STATE OF CONNECTICUT
SUPREME COURT

S.C. 17716

ELIZABETH KERRIGAN, *et al.*,

Plaintiffs-Appellants

vs.

COMMISSIONER OF PUBLIC HEALTH, *et al.*,

Defendants-Appellees.

BRIEF *AMICUS CURIAE* OF UNITED FAMILIES CONNECTICUT IN SUPPORT OF DEFENDANTS-APPELLEES

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Table of Contents

Statement of the Issue iii

Table of Authorities iv

Statement of the Interest of the *Amicus* vii

Counterstatement of the Facts and Proceedings viii

Argument. 1

Conclusion 15

Certification of Service

Certification of Compliance

Table of Authorities

Cases:

Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1980) 1

Andersen v. King County, 138 P.3d 963 (Wash. 2006) 1

Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) 1, 3

Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972) 1

Baker v. Vermont, 744 A.2d 864 (Vt. 1999) 1

Dean v. District of Columbia, 653 A.2d 307 (D.C. App. 1995) 1

DeSanto v. Barnsley, 476 A.2d 952 (Penn. Super. 1984) 1

Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) 1, 4, 6, 8

Hernandez v. Robles, 805 N.Y.S.2d 354 (N.Y. App. 2005) 1, 7

Hernandez v. Robles, 7 N.Y.3d 338 (N.Y. 2006) 1

In re Marriage Cases, 49 Cal. Rptr. 3d 675 (Cal. App. 2006) 1

Jones v. Hallahan, 501 S.W.2d 588 (Ky. App. 1973) 1

Kane v. Marsolais, 808 N.Y.S.2d 136 (N.Y. App. 2006) 1

Lewis v. Harris, 875 A.2d 259 (N.J. App. 2005) 1

Lewis v. Harris, 908 A.2d 196 (N.J. 2006) 1

Loving v. Virginia, 388 U.S. 1 (1967) 14

Morrison v. Sadler, 821 N.E.2d 15 (Ind. App. 2005) 1

Perez v. Lippold, 198 P.2d 17 (Cal. 1948) 14

Re Opinions of the Justices to the Senate, 802 NE2d 565 (2004) 6

Samuels v. New York Department of Public Health, 811 N.Y.S.2d 136 (N.Y. App. 2006) 1

Seymour v. Holcomb, 811 N.Y.S.2d 134 (N.Y. App. 2006) 1

Singer v. Hara, 522 P.2d 1187 (Wash. App. 1974), *review denied*, 84 Wash.2d 1008 (1974) 1

Standhardt v. Superior Court, 77 P.3d 451 (Ariz. App. 2003) 1

Williams v. North Carolina, 317 U.S. 287 (1942) 4

Other Authorities:

DAVID BLANKENHORN, THE FUTURE OF MARRIAGE (2007) 5, 8, 11, 13

DANIEL CERE, THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA 12 (Council on Family Law 2005), *available at* http://www.marriagedebate.com/pdf/future_of_family_law.pdf 7, 8, 10

RICHARD R. CLAYTON, THE FAMILY, MARRIAGE, AND SOCIAL CHANGE (2d ed. 1979) 5

William C. Duncan, *The Litigation to Redefine Marriage: Equality and Social Meaning*, 18 BYU J. PUB. L. 623 (2004) 3

RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? (2006) 2

Maggie Gallagher, *Does Sex Make Babies? Marriage, Same-Sex Marriage and Legal Justifications for the Regulation of Intimacy in a Post-*Lawrence *World*, 23 QUINNIPIAC L. REV. 447 (2004) 8

LINDA C. MCCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY (2006) 10

OXFORD ENGLISH DICTIONARY 3, 4

JOSEPH RAZ, THE MORALITY OF FREEDOM (1986) 9, 11

Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 CAN. J. FAM. L. 11 (2004), *available at* http://manwomanmarriage.org/jrm/pdf/jrm.pdf ...1, 7, 9

Monte Neil Stewart & William C. Duncan, *The Betrayal of* Perez *and* Loving, 2005 BYU L. REV. 555.....15

Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 DUKE J. CONST. L. & PUB. POL'Y 1 (2006), *available at* http://www.manwomanmarriage.org/jrm/pdf/Duke_Journal_Article.pdf ..... passim

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Monte Neil Stewart, *Eliding in Washington and California*, 42 GONZAGA L. REV. 501 (2007), *available at* http://manwomanmarriage.org/jrm/pdf/Eliding_in_WA_and_CA.pdf .... passim

Monte Neil Stewart, *Dworkin, Marriage, Meanings – and New Jersey,* 4 Rutgers J. L. & Pub. Pol'y 271 (2007) 2, 3

Seana Sugrue, *Soft Depotism and Same-Sex Marriage*, *in* THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, AND MORALS 172 (Robert P. George & Jean Bethke Elshtain eds. 2006) 9

William M. Sullivan, *Institutions as the Infrastructure of Democracy*, in NEW COMMUNITARIAN THINKING: PERSONS, VIRTUES, INSTITUTIONS, AND COMMUNITIES 175 (Amitai Etzioni ed. 1995) 5

W. BRADFORD WILCOX ET AL., WHY MARRIAGE MATTERS, SECOND EDITION: TWENTY-SIX CONCLUSIONS FROM THE SOCIAL SCIENCES (2005) 5

THE WITHERSPOON INSTITUTE, MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES 21–43 (2006), *available at* http://www.princetonprinciples.org/files/Marriage%20and%20the%20Public%20Good.pdf 8

Statement of the Interest of the *Amicus*

Amicus curiae is United Families Connecticut, a Connecticut-based citizens' organization that seeks to maintain and strengthen the family in the United States and other countries. Its parent organization, United Families International has been granted official consultative status at the United Nations as a non-governmental organization and has participated in UN conferences. Recognizing that the family is the natural and fundamental unit of society, UFI is committed to supporting those measures that maintain and strengthen the family. UFI believes a decision requiring Connecticut to redefine marriage as the union of any two persons will change the vital social institution of marriage in a way that will be harmful to society in general and children in particular.

Counterstatement of the Facts and Proceedings

Amicus curiae adopts the defendants-appellees' Counterstatement of the Facts and Proceedings.

ARGUMENT

I.
INTRODUCTION

Our generation's marriage issue is this: Do constitutional norms, particularly of equality and liberty, require the redefinition of marriage from *the union of a man and a woman* to *the union of any two persons*? Eighteen American appellate courts have addressed and resolved that issue.[1] Only one – a badly divided Massachusetts Supreme Judicial Court – mandated redefinition,[2] thereby making legally irrelevant the gender of the two who marry (hence, *genderless marriage* in the place of *man/woman marriage*[3]).

At this stage in the litigation of the marriage issue, two interrelated realities have become quite clear. The first is that the real fight is not over principles of law but over the

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[1] In chronological order, those appellate court decisions are: Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972); Jones v. Hallahan, 501 S.W.2d 588 (Ky. App. 1973); Singer v. Hara, 522 P.2d 1187 (Wash. App. 1974), *review denied*, 84 Wash.2d 1008 (1974); Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1980); DeSanto v. Barnsley, 476 A.2d 952 (Penn. Super. 1984); Baehr v. Lewin, 852 P.2d 44 (Haw. 1993); Dean v. District of Columbia, 653 A.2d 307 (D.C. App. 1995); Baker v. Vermont, 744 A.2d 864 (Vt. 1999); Standhardt v. Superior Court, 77 P.3d 451 (Ariz. App. 2003); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Morrison v. Sadler, 821 N.E.2d 15 (Ind. App. 2005); Lewis v. Harris, 875 A.2d 259 (N.J. App. 2005); Hernandez v. Robles, 805 N.Y.S.2d 354 (N.Y. App. 2005); Samuels v. New York Department of Public Health, 811 N.Y.S.2d 136 (N.Y. App. 2006); Seymour v. Holcomb, 811 N.Y.S.2d 134 (N.Y. App. 2006); Kane v. Marsolais, 808 N.Y.S.2d 136 (N.Y. App. 2006); Hernandez v. Robles, 7 N.Y.3d 338 (N.Y. 2006); Andersen v. King County, 138 P.3d 963 (Wash. 2006); *In re* Marriage Cases, 49 Cal. Rptr. 3d 675 (Cal. App. 2006); Lewis v. Harris, 908 A.2d 196 (N.J. 2006).

