

CONSTITUTIONS AND MARRIAGE

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I. INTRODUCTION

In a growing number of states, courts and legislatures have been grappling with a question that seems entirely novel but nonetheless compelling because it calls into question largely unstated assumptions about the most basic aspects of life. The subject of the debate is the definition of marriage. Although marriage has changed over time and across societies, it has been universally understood to involve a man and a woman:

Marriage exists in virtually every known human society. Exactly what family forms existed in prehistoric society is not known, and the shape of human marriage varies considerably in different cultural contexts. But at least since the beginning of recorded history, in all the flourishing varieties of human cultures documented by anthropologists, marriage has been a universal human institution. As a virtually universal human idea, marriage is about regulating the reproduction of children, families, and society. While marriage systems differ (and not every person or class within a society marries), marriage across societies is a publicly acknowledged and supported sexual union which creates kinship obligations and sharing of resources between men, women, and the children that their sexual union may produce.¹

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1. William J. Doherty et al., *Why Marriage Matters: 21 Conclusions from the Social Sciences* 8-9 (Inst. for Am. Values 2002).

This understanding is now subject to a serious challenge and California is in the middle of the debate. Although California's marriage statute dates back to pre-statehood times, the law has specifically defined marriage as the union of a man and a woman since 1977 (although that understanding was implicit before then).²

The debate over the meaning of marriage became more prominent in 2000 when the people of the state enacted, by ballot initiative, a statute that reads: "Only marriage between a man and a woman is valid or recognized in California."³ Through a series of events discussed later in this Article, this law was challenged and ruled unconstitutional by a San Francisco superior court in 2005.⁴ In that case, the court consolidated six cases, four by same-sex couples seeking to invalidate California's marriage law and two by policy organizations seeking to invalidate the issuance of marriage licenses to same-sex couples by the City and County of San Francisco.⁵ The cases were consolidated with the intent of securing an appealable ruling on the constitutionality of the state's marriage law.⁶

The court assessed the constitutionality (under the California constitution) of the marriage law using a rational basis test.⁷ The decision noted two justifications for the law offered by the state of California. The first was that the state's traditional understanding of marriage has always included an opposite-sex element.⁸ The court rejected this interest, holding that tradition is no justification for a law

2. Cal. Civ. Code § 4100 (1978) (repealed 1993); *see also* § 4101 which uses gender specific terms to refer to the parties to a marriage (as has the similar provision dating back to 1872, Cal. Civ. Code § 56 (1872)) thus suggesting the implicit understanding of marriage in the statutory scheme. That such an understanding is implicit in the entire history of California marriage law is suggested by the fact that the debate surrounding the enactment of the 1849 Constitution, the debate over the provision guaranteeing property ownership by married women was replete with sex-specific terms. *See* J. Ross Browne, *Report of the Debates in the Convention of California on the Formation of the State Constitution, in September and October, 1849*, at 257 (reprint ed., Arno Press Inc. 1973).

3. Cal. Fam. Code § 308.5 (2006).

4. *Consolidated Marriage Cases*, 2005 WL 583129 at *12 (Cal. Super. Ct. May 14, 2005).

5. *Id.* at *1.

6. *Id.*

7. *Id.* at *2.

8. *Id.* at *3.

otherwise invalid.⁹ The second justification addressed was the fact that California already offers all of the benefits of marriage to same-sex couples so they are not harmed by the definition of marriage. The court rejected this argument, holding instead that since the state already provides marital benefits to same-sex couples it has essentially conceded that there must be no rational basis for not allowing same-sex couples to marry.¹⁰ In addition, the court held that a separate benefits vehicle for same-sex couples is a “separate but equal” scheme that makes same-sex couples feel inferior.¹¹ The court also addressed an asserted state interest in procreation offered by the plaintiffs suing the City and County of San Francisco.¹² The court concluded that California precedent does not treat procreation as an essential purpose of marriage and that even if it had, procreation takes place outside of marriage and some married couples have no children (the court noted later that some same-sex couples rear children).¹³ Later, the court rejected another argument for the current definition of marriage: the possibility that a redefinition might lead to striking down other restrictions on marriage (such as incest bans), by concluding that a fundamental right can be limited where there is a legitimate government purpose.¹⁴ The court concluded that there was such a purpose behind age and consanguinity restrictions but did not identify the nature of that interest.¹⁵

The court next turned to the claim that marriage was a form of sex discrimination.¹⁶ It summarily concluded the law factors in the sex of individual spouses in determining their eligibility for marriage licenses.¹⁷ The court held that the equal application of the law to men and women did not save it by analogy to a refutation of the equal application argument in the race discrimination context.¹⁸ Since gender is a suspect classification and marriage is a fundamental right,

9. *Id.*

10. *Id.* at *4.

11. *Id.* at *5.

12. *Id.* at *8.

13. *Id.* at **6-8.

