

Marriage and the Betrayal of *Perez* and *Loving*

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I. INTRODUCTION

In March 2005, a San Francisco trial judge held that California voters' recent reaffirmation of marriage as the union of a man and a woman violated the state constitution's equality guarantee because that reaffirmation prevents same-sex couples from marrying.¹ In so holding, the court relied heavily on what is commonly known in "same-sex marriage" discourse as the argument of the *Loving* analogy—an analogy more fairly labeled *Perez/Loving*. In 1948, the California Supreme Court in *Perez v. Lippold*² led the way for the nation by holding that statutory prohibitions of interracial marriages violated constitutional protections of equality. Then in 1967, the United States Supreme Court in *Loving v. Virginia*³ held the same. The argument of the *Perez/Loving* analogy, in its simplest form, goes like this: Because it is unconstitutional (as unequal and unfair) to prevent a black from marrying a white, it is likewise unconstitutional to prevent a man from marrying a man or a woman from marrying a woman.

The argument of the *Perez/Loving* analogy⁴ is not only ubiquitous in genderless marriage cases⁵ but is also ubiquitous in the

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1. *In re* Coordination Proceeding, No. 4365, 2005 WL 583129 (Cal. Super. Ct. Mar. 14, 2005).

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

3. 388 U.S. 1 (1967).

4. Hereafter "the *Perez/Loving* argument."

5. Rather than use the more common phrase "same-sex marriage," this Article uses the phrase "genderless marriage" to refer to a form of civil marriage defined as the union of any two persons. The phrase "same-sex marriage" is subtly misleading; although the legal definition of civil marriage as the union of any two persons would allow same-sex couples to marry, it, of course, also would allow a woman and a man to marry, and everywhere the debate focuses on *one* legally recognized relationship known as *marriage*, not *two*. The phrase "same-sex marriage" thus conveys the sense (erroneously) of a legally recognized marriage separate or

popular debate on the meaning of civil marriage, no doubt because the argument is simple—that is, easy to make and easy to grasp—and thus well suited to a “sound bite” political culture. It also seems fair to say that the argument is a favorite of those advocating the redefinition of marriage as the union of any two persons and that it is likewise a media darling.

A. A Suggestion of Betrayal

Sometimes, but not always, simple arguments are flawed by superficiality. That is, they work at the surface level, at the level of the obvious, but are defeated by deeper realities constituting the subject of the argument. The subject of the *Perez/Loving* argument is, of course, marriage. Recent work investigating the realities constituting marriage⁶ suggests that the argument is flawed by superficiality. In a more startling and grave progression, however, that work also suggests that judicial adoption of the *Perez/Loving* argument amounts to a betrayal of those two landmark cases. This Article assesses the validity of this suggestion of betrayal—a suggestion summarized in unvarnished fashion in the following paragraphs.⁷

Marriage is a vital social institution. As such, it is constituted by a complex web of shared public meanings, with a core meaning being—across cultures and time—the union of a man and a woman. Like other powerful social institutions, marriage performs an important educative and socializing function. In its sphere, the marriage institution shapes and guides individuals’ identities, perceptions, aspirations, and conduct, including what they believe to be important and what they strive to achieve. It is in this way that

different from the marriage of a man and a woman. This Article refers to civil marriage defined as the union of a man and a woman as “man/woman marriage.” The term “genderless” is used instead of “nongendered” and “man/woman” instead of “gendered” because, as a matter of contemporary language usage, use of the words “gendered” and “nongendered” could be seen as an endorsement of certain versions of social constructionist thought. Although those versions may be valid, this Article stands neutral on the validity question for reasons made clear elsewhere. Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 CAN. J. FAM. L. 11, 85–95 (2004), available at <http://www.manwomanmarriage.org/jrm/pdf/jrm.pdf>.

6. *E.g.*, Daniel Cere, *War of the Ring*, in *DIVORCING MARRIAGE: UNVEILING THE DANGERS IN CANADA’S NEW SOCIAL EXPERIMENT* 9, 15 (Daniel Cere & Douglas Farrow eds., 2004) [hereinafter *DIVORCING MARRIAGE*]; Stewart, *supra* note 5, at 75–85.

7. Because this is merely a summary, footnotes are not used. Attribution for the ideas contained in the summary appears in footnotes in later sections.

the constitutive meanings of marriage provide valuable social goods, some uniquely.

The law has a role relative to the marriage institution, as it does with other social institutions of betterment. In support, the law gives marriage formal recognition, brings legal and administrative arrangements into line with institutional practices, facilitates the institution's use by members of the community, and encourages the transmission of institutional values from generation to generation. But the law can also change or even dismantle an institution—it does so by changing or suppressing the shared public meanings constituting the institution.

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

In the American past, two social movements temporarily succeeded in using marriage as a means to achieve ulterior ends: the white supremacist movement and the eugenics movement. In fact, the antimiscegenation laws were often found in the same legislative package as the laws calling for the sterilization of “idiots” and other so-called “genetic undesirables.” Central to the white supremacists' project was the alteration of the core meaning of marriage from the union of a man and a woman to the union of a man and a woman of the same “race.” Laws that prohibited blacks from marrying whites were an ugly feature grafted onto the marriage institution—the very logic of which makes the graft a foreign object. The voice of those laws, however, greatly magnified by social institutional power, subtly but effectively inculcated throughout society the core dogma of white supremacy. The courts that gave us the *Perez* and *Loving* decisions apprehended the white supremacists' marriage project for what it was and rightly used constitutional equality norms to dismantle it. In the process, those courts restored to marriage the integrity of its institutional purposes and logic, an historic accomplishment. It is that accomplishment that is now being betrayed.

The goal of the gay/lesbian rights movement's marriage project, like that of the white supremacists, is to appropriate the institution and change it to achieve sociopolitical purposes unrelated to

marriage. Again, that change entails an alteration in a core, constitutive meaning: from the union of a man and a woman to the union of any two persons. Granted that the respective objectives of the old and the new marriage projects are very different, still the projects in their appropriative strategy are of a kind.

Thus, because *Perez* and *Loving* refused to allow the marriage institution to be appropriated for nonmarriage ends, to use those two cases to advance just such an appropriative project is to betray them. In other words, the *Perez/Loving* argument advances a superficial analogy that masks a deep disanalogy. That disanalogy is between the intention of *Perez* and *Loving* to protect marriage from appropriation for nonmarriage purposes and the intention of the present marriage project to make such an appropriation. Thus, those who deploy the *Perez/Loving* argument, whether advocates or judges, are misleading people, including perhaps themselves.

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

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

B. The Structure of the Article

The foregoing is the unvarnished suggestion that we mean to address in some detail to see how it holds up. Before giving the roadmap to that endeavor, however, we need to say a word about a volatile subject: discussion of the gay/lesbian rights movement in a context that also encompasses the white supremacist movement. We ask that the reader in good faith (the only one we are writing for) not jump to the conclusion that we are equating Bill Eskridge with Bull Connor or the Lambda Legal Defense and Education Fund with the Klu Klux Klan; if she does so, we are not apt to be given a thoughtful read. What we are doing is considering whether those two movements have employed an essentially similar strategy relative to marriage. If so, that is something worth knowing, and knowing it may lead to other things worth knowing. That those two movements have profoundly different objectives goes without saying. Whether that difference justifies the present use of the older movement's strategy (if that is so) also seems to us worth some thoughtful analysis. So with apologies to any who may take offense at our choice to investigate these matters, we will go forward.

In Part II, we set forth the understandings and implications of marriage as a social institution. In Part III, we review both the white supremacist marriage project that resulted in the antimiscegenation laws and the work of the *Perez* and *Loving* courts in dismantling that project. In Part IV, we trace the use of the *Perez/Loving* argument over the past three decades—the period in which advocates have sought to redefine marriage as the union of any two persons. Because use of the argument has been ubiquitous, this exercise provides a good overview of the genderless marriage issue in the courts. Part V goes to the heart of the matter. It considers the evidence that the gay/lesbian rights movement, following a strategy analogous to the white supremacist movement, is trying to appropriate marriage by changing its core meaning contrary to the institution's purposes and logic, for the purpose of advancing a social, cultural, and political agenda essentially unrelated to marriage.⁸ Part VI concludes with reflections on likely consequences if the new marriage project succeeds.

8. These comments on terminology seem merited: When we speak of marriage's "institutional purposes and logic" or words to that effect, we are referring not to the entire complex of purposes and values inhering in the social institution of marriage as now

II. MARRIAGE AS A SOCIAL INSTITUTION

Marriage is a social institution.⁹ As such, it shares with all other social institutions certain salient features. Or stated slightly differently, what can be said accurately about all social institutions can be said accurately of the institution of marriage. One of the most important understandings is this: social institutions are constituted in large measure by shared public meanings. Although in pedestrian use the word “institution” may conjure up an image of an edifice constructed of steel, concrete, and glass, a social institution is not so constituted. Rather, it is “constituted by complex webs of social meaning.”¹⁰ John Searle explains this social reality using the example of another social institution, money:

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

experienced in American society; rather, we are referring to those components of that complex that three decades of court cases show to be most relevant to the genderless marriage issue. These components include the private welfare purpose discussed previously by Stewart, *supra* note 5, at 44–46, and summarized in these words: “Hence, what is understood to be a fundamental and originating purpose of marriage: to confine procreative passion to a setting, a social institution actually, that will assure, to the largest practical extent, that passion’s consequences (children) begin and continue life with adequate private welfare.” *Id.* at 45. Still focusing on children, another purpose is to make real the child’s right to know and to be brought up by his or her biological parents (with exceptions being justified only in the best interests of the child, not those of any adult). Another purpose is to bridge the male-female divide. Yet another is to confer the status of *husband* and *wife* and to transform identity and conduct in a way consistent with that status. For more on these purposes, see *infra* Part VI. When we speak of the use of the marriage institution for “nonmarriage” purposes or words to that effect, we mean purposes not logically consistent with the purposes just identified or actually inimical to them. This terminology is used not to pass moral or normative judgment on the nonmarriage purposes but to describe what seems to be a feature of those purposes important in the context of the *Perez/Loving* argument.