[2] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); *id.* at 970 (Greaney, J., concurring); *id.* at 974 (Spina, J., dissenting); *id.* at 978 (Sosman, J., dissenting); *id.* at 983 (Cordy, J., dissenting). Two appellate courts declined to mandate redefinition on condition of civil union legislation for same-sex couples. Lewis v. Harris, 908 A.2d 196 (N.J. 2006); Baker v. Vermont, 744 A.2d 864 (Vt. 1999).

[3] Regarding terminology, see Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 CAN. J. FAM. L. 11, 15-16 (2004), *available at* http://manwomanmarriage.org/jrm/pdf/jrm.pdf [hereinafter Stewart, *Judicial Redefinition*].

facts of marriage. Stated slightly differently, it is sharp division over the facts of marriage that really accounts for the sharp division between the American judges called on to resolve the marriage issue.[4] The second reality is that the social institutional argument for man/woman marriage has proven itself to be a sufficient response to all constitutional challenges leveled at the laws defining marriage as *the union of a man and a woman.* The American appellate judges who have engaged the argument have uniformly rejected the contention that constitutional norms of equality, liberty, autonomy, dignity, and so forth require the judicial redefinition of marriage to *the union of any two persons.* At the same time, the appellate judges favoring that radical redefinition have, without exception, evaded, ignored, or otherwise elided the social institutional argument – a troubling phenomenon now well documented in the scholarly literature.[5] Moreover, none of the many bright, even brilliant, academics and practicing lawyers advocating for judicial redefinition of marriage has genuinely engaged the social institutional argument for man/woman marriage, let alone brought forth any substantive counter to it – and this despite its growing prominence in both the juridical and wider social debate on the meaning of marriage.[6]

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[4] Most of the post-1992 decisions cited in note 1 *supra* featured dissenting opinions.

[5] *See, e.g.,* Monte Neil Stewart, *Eliding in Washington and California*, 42 GONZAGA L. REV. 501, 515-44 (2007), *available at* http://manwomanmarriage.org/jrm/pdf/Eliding_in_WA_and_CA.pdf [hereinafter Stewart, *Washington and California*]; Monte Neil Stewart, *Eliding in New York*, 1 DUKE J. CONST. L. & PUB. POL'Y 221, 231-58 (2006), *available at* http://www.manwomanmarriage.org/jrm/pdf/ElidingInNewYork.pdf [hereinafter Stewart, *New York*]; Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 DUKE J. CONST. L. & PUB. POL'Y 1, 28-60 (2006), *available at* http://www.manwomanmarriage.org/jrm/pdf/Duke_Journal_Article.pdf [hereinafter Stewart, *Judicial Elision*]. *See also* Monte Neil Stewart, *Dworkin, Marriage, Meanings – and New Jersey,* 4 Rutgers J. L. & Pub. Pol'y 271 [hereinafter Stewart, *Dworkin*]; Stewart, *Judicial Redefinition, supra* note x, at 71-85.

[6] One of the Nation's preeminent legal philosophers and public intellectuals, Ronald Dworkin, recently engaged the marriage issue, as an advocate of "gay marriage" (his label).

This *amicus* brief's purpose is to assist this Court in understanding and assessing these two interrelated realities in adjudication of the marriage issue.