14. *Id.* at *10.

15. *Id.* at **10-11.

16. *See id.* at *9.

17. *Id.* at *10.

18. *Id.* at *9.

the law could also be assessed under the strict scrutiny test.¹⁹ However, since the court could not find a rational basis for the law, the court could also not find a compelling government interest justifying the law.²⁰

The court opined that “it appears that no rational purpose exists for limiting marriage in this State to opposite-sex partners”²¹ and therefore “the denial of marriage to same-sex couples appears impermissibly arbitrary.”²²

This Article attempts to provide some context for understanding same-sex litigation in California, as well as suggests its implications (and similar cases in other states). Section II briefly describes the increasing constitutionalization of family law. Section III addresses, in turn, implications for the federal and state constitutions arising from the marriage litigation. Section IV discusses the implications for the “constitution” of society, which leads to some concluding comments.

II. CONSTITUTIONALIZATION OF FAMILY LAW

Over the past few decades, an increasing number of family law matters have been held to have constitutional implications. Prominent decisions related to illegitimacy,²³ abortion,²⁴ rights and roles of fathers,²⁵ sexual relations²⁶ and other matters related to families have resulted in constitutional scrutiny being introduced into the domain of family life, or at least the domain of state laws meant to regulate family relationships.

In one way, this development is not wholly novel. A series of cases from the early Twentieth Century made clear that, for instance, parental authority to control their children’s upbringing was not subject

19. *Id.* at *8.

20. *Id.* at *12.

21. *Id.* at *3.

22. *Id.* at *12.

23. *Levy v. La.*, 391 U.S. 68 (1968).

24. *Roe v. Wade*, 410 U.S. 113 (1973).

25. *Lehr v. Robertson*, 463 U.S. 248 (1983) (putative father registry); *Caban v. Mohammed*, 441 U.S. 380 (1979) (unwed fathers); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Planned Parenthood of C. Mo. v. Danforth*, 428 U.S. 52 (1976) (spousal consent to abortion); *Stanley v. Ill.*, 405 U.S. 645 (1972).

26. *Lawrence v. Tex.*, 539 U.S. 558 (2003).

to state micromanagement.²⁷ This doctrine has been recognized again in more recent case law.²⁸ The United States Supreme Court has also invalidated attempts to inject ideologies of racial supremacy and eugenics into marriage recognition.²⁹

As seen above, there is a significant philosophical shift between the early family autonomy cases and the later cases that focus on the individual autonomy of family members. The early cases can be characterized as recognizing negative rights to be free of government interference in ongoing family relationships. The more recent cases, by and large, seem to create a positive right to escape familial constraints and/or create new forms of status in replacement of those that had developed traditionally.

As a corollary, the position of the state vis-à-vis the family has also shifted. Where in the past the state gave deference to longstanding social norms (i.e., the state could recognize but not create institutions like marriage and parenthood),³⁰ the state now circumscribes social institutions to advance government values like equality and radical autonomy.³¹ Thus, the United States Supreme Court struck down Missouri's requirement of spousal consent to abortion stating, "[c]learly, since the State cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period."³² This is a far cry from the recognition in 1925 that "[t]he child is not the mere creature of the state . . ."³³ It is for this reason that the Court's opinion in *Lawrence v. Texas* can note the early family autonomy cases but recognize that the starting point for its analysis is the much more recent case of *Griswold v. Connecticut*.³⁴

27. *Pierce v. Socy. of Sisters*, 268 U.S. 510 (1925) (Oregon law requiring all children to attend public schools until the eighth grade was unconstitutional).

28. *Troxel v. Granville*, 530 U.S. 57 (2000).

29. *Loving v. Va.*, 388 U.S. 1 (1967). For a discussion of the relevance of this decision to the debate over the legal definition of marriage, refer to Monte Neil Stewart & William C. Duncan, *Marriage and the Betrayal of Perez and Loving*, 2005 BYU L. Rev. 555 (2005).

30. Stewart & Duncan, *supra* n. 29, at 571-572, 575, 578.

31. *See id.* at 572-575.

32. *Danforth*, 428 U.S. at 69.

33. *Pierce*, 268 U.S. at 535.

34. *Lawrence*, 539 U.S. at 564; *Griswold v. Conn.*, 381 U.S. 479 (1965).

