive of a vital social institution must inevitably have profound social impacts. His understanding that some of those impacts could be adverse is consistent with his opinion's act of sending the issue to Parliament with the power in Parliament, if it chooses, to not redefine marriage.

For these reasons, it seems valid to see the *Fourie* opinion as respecting, not rejecting by elision or otherwise, the social institutional argument. A contrary view of the opinion, given the opinion's careful language, seems hardly defensible. In any event, the validity of both possible views will likely be put to the test; post-*Fourie*, the gay/lesbian rights movement in South Africa has stated its intention to challenge in court any Parliamentary resolution other than one redefining marriage from the union of a man and a woman to the union of any two persons.¹⁶⁵

IV

NON-JUDICIAL ENGAGEMENT WITH THE SOCIAL INSTITUTIONAL ARGUMENT

I see two efforts to engage to some extent the social institutional argument. The first may be fairly called the "evolving marriage institution" argument; the second, the "overt social engineering"

164. See note 53 *supra*.

165. Telephone interview with Hazel Shelton, South African government lawyer in the *Fourie* case (Dec. 8, 2005).

argument.

A. The "Evolving Marriage Institution" Argument

This argument's most recent and perhaps most articulate iteration is Nicholas Bala's,¹⁶⁶ and it is that iteration that I will follow most closely.

The argument is premised most fundamentally on the uncontroversial understanding that marriage always has been and continues to be an "evolving" social institution. In Professor Bala's words:

[M]arriage has not been a static social or legal institution. Rather marriage has changed over the course of history in response to changing religious beliefs, social values and behaviors, technology and even demographics. Similarly there is great variation today in marital behaviors, attitudes and laws about marriage in different countries.¹⁶⁷

He further builds on the likewise uncontroversial understanding that "marriage laws [have] both reflected and reinforced changes in attitudes towards and behavior in marriage."¹⁶⁸ This language calls to mind the uncontroversial social institutional reality that society uses the law's authoritative voice to reinforce, to alter, or to dismantle the shared public meanings that constitute a social institution.

Professor Bala's next step also calls to mind another uncontroversial social institutional reality. He focuses particularly on those changes in the law that, in his judgment, both logically support and lead public opinion to support the next "inevitable" change in marriage law, the redefinition of marriage from the union

166. Bala, *supra* note 4.

167. *Id.* at 1.

168. *Id.*

of a man and a woman to the union of any two persons. He says, "In both Canada and the USA the laws and expectations for husbands and wives within marriage have changed dramatically over the past half century, setting the stage for the possible redefinition of marriage to include same-sex partners."¹⁶⁹ The institutional reality underlying and supporting this step is simply this: The shared meanings that constitute a social institution interact and are interdependent; each meaning affects and is dependent on all the others. "An institution is a *web of interrelated norms*—formal and informal—governing social relationships."¹⁷⁰

The legal changes on which Bala relies are those moving away from gender-based rights and roles towards legal equality of spouses;¹⁷¹ away from "the procreation of children . . . as a central purpose of marriage, as . . . reflected in the common concept of consummation";¹⁷² away from no legal protection (even penalties) for unwed, co-habiting couples and their offspring towards legal provision to them of a variety of rights and protections;¹⁷³ and away from the recognition of natural parenthood (that is, parenthood arising from biological ties) towards the recognition of legal parenthood (that is, parenthood as solely a status conferred by law, which may or may not consider biological ties).¹⁷⁴ Regarding the elimination of gender rights and roles in marriage, he says: "It is more difficult to argue that marriage requires two spouses of

169. *Id.* at 4.

170. Nee & Ingram, *supra* note 16, at 19.

171. "Spouses are viewed as legally equal. Gender roles in marriage are no longer *legally* prescribed." Bala, *supra* note 4, at 8 (emphasis in original).

172. *Id.* at 4.

173. *Id.* at 10.