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

10. Stewart, *supra* note 5, at 83.

voting, promises, *marriages*, buying and selling, political offices, and so on.¹¹

The shared meanings that constitute a social institution interact and are interdependent; each meaning affects and is dependent on all the others. “An institution is a *web of interrelated norms*—formal and informal—governing social relationships.”¹²

Social institutions shape and guide individuals’ identities, perceptions, aspirations, and conduct. An institution “supplies to the people who participate in it what they should aim for, dictates what is acceptable or effective for them to do, and teaches how they must relate to other members of the institution and to those on the outside.”¹³ This profound influence ought not to be underestimated; institutions “shape[] what those who participate in [them] think of themselves and of one another, what they believe to be important, and what they strive to achieve.”¹⁴ Thus,

an institution guides and sustains individual identity in the same way as a family, forming individuals by enabling or disabling certain ways of behaving and relating to others, so that each individual’s possibilities depend on the opportunities opened up within the institution to which the person belongs.¹⁵

But inasmuch as human societies create and sustain social institutions, a society can change its social institutions. “Institutions can be changed in the sense that they will necessarily change if sufficiently many individuals try to change them.”¹⁶ And because social institutions are constituted by shared public meanings, they are necessarily changed when those meanings are changed and/or no longer sufficiently shared. Indeed, that is the only way a social institution can be changed.

An individual may withdraw his deposit from a bank, or break the law, or the rules [of] a game, without causing the change or

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

12. Victor Nee & Paul Ingram, *Embeddedness and Beyond: Institutions, Exchange, and Social Structure*, in *THE NEW INSTITUTIONALISM IN SOCIOLOGY* 19, 19 (Mary C. Brinton & Victor Nee eds., 1998).

13. Stewart, *supra* note 5, at 111.

14. *Id.*

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

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

collapse of the institutions concerned. Such an action would not be possible for all individuals acting as a collective [without causing that change or collapse]. Conversely, there are acts which are possible only for all individuals, but not for any single individual. Changing, creating, maintaining or destroying institutions are examples of this.¹⁷

Just as social institutions can be changed by alteration of the constitutive shared public meanings, so they can be renewed and strengthened by use consistent with those shared public meanings.

[A]s several social theorists have pointed out, institutions are not worn out by continued use, but each use of the institution is in a sense a renewal of that institution. Cars and shirts wear out as we use them but constant use renews and strengthens institutions such as *marriage*, property, and universities. . . . [I]n terms of the continued collective intentionality of the users, each use of the institution is a renewed expression of the commitment of the users to the institution.¹⁸

And just as social institutions can be changed or reinforced, social institutions can be entirely dismantled.

The secret of understanding the continued existence of institutional facts is simply that the individuals directly involved and a sufficient number of members of the relevant community must continue to recognize and accept the existence of such facts. . . . The moment, for example, that all or most of the members of a society refuse to acknowledge [the social institution of] property rights, as in a revolution or other upheaval, property rights cease to exist in that society.¹⁹

Society can use the law effectively to reinforce, to alter, or to dismantle a social institution. This is because the law has an expressive or educative function that is magnified by its authoritative voice.²⁰ And in actual practice, the law's authoritative voice is used

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

18. SEARLE, *supra* note 11, at 57 (emphasis added).

19. *Id.* at 117.

20. *E.g.*, JOSEPH RAZ, THE MORALITY OF FREEDOM 162 (1986) ("Supporting valuable forms of life is a social rather than an individual matter. Monogamy, assuming that it is the only morally valuable form of marriage, cannot be practised by an individual. It requires a culture which recognizes it, and which supports it through the public's attitude and through

to reinforce, to alter, or to dismantle the shared public meanings that constitute a social institution. Regarding the reinforcing function, Joseph Raz observes:

Perfectionist political action may be taken in support of social institutions which enjoy unanimous support in the community, in order to give them formal recognition, bring legal and administrative arrangements into line with them, facilitate their use by members of the community who wish to do so, and encourage the transmission of belief in their value to future generations. In many countries this is the significance of the legal recognition of monogamous marriage and prohibition of polygamy.²¹

Use of the law to reinforce or alter or extinguish the shared public meanings that constitute a social institution is a political act. As Edward Schiappa notes, “Definitions put into practice a special sort of social knowledge—a shared understanding among people about themselves, the objects of their world, and how they ought to use language.”²² He continues:

If we look hard enough, all definitions serve some sort of interests Defining what is or is not part of our shared reality is a profoundly political act. The establishment of authoritative definitions by law or custom requires a political *process* involving persuasion or force that generates political *results* by advancing some views and interests and not others.²³

To alter a social institution by altering the shared public meanings that constitute it (whether by use of the law or otherwise) is to alter—if not immediately then certainly soon—the individual identity, perceptions, aspirations, and conduct formed by reference to the old institution. The greater the alteration to the institution, the greater the changes in the individual. Likewise, the more influential the social institution being changed, the greater the changes in the individual.²⁴

its formal institutions.”); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 69–71 (1996).

21. RAZ, *supra* note 20, at 161.

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

23. *Id.* at 69–70 (citation omitted).

24. *E.g.*, RAZ, *supra* note 20, at 392.

Almost universally, a shared, public, and core meaning (constituting the social institution of marriage) is that marriage is the union of a man and a woman.²⁵ That meaning has been a constitutive core of the institution in the American experience. That core meaning has been and continues to be influential in forming individual identity, perceptions, aspirations, and conduct in a way and to an extent that common sense readily comprehends.

[M]arriage is an institution that interacts with a unique social-sexual ecology in human life. It bridges the male-female divide. It negotiates a stable partnership of life and property. It seeks to manage the procreative process and to establish parental obligations to offspring. It supports the birthright of children to be connected to their mothers and fathers.

. . . .

Michael Foucault contends that marriage has fostered a particular type of human identity, namely, the “conjugal self.” Be that as it may, marriage has always been the central cultural site of male-female relations. A rich history and a complex heritage of symbols, myths, theologies, traditions, poetry, and art have been generated by the institution of marriage, which encodes a unique set of aspirations into human culture along the axis of permanent opposite-sex bonding and parent-child connectedness.²⁶

Man/woman marriage is deemed to provide well, and even uniquely, a number of social goods besides those just identified. It is the only institution that can confer the status of *husband* and *wife*,²⁷ in particular, it is the only effective means to socialize and acculturate and thereby transform males into husbands—a process the institution sustains both before and after the wedding.²⁸ The institution performs the same transformative role in the creation of

25. As put by Justice Blair in the Ontario Divisional Court decision in *Halpern v. Toronto*, 60 O.R.3d 321 (Ont. Div. Ct. 2002), *aff'd in part, rev'd in part*, 65 O.R.3d 161 (Ont. 2003), “Anthropological, sociological and historical studies reveal that from time immemorial ‘marriage’ has *almost* universally been viewed as a monogamous union between a man and a woman.” *Id.* at para. 40. For more on the appellate decision in the *Halpern* case, see *infra* note 145 and text accompanying notes 167 and 171.

26. Cere, *supra* note 6, at 11, 14 (footnote omitted).

27. See F.C. DeCoste, *The Halpern Transformation: Same-Sex Marriage, Civil Society, and the Limits of Liberal Law*, 41 ALBERTA L. REV. 619, 625–26 (2003).

28. See Katherine K. Young & Paul Nathanson, *The Future of an Experiment, in* DIVORCING MARRIAGE, *supra* note 6, at 41, 47–48.

husband/fathers, another identity beneficially different than that of a mere male.²⁹ It also promotes (by privileging) that form of adult intimacy—married heterosexual intercourse—that society may rationally value above all other such forms.³⁰

A social institution defined at its core as the union of any two persons is unmistakably different from the historic marriage institution.³¹

Much has been and can be said about public meanings influencing, [or] constituting, social institutions, which in turn influence, even define, the human participants. All of that can be said, of course, about both man/woman marriage as an institution and genderless marriage as an institution. The point is the high likelihood that an institution defined at its core as the union of a man and a woman (with all that limitation implies and entails regarding purposes and activities) will intend and sustain “the social understandings, the practices, the goods, and the social selves” in large measure not intended or sustained by an institution defined at its core as any two persons in a close personal relationship.³²

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

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

30. Stewart, *supra* note 5, at 52–57.

31. Observers of marriage who are both rigorous and well informed regarding the realities of social institutions uniformly acknowledge the magnitude of these differences between the two possible institutions of marriage. This is so regardless of the observers' own sexual, political, or theoretical orientation or preference. See, e.g., LADELLE MCWHORTER, *BODIES AND PLEASURES: FOUCAULT AND THE POLITICS OF SEXUAL NORMALIZATION* 125 (1999); RAZ, *supra* note 20, at 393; Cere, *supra* note 6, at 11–18; Douglas Farrow, *Canada's Romantic Mistake*, in *DIVORCING MARRIAGE*, *supra* note 6, at 1, 1–5; Young & Nathanson, *supra* note 28, at 48–56.

32. Stewart, *supra* note 5, at 77 (footnote omitted).

on one hand, and of the interests and needs of children, on the other hand.³³

Redefinition has other practical outcomes. For our purposes, perhaps the most important is found at the intersection of the law's authoritative role (relative to marriage's meanings) and the unitary nature of the institution. By unitary nature, we mean simply that society can sustain one and only one marriage institution. Society cannot, at one and the same time, tell the people (and especially the children) that marriage, in its core meaning, is the union of any two persons and that marriage, in its core meaning, is the union of a man and a woman. Given the role of language and meaning in constituting and sustaining institutions, two "coexisting" social institutions known society-wide as *marriage* would seem to amount to a factual impossibility. When we speak of law's authoritative role relative to marriage's meaning, we are thinking of this: Once the law (on constitutional grounds no less) has taken a stand that the core meaning is the union of any two persons, the law will then be unrelenting and thoroughgoing in enforcement of that decision. The law's own internal logic and institutional mandates require no less. Thus, at the intersection of the unitary nature of marriage and the law's authoritative role in marriage's meaning, what will result is the new meaning being mandated in texts, in schools, and in virtually every other part of the public square, and also being voluntarily published by the media and other institutions.³⁴ Even linguistic, social, or religious enclaves dedicated to preserving the old meaning will have a difficult time.³⁵

33. See Margaret Somerville, *What About the Children?*, in *DIVORCING MARRIAGE*, *supra* note 6, at 66–67, 78; Seana Sugrue, *Marriage: Inside and Out* 14–15 (paper presented at Illuminating Marriage Conference, Kananaskis, Alberta, Canada, May 18–20, 2005, on file with author) (“Hence, same-sex marriage as well as a number of other marital reforms, . . . foster the vulnerability of children to advance the desires of adults.”).