This shift, of course, runs counter to the common-sense advice of Dean Roscoe Pound from nearly a century ago: "It is important to distinguish the individual interests in domestic relations from the social interest in the family and marriage as social institutions."³⁵ This conflation, or rather substitution, of individual interests with social interests has contributed greatly to the current legal battle over the definition of marriage. In fact, the question of whether marriage will be defined as the union of a man and a woman or of any two persons is currently the key site for the intersection of constitutional and family law and one of the important arenas of interaction among different constitutions. The ongoing litigation in California over the constitutionality of the initiative measure, Proposition 22, which defined marriage as the union of a man and a woman, is particularly illustrative of the implications of the effort to redefine marriage for various constitutions, federal, state and social.³⁶

III. FEDERAL CONSTITUTION

On first glance, the California litigation would seem to have nothing to do with the federal constitution. In a sense this is true, but perhaps misleading. Although federal claims are conspicuous chiefly by their absence, in the *Consolidated Marriage Cases*, that absence is important.³⁷

To illustrate, we can examine an analogy to a previous California case urged by advocates of a redefinition of marriage. These advocates argue that the most apt precedent for their claims is the anti-miscegenation case of *Perez v. Lippold*,³⁸ decided by the California Supreme Court in 1948. In that case, the court invalidated the state marriage law for interfering with individuals' right to marry "on the basis of race alone."³⁹ To advocates of same-sex marriage, the lesson of *Perez* is that the state cannot make any law that restricts the choice of a marriage partner.⁴⁰ Further, they point to the 1948 court as an example to state courts around the country faced with claims for a

35. Roscoe Pound, *Individual Interests in the Domestic Relations*, 14 Mich. L. Rev. 177, 177 (1916).

36. *Consolidated Marriage Cases*, 2005 WL 583129 at **5-6.

37. *See generally id.*

38. 198 P.2d 17 (1948).

39. *Id.* at 21.

40. Stewart & Duncan, *supra* n. 29, at 555.

redefinition of marriage.⁴¹ The example they see is that some court had to “go first” in recognizing that anti-miscegenation laws were indeed unconstitutional.⁴²

There are numerous ways in which the respective litigation over anti-miscegenation laws and the male-female definition of marriage are not truly analogous.⁴³ For purposes of this Article, though, only one will be highlighted. In the *Perez* case, the plaintiffs had been denied a marriage license because of their answers to questions regarding their race on the marriage license application.⁴⁴ Plaintiffs challenged the statute that prohibited marriages between white persons and individuals of other races on the grounds that it denied them Equal Protection under the Fourteenth Amendment to the United States Constitution.⁴⁵ In the *Consolidated Marriage Cases*, the plaintiffs claim that the state’s definition of marriage as the union of a man and a woman is unconstitutional, but they have scrupulously avoided *any* federal claims.⁴⁶

It seems clear that the decision to avoid federal claims in the *Consolidated Marriage Cases* is a strategic decision.⁴⁷ By contrast, the approach of the plaintiffs in *Perez* reflects not a political decision, but a clear conviction that the United States Constitution mandated the result they sought.⁴⁸ This approach, rather than the calculated attempt to wait until elite understandings evolve towards acceptance of legal claims, seems more appropriate to our understanding of the federal constitution. Indeed, if we are to be a nation of laws, not men,⁴⁹ the attempt to secure sympathetic judges cannot be an appropriate approach to constitutional law.

41. *Id.* at 555-556.

42. *Id.* at 571-572.

43. *Id.* at 555-556.

44. *Perez*, 198 P.2d at 18.

45. *Id.*

46. See *Consolidated Marriage Cases*, 2005 WL 583129.

47. See William C. Duncan, *Avoidance Strategy: Same-Sex Marriage Litigation and the Federal Courts*, 29 Campbell L. Rev. 201, 201 (2006).

48. *Perez*, 198 P.2d at 18; Duncan, *supra* n. 47, at 207.

49. See Mass. Const. art. XXX.

IV. STATE CONSTITUTIONS

A. SUBSTANTIVE CONCERNS

As already noted, the advocates of redefining marriage have made state constitutional claims the sole basis for their argument that the definition of marriage is unconstitutional. These arguments are, however, unavailing as illustrated by an examination of four main claims: (1) that the definition of marriage impinges a fundamental right, (2) that marriage is a form of sex discrimination, or (3) a form of sexual orientation discrimination, and (4) that our current marriage definition is irrational. Each has been addressed in great detail in court decisions and articles, so this Article will discuss each in only the most summary way, citing to authority that is more detailed.

While an Alaska trial court has ruled that the definition of marriage conflicts with a fundamental right (relying on a unique privacy provision in the Alaska Constitution),⁵⁰ that claim has been rejected numerous times by other courts.⁵¹ It has even been rejected by courts that otherwise conclude that the marriage definition is unconstitutional.⁵² At its core, this argument fails because for most states and the federal constitution, a fundamental right must be deeply rooted in the history and tradition of the people of the United States or an individual state and a right to redefine marriage cannot find support in either the history or tradition of these jurisdictions.⁵³

Courts in Hawaii and Maryland have famously held that because the definition of marriage refers to men and women, it conflicts with

50. *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 at *1 (Alaska Super. Ct. 1998) (The Alaska Constitution recognizes a fundamental right to choose one's life partner.).