174. *Id.* at 8. Bala does not note this but C-38, the Canadian law mandating genderless marriage, contains a provision, albeit amending the Income Tax Act, expressly replacing natural parenthood with legal parenthood.

opposite gender, since there are no longer legally specified gender roles, and socially there is growing ambiguity about the roles of 'husband' and 'wife.'¹⁷⁵ Regarding both marriage-like legal arrangements governing unwed, co-habiting couples and the recognition of legal parenthood, he says: "The approach of Canadian courts and legislatures to unmarried opposite-sex partners and relationships of children to psychological parents has . . . laid the ground work for a more flexible approach for the more recent recognition of same-sex relationships."¹⁷⁶

Although Bala does not provide anywhere a summary of his response to the social institutional argument, it seems that his response can be fairly abridged to this: The social and legal trends relative to the marriage institution are clear; the constitutive meanings of the institution are changing in a way that must inevitably lead to the law's replacement of the core man/woman meaning with the "any two persons" meaning.

An evaluation of Bala's response, it seems to me, requires the application of two important distinctions. The first is between institutional change resulting from forces other than the law, on one hand, and, on the other hand, law-mandated institutional change. In other words, the law can either require or merely reflect institutional change, and those are different phenomenon. With some subjects, those two phenomenon may play on each other so subtly and imperceptibly that they appear as one. But that is certainly not the North American marriage experience. But for *EGALE* and *Halpern*, there would be no genderless marriage in Canada today. In the presence of authoritative court decisions holding that man/woman marriage is compatible with and can certainly continue to be

175. *Id.* at 8.

176. *Id.* at 15.

nurtured under the Canadian Charter of Rights and Freedoms, there would be no genderless marriage in Canada for a long time, if ever.¹⁷⁷ But for *Goodridge*, there would be no genderless marriage anywhere in the United States today, and most probably that would continue to be the case for a long time. To state the obvious in slightly different words, it was *EGALE*, *Halpern*, and *Goodridge* that switched the meaning of marriage at its core, not society.¹⁷⁸ As noted earlier, while it is true that in our society the shared constitutive meanings of the marriage institution do not include a large number of less central practices, those shared constitutive meanings most certainly include a bride and a groom, a wife and a husband. And that will continue to be the case even in Canada until the revolution consolidates its position, something that institutional studies suggest will not take long.

For reasons that should become clear, the second important distinction is related practically to the first. That is the distinction between judge-made law and legislation. In the world, we see judicial redefinition of marriage with no legislative role (Massachusetts), legislative redefinition of marriage pursuant or in response to a judicial mandate (Canada), and legislative redefinition without

177. In a May 2003 seminar at Oxford University on the marriage issue in Canada and the United States, genderless marriage advocate Professor Robert Wintemute said that if the Supreme Court of Canada held that man/woman marriage was compatible with the Charter (a possibility he was not willing to seriously entertain), Parliament would not enact C-38, the genderless marriage bill. In December 2004, that court refused to answer the question, leaving *EGALE* and *Halpern* as the two authoritative voices on the Charter issue. In July 2005, Parliament enacted C-38 after its proponents successfully cast the issue as one strictly of Charter rights and therefore human rights. The preamble to C-38 repeats that rhetoric.

178. Because of the nature of the remedy in South Africa's *Fourie* case (leaving it to Parliament, until December 1, 2006, to find "the best ways of ensuring that same-sex couples are brought in from the legal cold"), it is too early to characterize the nature of the phenomenon in that country. *Minister of Public Health v. Fourie*, CCT 60/04, slip op. at para. 138 (S. Afr. Const. Ct Dec. 1, 2005), available at <http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT60-04>.

judicial involvement (Netherlands, Belgium, Spain). Speaking generally, it seems fair to say that the third phenomenon is much more likely to reflect rather than require sea changes relative to the core constitutive meanings of marriage. The legislative redefinition in Europe, even in Spain, appears to have majority support, which may flow from favor for justice/equality notions (a matter discussed below), from ignorance of the social institutional realities at play, from apathy relative to the man/woman marriage institution, including a devaluing of its social goods, or from some combination of those. As already demonstrated, the North American experience in contrast has been one of judge-made law requiring, not reflecting, social favor for the replacement of man/woman marriage with genderless marriage.

My first criticism of Professor Bala's response to the social institutional argument is its failure to work through the implications of these two distinctions. The response is, after all, a response to an argument deployed in very large measure in the judicial arena.¹⁷⁹ It seems the response therefore should concern itself with arguments appropriately made to a judge resolving (at least ostensibly) a constitutional equality or liberty claim. What arguments Bala's response is making to a judge in that context are not at all clear to me. But here are some guesses, with critiques.