34. *Id.* at 111.

35. Helen Reece explains:

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

REECE, *supra* note 15, at 38.

This repetition seems merited. These realities regarding social institutions in general and the social institution of marriage in particular are not controversial in the literature on the nature of institutions. Although each side's "spin" and emphasis in the current genderless marriage debate differ dramatically, no scholarship (to date, anyway) has attempted to refute the social realities summarized above. And, as we show next, it seems clear that the leaders of the white supremacist movement apprehended these social realities and built a cunning strategy based on that understanding.

III. THE ASCENDANCY AND THE DISMANTLING OF THE WHITE SUPREMACISTS' MARRIAGE PROJECT

A. The Ascendancy

The history of antimiscegenation laws in the United States shows their purpose to be the promotion of white supremacy. "Under the common law of England, difference in race was not a disability rendering parties incapable of contracting marriage."³⁶ Although in some areas of the United States antimiscegenation laws date back to colonial times,³⁷ a number of Southern states had no antimiscegenation statutes before the Civil War.³⁸ One commentator noted that "[d]uring Reconstruction, anti-miscegenation laws, which had assumed a relatively minor position in Southern slave codes, spread to a number of Southern states for the first time."³⁹ Despite being of comparatively late origin, these laws took a deep hold in the South, and whereas "many states repealed their anti-miscegenation laws after ratification of the Civil War amendments, most Southern states did not."⁴⁰ Even in those states declining repeal, a very few early cases accepted the claim that the 1866 Civil Rights Act

36. Robert Kovach, Note, *Miscegenation Statutes and the Fourteenth Amendment*, 1 CASE W. RES. L. REV. 89 (1949).

37. Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s-1960s*, 70 CHI.-KENT L. REV. 371, 389 (1994).

38. Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1345 n.172 (1998); Wallenstein, *supra* note 37, at 372.

39. Hasday, *supra* note 38, at 1345.

40. James Trosino, Note, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93, 98 (1993) (citing ROBERT J. SICKELS, RACE, MARRIAGE AND THE LAW 64 (1972)).

invalidated antimiscegenation laws.⁴¹ But as late as 1910, twenty-eight states still had antimiscegenation laws in effect; sixteen such laws were still in effect at the time of the decision in *Loving* in 1967.⁴²

Although on their face the statutes only redefined marriage laws, numerous sources support the idea that the true aim of these statutes was to promote the white supremacist agenda. One commentator has pointed out that “it is clear that the prohibitions on racial intermarriage were indeed intended to be, among other things, ‘badges and incidents of slavery.’”⁴³ She also argues that “Southern antimiscegenation laws trumpeted the message that White families should close ranks to exclude and thus socially subordinate inferior Blacks.”⁴⁴ Another author has said that “[w]hite supremacists viewed interracial marriage as an abomination possibly resulting in the annihilation of the white race along with all of its concomitant glory. Legal restrictions on miscegenation were therefore necessary to prevent this perceived debacle.”⁴⁵ A 1912 treatise on Georgia constitutional law described antimiscegenation laws as “erect[ing] a barrier behind which legitimate home life should be sheltered from African admixture.”⁴⁶ A 1931 treatise says that “racial prejudice, social or ethnological considerations, or the dogma of white superiority, have resulted in the prohibition of inter-racial marriages.”⁴⁷ And in the *Dred Scott* decision, “Chief Justice Roger B. Taney had stressed state laws banning marriage between blacks and whites to support the conclusion that blacks were not citizens.”⁴⁸

41. Hasday, *supra* note 38, at 1365–66; Keith E. Sealing, *Blood Will Tell: Scientific Racism and the Legal Prohibitions Against Miscegenation*, 5 MICH. J. RACE & L. 559, 600 (2000).

42. Hrishikesh Karthikeyan & Gabriel J. Chin, *Preserving Racial Identity: Population Patterns and the Application of Anti-Miscegenation Statutes to Asian Americans, 1910–1950*, 9 ASIAN L.J. 1, 5, 14 (2002); Trosino, *supra* note 40, at 98.

43. Emily Field Van Tassel, “*Only the Law Would Rule Between Us*”: *Antimiscegenation, the Moral Economy of Dependency, and the Debate over Rights After the Civil War*, 70 CHI.-KENT L. REV. 873, 926 (1995).

44. *Id.* at 908.

45. Trosino, *supra* note 40, at 100.

46. Van Tassel, *supra* note 43, at 905 (quoting WALTER MCELREATH, A TREATISE ON THE CONSTITUTION OF GEORGIA 145 (1912)).

47. CHESTER G. VERNIER, 1 AMERICAN FAMILY LAWS 204 (1931).

48. Wallenstein, *supra* note 37, at 379 (citing *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 408 (1857)).

Moreover, by the early twentieth century, antimiscegenation laws were largely confined to the Western and Southern states. Commenting on this fact, the 1931 treatise said:

The peculiarly geographic distribution of statutes prohibiting racial intermarriage forces one to conclude (all logical justification to the contrary, notwithstanding) that such legislation is not based primarily upon physiological, psychological, or other scientific bases, but is for the most part the product of local prejudice and of local effort to protect the social and economic standards of the white race.⁴⁹

A historical analysis also shows that fears of interracial marriage were used to fuel opposition to Reconstruction Era civil rights laws.⁵⁰ In fact, antimiscegenation laws were part of a “triad”—together with restrictions on public accommodations and social equality—which became “a rallying cry for the force of ‘white supremacy.’”⁵¹

The racial fixation of these laws is further illustrated by their ties to eugenic theories.⁵² Professor Keith Sealing notes that “[t]he marriage of scientific racism and the former slaveholders’ need for anti-miscegenation laws created long-lived progeny.”⁵³ Professor Jennifer Wriggins similarly says that these laws “were also aimed at keeping the ‘blood’ of the white race pure and uncontaminated by ‘black blood,’ which was thought to transmit inferior intellect and other inferior traits.”⁵⁴ “While many [Jim Crow] statutes dictated separation broadly between the ‘white and colored races,’ the drafters of anti-miscegenation laws took much greater pains to specify the particular racial groups to whom those restrictions applied.”⁵⁵ In fact, over time, antimiscegenation laws were changed to increase the racial restrictions, moving them toward a “one-drop” rule.⁵⁶ For instance, in 1927 Alabama changed its antimiscegenation law to make “the definition of a white person . . . more exclusive

49. VERNIER, *supra* note 47, at 204–05.

50. Van Tassel, *supra* note 43, at 906.

51. *Id.* at 899.

52. Karthikeyan & Chin, *supra* note 42, at 21–23.

53. Sealing, *supra* note 41, at 606.

54. Jennifer Wriggins, *Genetics, IQ, Determinism, and Torts: The Example of Discovery in Lead Exposure Litigation*, 77 B.U. L. REV. 1025, 1048 (1997).

55. Karthikeyan & Chin, *supra* note 42, at 6.

56. Wallenstein, *supra* note 37, at 395, 406.

than ever before”⁵⁷ by defining a “negro” as a person who has “negro ancestors, without reference to or limit of time or number of generations removed.”⁵⁸ Prosecutions based on antimiscegenation laws often hinged on racial identity.⁵⁹

In summary, the antimiscegenation laws were a consequence of racial dogma and not of the purposes and logic of marriage as understood for many centuries before.⁶⁰ In David Wagner’s phrasing, the antimiscegenation laws must be seen as a logical extension of racial law, not of marriage law.⁶¹

B. The Dismantling of the Genderless Marriage Agenda

Language in the *Perez* and *Loving* decisions points to a judicial understanding that, with these kinds of laws, white supremacists had appropriated the law of marriage to promote their ideological program. In each case, the court looked beyond the nominal regulation of marriage and exposed the white supremacist ideology that enactment of the laws sought to advance.

I. Perez v. Lippold

In *Perez v. Lippold*,⁶² a county clerk refused to issue a marriage license because of the applicants’ answers to a form question about their race. The clerk relied on a statute that prohibited not *any* interracial marriage, but only marriages between white persons and those of other races.⁶³ The standard used by the California Supreme Court in reviewing the law was clear: “There can be no prohibition of marriage except for an important social objective and by reasonable means.”⁶⁴ As the court further articulated, “[l]egislation infringing [marriage] rights must be based upon more than prejudice

57. *Id.* at 407.

58. *Id.* (internal quotation marks omitted) (quoting Act of Sept. 6, 1927, No. 626, § 5, 1927 Ala. Acts 716, 717).

59. Peter Wallenstein, *Law and the Boundaries of Place and Race in Interracial Marriage: Interstate Comity, Racial Identity, and Miscegenation Laws in North Carolina, South Carolina, and Virginia, 1860s–1960s*, 32 AKRON L. REV. 557, 561–62 (1999).

60. As to those “purposes and logic,” see *supra* note 8.

61. David Wagner, *Why Goodridge Isn’t Loving*, Address at the Conference on State Marriage Amendments at Georgia State University (Apr. 16, 2005).

62. 198 P.2d 17 (Cal. 1948).

63. *Id.* at 18.