51. *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1307 (M.D. Fla. 2005); *Smelt v. Orange County*, 374 F. Supp. 2d 861, 879 (C.D. Cal. 2005); *Standhardt v. Super. Ct.*, 206 Ariz. 276, 290 (Ariz. App. Div. 1 2003); *Dean v. D.C.*, 653 A.2d 307, 311 (D.C. App. 1995); *Morrison v. Sadler*, 821 N.E.2d 15, 34 (Ind. App. 2005); *Lewis v. Harris*, 378 N.J. Super. 168, 188 (N.J. Super. App. Div. 2005); *Hernandez v. Robles*, 805 N.Y.S.2d 354, 362 (N.Y. App. Div. 1st Dept. 2005); *Samuels v. N.Y. Dept. of Pub. Health*, 811 N.Y.S.2d 136, 141-142 (N.Y. App. Div. 3d Dept. 2006); *In re Kandu*, 315 B.R. 123, 140 (Bankr. W.D. Wash. 2004).

52. *Baehr v. Lewin*, 74 Haw. 530, 557 (1993).

53. See William C. Duncan, *Legislative Deference and the Novelty of Same-Sex Marriage*, 16 Stan. L. & Policy Rev. 83, 86 (2005).

the Equal Rights Amendments of those states' constitutions.⁵⁴ This too is a minority opinion, having been rejected by courts both upholding state marriage laws as well as those that have rejected them.⁵⁵ More importantly, even in those decisions that have accepted the claim, the support for the argument is lacking. In the first place, state Equal Rights Amendments were clearly not intended to affect the definition of marriage.⁵⁶ Secondly, marriage does not treat men and women unequally and is based on the recognition of inherent differences in the sexes (particularly in relation to procreation).⁵⁷

The sexual orientation discrimination claim has been similarly unavailing in the marriage litigation. No appellate opinion, even those by the otherwise sympathetic Vermont and Massachusetts Supreme Courts, has relied on this claim to strike down a marriage law.⁵⁸ While some courts have suggested that marriage employs a sexual orientation classification, they have then noted that such a classification would merit only rational basis review and upheld the statute.⁵⁹ Some courts have noted what seems obvious—that marriage statutes do not require any probing into orientation in determining marriage eligibility.⁶⁰ Thus, the only way marriage laws could be held to discriminate on the basis of sexual orientation is to find a disparate impact on individuals of a certain orientation.⁶¹ There is good reason to believe that this kind of impact is irrelevant for purposes of constitutional analysis. As Judge

54. *Baehr*, 74 Haw. at 563; *Deane v. Conaway*, 2006 WL 148145 at *3 (Md. Cir. Ct. 2005).

55. See *Singer v. Hara*, 522 P.2d 1187, 1194-1195 (Wash. 1974) (rejecting the claim); *Baker v. Vt.*, 744 A.2d 864, 880 n. 13 (Vt. 1999) (accepting the claim); *In re Kandu*, 315 B.R. at 143 (rejecting the claim); *Wilson*, 354 F. Supp. 2d at 1307-1308 (rejecting the claim); *Hernandez v. Robles*, 7 N.Y.3d 338, 364-365 (2006) (rejecting the claim); *Andersen v. King County*, 138 P.3d 963, 988 (Wash. 2006) (rejecting the claim); *In re Marriage Cases*, 143 Cal. App. 4th 873, 914 (Cal. App. 1st Dist. 2006) (rejecting the claim).

56. See Paul Benjamin Linton, *Same-Sex "Marriage" Under State Equal Rights Amendments*, 46 St. Louis U. L. J. 909, 962 (2002).

57. See William C. Duncan, *"The Mere Allusion to Gender": Answering the Charge that Marriage is Sex Discrimination*, 46 St. Louis U. L. J. 963, 966 (2002).

58. *Castle v. Wash.*, 2004 WL 1985215 at *13 (Wash. Super. Ct. 2004); *but see Li v. State*, 2004 WL 1258167 at **7-8 (Or. Cir. Ct. 2004).

59. *Smelt*, 374 F. Supp. 2d at 875, 880; *Hernandez*, 805 N.Y.S.2d at 360-361.

60. *Dean*, 653 A.2d at 363; *Baehr*, 74 Haw. at 543 n. 11; *Goodridge*, 440 Mass. 309, 320 n. 11 (2003).

61. *Smelt*, 374 F. Supp. 2d at 875, 880; *Hernandez*, 805 N.Y.S.2d at 360-361.