Bala may be saying to a judge, "The direction and pace of the social/legal changes relative to the marriage institution make inevitable the big change to genderless marriage. Therefore, you can greatly discount the societal interests in man/woman marriage's social goods because of those goods' very short shelf-life." The

179. The social institutional argument is deployed in the legislative arena to a much lesser extent, probably for two reasons. First, other than California's, no state legislature has yet seriously considered redefining marriage. Second, it seems that until recently that argument's depth has not been fully congenial with the level of discourse that largely prevails in that arena.

(Cite as 1 DUKE J. CONST. L. & PUB. POL'Y 1, 65)

validity of this argument, of course, depends on the validity of the claim of inevitability, a claim founded on a confidently made reading of where social currents in history will certainly carry the marriage institution. Although the message of inevitability is a brilliant political move,¹⁸⁰ as an intellectual proposition it is dubious. For my part, I am prepared to accord to the inevitability message relative to genderless marriage all the respect and all the acknowledgements of validity due to another message of inevitability clearly to be perceived in powerful social currents revealed by history, the message preached by Karl Marx. If nothing else, the course of Marxism should teach us to be amply humble when setting forth, as an intellectual proposition, the inevitability of something as radical as the deinstitutionalization of man/woman marriage and its replacement by the institution of genderless marriage.¹⁸¹

A particularly toxic aspect of the inevitability argument in the judicial arena is its proclivity to become a self-fulfilling prophecy. Each judge who acts on the basis of the argument supplies further "evidence" of the inevitability of genderless marriage. It is entirely plausible that a bare majority of the judges (21 individuals) on the

180. This message of inevitability is a brilliant political move because it strengthens and encourages the troops on one side to see the long conflict through to its inevitable glorious outcome. At the same time, the message is influential in making those whose hearts and minds have them on the other side of the conflict more passive, more defeatist, less willing to make the kinds of sacrifices that could well make a material difference in the conflict. This past year, that phenomenon was seen first hand in Canada among those (actually a majority) who wanted to preserve marriage as the union of a man and a woman. Also, it seems at least interesting that so many different social movements have as a core belief the inevitability of the movement's triumph. I was recently reminded that Christianity is like that. An evangelical minister, discouraged by events in Canada and trying to cheer up himself and those around him, said, "Well, I peeked and read the last chapter, and we win." He was referring of course to the Book of Revelation, with its message of the final triumph of Christianity.

181. Maggie Gallagher strongly counters the "inevitability" argument in Gallagher, *supra* note 8, at 68-69, and in Joshua K. Baker & Maggie Gallagher, *Not Inevitable*, National Review Online (Dec. 1, 2004), http://www.nationalreview.com/comment/baker_gallagher200412010836.asp.

highest courts of a handful of key states – Massachusetts (a 4-3 decision), Washington, New Jersey, California, and New York – will play a material role in replacing man/woman marriage with genderless marriage. To then label that outcome the result of irresistible social forces is to be devious; to label it the work of 21 individuals who could have (and almost certainly should have¹⁸²) chosen to do otherwise is to be very much more accurate.

Bala may also be saying to a judge, "The direction and pace of the social/legal changes relative to the marriage institution means that the change to genderless marriage must be seen as a relatively small and evolutionary step, which means in turn that the societal impacts will be small and readily accommodated, without any serious societal harm." This argument can be seen as building on the social institutional realities that the shared meanings constituting a social institution interact and are interdependent and that in that web of interrelated norms governing social relationships relative to marriage are to be seen a number of fairly recently changed meanings.

But this argument ignores other social institutional realities. One is that, although constitutive meanings interact, some of the social goods provided by an institution flow quite particularly from one core meaning. Here is an example: Prior to the mid-1970's, a core meaning of marriage was permanence. That particular institutional meaning succeeded, to a degree that now looks remarkable, in teaching and forming individuals, in molding their identities, and in restraining antithetical impulses in a way that led to a relatively low rate of divorce and separation. Among the resulting social goods were a relatively high level of family stability and a relatively high and

182. See Stewart, *supra* note 6, at 130-32 (a summary of how the *EGALE*, *Halpern*, and *Goodridge* courts "did an unacceptable job with their performance of the very tasks that lie at the heart of judicial responsibility in virtually every case.").