64. *Id.* at 19.

and must be free from oppressive discrimination” to be constitutional.⁶⁵ For the court, the relevant question was “whether the state can restrict that right on the basis of race alone.”⁶⁶ The court concluded that the state could not.⁶⁷

In its opinion, the court outlined the relevant standard for the regulation of marriage, holding that the state could regulate marriage for health reasons but that any such regulation “must apply to all persons regardless of race.”⁶⁸ The court found that the California regulations prohibiting a white person from marrying a person of another race did not do so and that, “[b]y restricting the individuals’s [sic] right to marry on the basis of race alone, they” violated the Equal Protection Clause.⁶⁹ Noting that “[r]ace restrictions must be viewed with great suspicion,” the court further held that “[a]ny state legislation discriminating against persons on the basis of race or color has to overcome the strong presumption [against such discrimination] inherent in this constitutional policy.”⁷⁰

In striking down the laws at issue, the court relied in part on its finding of racial animus behind the laws. It noted that the antimiscegenation statutes had been enacted along with other racial classifications⁷¹ and that the case law upholding such statutes contained a number of prejudicial statements about nonwhite races.⁷² Further noting that the law applied only to interracial marriages involving whites, the court suggested that the law was “based upon the theory that the progeny of a white person and a Mongolian or Negro or Malay are inferior or undesirable, while the progeny of other different races are not.”⁷³ The court also made much of the statute’s failure to address mixed-race individuals and of the difficulties with legislative definitions of race, given the purported intent of the laws as preventing problems with the

65. *Id.*

66. *Id.*

67. *Id.* at 29.

68. *Id.* at 21.

69. *Id.*

70. *Id.*

71. *Id.* at 21–22.

72. *Id.* at 22.

73. *Id.* at 23.

offspring of interracial marriages.⁷⁴ In its conclusion, the court stated that the challenged laws “violate the equal protection of the laws clause of the United States Constitution by impairing the right of individuals to marry *on the basis of race alone* and by arbitrarily and unreasonably discriminating *against certain racial groups*.”⁷⁵

Justice Carter’s concurrence also noted that the antimiscegenation laws were “the product of ignorance, prejudice and intolerance.”⁷⁶ To Justice Carter, the relevant constitutional value was “that all human beings have equal rights regardless of race, color or creed, and that the right to liberty and the pursuit of happiness is inalienable and may not be infringed because of race, color or creed.”⁷⁷ He believed that “the matter of race equality should be a settled issue” and “that it is not possible for the Legislature, in the face of our fundamental law, to enact a valid statute which proscribes conduct on a *purely racial basis*.”⁷⁸ Justice Carter noted that marriage involves the “pursuit of happiness in its clearest and most universally approved form.”⁷⁹ A corollary to this principle is that “an infringement of that right by means of a racial restriction is an unlawful infringement of one’s liberty.”⁸⁰

After the *Perez* decision was handed down, the commentators lauded the decision’s emphasis on the invalidating racial nature of the classification. For instance, one commentator placed the *Perez* decision in the context of then-recent court trends: “The past two years have witnessed significant developments by the courts in checking discrimination against minority racial groups.”⁸¹ Many other commentators made similar observations.⁸²

74. *Id.* at 28.

75. *Id.* at 29 (emphasis added).

76. *Id.* (Carter, J., concurring).

77. *Id.*

78. *Id.* at 30 (emphasis added).

79. *Id.*

80. *Id.* at 31.

81. Robert T. Hurwitz, Recent Case, 37 CAL. L. REV. 122, 122 (1949).

82. Donald D. Davis, Recent Case, 47 MICH. L. REV. 834 (1949); Francis J. Keating, *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948), 24 NOTRE DAME L. REV. 410 (1949); Kovach, *supra* note 36; Arturo G. Ortega, Recent Case, 37 GEO. L.J. 442 (1949); Alice Helen Sofis, Note, *The Constitution and Anti-Miscegenation Statutes*, 10 PITT. L. REV. 364 (1948); Theodore C. Sorenson, Recent Case, 28 NEB. L. REV. 475 (1949); William F. Whetmore, Jr., Recent Case, 17 GEO. WASH. L. REV. 262 (1948); Case Note, 3 MIAMI L.Q. 303 (1949); Recent Case, 33 MINN. L. REV. 530 (1948-49); Note, *Constitutionality of State Anti-*

2. Loving v. Virginia

Virginia contained similar invalid racial classifications in its marriage laws. Professor Walter Wadlington noted this about the Virginia laws just prior to their review by the United States Supreme Court in *Loving v. Virginia*:⁸³ “It may seem surprising that a state which regularly recalls with glowing sentiment the story of how one of her early white sons married an Indian princess today maintains one of the strictest legal codes against racial intermarriage.”⁸⁴ This strict code was not the product of incidental marriage regulation; rather, as the *Loving* court eventually held, it was based in racial animosity.⁸⁵

The *Loving* case began when two Virginians, a Negro woman and a white man, were married in the District of Columbia.⁸⁶ When they returned to Virginia, they were indicted under Virginia’s miscegenation ban; subsequently, they pled guilty and were later sentenced to one year in jail, to be suspended on the condition that they leave the state for twenty-five years.⁸⁷ The couple returned to the District of Columbia, from whence they instituted a class action in Virginia state court seeking to declare the Virginia statute unconstitutional.⁸⁸ The case progressed to the Virginia Supreme Court of Appeals, which upheld the statute’s constitutionality.⁸⁹

In its decision reversing the Virginia court, the United States Supreme Court framed the question for review as “whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons *solely on the basis of racial classifications* violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.”⁹⁰ In evaluating this question, the Court

Miscegenation Statutes, 43 NW. U. L. REV. 866 (1949); Recent Case, 97 U. PA. L. REV. 438 (1949); Recent Case, 2 VAND. L. REV. 307 (1949).

83. 388 U.S. 1 (1967).

84. Walter Wadlington, *The Loving Case: Virginia’s Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1189 (1966) (footnote omitted). The reference is, of course, to John Smith and Pocahontas.

85. Professor Harvey Applebaum noted that “miscegenation” was “at the heart of racial prejudice.” Harvey M. Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 GEO. L. REV. 49, 78–79 (1964).

86. *Loving*, 388 U.S. at 2.

87. *Id.* at 2–3.

88. *Id.* at 3.

89. *Id.*

90. *Id.* at 2 (emphasis added).

determined that the antimiscegenation statute was an effort to promote an ideology of the superiority of the white race.⁹¹ The opinion initially noted a comment by the judge at the couple's criminal trial:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.⁹²

The Court noted the historical root of antimiscegenation laws “as an incident to slavery” and pointed out that Virginia’s ban was part of the Racial Integrity Act of 1924 enacted during a period of “extreme nativism.”⁹³ This act included a requirement of “certificates of ‘racial composition’ to be kept by both local and state registrars.”⁹⁴ The Supreme Court found it significant that an earlier Virginia Supreme Court decision had identified the following “legitimate purposes” of the antimiscegenation law: “‘to preserve the racial integrity of its citizens,’ and to prevent ‘the corruption of blood,’ ‘a mongrel breed of citizens,’ and ‘the obliteration of racial pride,’” all of which the United States Supreme Court identified as “obviously an endorsement of White Supremacy.”⁹⁵

The Court further identified the “clear and central purpose of the Fourteenth Amendment” as “eliminat[ing] all official state sources of invidious racial discrimination.”⁹⁶ The Court concluded that the challenged law rested “solely upon distinctions drawn according to race” and that there was “patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.”⁹⁷ The Court stated succinctly: “There can be no doubt that restricting the freedom to marry *solely*

91. *Id.* at 11.

92. *Id.* at 3. Not insignificantly, the trial court judge did not say that marriage itself was created to keep the races from mixing, but rather that the state had created antimiscegenation laws to effect what the judge believed was the intent of God—keeping the races separate.

93. *Id.* at 6.

94. *Id.* at 7.

95. *Id.*

96. *Id.* at 10.

97. *Id.* at 11.

because of racial classifications violates the central meaning of the Equal Protection Clause.”⁹⁸

After *Loving*, Reverend Robert S. Drinan, then-Dean of the Boston College of Law, noted that “[i]n view of the undeniable racist motivation of Virginia’s anti-miscegenation law the Supreme Court did not really have to confront the question of limits of the state’s power to regulate the freedom of choosing one’s spouse.”⁹⁹ Another contemporaneous article said that the decision “represent[ed] an inevitable conclusion, rather than a major breakthrough of the Negroes’ quest for equal rights.”¹⁰⁰

The important point is this: The historical context, the scholarly commentary, and the court decisions in *Perez* and *Loving* uniformly sustain the view that, with the antimiscegenation laws, the advocates of those laws were appropriating the marriage institution to further an ideology about something else—in this case, race. Acting on an accurate assessment of the institution of marriage as a powerful means to advance a social and political agenda essentially *nonmarriage* in its purposes, white supremacists used the law to change and then to highlight shared public meanings constituting the institution, all in an effort to implement their vision of the “good” society. With the *Perez* and *Loving* decisions, the law ceased to sustain that marriage project and affirmatively repudiated it.

IV. THE USE OF THE *PEREZ/LOVING* ARGUMENT: THREE DECADES IN THE COURTS

This issue—whether society may, consistent with constitutional guarantees of equality, sustain marriage as the union of a man and a woman—has been before American courts for more than thirty years.¹⁰¹ The constitutional challenges became a matter of considerable public interest for the first time with the 1993 Hawaii

98. *Id.* at 12 (emphasis added). The Court added an alternative basis for its holding, one sounding in substantive due process: “The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.” *Id.* This alternative basis for the holding has been the launch pad for many circular arguments—each beginning with an assertion of what marriage “is” as understood by the Court.

99. Robert S. Drinan, *The Loving Decision and the Freedom To Marry* 29 OHIO ST. L.J. 358, 358–59 (1968).

100. Donald W. Merritt, Recent Case, 17 BUFF. L. REV. 507, 512 (1967).

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

Supreme Court decision applying strict scrutiny analysis to the state's marriage law.¹⁰² Public interest in the issue has intensified since November 2003, when the Massachusetts Supreme Judicial Court redefined marriage in the commonwealth as the union of any two persons.¹⁰³ These cases, as well as all others over the years, have a common thread: they all cite *Loving* and/or *Perez* in some fashion or other relative to the same-sex couples' challenge to man/woman marriage. But the courts have not agreed on the validity of the *Perez/Loving* argument or the lessons those cases have for the contemporary marriage issue.