II.
MARRIAGE FACTS: TWO COMPETING DESCRIPTIONS OF MARRIAGE

By *the facts of marriage* or *marriage facts*, we mean those facts that almost fifteen years[7] of litigating the marriage issue in sixteen states and the District of Columbia[8] have shown to be relevant to that issue. Thus, we use the word *facts* in a narrow, lawyerly way; its referent are those matters disputable in litigation other than legal principles and procedures, a distinction seen in such oft-used phrases as *issue of fact, question of law,* and *a mixed question of law and fact.* In this sense, a fact is not necessarily "[s]omething that has really occurred or is actually the case"[9] but is rather what a judge, for purposes of resolving a case, will accept as such – or will accept as something that a reasonable legislator could accept as such. Thus, in the lawyers' realm, the notion of *alleged fact* or

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That engagement appears in its most focused form in *Is Democracy Possible Here?* published in August 2006 (with key excerpts appearing in the September 21, 2006 issue of the New York Review of Books). Much to Dworkin's credit, he both sees the social institutional argument for man/woman marriage (what he calls "the cultural argument against gay marriage") as the strongest such argument and attempts to engage and counter the argument. *Id.* at 86-89. But his counter fails because it is premised solely on the strategy of mischaracterizing the social institutional argument as "religious" (patently it is not) and then invoking Establishment Clause jurisprudence and sensibilities. All this is examined in detail in Stewart, *Dworkin, supra* note 5, at 292-308.

[7] Before the 1991 commencement of the marriage litigation in Hawaii, the marriage issue was raised in other states. *See* note 1 *supra*. But the Hawaii case, Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), undoubtedly marks the beginning of the organized and strategic effort to redefine marriage by judicial mandate. *See* William C. Duncan, *The Litigation to Redefine Marriage: Equality and Social Meaning*, 18 BYU J. PUB. L. 623, 630-42 (2004).

[8] For the cases that since 1992 have had appellate court decisions, see note 1 *supra*.

[9] OXFORD ENGLISH DICTIONARY, *fact* n., 4a.

even *false fact* is not unintelligible[10]; in our references to *the facts of marriage* or *marriage facts*, that is our realm.

The opposing sides have repeatedly presented to the courts two seemingly[11] different "packages" of marriage facts, and each judge, in upholding man/woman marriage or mandating its replacement by genderless marriage, has to some degree both expressly premised her ultimate legal conclusion on the contents of the supportive package and attempted to counter the contents of the other package. This Court has seen in the briefs filed in this case a repetition of this phenomenon of competing and seemingly different packages of marriage facts.

What follows next is a summary of the factual basis of man/woman marriage's constitutionality, what is fairly called the broad (or institutional) description of contemporary American marriage. Because of page limitations, that summary is sparse indeed but does point to the sources giving fuller and more helpful descriptions. There then follows a brief summary of the narrow (or personal relationship) description of marriage necessarily and always advanced in favor of the genderless marriage position. Important parts of the narrow description are encompassed by the broad description.

A. The factual basis of man/woman marriage's constitutionality

Marriage is a vital social institution.[12] Like all social institutions, marriage is

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[10] *Id.* at 5.

[11] We say "seemingly" because the package presented by man/woman marriage proponents – the broad (or institutional) description – encompasses much of the other side's narrow description.

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

constituted by a unique web of shared public meanings.[13] For important institutions, again including marriage, many of those meanings rise to the level of norms.[14] Consequently, important social institutions affect individuals profoundly; institutional meanings teach, form, and transform individuals, providing identities, purposes, practices, and projects.[15]

Those meanings, as the constituent stuff of social institutions, are therefore the source of the institutions' respective social goods. In other words, it is by teaching, forming, and transforming individuals across the society that an institution's constitutive meanings provide the social goods.

Across time and cultures, a core meaning constitutive of the marriage institution has nearly always been *the union of a man and a woman.*[16] This core man/woman meaning is powerful and even indispensable for the marriage institution's production of at least six of its valuable social goods.[17] Those are social goods pertaining to the quality of child-bearing and child-rearing, to the statuses, identities, and projects of *wife* and *husband*, to negotiation of the male/female divide, and to rational valuation of various forms of intimate, adult conduct and relations.[18]

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[13] *See* Stewart, *Judicial Elision, supra* note 5, at 8-9.