concomitant level of childhood well-being (emotional, psychological, and financial). In a surge of "reform" between the mid-1960's and the mid-1970's, however, American and Canadian legislatures adopted legislation providing for no-fault divorce.¹⁸³ In this way and at this time, it seems fair to say, the law's authoritative voice at least for a while effectively minimized permanence as a constitutive meaning of the marriage institution. In the light of social institutional studies, what in fact then happened was unsurprising: In the ensuing years divorce skyrocketed¹⁸⁴ and the number of children of divorce rose to many millions.¹⁸⁵ The further results, now extraordinarily well documented, have been substantial injury to the physical, psychological, emotional, and financial well-being both of those made children of divorce by that "divorce revolution" and of their mothers.¹⁸⁶

183. By 1977, all but seven states had enacted no-fault divorce, and four of those seven followed within several years. Illinois made the change in 1984; South Dakota, in 1985; Utah, in 1987. Paul A. Nakonezny, Robert D. Shull, and Joseph Lee Rodgers, *The Effect of No-Fault Divorce Law on the Divorce Rate Across the 50 States and Its Relation to Income, Education, and Religiosity*, 57 J. MARRIAGE AND THE FAM. 477, 480 (1995).

184. In 1965, the American divorce rate was 10.6 per 1,000 married women age 15 and older; in 1985, it was 21.7. The National Marriage Project, *The State of Our Unions 2004* at 19, available at <http://marriage.rutgers.edu/Publications/SOOU/SOOU2004.pdf>.

In and of itself, conclusive proof of correlation (the timing of the no-fault divorce "reform" and of the upsurge in divorces) is not conclusive proof of causation (the "reform" as a substantial cause of the upsurge). But the correlation is certainly good evidence relative to the causation issue, and once it is paired with social institutional studies, the evidence it seems to me should at least shift the burden of proof and persuasion to those who would absolve the no-fault divorce "reform" of responsibility. See Nakonezny et al., *supra* note 183, at 487 ("[T]he enactment of no-fault divorce law had a clear positive influence on divorce rates.")

185. ELIZABETH MARQUARDT, *BETWEEN TWO WORLDS: THE INNER LIVES OF CHILDREN OF DIVORCE* (2005).

186. *E.g., id.*; JUDITH S. WALLERSTEIN, JULIA M. LEWIS, SANDRA BLAKESLEE, *THE UNEXPECTED LEGACY OF DIVORCE: A TWENTY-FIVE YEAR LANDMARK STUDY* (2000); LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* (2000); BARBARA DAFOE WHITEHEAD, *THE DIVORCE CULTURE: RETHINKING OUR COMMITMENTS TO MARRIAGE AND FAMILY* (1996).

Professor Bala attempts to dispute or at least downplay the social institutional realities underlying what he calls the "divorce revolution." Bala, *supra* note 4, at 6-7. He says that there

Bala's response does not explain how past changes of some constitutive meanings of marriage (whether for good or for ill) make more or less wise the proposed elimination of the man/woman meaning. Unless he is arguing that change for change's sake is good, it seems fair to require that his (or any) response based on the "evolving" nature of marriage demonstrate the wisdom of the next proposed change. After all, the valuable social goods identified at this article's outset result in large measure or entirely from the man/woman meaning. To lose that meaning is to lose those goods, just as the loss of the core meaning of permanence meant the loss of its goods – a loss now viewed, in the midst of considerable resulting suffering, as grievous. Any comfort derived from this assurance thus seems illusory: "Genderless marriage must be seen as a relatively small and evolutionary step, which means in turn that the societal impacts will be small and readily accommodated, without any serious societal harm."

is "controversy about whether the adoption of a no-fault regime is related to any long term effects on rates of divorce and family breakdown" and that "adoption of a no-fault regime is weakly correlated with increases in long term divorce rates." *Id.* at 7. He suggests that "[m]ost if not all of the increase in divorce rates in North America is attributable to a complex interaction of social, cultural and economic factors."

