

No. 02499

Maryland Court of Special Appeals

Frank Conaway, *et al.*, Defendants-Appellants

vs.

Gitanjali Deane, *et al.*, Plaintiffs-Appellees

No. 02499

September Term, 2005

**Appeal from the Circuit Court for Baltimore City
(Honorable M. Brooke Murdock, Judge)**

**PETITION AND BRIEF OF *AMICI CURIAE*
CITIZENS FOR TRADITIONAL FAMILIES,
FAMILY LEADER FOUNDATION, and
UNITED FAMILIES INTERNATIONAL
IN SUPPORT OF DEFENDANTS-APPELLANTS**

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PETITION AND BRIEF OF AMICI CURIAE

Three non-profit organizations engaged in charitable and community work protective of marriage and family – Citizens for Traditional Marriage, Family Leader Foundation, and United Families International – petition this Court for permission to file in this case their Brief of Amici Curiae in support of the defendants-appellants.

Citizens for Traditional Marriage (CTF) filed an amicus brief with the Circuit Court in this case. CTF is a Maryland-based citizens’ organization that promotes the welfare of families and children. It does this by working to preserve and strengthen the vital social institution of man/woman marriage. CTF believes that a decision redefining marriage in Maryland will change the social institution of marriage in ways that will prevent the institution from performing its vital functions, with consequent harm to society and, particularly, children.

Family Leader Foundation (FLF) is a non-profit organization with members in Maryland and nationwide. FLF works in the public square to promote principles that support the family—with marriage between a man and a woman at its heart—as central to the hope and future of nations, peoples, and the rising generation. FLF supports educational and other efforts to secure support for principles that strengthen home and family.

United Families International (UFI) is a non-sectarian, 501(c)(3) public charity founded in 1978 and based in Gilbert, Arizona, with members in Maryland and nationwide. UFI seeks to maintain and strengthen the family in the United States and other countries. The United Nations has granted to UFI official consultative status as a non-governmental organization, and UFI has participated in United Nations conferences. Because UFI is committed to supporting those measures that maintain and strengthen marriage and the family, it has supported a broad range of efforts to reaffirm the legal definition of marriage as the union of a man and a woman.

Thus, the three *amici* are well positioned to provide helpful perspectives and understandings to this Court as it resolves issues of broad public interest and profound societal impact in this case. Accordingly, the *amici* respectfully request that this Court grant leave for the filing of the following Brief of *Amicus Curiae*.

BRIEF OF AMICI CURIAE

I. INTRODUCTION

It has been called, cleverly but aptly, “The War of the Ring.”¹ It is being waged all across the public square, but the hottest and most consequential battles are in the courts. On one side are those who want marriage legally redefined to “the union of any two persons,” with the law treating the parties’ gender as irrelevant to the civil meaning of marriage. Hence, *genderless marriage*. On the other side are those who want to preserve “the union of a man and a woman” as a core meaning of the marriage institution. Hence, *man/woman marriage*.

In support of man/woman marriage, this brief demonstrates the veracity of three propositions. First, society has compelling interests in preserving the union of a man and a woman as a core meaning of the vital social institution of marriage. Second, for the law to replace that meaning with a radically different meaning, the union of any two persons, assures in time the loss of a number of invaluable social goods. Third, because of the very nature of social institutions – and marriage is unquestionably a social institution – it could not be otherwise.

This brief makes that demonstration by setting forth what is emerging as the clearest and strongest explication of society’s (and, hence, government’s) compelling interests in man/woman marriage. That explication is generally referred to as the social institutional argument for marriage. Before summarizing that argument, however, certain of its extraordinary aspects merit note.

¹ Daniel Cere, *The War of the Ring*, in DIVORCING MARRIAGE: UNVEILING THE DANGERS IN CANADA’S NEW SOCIAL EXPERIMENT 9 (Daniel Cere & Douglas Farrow eds., 2004) [hereinafter DIVORCING MARRIAGE].