Catterson noted in a concurrence in the recent *Hernandez v. Robles* case in New York's Appellate Division, "it is fundamental that disparate impact alone is insufficient to invalidate a statute, even with respect to suspect or quasi-suspect classifications such as race and gender."⁶² Instead, those challenging a law must show that any such impact "can be traced back to a discriminatory purpose or intent."⁶³ The United States Supreme Court has clearly endorsed this reasoning.⁶⁴

Some courts have tried to avoid these kinds of claims altogether, concluding instead that the definition of marriage is inherently irrational or arbitrary and thus, that it cannot even satisfy the deferential rational basis test for constitutionality under state constitutions.⁶⁵ A series of recent decisions, however, have seriously undercut the credibility of this argument.⁶⁶ For instance, in the wake of the United States Supreme Court decision in *Lawrence v. Texas*, an Arizona Appeals Court assessed the validity of Arizona's marriage law in the face of a challenge based on *Lawrence*.⁶⁷ In that decision, the court applied the rational basis standard of review but concluded "the State has a legitimate interest in encouraging procreation and child-rearing within the marital relationship, and that limiting marriage to opposite-sex couples is rationally related to that interest."⁶⁸ A federal district court in Florida held that the Eleventh Circuit's recognition that "encouraging the raising of children in homes consisting of a married mother and father is a legitimate state interest" meant that the state had a rational basis for defining marriage as the union of a man and a woman.⁶⁹ A California district court identified "encourag[ing] the stability and legitimacy of what may reasonably be viewed as the optimal union for procreating and rearing children by both biological

62. 805 N.Y.S.2d at 371.

63. *Id.*

64. *See Wash. v. Davis*, 426 U.S. 229, 230, 241 (1976).

65. *Goodridge*, 440 Mass. at 341; *Consolidated Marriage Cases*, 2005 WL 583129 at *4.

66. For a discussion of the state interests in marriage, *see* William C. Duncan, *The State Interests in Marriage*, 2 Ave Maria L. Rev. 153 (2004).

67. *Id.* at 157.

68. *Standhardt*, 206 Ariz. at 288-289.

69. *Wilson*, 354 F. Supp. 2d at 1309.

parents” as the rational basis for upholding the federal Defense of Marriage Act.⁷⁰

A series of recent state appellate decisions have been particularly strong on this point. In January 2005, the Indiana Court of Appeals asked “whether the recognition of same-sex marriage would promote all of the same state interests that opposite-sex marriage does, including the interest in marital procreation.”⁷¹ The court concludes that redefining marriage would not have that result despite the plaintiffs’ claim that same-sex couples have children.⁷² The essential difference noted by the court is that same-sex couples must intend to have children while opposite-sex couples may have children without intending to.⁷³ The state has an interest in promoting marriage where children may result without being intended and need not recognize situations where there is intent (since there will presumably be some protection for children whose birth is intentional).⁷⁴ A New Jersey appeals court recognized that marriage is “something more than just State recognition of a committed relationship between two adults.”⁷⁵ It has “a vital role in propagating the species and in providing the ideal environment for raising children.”⁷⁶

In a decision from the New York appellate division, the court noted a number of state interests served by the marriage law including support of procreation, child welfare and social stability which are “based on innate, complementary, procreative roles, a function of biology, not mere legal rights.”⁷⁷ The court further stated:

The law assumes that a marriage will produce children and affords benefits based on that assumption. It sets up heterosexual marriage as the cultural, social and legal ideal in an effort to discourage unmarried childbearing and to encourage sufficient marital childbearing to sustain the population and society; the entire society, even those who do not marry, depend on a healthy marriage culture for this latter critical, but presently undervalued,

70. *Smelt*, 374 F. Supp. 2d at 880.

71. *Morrison*, 821 N.E.2d at 23.

72. *Id.* at 25.

73. *Id.* at 24.

74. *Id.* at 26.

75. *Lewis*, 378 N.J. Super. at 184-185.

76. *Id.* at 185.

77. *Hernandez*, 805 N.Y.S.2d at 360.

benefit. Marriage laws are not primarily about adult needs for official recognition and support, but about the well-being of children and society, and such preference constitutes a rational policy decision. Thus, society and government have reasonable, important interests in encouraging heterosexual couples to accept the recognition and regulation of marriage.⁷⁸

A few months later, another appellate division panel reached a similar conclusion.⁷⁹ The court held that “[i]t is an undisputed biological fact that the vast majority of procreation still occurs as a result of sexual intercourse between a male and a female” so the state could conclude that encouraging opposite-sex couples to marry would provide children with opportunities to be raised by their parents in a committed relationship.⁸⁰

B. STRUCTURAL CONCERNS IN CALIFORNIA

1. Other Constitutional Provisions

The effort to redefine marriage has also created other state constitutional issues. The push for a redefinition of marriage in California, premised on controversial readings of state constitutional provisions, has given short shrift to other, clear provisions. For instance, when the California legislature decided to enact legislation that would define marriage as the union of any two people, it did so in direct contravention of the state constitution.⁸¹ Specifically, since the legislation directly conflicted with Proposition 22, an initiative statute, the constitution required that it would have had to be submitted for the approval of the electorate.⁸² Thus, the governor “had no choice” but to veto the marriage redefinition legislation.⁸³

78. *Id.* at 104-105.

79. *Samuels*, 811 N.Y.S.2d at 145-146.