A footnote is not a good place to ventilate well a correlation/causation issue, *see* note 182 above, like this one. But these observations seem justified. Bala ignores the insights and even predictive power of social institutional studies in discussing the issue. He also fails to address a scientifically rigorous study of the question, Nakonezny et al., *supra* note 183, and therefore fails to come to grips in an equally rigorous way with its conclusion: "[T]he enactment of no-fault divorce law had a clear positive influence on divorce rates." *Id.* at 487. Bala's argument also violates the rule of Ockham's Razor in that, without demonstrating the inadequacy of the more parsimonious explanation (correlation plus the insights of social institutional studies), it rests on a multiplicity of vaguely alluded to "social, cultural, and economic factors" in "complex interaction." Bala, *supra* note 4, at 5. *See* Paul Vincent Spade, *Ockham's Nominalist Metaphysics: Some Main Themes*, in *THE CAMBRIDGE COMPANION TO OCKHAM* (Paul Vincent Spade ed., 1999) at 101-102. Finally, Bala's approach is marred by a certain inconsistency. He minimizes the law's impact on a marriage negative (great increase in divorce) but maximizes the law's impact in paving the way for what he views as a marriage positive (genderless marriage). *E.g.*, Bala, *supra* note 4, at 26 ("As a result of constitutional litigation, the Canadian courts prodded reluctant politicians to take action on a controversial issue . . .").

(Cite as 1 DUKE J. CONST. L. & PUB. POL'Y 1, 69)

One other aspect of Bala's response merit analysis. That response is replete with references to religious folks' opposition to genderless marriage.¹⁸⁷ Those references are entirely appropriate to demonstrate the social/political dynamics leading to adoption, or not, of genderless marriage; his response helpfully discusses both the legal and the non-legal aspects of "evolving" marriage. But a question arises whether, intending to or not, the response is also suggesting that the arguments against the move to genderless marriage all derive ultimately from religious tradition and discourse. If so, that suggestion is disquieting. As Margaret Somerville has noted:

One strategy used by same-sex marriage advocates is to label all people who oppose same-sex marriage as doing so for religious or moral reasons in order to dismiss them and their arguments as irrelevant to public policy. Good secular reasons to oppose same-sex marriage are re-characterized as religious or as based on personal morality and, therefore, as not applicable at a societal level. . . . These [tactics] . . . do not serve the best interests of either individuals or society in this debate.¹⁸⁸

Whatever the religiosity (or otherwise) of those advancing the social institutional argument, the argument itself unquestionably qualifies as "good secular reasons," or as Rawlsian "public reason."¹⁸⁹ Indeed, the social institutional argument rather precisely meets the high standard urged by Linda McClain: "The requirements of public reason would . . . require the delineation of precisely how same-sex marriages threaten the institution of marriage in terms of public reasons and political values implicit in our public culture."¹⁹⁰

187. Bala, *supra* note 4, at 1-6, 25, 32, 38.

188. Somerville, *supra* note 34, at 70-71.

189. *E.g.*, John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997).

190. Linda C. McClain, *Deliberative Democracy, Overlapping Consensus, and Same-Sex Marriage*, 66 FORDHAM L. REV. 1241, 1251 (1998).

B. The "Overt Social Engineering" Argument

This argument generally proceeds in two steps. To begin, the argument accepts, at least implicitly, virtually all the building blocks of the social institutional argument. On that basis, it then asserts that, exactly because of the powerful formative and transformative nature of social institutions, especially marriage, this core man/woman meaning must be changed, for to do so will result in a more just and equal society.

This argument partakes of intellectual honesty and moral bravery. It is intellectually honest to the extent it does not elide social institutional realities, realities that those who have attended rigorously to institutional studies deem essentially uncontroversial. It is morally brave to the extent it speaks publicly of the ultimate objective of the redefinition project, to use institutional power to transform the hearts and minds of the general populace in a way that assures full public acceptance of gay and lesbian identities and lifestyle. Such public acknowledgement of that ultimate objective is rare. Recent scholarship from man/woman marriage proponents has pointed to that ultimate objective,¹⁹¹ as has the South Africa Constitutional Court.¹⁹² Bala almost gets there:

191. Wardle, *supra* note 73, at 256 n. 181 & 182; Stewart & Duncan, *supra* note 9.

192. Minister of Public Health v. Fourie, CCT 60/04, slip op. at para. 137 (S. Afr. Const. Ct. Dec. 1, 2005), available at <http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT60-04>:

The claim by the applicants in *Fourie* of the right to get married should, in my view, be seen as part of a comprehensive wish to be able to live openly and freely as lesbian woman emancipated from all the legal taboos that historically have kept them from enjoying life in the mainstream of society. The right to celebrate their union accordingly signifies far more than a right to enter into a legal arrangement with many attendant and significant consequences, important though they may be. It represents a major symbolical milestone in their long walk to equality and dignity.