1. Each building block in the argument is uncontroversial. Virtually all serious students of social institutions accept the validity of the understandings comprising it.²
2. To date, the argument remains unrefuted. The appellate courts that have mandated genderless marriage (in Massachusetts and Canada), in order to reach that result, ignored or otherwise evaded the argument, and these courts' elision of the argument is now well demonstrated in the scholarly literature.³ Likewise, none of the serious legal scholars supporting genderless marriage have genuinely engaged and countered the argument.⁴ In contrast, the courts that have engaged the argument have rejected genderless marriage.⁵
3. The argument fully qualifies as Rawlsian "public reason"⁶ and satisfies even this high standard: "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."⁷ This achievement of the social institutional argument merits emphasis exactly because of a phenomenon that Margaret Somerville has accurately observed:

One strategy used by same-sex marriage advocates is to label all people who oppose same-sex marriage as doing so for religious or

² Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 DUKE J. CONST. L. & PUB. POL'Y 1, 8-27 (2006), available at <http://www.law.duke.edu/journals/DJCLPP/index.php?action=showitem&id=24>.

³ *Id.* at 28-60.

⁴ *Id.* at 60-77.

⁵ *E.g.*, Lewis v. Harris, 875 A.2d 259 (N.J. Super. Ct. App. Div. 2005); *id.* at 275-78 (Parrillo, J., concurring); *see also* Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941, 983-1005 (Mass. 2003) (Cordy, J., dissenting).

⁶ *E.g.*, John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997).

⁷ Linda C. McClain, *Deliberative Democracy, Overlapping Consensus, and Same-Sex Marriage*, 66 FORDHAM L. REV. 1241, 1251 (1998).

- moral reasons in order to dismiss them and their arguments as irrelevant to public policy. [Further,] 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.⁸
4. Because the argument demonstrates that adoption of genderless marriage will necessarily de-institutionalize man/woman marriage and thereby cause the loss of its unique social goods, the argument effectively refutes the notion that the proponents of man/woman marriage have only one “real” motive: animus towards gay men and lesbians.⁹
 5. Because the argument demonstrates society’s (and hence the government’s) compelling interests in preserving the vital social institution of man/woman marriage, the argument is a sufficient response to all constitutional challenges leveled at the laws sustaining that institution, and that is so regardless of what standard of review the court applies.¹⁰

⁸ Margaret Somerville, *What About the Children?*, in *DIVORCING MARRIAGE*, *supra* note 1, at 70-71. She goes on to note that these tactics “do not serve the best interests of either individuals or society in this debate.” *Id.* at 71.

⁹ *See, e.g.*, *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003) (“The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual.”); Editorial, *For Gay Marriage*, *BOSTON GLOBE*, July 8, 2003, at A18 (“For all the legal acrobatics offered by opponents, it is hard to see how anything other than an animus toward gays and lesbians prevents them from obtaining the same ‘benefits and protections’ enjoyed by heterosexual couples.”); Gay & Lesbian Advocates & Defenders, *Is DOMA Doomed?: The Federal “Defense of Marriage Act” and State Anti-Gay, Anti-Marriage Laws*, 13, available at <http://www.glad.org/rights/IsDOMADoomed.pdf> (“DOMA’s sheer breadth and its lack of any connection to a legitimate legislative end demonstrates that it can only be explained by anti-gay animus.”).

¹⁰ Stewart, *supra* note 2, at 27-28.

II. THE SOCIAL INSTITUTIONAL ARGUMENT FOR MAN/WOMAN MARRIAGE IS A SUFFICIENT RESPONSE TO ALL CONSTITUTIONAL CHALLENGES LEVELED AGAINST IT.

The social institutional argument for man/woman marriage is a sufficient response to all constitutional challenges because of what it succeeds in demonstrating.¹¹ 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, providing identities, purposes, and projects; and that in this way, these meanings provide vital social goods.¹² Across time and cultures, a core meaning constitutive of the marriage institution has virtually always been the union of a man and a woman.¹³ This core man/woman meaning is powerful and even indispensable for the marriage institution's production of a number of its valuable social goods.¹⁴ The man/woman marriage institution is:

1. Society's most effective means to draw a man and a woman together into a relationship as the parents of the child they create, to bind that child to his or her parents, and to encourage fulfillment of the natural obligations between husband and wife and parents and child.¹⁵
2. Society's best and probably only effective means to make real the right of a child to know and be brought up by his or her biological parents (with exceptions justified only in the best interests of the child, not those of any adult).¹⁶

¹¹ See Stewart, *supra* note 2, at 6-7.