80. *Id.* at 145.

81. Cal. Assembly 849, 2005-2006, Reg. Sess. 1 (Sept. 29, 2005).

82. Cal. Const. art. II, § 10(c) (“The Legislature . . . may amend or repeal an initiative statute by another statute *that becomes effective only when approved by the electors* unless the initiative statute permits amendment or repeal without their approval.”) (emphasis added).

83. Nancy Vogel & Jordan Rau, *Gov. Vetoes Same-Sex Marriage Bill*, L.A. Times B3 (Sept. 30, 2005).

2. Enumerated Powers

Similarly, the media event staged by one mayor who gave marriage licenses to same-sex couples, was the proximate cause of the *Consolidated Marriage Cases*.⁸⁴ It was also illegal, as a local official has no right to refuse to obey relevant state laws in the absence of clear unconstitutionality of those laws.⁸⁵ The California Supreme Court made clear that no such clear unconstitutionality was evident in this case.⁸⁶

3. Constitutional Duties

Finally, if the state constitutional process is to work in an adversarial system, those charged by the state constitution with enforcing laws have to actually do so. In the *Consolidated Marriage Cases*, the briefing of the state attorney general's office has failed to include or make substantive arguments for marriage, despite the acceptance of these claims in other state appellate courts.⁸⁷ Indeed, when amici made such claims before the California Court of Appeals, the attorney general's office denounced the amici supporting its position in a way that is nothing short of disrespectful.⁸⁸ In this case, interveners have been allowed to present the substantive case for marriage, but that is not true in every instance and the lack of a robust defense of state marriage laws presents yet another constitutional problem linked to the marriage redefinition debate.⁸⁹ This problem is not, it should be noted, peculiar to California.⁹⁰

84. See Cheryl Wetzstein, *Licenses to Gays Top 2,000*, Wash. Times A1 (Feb. 17, 2004).

85. *Lockyer v. City & County of San Francisco*, 33 Cal. 4th 1055, 1068-1069 (2004).

86. *Id.* at 1102.

87. See *Standhardt*, 206 Ariz. at 278; *Morrison*, 821 N.E.2d at 35; *Lewis*, 378 N.J. Super. at 197; *Hernandez*, 805 N.Y.S.2d at 362; *Samuels*, 811 N.Y.S.2d at 141-142.

88. See State Appellants' Response to Amicus Curiae Brs. at 7-12, *In re Marriage Cases*, 143 Cal. App. 4th 873 (Cal. App. 1st Dist. 2006).

89. See generally *Baehr*, 74 Haw. at 530; *Lewis v. Harris*, 2003 WL 23191114 (N.J. Super. 2003); *Shields v. Madigan*, 783 N.Y.S.2d 270 (N.Y. Super. 2004); *Hernandez v. Robles*, 798 N.Y.S.2d 710 (N.Y. Super. 2004); *Kerrigan v. State*, 2005 WL 834296 (Conn. Super. 2005); *Deane*, 2006 WL 148145.

90. See William C. Duncan, *Is That All You Got?*, <http://article.nationalreview.com/print/?q=YWiyY2NmZTY0NjgxYWlzMzNDc2OTU3OTFjNWU4YzE=> (Feb. 17, 2006) (describing New Jersey attorney general's office participation in that marriage

V. SOCIAL CONSTITUTION

One of the great contributions of the excellent amici curiae briefs filed on behalf of religious organizations in the California Court of Appeals is its identification of another kind of “constitution” that will be potentially affected by a decision to redefine marriage. The brief notes:

[T]he deeply rooted traditions and practices that “constitute” a nation or state are also part of its “constitution” in an important sense. Sometimes those traditions are of such weight that they are deemed worthy of judicial protection. In a related sense, the institution of male-female marriage also has a constitutional stature that entitles it to judicial respect.⁹¹

This analysis is in keeping with statements of the United States Supreme Court, notably this famous language:

Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.⁹²

Notably, this decision suggests the appropriate posture for the state to take toward marriage. Specifically, rather than creating marriage as an act of positive will, the state recognizes marriage and the family as the “foundation of society,” only later to step in when necessary.

This is an accurate representation of the way in which the law has interacted with marriage in the United States for most of its history. The law creates a legal structure for recognition and allows for other actors (like extended families or churches) to provide the normative content to that structure.⁹³ So for instance, social actors may promote an ethic of kindness and cooperation within marriage but these kinds of

case).

91. Amici Curiae Br. of The Church of Jesus Christ of Latter-day Saints, et al. at 26, *In re Marriage Cases*, 143 Cal. App. 4th 873 (Cal. App. 1st Dist. 2006).