Just six years after *Loving*, the Minnesota case *Baker v. Nelson*¹⁰⁴ was the first reported case to weigh the constitutionality of a state marriage definition. The Minnesota Supreme Court held that *Loving* did not support a same-sex couples' claim to redefine marriage because that case was decided on the basis of Virginia's unconstitutional racial classification.¹⁰⁵ The court further noted that the racial classifications in antimiscegenation statutes were fundamentally different than the sex classification in the marriage law being challenged in the case before it.¹⁰⁶ The U.S. Supreme Court dismissed the subsequent appeal for failure to state a substantial federal question—a ruling on the merits.¹⁰⁷

Not long after *Baker*, a Washington court of appeals similarly rejected the *Perez/Loving* argument.¹⁰⁸ That court also held that *Loving* primarily involved the impermissibility of racial classifications.¹⁰⁹ It further noted that while the *Loving* and *Perez* cases involved attempts by interracial couples to marry, the claim for same-sex marriage was really an attempt to change the “nature of marriage itself.”¹¹⁰

In the 1993 Hawaii Supreme Court decision *Baehr v. Lewin*,¹¹¹ the plurality opinion discussed *Loving* at some length and asserted

102. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

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

104. 191 N.W.2d 185 (Minn. 1972).

105. *Id.* at 187.

106. *Id.* (“[T]here is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.”).

107. *Baker v. Nelson*, 409 U.S. 810 (1972).

108. *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

109. *Id.* at 1192 n.8.

110. *Id.* at 1191–92, 1995–96.

111. 852 P.2d 44 (Haw. 1993).

that the reasoning of *Loving* foreclosed the State's argument that marriage is an inherently opposite-sex institution.¹¹² Later in its opinion, the plurality cited *Loving* to rebut the State's argument that the equal *application* of the marriage law to both men and women (neither can marry a person of their same gender) prevents a finding of sex discrimination.¹¹³ Specifically, the plurality said that this argument is akin to the argument that equal application of antimiscegenation law to individuals of different races rebuts a finding of unconstitutional racial discrimination.¹¹⁴ Ignoring a simple difference between the two contexts—antimiscegenation laws clearly intended to stamp nonwhites as inferior, while the limitation of man/woman marriage stamps neither sex as inferior or superior but treats both as equally necessary—the plurality used *Loving*'s rejection of “the notion that the mere ‘equal application’ of a statute containing racial classifications is enough”¹¹⁵ as adequate basis for its holding of sex discrimination.

In the Vermont Supreme Court's decision *Baker v. Vermont*,¹¹⁶ holding that the state's constitution mandated the benefits of marriage for same-sex couples, a concurring and dissenting opinion by Justice Johnson argued that Vermont's marriage statute is sex discrimination and, like the Hawaii plurality, cited *Loving* to establish that the equal application of the law is not relevant.¹¹⁷ The

112. *Id.* at 61–63; see also David Orgon Coolidge, *Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy*, 12 *BYU J. PUB. L.* 201 (1998). Because the *Loving* decision did not address whether same-sex couples may marry, the plurality opinion needed a logical or factual link between *Loving*'s reasoning in its race-based context and the plurality's conclusion in its sexual-orientation-based context, but the opinion provided no such link. Rather, the plurality opinion resorted to a rather supercilious tactic; it asserted (without support) that the State's argument was analogous to the argument of the Virginia courts in *Loving* that “Deity had deemed” interracial marriages “intrinsically unnatural.” *Baehr*, 852 P.2d at 63. The plurality then said: “With all due respect to the Virginia courts of a bygone era, we do not believe that trial judges are the ultimate authorities on the subject of Divine Will, and, as *Loving* amply demonstrates, constitutional law may mandate, like it or not, that customs change with an evolving social order.” *Id.* Inasmuch as the State had not asserted that the marriage law was constitutional because of divine will or commandment and had not advanced a natural law argument, it is hard to escape the thought that the plurality invoked *Loving* for no defensible purpose other than to discredit the State's argument by a judicially forced association.

113. *Baehr*, 852 P.2d at 67–68.

114. *Id.* The validity and relevance of this comparison will be discussed *infra* Part IV.

115. *Id.* at 68 (quoting *Loving v. Virginia*, 388 U.S. 1, 8 (1967)).

116. 744 A.2d 864 (Vt. 1999).

117. *Id.* at 906 (Johnson, J., concurring and dissenting). Stewart has previously criticized in some detail the Johnson opinion. See Stewart, *supra* note 5, at 85–95.

majority, however, specifically disavowed this argument, stating that Justice Johnson's opinion's "reliance [on *Loving*] is misplaced."¹¹⁸ Unlike the court in *Loving*, the Vermont majority found no intent to discriminate in the marriage law at issue.¹¹⁹ In fact, the majority held that "[p]laintiffs 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."¹²⁰

A decision by the Arizona Court of Appeals held that *Loving* implicitly relied on the opposite-sex nature of marriage in holding that marriage was a fundamental right.¹²¹ The court reasoned that, because mandating genderless marriage would go much further than the *Loving* decision had gone, *Loving* did not compel the result that the plaintiffs sought.¹²² The court also cited *Loving* for the proposition that marriage is subject to appropriate state regulation and then concluded that the Arizona marriage statute involves such appropriate regulation because it advances the state interest in linking procreation and child rearing.¹²³

In the Massachusetts Supreme Judicial Court's decision *Goodridge v. Department of Public Health*,¹²⁴ mandating genderless marriage, the plurality opinion invoked *Loving* and *Perez* for the proposition that a right to marry means the right to choose whom one will marry.¹²⁵ This opinion also analogized the antimiscegenation laws to man/woman marriage with the assertion that in both contexts marriage was denied "because of a single trait:

118. *Baker*, 744 A.2d at 880 n.13.

119. *Id.*

120. *Id.* at 887.

121. *Standhardt v. Superior Court*, 77 P.3d 451, 458 (Ariz. Ct. App. 2003).

122. *Id.*

123. *Id.* at 461-62.

124. 798 N.E.2d 941 (Mass. 2003).

125. *Id.* at 958. The plurality opinion ignored the reality that the plaintiffs' (same-sex couples) "right to marry" of necessity consisted in this context of two rights and that the right to choose whom one will marry is only the totally dependent second right, the first being the right to alter the core meaning of marriage by redefinition. Because the opinion begins its analysis with a redescription (redefinition) of marriage as a close personal relationship of two adults and then proceeds to demonstrate that no good reason exists for limiting the "two adults" to a man and a woman, the plurality opinion's equality-rights argument is "viciously circular." Douglas Farrow, *Rights and Recognition*, in *DIVORCING MARRIAGE*, *supra* note 6, at 97, 98-101.

skin color in *Perez* and *Loving*, sexual orientation here.”¹²⁶ In a concurring opinion, Justice Greaney went down the track of the Hawaii plurality opinion and its use of *Loving*’s rejection of the equal-application argument in support of the conclusion that man/woman marriage is a form of sex discrimination.¹²⁷

The dissent by Justice Spina argued that the majority had mistakenly elevated the notion of “choice” as the essential element of marriage, contrary to what the court had done in *Loving*.¹²⁸ Justice Spina noted:

The “choice” to which the Supreme Court referred was the “choice to marry,” and it concluded that with respect to the institution of marriage, the State had no compelling interest in limiting the choice to marry along racial lines. The Supreme Court did not imply the existence of a right to marry a person of the same sex.¹²⁹

In other words, *Loving* stands for the proposition that racial classifications are not grounds for denying the right to marry and does not stand for the proposition that marriage can and should be defined to suit individual desires. The dissent of Justice Cordy similarly argued that *Loving* and other United States Supreme Court marriage cases recognized marriage as a fundamental right because of the institution’s importance and because of the institution’s role in regulating the consequences of heterosexual procreation.¹³⁰ The Cordy dissent characterized the majority’s approach to be, first, redefining marriage and then, second, declaring a right to the new institution to be fundamental.¹³¹

Two recent decisions from the State of Washington also invoked *Loving*, albeit in significantly different ways. In the first, a state trial judge invoked *Loving* for the proposition that the historical acceptance of a restriction does not make it constitutional.¹³² In the second, a federal bankruptcy court rejected a constitutional challenge to the Federal Defense of Marriage Act by noting that *Loving* relied

126. *Goodridge*, 798 N.E.2d at 958.

127. *Id.* at 971 (Greaney, J., concurring).

128. *Id.* at 975 (Spina, J., dissenting).

129. *Id.* (citations omitted).

130. *Id.* at 985 (Cordy, J., dissenting).

131. *Id.* at 984.

132. *Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *5 (Wash. Super. Ct. Aug. 4, 2004).

on a finding of racial discrimination rather than the sex discrimination allegedly tainting the federal statute.¹³³

Perhaps the most extensive treatment of the antimiscegenation cases is contained in one of the several marriage cases recently decided in the New York trial courts.¹³⁴ That decision opened with an invocation of the *Perez* and *Loving* decisions, which the court linked to the claim of the same-sex couples who were before the court as plaintiffs: “[T]he freedom to choose whom to marry has consistently been the subject of political outcry and controversy.”¹³⁵ The court also invoked the antimiscegenation decisions to dismiss concerns about overturning the longstanding definition of marriage as the union of a man and a woman: “[T]he United States Supreme Court was not deterred by the deep historical roots of anti-miscegenation laws.”¹³⁶ The court further relied on *Loving* and *Perez* in identifying the right to marry as the right to choose one’s spouse¹³⁷ and cited to *Perez* as an example of a state court refusing to consider the laws of other states in reaching its decision.¹³⁸ Finally, the court invoked *Loving* while rejecting any deference to the legislature in the matter.¹³⁹ In all, the court cited *Loving* at least eighteen times and *Perez* about a half-dozen times—a rather striking statistic given that the New York decision expressly limited its entire basis to the state constitution.