¹² *Id.* at 8-15; see Behr v. Behr, 181 Md. 422, 426, 30 A.2d 750, 752 (Md. 1943) (“While marriage is a civil contract and not a sacrament, the law regards it with a sanctity which is not attributed to any other kind of contract; on the theory that the public has a direct interest in it as *an institution of transcendent importance to social welfare.*” (emphasis added)).

¹³ Stewart, *supra* note 2, at 15.

¹⁴ *Id.* at 16-20, 67-69.

¹⁵ *Id.*

¹⁶ *Id.*

3. The most effective means humankind has developed to maximize the private welfare provided to those children (nearly all) conceived by passionate, heterosexual coupling (with “private welfare” meaning not just the basic requirements like food and shelter, but also education, play, work, discipline, love, and respect).¹⁷
4. The indispensable foundation for that child-rearing mode – that is, married mother/father child-rearing – that correlates (in ways not subject to reasonable dispute) with the optimal outcomes deemed crucial for a child’s – and therefore society’s – well being.¹⁸
5. Society’s primary and most effective means of bridging the male-female divide.¹⁹
6. Society’s only means of conferring the identity of, and transforming a male into, husband/father and a female into wife/mother, statuses and identities particularly beneficial to society.²⁰
7. 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 in the scholarly literature and remains, to date, unrefuted.²¹

The social institutional 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.²² Further, 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 (in the case of genderless marriage, only promised, not yet

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 6, 11-13, 24-25.

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

Another social institutional reality is that a society can have, at any one time, only one social institution denominated *marriage*.²⁵ That is because a society, as a simple matter of reality, cannot at one and the same time tell the people, and especially the children, that *marriage* means “the union of a man and a woman” and that *marriage* means “the union of any two persons.”²⁶ The one meaning necessarily displaces the other. Hence, every society must choose either to retain the old man/woman marriage institution, or by force of law, to suppress it and put in its place the radically different genderless marriage institution. But to suppress, by force of “constitutional” law no less, the shared public meanings constituting the old institution is to lose the valuable social goods flowing from those institutionalized meanings. Thus, the social institutional argument refutes the “no-downside” argument advanced by genderless marriage proponents and seen in the famous tactic of asking: “How will letting Jim and John marry hurt Aaron’s and Anne’s marriage?”²⁷

These social institutional realities further reveal phrases like *gay marriage* or *same-sex marriage* to be misleading.²⁸ These phrases get people thinking that a

²³ *Id.* at 20-24.

²⁴ *Id.* at 20 n. 53.

²⁵ *Id.* at 24.

²⁶ *Id.* Further, by demonstrating that the societal choice is indeed between one or the other of two radically different marriage institutions, the social institutional argument illuminates the silly nature of the argument that the man/woman marriage institution is not sufficiently “well or narrowly tailored” to pass constitutional muster.

²⁷ *Id.* at 41-44.

²⁸ *Id.* at 25.

society will keep its old kind of marriage and just get a new and separate kind.²⁹ But that is not so because of the social institutional realities just reviewed; a society can have one or the other but never at the same time both possible kinds of civil marriage.³⁰ And after a judicial decree of genderless marriage, made in the name of constitutional norms of equality, liberty, dignity, or autonomy, Maryland would certainly *not* be 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.³¹ Rather, Maryland would have one marriage norm community (genderless marriage) officially sanctioned and officially protected; all other marriage norm communities would be officially constrained, officially disdained, and sharply curtailed.³² Moreover, there are profound problems with the notion that supporters of the old marriage institution can, if they want, just huddle together in some linguistic, social, or religious enclave to preserve the old institution and its meanings.³³ Social institutional studies teach that the dominant society and its language and meanings will, like an ocean and its waves, inevitably wear down and cause to disappear any island enclave of an opposing norm. To the degree that members of the enclave were to adopt the speech of the dominant society, they would lose the power to name and in large part the power to discern what once mattered to their forbears.³⁴ To that degree, their forbears' ways would seem implausible to them, and probably even unintelligible.³⁵

The courts that give these social institutional realities their due reject the argument urged by the plaintiffs-appellees, that man/woman marriage violates

²⁹ *Id.*

³⁰ *Id.* at 24-25.