[14] Clayton provides a standard definition of *institution:* "An organized system of social relationships (roles, positions, *norms*) that is pervasively implemented in the society and that serves certain basic needs of the society." RICHARD R. CLAYTON, THE FAMILY, MARRIAGE, AND SOCIAL CHANGE 22 (2d ed. 1979) (emphasis added).

[15] *See* Stewart, *Judicial Elision, supra* note 5, at 9-10; *see also* William M. Sullivan, *Institutions as the Infrastructure of Democracy*, in NEW COMMUNITARIAN THINKING: PERSONS, VIRTUES, INSTITUTIONS, AND COMMUNITIES 175 (Amitai Etzioni ed. 1995).
Id. at 173-74.

[16] DAVID BLANKENHORN, THE FUTURE OF MARRIAGE 91 (2007); W. BRADFORD WILCOX ET AL., WHY MARRIAGE MATTERS, SECOND EDITION: TWENTY-SIX CONCLUSIONS FROM THE SOCIAL SCIENCES 15 (2005).

[17] Stewart, *Washington and California, supra* note 5, at 504-06; Stewart, *Judicial Elision, supra* note 5, at 16-20.

[18] *Id.*

Nowhere in contemporary America has the man/woman meaning been deinstitutionalized by broad social trends, and only Massachusetts has a legal mandate designed to perform that task.[19] *The union of a man and a woman* continues as a widely shared, public, and core meaning constitutive of the marriage institution across Connecticut and the Nation. That is not to say that the man/woman meaning is universally shared; an alternate view of marriage (the "close personal relationship" model) makes that meaning quite dispensable, and that model's description of what marriage now *is* – after a process of evolution – is not inaccurate in some American communities or in portions of that world created by Hollywood. But its description is inaccurate beyond those particular spheres.[20]

With its power to suppress social meanings, the law can radically change and even deinstitutionalize man/woman marriage.[21] The consequence of such deinstitutionalization must necessarily be loss of the institution's social goods. Further, genderless marriage is a radically different institution than man/woman marriage.[22] This significant divergence is seen in the nature of the two institutions' respective social goods (in the case of genderless marriage, only promised, not yet delivered).[23] Nor should this divergence be surprising: fundamentally different meanings, when magnified by institutional power and influence, do

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[19] *Re* Opinions of the Justices to the Senate, 802 NE2d 565 (2004); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

[20] *See* Stewart, *Washington and California, supra* note 5, at 508, 532-35; Stewart, *New York, supra* note 5, at 235-37.

[21] Stewart, *Judicial Elision, supra* note 5, at 11-13.

[22] This does not mean, of course, that there is no overlap in formative instruction between the two possible marriage institutions; the significance is in the divergence.

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

not produce the same social identities, aspirations, projects, or ways of behaving, and hence the same social goods.[24]

Although the contemporary social institution of marriage in America has evolved in important ways over the centuries and undoubtedly now includes the ideal of "a partnership of equals with equal rights, who have mutually joined to form a new family unit, founded upon shared intimacy and mutual financial and emotional support,"[25] enduring aspects of the institution go *far beyond* that limited and limiting description of transformative meanings. Those enduring aspects are grounded in the man/woman meaning, a norm under "which men and women commit to each other and to the children that their sexual unions commonly (and even at times unexpectedly) produce,"[26] a norm that does much to maximize the private welfare received by the children (nearly all) conceived by passionate, heterosexual coupling,[27] a norm that makes the marriage institution "fundamentally child-centered, focused beyond the couple towards the next generation."[28] Although "not every married couple has or wants children," still "at its core marriage has always had something to do with societies' recognition of the fundamental importance of the sexual ecology of human life: humanity is male and female, men and woman often have sex, babies often

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[24] *Id.* at 20-21. The observers of marriage who are both rigorous and well-informed regarding the realities of social institutions uniformly acknowledge the magnitude of the differences between the two possible institutions of marriage, and this is so regardless of the observer's own sexual, political, or theoretical orientation or preference. The citations are collected at Stewart, *Washington and California, supra* note 5, at 507 n. 28.