Not surprisingly, the one California decision to date on the definition of marriage focused more on *Perez* than on *Loving*.¹⁴⁰ In that opinion, a San Francisco trial court supported its holding that the California marriage statute constitutes impermissible sex discrimination by referring to *Perez*’s rejection of the equal-application justification for the law.¹⁴¹

133. *In re Kandu*, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2004).

134. *See, e.g.*, *Hernandez v. Robles*, No. 103434, 2005 WL 363778 (N.Y. Sup. Ct. Feb. 4, 2005).

135. *Id.* at *1.

136. *Id.* at *2. Unlike *Loving*, the New York trial court ignored, or was simply unaware of, the even older root stock of marriage into which the white supremacists’ marriage project grafted the foreign racial branch.

137. *Id.* at *13.

138. *Id.* at *16.

139. *Id.* at *23.

140. *See In re Coordination Proceeding*, No. 4365, 2005 WL 583129 (Cal. Super. Ct. Mar. 14, 2005).

141. *Id.* at *9.

Those are the cases. As noted at the outset, the *Perez/Loving* argument is also ubiquitous in the public debate of the marriage issue. The argument packs a rhetorical punch. At the rhetorical level, it effectively (1) implies that support for man/woman marriage (and therefore, of necessity, opposition to genderless marriage) is morally akin to racism; (2) creates a sense of inevitability regarding genderless marriage; (3) consequently implies (especially to legacy-conscious officials) that supporting genderless marriage is the only way to stay on the “right side of history”; and (4) fosters a particular self-perception in those accepting and implementing the argument—a self-perception of equivalence with those who fought the great civil rights battles of earlier generations.¹⁴²

V. USING THE INSTITUTION OF MARRIAGE AS A MEANS,
NOT AN END

*A. Evidences of the Use of Marriage To Achieve a Broader
Cultural, Social, and Political Agenda*

The suggestion summarized in unvarnished form at the beginning of this Article is that, for the gay/lesbian rights movement, the institution of marriage is not really a destination but rather a powerful tool for the achievement of a broader cultural, social, and political agenda. Stated slightly differently, the primary objective of the campaign to redefine marriage is to bring that institution into service to the movement’s essentially *nonmarriage* agenda. That suggestion presupposes a number of things, and the accuracy of those presuppositions bears on the validity of the suggestion. We address those presuppositions, even though most are probably widely taken for granted.

First, there is a gay/lesbian rights movement. That is not to say that it is monolithic in organization or objectives, or that it responds

142. Professor Douglas Farrow describes the mindset as follows:

The struggle for gay marriage, like the struggle against the anti-miscegenation laws of America’s southern states, is a noble one that keeps alive the heroic spirit of the freedom marches. (Is that not what justifies the pictures we saw in the papers of *Halpern* judges celebrating their landmark decision over drinks, arm in arm with activists and former litigants?) The march toward freedom is still moving. The old are still young, and the only question is where to march next.

Farrow, *supra* note 31, at 2–3. For more on the *Halpern* case, see *infra* note 145 and text accompanying notes 167 and 171.

to the directives of a highly centralized command and control apparatus. It is to say that the movement, with all the variety of its actors and all the shadings of its objectives and projects (and even with its schisms), is self-consciously a movement; its actors perceive it as a social movement of some force and consequence, and in important ways, they define themselves and formulate their projects in relation to that perception.¹⁴³ Thus, it is sensible to speak of the gay/lesbian rights movement as an actual social phenomenon possessing both certain acknowledged (tacitly at least) social objectives as well as necessary social resources to make the movement's pursuit of those objectives consequential.¹⁴⁴

Next, the objectives of the gay/lesbian rights movement are rationally and emotionally consistent with the project to redefine marriage. Stated generally, the ultimate objective is a society affording wide acceptance of the equal moral validity of gay and lesbian life experiences and thus affording to gays and lesbians equal social opportunity and freedom from adverse treatment.¹⁴⁵ For a number of fairly obvious reasons, judicial imposition of genderless marriage is seen as advancing that objective.

Next, the gay/lesbian rights movement, as a movement, has in fact pursued the redefinition of marriage and in the process devoted considerable resources to the task. A prime example is the thoroughly orchestrated, systematic, and persistent effort of key components of the movement—such as Lambda Legal Defense and Education Fund, the ACLU Lesbian and Gay Rights Project, and

143. See, e.g., PATRICIA A. CAIN, RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT (2000); Even Wolfson, *All Together Now*, in MARRIAGE AND SAME-SEX UNIONS: A DEBATE 3 (Lynn D. Wardle et al. eds., 2003); Douglas NeJaime, Note, *Marriage, Cruising, and Life in Between: Clarifying Organizational Positionalities in Pursuit of Polyvocal Gay-Based Advocacy*, 38 HARV. C.R.-C.L. L. REV. 511 (2003).

144. NeJaime, *supra* note 143.

145. See, e.g., *Halpern v. Toronto*, 65 O.R.3d 161, at para. 5 (Ont. 2003) (“This public recognition and sanction of marital relationships reflect society’s approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships. This can only enhance an individual’s sense of self-worth and dignity.”).

NeJaime notes this opening statement of the Human Rights Campaign’s Annual Report: “As the nation’s largest lesbian and gay political organization, the Human Rights Campaign envisions an America where lesbian, gay, bisexual and transgender people are ensured of their basic equal rights—and can be open, honest and safe at home, at work and in the community.” NeJaime, *supra* note 143, at 525 (internal quotation marks omitted) (quoting HUMAN RIGHTS CAMPAIGN AND THE HUMAN RIGHTS CAMPAIGN FOUNDATION, ANNUAL REPORT: APRIL 1, 2000–MARCH 31, 2001 (2001)).

the National Center for Lesbian Rights—to raise state constitutional challenges in judicial systems thought likely to be sympathetic. These key components build on each success (by proceeding to the next most likely court), avoid sure and even likely losers, and calibrate the timing of each step to maximize speed consistent with avoidance of a too-rapid advance that might bring forth adverse judicial rulings in jurisdictions that, just a year or two later and with more “evolving social developments,” might bring forth judicial victories.¹⁴⁶

Those are the points widely taken for granted. We now turn to an essential link in the logic/evidence chain. It is that, although most of the leadership and a strong majority of the movement’s adherents favor the campaign for genderless marriage, relatively few of those have a manifested intent to marry once they can. More specifically, the emerging accounts and reports from jurisdictions where same-sex couples may legally marry reveal two patterns. First, the strong majority of the gay and lesbian community appear to desire the redefinition of marriage from the union of a man and a woman to the union of any two persons and, thus, reject legislative solutions that grant same-sex couples virtually all the benefits of marriage except use of the word “marriage.”¹⁴⁷ Second, the number of same-sex couples actually entering marriage when they can do so legally is relatively small and is marked by a downward trend.¹⁴⁸

Regarding the second pattern, the example of the Netherlands—the first country to move from man/woman marriage to genderless marriage—is instructive. The infrequent use and downward trend of marriage can be seen in a press release issued by Statistics Netherlands—a department of that country’s Ministry of Economic Affairs.¹⁴⁹ The release notes that in 2001, when marriage was officially redefined to include same-sex couples, there were 2400

146. See David J. Garrow, *Toward a More Perfect Union*, N.Y. TIMES, May 9, 2004, § 6, at 52; see also Duncan, *supra* note 101, at 645–47.

147. See William N. Eskridge, Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 ALB. L. REV. 853 (2001).

148. David Frum, *A Blow to Canada’s Families*, NAT’L POST, Dec. 14, 2004, at A20 (“[Eighteen] months after same-sex marriage arrived in Canada, some 98% of adult Canadian gays have chosen to ignore their new legal right.”); Noelle Knox, *European Gay-Union Trends Influence U.S. Debate*, USA TODAY, July 14, 2004, at 5A (noting a forty percent decrease in the number of same-sex couples contracting marriage in the Netherlands since the law became available).

149. Press Release, Statistics Netherlands, *More Marriages and More Partnerships* (Nov. 27, 2002), available at www.cbs.nl/en/publications/press-releases/2002/pb02e244.pdf.

same-sex marriages but this number dropped to 1900 in 2002.¹⁵⁰ The release says: “Same-sex couples do not seem to be very interested in marriage. Statistics Netherlands estimates that there are about 50 thousand same-sex couples in the Netherlands, of whom less than 10 percent has married so far.”¹⁵¹ Since the press release was issued, the downward trend has continued: the number of same-sex marriages dropped to 1500 in 2003¹⁵² and 1100 in 2004.¹⁵³

This statistical evidence is consistent with anecdotal evidence from Canada and the United States. As an editor of a Canadian gay magazine in Toronto stated, “Ambiguity is a good word for the feeling among gays about marriage”¹⁵⁴ The journalist reporting such comments noted that:

[This] ambivalence is reflected in the numbers of gay couples who have chosen marriage so far. While members of Toronto’s gay population, by far Canada’s largest, express support of the Ontario court’s ruling and Prime Minister Jean Chretien’s decision to introduce legislation to legalize same-sex marriage nationwide, they have not mobilized to defend the change.¹⁵⁵

The article further notes that in the first months after the decision to issue marriage licenses to same-sex couples in Ontario, only a few hundred same-sex couples sought marriage licenses at the Toronto city hall—a small fraction of the 6685 same-sex couples registered as domestic partners in Toronto.¹⁵⁶ More recently, the

150. *Id.*

151. *Id.*; see also D. MANTING & J.A. LOEVE, ECONOMIC CIRCUMSTANCES AND UNION DISSOLUTION OF COUPLES IN THE 1990S IN THE NETHERLANDS 4–5 (Mar. 16, 2004), *available at* <http://www.cbs.nl/nl/publicaties/publicaties/maatschappij/bevolking/papers/economic-circumstances-union-dissolution.pdf>; LIESBETH STEENHOF & CAREL HARMSSEN, SAME-SEX COUPLES IN THE NETHERLANDS 10 (2003), *available at* <http://www.cbs.nl/nl/publicaties/publicaties/maatschappij/bevolking/papers/same-sex-couples.pdf>.