³¹ *Id.* at 48.

³² *Id.* at 49.

³³ *Id.* at 46-47.

³⁴ *Id.* at 47.

³⁵ *Id.*

constitutional norms and therefore must be replaced with genderless marriage. The courts that have held man/woman marriage to be constitutionally infirm have, in one way or another, gotten to that result by ignoring or otherwise evading the social institutional realities. The next section so demonstrates.

III. THE COURTS THAT HAVE REDEFINED MARRIAGE HAVE ELIDED THE SOCIAL INSTITUTIONAL REALITIES OF MARRIAGE.

A. The Circuit Court Decision in this Case, the Dissenting Opinion in New York's *Hernandez v. Robles*, and the Dissent in New Jersey's *Lewis v. Harris* Ignore the Social Institutional Argument.

Between the Circuit Court's decision in this case, the dissenting opinion in New York's recent *Hernandez v. Robles*,³⁶ and the dissenting opinion in New Jersey's recent *Lewis v. Harris*,³⁷ there are two great similarities: one, each would invoke constitutional norms of equality and liberty to mandate that the man/woman marriage institution be replaced with the genderless marriage institution; two, each simply ignored entirely the social institutional realities pertaining to that judicially mandated and radical change. But this evasion of the social institutional argument for man/woman marriage is inexcusable. For example, the Circuit Court in this case had the argument before it in considerable detail.³⁸ In New Jersey's *Lewis v. Harris*, the two judges in the majority engaged the social institutional realities³⁹ and went on to reject the argument that state

³⁶ 805 N.Y.S.2d 354, 377-89 (App. Div.2005) (Saxe, J., dissenting).

³⁷ 875 A.2d 259, 278-90 (N.J. Super. A.D. 2005) (Collester, J., dissenting).

³⁸ Through the *amicus* brief of Citizens for Traditional Families.

³⁹ Both the majority opinion and the concurring opinion in the *Lewis* decision 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

constitutional norms mandated the redefinition of marriage. The dissenting opinion, however, would have held that man/woman marriage must be replaced by genderless marriage. But in arguing for redefinition of marriage, that opinion quite simply ignored entirely the social institutional argument,⁴⁰ even though that argument was material to the majority's analysis and conclusion.

This particular approach, taken by the Circuit Court, the New Jersey dissenter, and the New York dissenter, may be fairly characterized as the "willful blindness" elision. The other judges who, to-date, have ruled for genderless marriage have employed other kinds of elision. Scholarly work has described in some detail that elision phenomenon and has demonstrated the inadequacies of such judicial performances.⁴¹ Each of the following subsections describes one of these judicial elisions and, in so doing, captures the essence of the analytical failure behind it.

B. The Elisions in *Goodridge*, *Halpern*, and *EGALE* Destroy Those Opinions' Intellectual Integrity.

The phenomenon of judicial elision of the social institutional argument can be seen clearly in the three most important genderless marriage cases – *Goodridge*⁴² in Massachusetts, *EGALE*⁴³ in British Columbia, and *Halpern*⁴⁴ in

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. *Lewis v. Harris*, 875 A.2d 259, 275-78 (N.J. Super. A.D. 2005) (Parrillo, J., concurring) (citations omitted).

⁴⁰ *Id.* at 278-90 (Collester, J., dissenting).

⁴¹ Stewart, *supra* note 2, at 28-60.

⁴² *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

⁴³ *EGALE v. Attorney General (Canada)*, 2003 BCCA 251, 225 DLR (4th) 472 (2003).

Ontario.⁴⁵ There is considerable similarity of analytic strategy between the three across a number of issues,⁴⁶ and that similarity is certainly present with respect to the social institutional argument.⁴⁷ The *EGALE*, *Halpern*, and *Goodridge* courts all proceeded with a full awareness of the social institutional nature of marriage.⁴⁸ 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 cases such as this.