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

[26] DANIEL CERE, THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA 12 (Council on Family Law 2005), *available at* http://www.marriagedebate.com/pdf/future_of_family_law.pdf.

[27] *See* Stewart, *Judicial Redefinition, supra* note 3, at 41-64.

[28] CERE, *supra* note 26, at 13.

result, and those babies, on average, seem to do better when their mother and father cooperate in their care."[29]

Because contemporary American marriage advances, albeit imperfectly, the purposes and goods emerging from the institutionalized man/woman meaning, many tens of millions in this Nation continue to enjoy the significant incremental increase in child and adult happiness, health, achievement, and prosperity associated with that institution, something that social science has measured and stated in conclusions that are by now rather uncontroversial.[30]

A society can have, at any given time, only *one* social institution denominated *marriage*.[31] That is because a society, as a simple matter of reality, cannot, at one and the same time, have as shared, core, constitutive meanings of the marriage institution *both* "the union of a man and a woman" *and* "the union of any two persons." The one meaning necessarily displaces the other. Hence, every society must choose either to retain the old man/woman marriage institution or, by force of law, to suppress it and put in its place the radically different genderless marriage institution.

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[29] *Id.* at 12–13. None of this is to assert that an institutionalized purpose is to mandate or even promote procreation; rather, it is to ameliorate the consequences of heterosexual coupling. For further descriptions of the meanings and purposes inhering in contemporary man/woman marriage—meanings beyond those few comprising the close personal relationship model— see Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 995-96 (Mass. 2003) (Cordy, J., dissenting); BLANKENHORN, *supra* note 16, at 91-120; Stewart, *Judicial Elision*, *supra* note 5, at 16–20; Maggie Gallagher, *Does Sex Make Babies? Marriage, Same-Sex Marriage and Legal Justifications for the Regulation of Intimacy in a Post*-Lawrence *World*, 23 QUINNIPIAC L. REV. 447, 451-71. (2004).

[30] *E.g.*, THE WITHERSPOON INSTITUTE, MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES 21–43 (2006), *available at* http://www.princetonprinciples.org/files/Marriage%20and%20the%20Public%20Good.pdf; WILCOX ET AL., *supra* note 16.

[31] Stewart, *Judicial Elision*, *supra* note 5, at 24 ("Given the role of language and meaning in constituting and sustaining institutions, two 'coexisting' social institutions known society-wide as *marriage* amount to a factual impossibility.").

Another salient social institutional reality is this: man/woman marriage is a pre-political institution,[32] while genderless marriage must of necessity be a post-political, law-constructed, and hence fragile institution.[33] Joseph Raz captures the reality well and accurately when he observes that the law's role relative to man/woman marriage and other pre-political institutions is "to give them formal recognition, bring legal and administrative arrangements into line with them, facilitate their use by members of the community who wish to do so, and encourage the transmission of belief in their value to future generations."[34] Thus, when a same-sex couple successfully asserts a "right to marry," they are necessarily imposing on the state *not* a correlative duty to allow them into the existing man/woman marriage institution – which the law is impotent to do,[35] although it is sufficiently potent to de-institutionalize man/woman marriage[36] – *but* a correlative duty to construct and maintain in all its fragility the radically different genderless marriage institution, in which every couple who claims to be married (whether same-sex or man/woman) must participate if the couple's claim is to have legitimacy.[37]

B. The close personal relationship model: factual errors

In contrast to this full, rich, and complete description of the marriage institution is the narrow description advanced by genderless marriage proponents. For them, contemporary

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[32] *See* Stewart, *Washington and California, supra* note 5, at 536-37 ("Rather clearly for the purpose of making the marriage institution appear a fit object of judicial alteration, some judges assert that it is the law that creates, that originates, and that gives life to the institution. ... [T]o be short ... marriage law no more 'creates' the marriage institution than the Rule Against Perpetuities 'creates' dirt.").

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

[34] RAZ, THE MORALITY OF FREEDOM 161 (1986).