92. *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

93. See Amici Curiae Br. of the Church of Jesus Christ of Latter-day Saints, *supra* n. 91, at 26.

values have not been legally enforceable (except in extreme cases of abusive behavior).⁹⁴ With the advent of no-fault divorce, even norms like faithfulness are increasingly not the subject of any significant kind of legal sanction.⁹⁵ The deference of the law in regards to the normative content of family functioning serves important interests, as Professor Bruce Hafen notes:

The family interposes a significant legal entity between the individual and the state, where it performs its mediating and value-generating function. It remains fundamental to democratic theory that parents, through this institutional role of the family, control the heart of the value-transmission process. As that crucial process is dispersed pluralistically, the power of government is limited.⁹⁶

Marriage and the family deserve special deference because “family, not the individual, is the real molecule of society, the key link of the social chain of being.”⁹⁷

None of this is to say that the law is powerless to effect social practices; far from it. The primary way in which the law affects society is by endorsing an ideal for which to strive. The legal form of marriage thus promotes an aspirational end. Professor Carl Schneider explains how this “channeling function” works:

Generally the channeling function does not specifically require people to use these social institutions, although it may offer incentives and disincentives for their use. Primarily, rather, it is their very presence, the social currency they have, and the governmental support they receive which combine to make it seem

94. See generally *Amici Curiae Br. of the Church of Jesus Christ of Latter-day Saints*, *supra* n. 91.

95. See *Diosdado v. Diosdado*, 97 Cal. App. 4th 470 (Cal. App. 2d Dist. Div. 4 2002). A divorced wife brought a breach of contract action against her former husband, seeking to enforce a contract which provided for payment of damages by a party guilty of sexual infidelity. The court ruled that the contract was unenforceable because it “attempt[ed] to impose a penalty on one of the parties as a result of that party’s ‘fault’ during the marriage, [and] is contrary to the public policy underlying the no-fault provisions for dissolution of marriage.” *Id.* at 473-474.

96. Bruce C. Hafen, *Law, Custom and Mediating Structures: The Family as a Community of Memory* 100 (Richard John Neuhaus, William B. Eerdmans Publ. Co. 1989).

97. Robert Nisbet, *Twilight of Authority* 260 (Oxford U. Press 1975).

reasonable and even natural for people to use them. Thus people can be said to be channeled into them.⁹⁸

Our traditional view of the way law relates to the family is challenged by a view of society based on the notion that each person is a purely atomistic individual with no more important relationship than that with the state which guarantees her autonomy against the claims of any other person or group, making all relationships subsidiary to state power. In an extreme form, this is totalitarianism:

Totalitarianism involves the demolition of the social ties among a people, such as are represented by the family, church, or university, and the replacement of these by the unitary connection of citizen to citizen. It is the reduction of social man into political man, and involves the substitution of the state alone for the myriad relationships which compose traditional society.⁹⁹

In a subtler version, this is what is urged by the effort to redefine marriage. It relies on an assumption that the state, not society, is the creator of marriage but does not differentiate between the legal structure of marriage (which can plausibly be attributed to state action) and the normative content of marriage (which is a creation of societal forces). It thus conflates the two and makes marriage not a social institution meriting legal recognition, but a purely legal construct with ancestral ties to society. Sociologist Robert Nisbet points out:

[S]ociety - is not a mechanical aggregate of individual particles subject to whatever rearrangements may occur to the mind of the industrialist or the governmental official. It is an organic entity, with internal laws of development and with infinitely subtle personal and institutional relationships. Society cannot be created by individual reason, but it can be weakened by those unmindful of its true nature, for it has deep roots in the past—roots from which the present cannot escape through rational manipulation.¹⁰⁰

This understanding of society must be jettisoned if a claim for a constitutional mandate to redefinition is to be accepted. Courts focus not on social, or even state interests, in marriage, but rather on the

98. Carl E. Schneider, *The Channeling Function in Family Law*, 20 Hofstra L. Rev. 495, 498 (1992).

99. Robert A. Nisbet, *Rousseau and Totalitarianism*, 5 J. Pol. 93, 96 (1943).

100. Robert A. Nisbet, *Conservatism and Sociology*, 58 Am. J. Sociology 167, 169 (Sept. 1952).

benefits marriage might offer to individuals.¹⁰¹ Once marriage is reengineered from a social institution into an individual entitlement, it is not as difficult for a court to conclude that the entitlement should be made available on more egalitarian principles as it has been previously.

The focus on the needs of individuals rather than on the nature and purpose of social institutions is endemic to the same-sex marriage litigation, but it does not come without risks.¹⁰² For instance, in a given case a relatively small sample of plaintiffs will come forward seeking the remedy of redefinition. That remedy, however, changes the law not only for those individual couples but also for all others similarly situated (as in a class action).

Law would change for everyone. If marriage is redefined as the union of any two persons, the link between the institution and procreation is completely severed. No longer could marriage serve to channel individuals whose sexual relations are generally capable of creating children (regardless of their subjective intent) because marriage would now be solely determined by adult choices of partners with children playing a secondary role (as beneficiaries of the adult choices rather than the focus of the institution).