So the important question arises how these courts proceeded to reach a conclusion that mandated genderless marriage. The answer is that, with a variety of tactics, they elided the very argument that sustains the constitutionality of man/woman marriage.

⁴⁴ *Halpern v. Toronto (City)*, 225 DLR (4th) 528 (Ont. Ct. App. 2003).

⁴⁵ Consideration of both American and Canadian cases is warranted in this context for several interrelated reasons. Most fundamentally, despite some not insubstantial differences in equality jurisprudence between the two nations, certain fundamental concepts (although carrying different labels) appear nearly universally in the equality jurisprudence of polities with judicial review and constitutional equality norms, and that includes Canada and the American jurisdictions, including California. *See generally* Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 CANADIAN J. FAM. L. 11, 26-31, 36-38 (2004) (available at <http://www.manwomanmarriage.org/jrm/pdf/jrm.pdf>) (hereafter *Judicial Redefinition*). One of the universals in the equality equation is the weight of the societal (or governmental) interest advanced (or thought to be) by the impugned state action. The social institutional argument aims to give a fair weight to the societal interests implicated by the man/woman limitation in marriage. Thus, the argument has been raised in both countries; Canadian judicial experience with equality-based demands for redefinition of marriage is at least as great as the corresponding American experience, and the elision phenomenon is to be seen in both countries.

⁴⁶ *Id.* at 41-99.

⁴⁷ *Id.* at 75-85.

⁴⁸ Indeed, the plurality opinion in *Goodridge* begins: "Marriage is a vital social institution." 798 N.E.2d at 948. The opinions in that case then go on to refer to institution in the context of marriage over 80 times. The *Halpern* decision has more than 40 such references; the decision in *EGALE*, more than 35.

1. The “large change/no change” elision.

As noted, the three courts repeatedly acknowledged 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.”⁴⁹ The lower court in the *Halpern* case expressed the same view,⁵⁰ 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.”⁵¹ 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.”⁵² And *EGALE* and *Halpern* manifest a similar view.

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

⁴⁹ 2003 BCCA 251 at para. 78.

⁵⁰ [2002] OJ 2714, 215 DLR (4th) 223 (Ont. Civ. Ct.) at paras. 97-98.

⁵¹ 798 N.E.2d at 965.

⁵² *Id.*

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”,⁵³ 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.”⁵⁴ *Halpern* takes the same tack: “The Couples are not seeking to abolish the institution of marriage; they are seeking access to it.”⁵⁵ 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 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.

2. *The “selectively impotent law” elision.*

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 linchpin of many arguments. For example, the *Goodridge* plurality opinion speaks of an unchanged definition giving a “stamp of approval” to stereotypes.⁵⁶ And *Halpern* repeatedly speaks of the definition of man/woman marriage “perpetuating” “views” about the capacities of same-sex couples.⁵⁷ Yet the acknowledged educative function of law seems to reinforce the lessons of social institutional theory 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

⁵³ *Id.* at 995-97.

⁵⁴ *Id.*

⁵⁵ 225 DLR (4th) 529 at para. 129.

⁵⁶ 798 N.E.2d at 962.

⁵⁷ *E.g.*, 225 DLR (4th) 529 at para. 94.

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 at risk. Yet the law is not both potent and impotent in the very same endeavor.⁵⁸

Even if it were a proper judicial role to weigh the societal costs against the societal benefits flowing from a profound change in the public meanings of marriage (it is not, as shown later), the three cases' fundamental inconsistency of approach to benefits and costs cannot qualify as a defensible judicial performance.

3. Preserving the institution and providing child welfare: eliding the differences.

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 dispute) 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”,⁵⁹ 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

⁵⁸ 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).

⁵⁹ 798 N.E.2d at 962-63.

“penalize[s] children by depriving them of State benefits because the State disapproves of their parents' sexual orientation.”⁶⁰

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.

4. The “speculative” elision.

Finally, there is an elision unique to *Halpern*. With respect to the Attorney General’s institutional argument, the *Halpern* court insisted that the government

⁶⁰ *Id.* at 962-64.