152. VIRGINIE GUIRAUDON ET AL., COMPARATIVE STUDY ON THE COLLECTION OF DATA TO MEASURE THE EXTENT AND IMPACT OF DISCRIMINATION IN A SELECTION OF COUNTRIES: FINAL REPORT ON THE NETHERLANDS 26 (June 2004), *available at* http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/aneval/pb_en.pdf.

153. See Statistics Netherlands, Population by Month, Quarter, and Year (2004), *at* <http://statline.cbs.nl/StatWeb/Start.asp?lp=Search/Search&LA=EN&DM=SLEN> (last visited May 11, 2005).

154. Clifford Krauss, *Now Free To Marry, Canada’s Gays Say, ‘Do I?’* N.Y. TIMES, Aug. 31, 2003, §1, at 1.

155. *Id.*

156. *Id.*

same journalist has noted that the rate of same-sex marriages has been falling since the redefinition of marriage in Canada, despite the fact that 34,200 same-sex couples registered as permanent partners in the 2001 census, the large majority of whom have not married.¹⁵⁷ Another article quotes a “coordinator of the office for queer issues at the University of Toronto” as saying: “It’s an accomplishment, the legalization of same-sex marriage. But I think the desire for it in the community simply doesn’t match that accomplishment.”¹⁵⁸ In Montreal, another man from the gay/lesbian community is quoted as saying: “‘It’s important to get the choice, but I don’t really want to get married. . . . It’s for the igitati,’ he said—equality, ‘Just feeling as the others.’”¹⁵⁹

A media report from Provincetown, Massachusetts, focusing on a same-sex couple who had lived together for 15 years notes:

[The couple] believe[s] that gays should have the right to marry, both as a matter of simple equality and as a form of legal protection.

But that doesn’t mean they necessarily want to exercise that right. “Do we need the marriage ceremony or all of the inherent baggage that goes with it?”¹⁶⁰

Other accounts from the American gay and lesbian community also reflect this sharp distinction between capturing the right to marry and actually exercising it, with the first endeavor having widespread support while the second languishes.

In sum, the evidence is of a large disparity between the gay and lesbian community’s support for the right of same-sex couples to marry, on the one hand, and actual exercise of that right, on the other hand. We see this evidence as probative of the suggestion summarized at the beginning of this Article: For the gay/lesbian

157. Clifford Krauss, *The Right To Marry, or Not To Marry, Is the Issue Among Canada’s Gays*, N.Y. TIMES, Feb. 6, 2005, § 4, at 14 (“Only an estimated 4,500 couples . . . have tied the knot in Canada since the first [court] decision . . . opened the door.”).

158. Matthew Hays, *Dodging the Altar: Gay Men and Lesbians Aren’t Exactly Rushing To Marry in Canada*, THE ADVOCATE, May 11, 2004, available at http://www.findarticles.com/p/articles/mi_m1589/is_2004_May_11/ai_n6152730.

159. Anne C. Mulkern, *Canada Offers Preview of Gay-Marriage Impacts*, DENVER POST, July 4, 2004, at A1.

160. Don Aucoin, *For Gays, No Unanimity on Marriage*, BOSTON GLOBE, July 10, 2003, at A1.

rights movement qua movement, the institution of marriage is not really a destination but rather a powerful tool for the achievement of a broader cultural, social, and political agenda. Stated slightly differently, the primary objective of the campaign to redefine marriage is to bring that institution into service for the movement's essentially *nonmarriage* agenda. We know of no other plausible account of the evidence.

B. The "Atypical Couples Tactic"

We also perceive an effort to mask or obscure what has been going on with the new project to appropriate marriage. The gay/lesbian rights movement has skillfully and often successfully deployed what may fairly be called the "atypical couples tactic." This tactic uses as the public face of the genderless marriage campaign a number of carefully selected same-sex couples virtually indistinguishable (except for gender) from Ozzie and Harriet Nelson or Clair and Heathcliff Huxtable and then points relentlessly to those couples as the "answer" to what the genderless marriage campaign is all about.¹⁶¹ The phrase "atypical couples tactic" is fair because such couples constitute a quite small portion of the gay and lesbian community¹⁶² and because the movement, and especially its most active litigating components—Lambda Legal Defense and Education Fund¹⁶³ and Gay and Lesbian Advocates and Defenders (GLAD)¹⁶⁴—is indeed being consciously tactical:

161. See, e.g., LAMBDA LEGAL, NEW JERSEY: FAMILY PROFILES, at http://www.lambda.legal.org/binary-data/LAMBDA_PDF/pdf/133.pdf (last visited May 10, 2005).

162. We have no desire to enter into the highly contentious subject of gay/lesbian demographics; our review of the literature, however, supports the essential accuracy of this conclusion by Dr. Timothy J. Dailey: "[O]nly a small minority of gays and lesbians choose to live in partnered relationships, and furthermore, only a small percentage of partnered homosexual households actually have children." Timothy J. Dailey, *Comparing the Lifestyles of Homosexual Couples to Married Couples*, INSIGHT (March 24, 2004), available at <http://www.frc.org/get.cfm?i=IS04C02>.

163. Lambda is based in New York City and pursues "impact litigation," an example being the test case in New Jersey, *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114 (N.J. Sup. Ct. Nov. 5, 2003). For more information about Lambda's litigation efforts, including its activity with regards to the appeal of *Lewis*, see <http://www.lambdalegal.org/cgi-bin/iowa/cases/summary.html> (last visited May 10, 2005).

164. GLAD is based in Boston and successfully prosecuted the same-sex marriage cases in Vermont, *Baker v. State*, 744 A.2d 864 (Vt. 1999), and Massachusetts, *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). For more information about GLAD's litigation efforts, see <http://www.glad.org> (last visited May 10, 2005).

At times, lawyers must construct identities in order to achieve legal reform. For instance, if the judiciary proves sympathetic to a particular gay identity—e.g., homosexual as respectable family member—advocates will use such identity to obtain desirable results

. . . .

Much like Lambda, GLAD relies on . . . normalizing rhetoric and . . . goes to great lengths to discuss the plaintiff couples and describe their lives in hetero-normative terms. While the couples are technically GLAD’s clients, they are held up as signifiers for the broader constituency seeking marriage *rights*. They are meant to be representative, both in the sense of being ideal within society and ordinary within GLBT circles. . . . [T]he plaintiff couples are meant to typify most other gay couples¹⁶⁵

Here are examples of the successful use of that tactic. In cases mandating genderless marriage in British Columbia,¹⁶⁶ Ontario,¹⁶⁷ and Massachusetts,¹⁶⁸ advocates of man/woman marriage sought to argue that alteration in the core and constitutive meaning of the marriage institution would greatly alter the institution and its role in society and thereby jeopardize the institution’s social goods. In the two contexts where this argument was relevant, the courts elided it.

In the first context, the likelihood of institutional change, the *Goodridge* plurality opinion in Massachusetts presented 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,”¹⁶⁹ and “[t]hat 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.”¹⁷⁰ In Ontario, *Halpern* took the same tack: “The Couples are not seeking to abolish the institution of marriage; they are seeking access to it.”¹⁷¹ (But, as we have noted elsewhere, “the probative value of

165. NeJaime, *supra* note 143, at 519, 545 (emphasis added) (footnote omitted). It is worth noting that the referenced constituency seeks marriage *rights*, not marriage.

166. *EGALE Canada Inc. v. Canada*, 13 B.C.L.R.4th 1 (B.C. 2003).

167. *Halpern v. Toronto*, 65 O.R.3d 161 (Ont. 2003).

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

169. *Id.* at 965.

170. *Id.*

171. *Halpern*, 65 O.R.3d 161, at para. 129.

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.”¹⁷²)

In the second context, the strength of the societal interests in preserving man/woman marriage, the courts again turned away from the social institutional realities to the feelings of the couples.

[A] central feature of the language from the[se] . . . cases . . . is its shift to the personal perspective—“the personal hopes, desires and aspirations,” “the professed commitment of two individuals,” and the “deeply personal commitment of the marriage partners to one another”. The societal interest and role in all this couple-centeredness is only “public celebration” of it, that is, society is an important guest at the wedding. But a wedding is not a marriage. A marriage seems better understood as participation in and engagement with a rich, complex, influential social institution whose meanings and deep logic seem best accounted for primarily by reference to societal interests, not individual hopes and desires.¹⁷³

This shift to “the personal perspective” qualifies as a “successful” deployment of the atypical couples tactic because, “when speaking of civil marriage, the shift in judicial focus to the wedding and to other manifestations of the personal perspective and away from society’s interests embedded in and served by the institution of marriage *of necessity* diminishes the force of those societal interests in the equality analysis.”¹⁷⁴

VI. CONSEQUENCES AND CONCLUSIONS

We believe that the work of the prior sections rather strongly validates this conclusion: The means successfully employed by the white supremacist movement to advance its essentially *nonmarriage*

172. Stewart, *supra* note 5, at 79.

173. *Id.* at 61.

174. *Id.* at 62. It seems fair to say that there is a contest within the larger contest and that it is a contest between a “macro” perspective and a “micro” perspective. The former comprehends the social institutional realities summarized *supra* Part II, while the latter is highly atomistic, with its personal rights rhetoric. Across the arenas where the larger contest is waged, we have observed that genderless marriage advocates, as a general rule, decline to engage the macro perspective and, when it is thrust before them, quickly revert to the arguments and rhetoric of the micro perspective.

agenda—altering the core meaning of marriage—is of a kind with the means being employed by the gay/lesbian rights movement to advance its essentially *nonmarriage* agenda. Now, it does not necessarily follow, in abstract logic, that the means, because of a kind, are unjustified in both cases.¹⁷⁵ Some advocates of redefinition may well argue that the contemporary movement’s objectives are laudable and justify the means, while the discredited objectives of the older movement did not; in other words, that the ends here and now justify the means, whereas the ends then and there did not. But what is called for, it seems to us, is that this “the ends justify the means” argument engage, not elide, two realities: one, redefinition as indeed a means to implement a broader and nonmarriage agenda and, two, redefinition as a profoundly consequential alteration—indeed, a dismantling—of the vital social institution of man/woman marriage.¹⁷⁶ The second may be seen as the “price tag” hanging on the first.