Immediately thereafter, the opinion acknowledges: "The law ... serves as a great teacher [and] establishes public norms . . ." *Id.* at ¶ 138.

(Cite as 1 DUKE J. CONST. L. & PUB. POL'Y 1, 71)

Further, it is clear that for a variety of social, psychological and legal reasons, only a minority of homosexuals in long-term relationships will exercise the right to marry in the foreseeable future. Nevertheless, the recognition of same-sex marriage is of profound symbolic significance, both for advocates and opponents. The [favorable] court decisions about same-sex marriage and the ultimate [Canadian] government response recognize the fundamental right of gays and lesbians to full equality under the law and provide important social validation of these relationships.¹⁹³

But beyond these and a few other scattered acknowledgements about an ultimate "non-marriage" objective rooted in social institutional realities,¹⁹⁴ there is silence in the public marriage debate.

That silence almost certainly results from calculation by genderless marriage proponents that what is publicly talked about – governmental benefits pertaining to marriage status, emotional benefits, protections for the children in homes headed by same-sex couples – is more politically (in the broadest sense of the word) effective. And this calculation works with a further calculation – that it is politically unwise to acknowledge the social institutional realities implicated by redefinition exactly because those realities shine the light on a price tag, indeed write that price tag. That price tag, of

193. Bala, *supra* note 4, at 26-27 (footnotes omitted).

194. *E.g.*, Sullivan, *supra* note 53, at 17 ("In the context of marriage, we are telling people in a way that almost no other institution tells people, that we mean business about the absolute equality of human beings in this society."); Wise & Stanley, *supra* note 73, at 335 ("This position [of genderless marriage advocates] acknowledges the key, foundational properties of marriage as a social institution, for this is precisely why it is thought it will lead to social equality."); Graff, *supra* note 53, at 12 ("Marriage is an institution that towers on our social horizon, defining how we think about one another If same-sex marriage becomes legal, that venerable institution will ever after stand for sexual choice"); *cf.* Cott, *supra* note 105, at 90 (the law's power over the marriage institution ought to be used "to serve more egalitarian social goals than those served in the past – goals attuned to the actual diversity of society in the United States.")

course, is the value of man/woman marriage's social goods inevitably lost when that institution is replaced with the new institution of genderless marriage. That new institution's meanings may or may not produce valuable social goods, but it plainly cannot produce those valuable goods resulting from the man/woman meaning constitutive of the old institution.

These understandings lead to my initial criticism of the "overt social engineering" argument, that it is incomplete. So far, it provides no answer to two questions raised by what it does provide. The first question is this: Why should we conclude that a rigorous valuation of the promised gains and the certain losses will show a net gain to society generally? The second: To what extent, if any, is that valuation, that cost-benefit analysis, rightly a job for judges?

That first question brings me back to Barbara and Klara. The 1918 Soviet constitution replaced the old private property institution with a new property institution. That exchange undoubtedly made for, in certain respects, a more equal society. But with its eye on the whole of human experience, history has judged that exchange a very bad one indeed. So the first question is crucial, and to date no one has made a careful, transparent valuation of man/woman marriage's unique social goods sure to be lost and genderless marriage's necessarily speculative benefits. Those who have spoken somewhat openly about using the institution of marriage for non-marriage ends speak almost exclusively of genderless marriage's benefits to the gay and lesbian community and thus say virtually nothing about the consequences to society generally, apparently out of a lack of interest in that subject or on the basis of an unstated assumption that what is good for the gay and lesbian community is good for society generally. Yet absent a credible society-wide valuation of the losses and gains to result from the proposed institutional exchange, the case for that

(Cite as 1 DUKE J. CONST. L. & PUB. POL'Y 1, 73)

exchange must remain materially deficient.