[35] Stewart, *Judicial Redefinition*, *supra* note 3, at 84-85.

[36] Stewart, *Judicial Elision*, *supra* note 5, at 36-37.

[37] *See id.* at 52 n.137.

American marriage is now – after a process of evolution – *only* a close personal relationship, meaning a relationship "that has been stripped of any goal beyond the intrinsic emotional, psychological, or sexual satisfaction which the relationship currently brings to the [two adult] individuals involved."[38] Under this model, marriage's social goods are *only* "love and friendship, security for adults and their children, economic protection, and public affirmation of commitment"[39] and *not* the many additional social goods actually produced in our society by the institutionalized man/woman meaning.[40] Further, under this model, it is the law that creates and gives life to the marriage institution.[41] Finally, genderless marriage proponents assert that religion must be seen as the source (indeed, the sole source) of the man/woman meaning found in our marriage laws.[42]

> [T]he very logic of genderless marriage is grounded in the close personal relationship model of marriage. Indeed, at this stage in the court battles, the nexus between genderless marriage and the close personal relationship model cannot be gainsaid. *Every* appellate court that has mandated, and *every* dissenting judge who would mandate, genderless marriage has relied on that model as a sufficient and accurate description of what marriage *is*.[43]

But that model clearly is *not* a sufficient and accurate description of contemporary marriage – not across Connecticut and not across the Nation. Rather, as a matter of fact, in all but certain communities that description is so incomplete as to be profoundly misleading.[44] The narrow description is incomplete to the extent that it posits the prior deinstitutionalization of the man/woman meaning and therefore the present absence of the

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38 CERE, *supra* note 34, at 14.

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

40 *See* Stewart, *Judicial Elision*, *supra* note 5, at 16-24.

41 *See* Stewart, *Washington and California*, *supra* note 5, at 536 (collecting such assertions).

42 *See id.* at 537-38 (collecting such assertions).

43 *Id.* at 527.

44 *See, e.g.*, Stewart, *Washington and California*, *supra* note 5, at 533.

social goods produced (importantly and even uniquely) by that meaning, especially those social goods pertaining to the quality of child-bearing and child-rearing, to the statuses, identities, and projects of *wife* and *husband*, and to negotiation of the male/female divide.[45] But as a matter of fact, the man/woman meaning continues as a widely shared public meaning at the core of *marriage* and therefore continues fully institutionalized.[46] Although a not insubstantial minority of people embrace the close personal relationship model as a description of what marriage *ought to be*,[47] that reality does not counter the fact that the man/woman meaning continues constitutive of the marriage institution and therefore formative and transformative of the large majority of individuals in this State.[48] Consequently, the man/woman meaning continues uniquely productive of a number of valuable social goods – most centering on the quality of humankind's child-bearing and child-rearing endeavors.[49] Further, the overwhelming anthropological evidence sustains the understanding that marriage is indeed a pre-political institution[50] and that the law is not its creator but its facilitator.[51] "[M]arriage law no more 'creates' the marriage institution than the Rule Against Perpetuities 'creates' dirt."[52] Finally, the idea that man/woman marriage "is a religious idea ... is about as intellectually weak as an idea can be."[53]

In sum, regarding the question of fact "What is marriage?," the evidence quite decidedly favors the broad description advanced by man/woman marriage proponents. Much but not all of

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45 *See* Stewart, *Judicial Elision, supra* note 5, at 16-24.
46 *See, e.g.,* Stewart, *New York, supra* note 5, at 235-42.
47 *See generally* Stewart, *Washington and California, supra* note 5, at 532-33.
48 *See, e.g.,* Stewart, *New York, supra* note 5, at 235-42.
49 *See* Stewart, *Judicial Elision, supra* note 5, at 16-25.
50 *See generally* BLANKENHORN, *supra* note 16, at 105-20.
51 *See* RAZ, *supra* note 34, at 161.
52 Stewart, *Washington and California, supra* note 5, at 537.
53 BLANKENHORN, *supra* note 16, at 159; *accord* Stewart, *Washington and California, supra* note 5, at 537-40.