Our reflections on that price tag run as follows: Our society can sustain one and only one marriage institution. Society cannot, at the same time, tell the people (and especially the children) that marriage is the union of any two persons and that marriage is the union of a man and a woman. Two “coexisting” social institutions known society-wide as *marriage* is a factual impossibility. Thus, success of the gay/lesbian rights movement’s marriage project will in the process of time necessarily displace the institution of man/woman marriage and necessarily deprive society of the social goods provided, sometimes uniquely, by the old institution.¹⁷⁷ So, although one may

175. We have no intent to do to genderless marriage advocates what their use of the *Perez/Loving* argument has done to their opponents—implied that their position is morally akin to racism.

176. The scholarship of Katherine K. Young and Paul Nathanson accounts, in our judgment, for the contemporary marriage project’s much greater destructive effect on the marriage institution, compared to the effect of the older white supremacist marriage project. Young and Nathanson, based on “[c]omparative research on the worldviews of both small-scale societies and those of world religions,” conclude: “Marriage has universal, nearly universal, and variable features.” Katherine K. Young & Paul Nathanson, *The Future of an Experiment*, in *DIVORCING MARRIAGE*, *supra* note 6, at 45. The redefinition of marriage implemented by the white supremacists affected only a variable feature: “endogamy (marrying within a group) or exogamy (marrying outside it).” *Id.* By contrast, the redefinition from the union of a man and a woman to the union of any two persons counters a number of the universal and nearly universal features of marriage. *Id.*

177. What we are saying contrasts starkly with the old “definitional preclusion,” “natural limits,” and “marriage as supra-legal construct” arguments. Each of those, in its own way, says in effect that something essential to marriage precludes alteration by the law and, hence, by

by selective reference to social institutional realities tout genderless marriage as the way to a more just and equal society, the full panoply of relevant institutional realities compels acknowledgement of the awesome price that must be paid for entry into such a radically new and different world.

How large the price is suggested by a listing of what must of necessity be lost with the deinstitutionalization of man/woman marriage:

First, husbands and wives. Man/woman marriage is the only institution that can confer the status of *husband* and *wife*, that can transform a male into a husband (a social identity quite different from “partner”),¹⁷⁸ and thus that can transform males into husband/fathers (a category of males particularly beneficial to society).¹⁷⁹

Second, an effective bridge over the male-female divide. “[M]arriage has always been the central cultural site of male-female relations”¹⁸⁰ and society’s primary and most effective means of bridging the male-female divide—that “massive cultural effort of every human society at all times and in all places.”¹⁸¹

Third, the most effective means humankind has developed so far to maximize the level of private welfare provided to the children conceived by passionate, heterosexual coupling.¹⁸² The phrase *private welfare* includes not just the provision of physical needs such as food, clothing, and shelter; it encompasses opportunities such as education, play, work, and discipline and intangibles such as love, respect, and security.

Fourth, the effective means to make real the child’s right to know and to be brought up by his or her biological parents (with

society. We are saying plainly that the law and, hence, a society do indeed have the power to alter the constitutive meaning of marriage in that society; the real issue is the wisdom of doing so. We need to say at the same time that, as a matter of social institutional reality, same-sex couples cannot enter the marriage institution that has come down to us; their law-mandated marriage constitutes entry into a different institution, one defined at its core as the union of any two persons and one embodying the close personal relationship model of marriage. Stewart, *supra* note 5, at 84 (“Same-sex couples look to the law to let them into the privileged institution, and the law . . . may want to, but it cannot; it can only give them access to a different institution of different value.”).

178. See, e.g., DeCoste, *supra* note 27, at 625–26.

179. See, e.g., POPENOE, *supra* note 29, at 139–88.

180. Cere, *supra* note 6, at 14.

181. Young & Nathanson, *supra* note 28, at 43.

182. Stewart, *supra* note 5, at 44–52.

exceptions being justified only in the best interests of the child, not those of any adult).

[A]ccepting same-sex marriage necessarily means accepting that the societal institution of marriage is intended primarily for the benefit of the partners to the marriage, and only secondarily for the children born into it. And it means abolishing the norm that children—whatever their sexual orientation later proves to be—have a prima facie right to know and be reared within their own biological family by their mother and father. Carefully restricted, governed, and justified exceptions to this norm, such as adoption, are essential. But abolishing the norm would have a far-reaching impact.¹⁸³

Fifth, authoritative encouragement of the child-rearing mode—that is, married mother/father child-rearing—that correlates (in ways not subject to reasonable dispute)¹⁸⁴ with the optimal outcomes deemed crucial for a child's (and hence society's) well being. These outcomes include physical, mental, and emotional health and development; academic performance and levels of attainment; and avoidance of crime and other forms of self- and other-destructive behavior such as drug abuse and high-risk sexual conduct.¹⁸⁵

183. Margaret Somerville, *What About the Children?*, in *DIVORCING MARRIAGE*, *supra* note 6, at 67.

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

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

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

185. Stewart, *supra* note 5, at 64–70.

Sixth, the power to officially endorse that form of adult intimacy—married heterosexual intercourse—that society may rationally value above all other such forms.¹⁸⁶

The arguments marshaled to discount this price tag or even to deny its existence strike us as fundamentally inadequate. The first and most often deployed argument simply ignores the social institutional realities of marriage: “Redefinition will not really change anything. Just as many straight men and women will marry—and have just as many children—if gays can marry or not.”¹⁸⁷ But this mantra entirely 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 that means that they (and the generations after them) will undergo a much different formative and transformative experience.

The inadequacy of this “no downside” argument does not end there. 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”¹⁸⁸ 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

186. *Id.* at 54–57. Because the redefinition occurs by judicial mandate, assertedly compelled by constitutional norms—this being the context in which the *Perez/Loving* argument is deployed—*any* official or “state action” acknowledgement of marriage as the union of a man and a woman is Constitution-taboo.

187. Another “argument” may actually be moving into first position among genderless marriage advocates. It is simply to proceed from the assumed or implied premise that of course man/woman marriage violates equality norms and constitutes discrimination. In other words, the speaker proceeds as if she “owns” the words *equality* and *discrimination*. From this beginning, it is not difficult to move to the conclusion that man/woman marriage violates equality norms and constitutes discrimination. But it goes without saying (or rather, should go without saying) that what the contest is all about is the meaning of equality and discrimination in the context of marriage, particularly its social institutional realities. The increasingly popular new “argument,” being wholly circular, hinders rather than helps in reaching an understanding of the rational use of those two words in the marriage context.

188. SEARLE, *supra* note 11, at 57.

consequences may initially be misunderstood by many or even most, but the strengthening effect on the new institution is largely unavoidable.¹⁸⁹ Thus the argument—“just as many straight men and women will marry”—actually cuts against, not in favor of, genderless marriage once willful blindness toward the social institutional realities is no longer tolerated.

The other main argument advanced to discount or to evaporate the cost of this price tag is the following: “The law won’t really have that big of an impact on a fundamental social institution. People know what they think; it doesn’t matter what the law says is right. Something like marriage will just go on as before.” This appeal to the impotency of the law, of course, ignores the historical truth that when in America the law starts a current running through society—and does so in the name of the Constitution—that current will broaden and deepen and become ever swifter until it has transformed the landscape. The ending of *de jure* segregation in the South after *Brown v. Board of Education*¹⁹⁰ amounted to “revolutionary racial change,”¹⁹¹ and other than the end of apartheid in South Africa, it is difficult to identify in history a social transformation of equal magnitude effected without war. There is something almost astounding in the irony of the “impotent law” argument being used in the same context with the *Perez/Loving* argument.

To understand the “impotent law” argument’s kinship with the “enclave” argument is to further understand the inadequacy of both arguments. The “enclave” argument is that those in our society who do not agree with the teachings and formative influences of the genderless marriage institution and the interests that institution advances can simply enter an enclave—linguistic, social, and/or religious—where they can do their own marriage thing unaffected by the new social institution. But as we have noted elsewhere,¹⁹² there

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

190. 347 U.S. 483 (1954).

191. Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 11 (1994).

192. Stewart, *supra* note 5, at 82–83.

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.

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.¹⁹³

Only an excessively sanguine artist would paint this post-redefinition picture: the State of (fill in the blank: Massachusetts, California, etc.) as the happy home of many different marriage norm communities, each doing its own marriage thing, each equally valid before the law, each equally secure in its own space. There is reason to believe that the genuinely realistic picture as a matter of legal and social fact is far different: The state mandates by force of polity-wide law one and only one marriage institution and one and only one

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

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

REECE, *supra* note 15, at 38.

marriage norm, and that is genderless marriage. That 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, will be officially disdained.¹⁹⁴ 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. No, the law is tremendously potent in this area, and the unavoidable price of using the law to enthrone the genderless marriage institution is the dismantling and loss (if not immediately, then certainly sooner rather than later) of the marriage institution heretofore central in our society.

194. Farrow, *supra* note 125, at 101–02 (“The preamble to this draft legislation [the Chrétien government’s proposed genderless marriage bill of 2003] indicates that redefining marriage to make it accessible to same-sex couples will ‘reflect values of tolerance, respect and equality’ consistent with the *Charter*. But of course it follows that those who oppose redefinition do not reflect such values. This charge, publicly made and enshrined in law, can only diminish the respect in which such people are held”); Darrel Reid & Janet Epp Buckingham, *Whose Rights? Whose Freedoms?*, in *DIVORCING MARRIAGE*, *supra* note 6, 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.”).