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.⁶¹ Ignoring the predictive power of institutional theory 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.”⁶² 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 theory and its resulting predictive power, the court was silent.

C. Four Elisions Seen in Trial Court Decisions Are Likewise Indefensible.⁶³

1. Shifting from the macro to the micro.

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, we mean a discourse focused solely 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 the most effective political tactic deployed by genderless marriage proponents. It 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

⁶¹ Halpern, 225 DLR (4th) 529 at ¶¶ 123, 134.

⁶² *Id.* at ¶ 134.

⁶³ Citations to and quotes from the referenced trial court decisions are found at Stewart, *supra* note 2, at 39-49.

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 theory. 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 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 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 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. Maryland’s

equality and liberty jurisprudence do that.⁶⁴ And 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 understanding and thereby preclude that fair measurement.

2. *The “variety of marriages” elision.*

A common and further elision is the notion that ubiquitous variety in individuals’ marriage customs, perceptions, and conduct somehow means that the whole institution is up for grabs. 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.⁶⁵ 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 leave in order for genderless marriage to arrive.

3. *The “two co-existing marriage institutions” elision.*

This elision is seen when a court suggests or implies 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 a woman and that marriage means the

⁶⁴ *E.g.*, Moore v. State, 390 Md. 343, 889 A.2d 325 (Md. 2005).

⁶⁵ Maggie Gallagher, (*How*) *Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 U.ST.THOMAS L.REV. 33, 45 (2004) (“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.”).

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 a court has 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 courts have no such thing in mind; certainly the genderless marriage proponents are not asking the courts to de-institutionalize marriage but rather to replace the old man/woman institution with the new genderless marriage one.

4. *The “enclave argument” elision.*

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.

But as scholarship has noted elsewhere,⁶⁶ 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. 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.

⁶⁶ *E.g.*, Stewart, *supra* note 45, at 82–83.

The possibility becomes even less substantial upon realization that

[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.⁶⁷

Thus, this picture is misleading: Maryland 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 state-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 the statewide 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 other institutions. One marriage norm community will be officially sanctioned and protected; all other marriage norm communities will be officially constrained and officially disdained.⁶⁸

⁶⁷ *Id.* at 111.

⁶⁸ Gallagher, *supra* note 65, 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.”); Douglas Farrow, *Canada’s Romantic Mistake*, in *DIVORCING MARRIAGE*, *supra* note 1, at 101–02 (“The preamble to this draft legislation [the

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.

IV. THE OTHER EFFORTS TO HARMONIZE GENDERLESS MARRIAGE WITH SOCIAL INSTITUTIONAL REALITIES ALSO FAIL.

A. The “Evolving Marriage Institution” Argument Cannot Sustain the Redefinition of Marriage.

The “evolving marriage institution” argument⁶⁹ is an attempt to counter the social institutional argument and thereby keep the door open to judicially mandated genderless marriage. This counter is premised most fundamentally on the uncontroversial understanding that certain aspects of marriage in our society

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 1, 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.”).

⁶⁹ This argument’s most recent and perhaps most articulate iteration is Nicholas Bala, *The Debates About Same-sex Marriage in Canada and the United States: Controversy over the Evolution of a Fundamental Social Institution*, --- BYU J. PUB. L. ---- (paper presented at the Federal Marriage Protection Amendment Symposium, Brigham Young University, Provo, Utah, 9 September 2005) (*available at* http://www.law2.byu.edu/marriage_family/Sept9conference/draft%20papers/NBalaSame%20Sex%20Marr%20Can%20USA%202005drft.pdf)

and in our society’s predecessors have changed. This leads to the assertion that marriage is therefore an “evolving” social institution.⁷⁰

The “evolving” argument generally acknowledges that “marriage laws [have] both reflected and reinforced changes in attitudes towards and behavior in marriage.”⁷¹ This, of course, is simply an acknowledgement of 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.

The next step is to point to legal “reforms” already in place and deemed to prepare the way for genderless marriage. These include legal changes moving away from gender-based rights and roles towards legal equality of spouses⁷²; away from “the procreation of children ... as a central purpose of marriage, as ... reflected in the common concept of consummation”;⁷³ 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 protections⁷⁴; 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

⁷⁰ 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.