Thus, the logical next step after a redefinition of marriage is the redefinition of parenthood.¹⁰³ This second redefinition raises the possibility that natural parents will have to be treated the same as individuals with no natural tie to a child but who have become “parents” through the choice of the child’s partner or a court order. Of course, this may be appropriate in exceptional circumstances such as adoption, but it would be a sweeping change to remove the traditional presumptions attached to biological parenthood in favor of a system in which the state doles out parental status.

The stories of individual couples who seek a marriage redefinition may actually obscure as much as they reveal. These are, after all, small sample sizes.¹⁰⁴ Briefs, complaints and judicial opinions may stress

101. *See generally id.*

102. *See* Melanie Barrett, *A Critique of the Use of Stories in Hernandez v. Robles* 1, 11 (unpublished student paper on file with author).

103. *See* David Rennie, *How’s Your ‘Progenitor A?’*, Daily Telegraph 16 (Mar. 7, 2006) (available at 2006 WLNR 3791336) (reporting Spanish law replacing the terms “father” and “mother” with “Progenitor A” and “Progenitor B” on birth certificates in order to avoid conflict with an earlier law redefining marriage in Spain to include same-sex couples).

104. The California case, for instance, involves twenty same-sex couples along with

features such as the presence of a child in the couple's home to create an analogy to married male-female couples raising children.¹⁰⁵ The analogy, however, will not likely stress the differences, such as the need for an intentional involvement of third parties in all same-sex couple relationships in which children are present.¹⁰⁶

Attorneys and judges may also not be reflective enough to look at other analogous situations which are ignored because they do not generate any particular sympathy for the extension of marriage licenses (such as three generation households where only one person present in the household is the parent of the child and the parent's parent is responsible for significant child rearing duties).¹⁰⁷ Thus, the use of stories may actually substitute for legal conclusions as when a court says that a set of plaintiff same-sex couples are no different from married male-female couples. The reliance on individual circumstances also exalts emotional appeals over legal principles.

We would be wise to remember, in connection with this matter of marriage and the constitution of society, that "the encouraging of a false sentimentality in the idea of marriage, and the slurring over of its importance as a social institution and as the basis of the family, is one of the sure ways of degrading that natural relation into something we do not like to consider."¹⁰⁸

various advocacy groups. See Pet. for Writ of Mandate or Prohibition, *Tyler v. County of Los Angeles*, Case No. BS088506 (Cal. Super. Ct. 2004); Compl. for Declaratory Relief by Same-Sex Married Couples Challenging the Constitutionality of the Family Code, *Clinton v. State*, Class Action CGC-04-429548 (Cal. Super. Ct. 2004); 3d Amend. Pet. for Writ of Mandate and Compl. for Declaratory and Injunctive Relief, *Woo v. Lockyer*, Case No. 4365 (Cal. Super. Ct. 2004). Estimates suggest there are 92,128 same-sex couples in California. R. Bradley Sears & M.V. Lee Badgett, *Same-Sex Couples and Same-Sex Couples Raising Children in California: Data from Census 2000*, at 3, <http://www.law.ucla.edu/williamsinstitute/publications/CaliforniaCouplesReport.pdf> (May 2004).

105. Sears & Badgett, *supra* n. 104, at 10-11.

106. See *Morrison*, 821 N.E.2d at 26 (noting the intentional nature of procreation in same-sex couple relationships).

107. Cf. Duncan, *supra* n. 66, at 181-182 (indicating grandmothers raising their grandchildren is not a function specific to marriage).

108. Paul Elmer More, *Property and Law, The Essential Paul Elmer More* 304 (Byron C. Lambert, ed., Arlington House 1972).

VI. CONCLUSION

In the past, and to some degree still, the United States constitutional tradition has treated the family as an autonomous institution, recognized though not created by law to which great deference was owed. Social and legal trends have threatened this position but the family has been remarkably resilient, involving as it does not only human longings but also powerful biological, social and emotional realities. Marriage, the foundation of the family, is in the midst of another ideological challenge to its legitimacy from those who would, in the service of egalitarianism, force it to take a shape and fulfill functions very different from the inherited understanding.

Before we abandon an “entailed inheritance derived to us from our forefathers, and to be transmitted to our posterity,”¹⁰⁹ we need to count the costs of such disinheritance. What do we risk losing if the social institution of marriage is replaced by new institutions contrived with our “own private stock of reason”?¹¹⁰ I believe we stand to lose much, including the channeling power of marriage to encourage men and women who are responsible for creating children to take responsibility and provide for them. If the disinheritance is affected through legal processes and with legal theories that deform constitutional principles, we stand to lose even more.

109. Edmund Burke, *Reflections on the Revolution in France* 119 (Conor Cruise O’Brien, ed., Penguin Classics 2d ed. 1986).

110. *Id.* at 183.