The second question – should judges be in the business either of creating their own or evaluating someone else's valuation of the losses and gains to result from the proposed institutional exchange – quite clearly ought to be answered "no." Even the judges mandating genderless marriage in *Goodridge*, *Halpern*, and *EGALE* did not claim a competence to engage in such a task; they reached their holding by denying the possibility of any losses, any downside, from their replacement of the old institution with the new, a denial clearly false. Once social institutional realities are given their due, and consequently once the judicial task can no longer be characterized with any credibility as discarding a legal definition of marriage with no rational basis,¹⁹⁵ the fact-finding and constitutional competence of judges to engage the real task must be seriously doubted.¹⁹⁶

The "overt social engineering" argument has other defects. It is plagued by a very considerable circularity in its notion of using the marriage institution to make ours a more just and equal society. The notion proceeds from the assumed or implied premise that of course man/woman marriage violates equality norms and that genderless marriage will make ours a more just society. From this beginning, it is not difficult to move to the conclusion that man/woman marriage violates equality norms and that genderless marriage will make ours a more just society. But it should go without saying that what the important discourse is all about is the meaning of equality in the

195. See *Goodridge*, 798 N.E.2d 941, 961; *Hernandez v. Robles*, Index No. 103434/04, 2005 NY Slip Op 09436 at *37-38 (N.Y. App. Div. Dec. 8, 2005) (Saxe, J.P., dissenting), available at http://www.courts.state.ny.us/reporter/3dseries/2005/2005_09436.htm.

196. Cf. *United States v. Lopez*, 514 U.S. 549, 604 (Souter, J., dissenting) ("The practice of deferring to rationally based legislative judgments ... reflects our respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes from Congress's political accountability in dealing with matters open to a wide range of possible choices.")

context of marriage, particularly its social institutional realities. The debate to date strongly suggests that the equality argument for genderless marriage can succeed only if one ignores those realities and, even more, only if one replaces the full institutional understanding of man/woman marriage with the impoverished "close personal relationship model." That model is of a "pure relationship," that is, a relationship stripped of any goal or end beyond the intrinsic, emotional, psychological, or sexual satisfaction that the relationship brings to the two adult individuals involved.¹⁹⁷ Judicial rejection of that model because it inadequately describes what marriage "is" results in judicial rejection of the equality argument for genderless marriage.¹⁹⁸ Judicial acceptance of that model's accuracy and adequacy is the foundation for judicial acceptance of that equality argument,¹⁹⁹ but to date judicial acceptance of the close personal relationship model has been an unexamined and unproven starting point of analysis, not the result of thoughtful examination. This obvious feature of cases such as *Halpern* and *Goodridge* has led Douglas Farrow to label, and fairly so, their approach as "obviously circular, and viciously so."²⁰⁰

197. Cere, *supra* note 10, at 12-20; Stewart, *supra* note 6, at 95-96.

198. See Lewis, 875 A.2d at 275-76 (J. Parrillo, concurring) (arguing that the close personal relationship model improperly ignores the full gamut of what man/woman marriage is about).

199. Stewart, *supra* note 6, at 97 ("Language in [*EGALE*, *Halpern*, and *Goodridge*] suggests ... that the courts deciding those case have consciously accepted the arguments of the close personal relationship theorists."). See Hernandez v. Robles, Index No. 103434/04, 2005 NY Slip Op 09436 (N.Y. App. Div. Dec. 8, 2005), available at http://www.courts.state.ny.us/reporter/3dseries/2005/2005_09436.htm, where the majority, in rejecting a state constitutional claim to genderless marriage, refused to adopt the close personal relationship model of marriage, which "treats all intimate and dependent relations as equal," *id.* at *9, while the dissent unequivocally adopted that model, albeit with no justification other than the bare assertion that such now constitutes a "widely held view" of marriage. *Id.* at *30.

200. Farrow, *supra* note 129, at 98-99:

To proceed at all, we need to notice that the main rights argument [equality] amounts to a nice piece of subterfuge. Its conclusion is that marriage must be redefined. This distracts us from the fact that marriage has *already* been redefined in the argument's