Id. at 1.

⁷¹ *Id.*

⁷² “Spouses are viewed as legally equal. Gender roles in marriage are no longer *legally* prescribed.” *Id.* at 6 (emphasis in original).

⁷³ *Id.* at 3, 6-7.

⁷⁴ *Id.* at 3, 8-12.

solely a status conferred by law, which may or may not consider biological ties).⁷⁵ Regarding the elimination of gender rights and roles in marriage, for example, it is asserted: “It is more difficult to argue that marriage requires two spouses of opposite gender, since there are no longer legally specified gender roles, and socially there is growing ambiguity about the roles of ‘husband’ and ‘wife.’”⁷⁶ The emergence of both marriage-like legal arrangements governing unwed, co-habiting couples and the recognition of legal parenthood, is also deemed to have laid the groundwork for a more flexible approach for the recognition of same-sex relationships.

The “evolving” argument 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.

Any helpful evaluation of the “evolving” argument 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 nurtured under the Canadian Charter of Rights and Freedoms, there would be no genderless

⁷⁵ *Id.* at 12-14. 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.

⁷⁶ *Id.* at 7.

marriage in Canada for a long time, if ever. 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.⁷⁷ 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.

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 judicial involvement (Netherlands, Belgium, Spain).

The “evolving” argument fails to work through the implications of these two distinctions. Consequently, the “evolving” argument is ill-situated in the judicial arena, especially if this is what the “evolving” argument intends to say 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, Judge, you can greatly discount the societal interests in man/woman marriage’s social goods because of those goods’ very short shelf-life.” The 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,⁷⁸ as an intellectual proposition it is dubious. No one,

⁷⁷ Stewart, *supra* note 2, at 63-64.

⁷⁸ 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,

especially a judge, should accord to the inevitability message relative to genderless marriage any more respect and acknowledgements of validity than is 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 all 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.⁷⁹

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 possible that a bare majority of the judges (25 individuals) on the highest courts of a handful of key states – Massachusetts (a 4-3 decision), Washington, New Jersey, California, New York, and Maryland – 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 25 individuals who could have (and almost certainly should have⁸⁰) chosen to do otherwise is to be very much more accurate.

The “evolving” argument 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

less willing to make the kinds of sacrifices that could well make a material difference in the conflict.

⁷⁹ Maggie Gallagher strongly counters the “inevitability” argument at Gallagher, *supra* note 61, at 68-69, and, with Joshua K. Baker, at *Not Inevitable*, NATIONAL REVIEW ONLINE (1 December 2004), available at http://www.nationalreview.com/comment/baker_gallagher200412010836.asp.

⁸⁰ See Stewart, *supra* note 45, 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.”).

accommodated, without any serious societal harm.” But this argument ignores 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, while some of its other goods flow from another.⁸¹ The “evolving” argument 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 the argument is that change for change’s sake is good, it seems fair to require that any argument based on the “evolving” nature of marriage demonstrate the wisdom of the next proposed change. After all, the valuable social goods identified at this brief’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, through the no-fault divorce “reform” of the 1970s, of the core meaning of permanence meant the loss of that meaning’s goods, a loss now viewed, in the midst of considerable resulting suffering, as grievous.⁸² 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.”

Two additional aspects of the “evolving” argument merit analysis. That argument often invokes the classic statement of the “no-downside” argument: “[R]ecognizing same-sex unions will not be likely to deter any heterosexual person from marrying or having children.”⁸³ This language suggests, and no

⁸¹ See section II *supra*.

⁸² E.g., Elizabeth Marquardt, *BETWEEN TWO WORLDS: THE INNER LIVES OF CHILDREN OF DIVORCE* (2005); 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).

⁸³ E.g., Bala, *supra* note 69, at 19.

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 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"⁸⁴ 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.⁸⁵ Thus, the argument "just as many straight men

⁸⁴ John R. Searle, *THE CONSTRUCTION OF SOCIAL REALITY* 32, 57 (1995) (emphasis added).