child-bearing and child-rearing meanings, purposes, practices, and social goods; man/woman couples will still marry at the same rate and still do just as well raising their children.[54] "The argument's conclusion is that it is irrational not to 'open' marriage to same-sex couples where there is no downside and such substantial upside."[55]

"The ... 'no downside' argument is a breathtaking evasion of a number of uncontroversial social institutional realities,"[56] an evasion now well documented in the literature.[57] The only way the law can "allow same-sex couples to enter into marriage" is by suppressing the man/woman marriage institution and creating and sustaining the genderless marriage institution,[58] but to do that is to diminish first and then lose entirely the valuable social goods produced materially (even uniquely) by the institutionalized man/woman meaning.[59] That is a very big downside indeed, for no significant society since pre-history has flourished without those goods.[60] The perpetuation of those goods qualifies as a compelling governmental interest.

B. The "child welfare" argument

Genderless marriage proponents argue that child welfare is only promoted by the radical redefinition of marriage because the children being raised by (the uncertain number of) same-sex couples who desire to marry will thereby receive the well-documented benefits received by children inside the man/woman marriage institution. But these

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[54] The appearances of the "no-downside" argument in judicial opinions are collected at Stewart, *Judicial Redefinition, supra* note 3, at 35-36; Stewart, *Washington and California, supra* note 5, at 519-25.

[55] Stewart, *Judicial Redefinition*, *supra* note 3, at 36.

[56] Stewart, *Washington and California, supra* note 5, at 520.

[57] *Id.*; Stewart, *Judicial Elision, supra* note 5, at 32-38, 39-49; Stewart, *Judicial Redefinition, supra* note 3, at 71-85.

[58] *Id.*

[59] *See* note 57 *supra*.

[60] *E.g.*, BLANKENHORN, *supra* note 16, at 105-20.

proponents without exception ignore that society (government) engages in two *different* child-welfare endeavors: (1) protection, sustenance, and perpetuation of a social institution demonstrably good for children through the generations (which endeavor includes laws enshrining the man/woman meaning) and (2) provision of public assistance of some form or another (protective laws, access to resources, material resources themselves, etc.) to individual children or their caretakers. By engaging in both endeavors simultaneously, government strives to maximize, and understandably so, the well-being of all children, both those now among us and those of future generations. Genderless marriage proponents ignore the first endeavor (as they must, for obvious reasons).

> They ignore this reality: to mandate genderless marriage and thereby de-institutionalize man/woman marriage is to thwart quite completely the first of the two government child-welfare endeavors—protection, sustenance, and perpetuation of a social institution demonstrably good for children through the generations. Indeed, they ignore the very essence of that first and important government child-welfare endeavor. They further ignore that the law is impotent to usher same-sex couples and their children into the child-centered and child-protective social institution of man/woman marriage, although the law's power is certainly sufficient to de-institutionalize it. And they ignore the substantial reasons to believe that genderless marriage, by the very nature of its core constitutive meanings, is an adult-centered, adult-promoting institution unlikely to sustain those practices most beneficial to children.[61]

C. The "racial analogy" argument

Social institutional realities also defeat the oft-deployed strategy of equating the genderless marriage project with the endeavor to eliminate anti-miscegenation laws, an endeavor vindicated by the *Perez*[62] and *Loving*[63] decisions. That supposed analogy actually 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

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61 Stewart, *Washington and California, supra* note 5, at 527.
62 Perez v. Lippold, 198 P.2d 17 (Cal. 1948).
63 Loving v. Virginia, 388 U.S. 1 (1967).

Certification of Compliance

I hereby certify that the foregoing brief complies with the formatting requirements set forth in Practice Book § 67-2, and that the font is Arial 12.

Gregg M. Hannan

Certification of Service

I, Gregg Hannan, hereby certify that the a copy of the foregoing brief was mailed, first class postage prepaid, on April 25, 2007, to the Hon. Patty Jenkins Pittman, J., at the address listed below, and the following counsel of record:

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