Further, the equality argument for genderless marriage has not yet come to grips with other social institutional realities, particularly the understandings that same-sex couples simply cannot enter the privileged marriage institution we have always known and that the sought for "marriage equality" can be achieved only by creating a radically new institution into which already married men and women are pulled and into which all couples seeking marriage in the future will enter. These understandings necessarily lead to reflection on some basic ideals of equality jurisprudence, treating similarly situated people similarly and not treating dissimilarly situated people as the same.²⁰¹ The simple fact is that, relative to the valued marriage

very first move. That is, a new category - the "close personal adult relationship" - has been invented to provide a framework for our understanding of marriage. Once this framework is accepted, it follows that homosexual unions can be marriage-like and, in that case, should qualify as marriage. If marriage is nothing but a certain form of publicly acknowledged sexual intimacy and commitment between two persons, one to which gender and biology and procreation are not directly relevant, why should the two persons not be of the same sex? Would we not be discriminating against such persons by denying to their relationship the name and benefits of marriage? And what requires such a denial? Merely the common-law definition of marriage as the union of a man and a woman. So let us change the definition and write into law that marriage is a close personal relationship between adults, a union of two persons. That will erase the discrimination and resolve the equality-rights violation. Marriage will be open to homosexuals.

This argument is obviously circular, and viciously so. Certainly there can be nothing wrong with saying that, if marriage is simply a union of two persons, two persons of the same sex must not be denied a marriage licence. Nor is it necessarily wrong (though it may be foolish) to write into law that marriage is, or rather will be, simply a union of two persons. It is wrong, however, to claim that we *must* write this new definition into law in order to avoid unconstitutional discrimination and equality-rights violations, when in fact no such discrimination or violation is possible until after the new definition is in place.

201. See *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (ruling that a class of one treated differently from others similarly situated can be discrimination under the Fourteenth Amendment); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985) (the Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike."); ARISTOTLE, *ETHICA NICHOMACEA* 1113a-13b Book V3 (W.D. Ross trans., Clarendon Press 1925) ("[T]hings that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unalikehood."); cf. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at paras 4-21. Regarding *Andrews's* conception

(Cite as 1 DUKE J. CONST. L. & PUB. POL'Y 1, 76)

institution received to date, man/woman couples and same-sex couples are not similarly situated. And this is not a matter of "legal definitional preclusion." Rather, this is a matter of the very nature and purposes of this social institution. That nature and those purposes are clearly not the result of any anti-gay/lesbian animus²⁰² but have their own practical logic and effectiveness. In this light, those making the equality argument for genderless marriage simply have not made their case at the most fundamental level of equality jurisprudence. In this light, the equality argument for genderless marriage shows itself as nothing more than a demand that the law eliminate a vital social institution – an ancient institution of betterment and one fashioned from the beginning with no relevant animus, an institution that provides social goods crucially important to society – so that those dissimilarly situated relative to that institution will be leveled.

V

CONCLUSION

To not blink at the social institutional realities is to realize, with understandable regret, that there can be no "win-win" outcome to the present marriage contest. A society can sustain and nurture

that Charter equality "entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration," *Andrews*, 1 S.C.R. 143, at para. 16, and the application of that conception to genderless marriage claims, *see Stewart, supra* note 6, at 102-115.

202. *See Baker v. State*, 744 A.2d 864, 887 (Vt. 1999) ("Plaintiffs have not demonstrated that the exclusion of same-sex couples from the definition of marriage was intended to discriminate against women or lesbians and gay men, as racial segregation was designed to maintain the pernicious doctrine of white supremacy."); *compare Hernandez v. Robles*, Index No. 103434/04, 2005 NY Slip Op 09436, at *19 (N.Y. App. Div. Dec. 8, 2005) (Catterson, J., concurring) ("Plaintiffs have not alleged, much less proved, that the legislators who enacted the New York statutes related to marriage were motivated by" an "anti-homosexual animus"), *available at* http://www.courts.state.ny.us/reporter/3dseries/2005/2005_09436.htm, *with id.* at *34 (Saxe, J.P., dissenting) ("The discriminatory impetus for the distinction made by the [marriage] statutes ... was implicit.").

(Cite as 1 DUKE J. CONST. L. & PUB. POL'Y 1, 77)

man/woman marriage but only by declining genderless marriage. Or a society can sustain and nurture genderless marriage but only by causing, through force of law, the demise of the old institution. Each society must choose. And a choice as portentous as this choice may never come before us again.²⁰³

203. Sullivan, *supra* note 53, at 18: “The work we do today, and the issues we raise in this debate are among the most profound that this country has ever discussed and among the most important the country now faces.”

(Cite as 1 DUKE J. CONST. L. & PUB. POL'Y 1, 78)