⁸⁵ We say "largely" because 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

and women will marry” actually cuts against, not in favor of, genderless marriage once the social institutional realities are given their due.

B. The “Overt Social Engineering” Argument Is Likewise Fatally Defective.

The “overt social engineering” 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.

The “overt social engineering” argument, however, 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?

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 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

labeled as bigoted (or at least “discriminatory”) — that is, as hostile to the constitutional ideal of equality.

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 achieved their desired end 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 basis⁸⁶ – the fact-finding and constitutional competence of judges to engage the real task must be seriously doubted.⁸⁷

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 equal 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 equal society. But it should go without saying that what the important discourse is all about is the meaning of equality in the 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

⁸⁶ See *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 961 (Mass. 2003).

⁸⁷ Cf. *United States v. Lopez*, 514 U.S. 549, 605 (1995) (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.”).

or end beyond the intrinsic, emotional, psychological, or sexual satisfaction that the relationship brings to the two adult individuals involved.⁸⁸ Judicial rejection of that model because it inadequately describes what marriage “is” results in judicial rejection of the equality argument for genderless marriage.⁸⁹ Judicial acceptance of that model’s accuracy and adequacy is the foundation for judicial acceptance of that equality argument,⁹⁰ 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.”⁹¹

⁸⁸ Stewart, *supra* note 45, at 95-96; Cere, *supra* note 1, at 12.

⁸⁹ E.g., *Lewis v. Harris*, 378 N.J. Super. 168, 875 A.2d 259, 275-76 (N.J. Super. A.D. 2005) (Parrillo, J., concurring).

⁹⁰ Stewart, *supra* note 45, 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.”; collecting language and citations).

⁹¹ Douglas Farrow, *Rights and Recognition*, in *DIVORCING MARRIAGE*, *supra* note 1, 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 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.

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: to treat similarly situated people similarly and to not treat dissimilarly situated people as the same.⁹² The simple fact is that, relative to the valued marriage institution received to date, man/woman couples and same-sex couples are not similarly situated. And this is not a matter of “legal definitional

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.

⁹² *E.g.*, *Salisbury Beauty Schools v. State Bd. of Cosmetologists*, 268 Md. 32, 60, 300 A.2d 367, 383 (Md. 1973) (“If all persons who are in like circumstances or affected alike are treated under the laws the same, there is no deprivation of the equal protection of the law. Conversely, a law which operates upon some persons or corporations, and not upon others like situated or circumstanced or in the same class is invalid.”); *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *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 (1925)(trans. W. Ross, Book VC, 1925) (“[T]hings that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unalikeness.”).

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 animus,⁹³ 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 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

This brief has verified the three sentences with which it opened: Society has compelling interests in preserving the union of a man and a woman as a core meaning of the vital social institution of marriage. For the law to replace that meaning with a radically different meaning, the union of any two persons, assures in time the loss of a number of invaluable social goods. Because of the very nature of social institutions, including marriage, it could not be otherwise.

This brief has also fulfilled its promise to engage the marriage issue on the basis of public reason. This fulfilled promise must not be overlooked exactly

⁹³ 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, 26 A.D.3d 98, 805 N.Y.S.2d 354, 370 (App. Div.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.”), with *id.* at 386 (Saxe, J.P., dissenting) (“The discriminatory impetus for the distinction made by the [marriage] statutes ... was implicit.”); see Stewart, *supra* note 45, at 112-14 (the *Goodridge* plurality opinion’s suggestion of “animus” rests solely on that opinion’s now-discredited argument that no rational basis sustains man/woman marriage.).

because of an unfortunate phenomenon in the contemporary marriage debate, one already noted but one that bears noting again:

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.⁹⁴

Finally, 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 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.⁹⁵

⁹⁴ Margaret Somerville, *supra* note 8, at 70-71.

⁹⁵ Andrew Sullivan, *Recognition of Same-Sex Marriage*, 16 QUINNIPIAC L. REV. 13, 18 (1996): “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.”

* * * * *

For all the foregoing reasons, *amici* respectfully urge this Court to reverse the decision of the Circuit Court and to hold constitutional the impugned Maryland laws that sustain the vital social institution of man/woman marriage.

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