

ELIDING IN NEW YORK[†]

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

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

In January 2006, this Journal published an article³ that set forth the social institutional argument for man/woman marriage, demonstrated how that argument is a sufficient response to all constitutional attacks leveled at the laws sustaining that social institution, and detailed how the courts mandating genderless marriage (and the dissenting judges favoring that result) had elided the argument (“the Judicial Elision article”). Since the Judicial Elision article’s early December 2005 cut-off date, two more instances of judicial elision of social institutional realities have cropped up in New York. Both are dissenting opinions, one in the Appellate Division and one in the Court of Appeals. Because those dissenting opinions are interesting, and engagement with them intellectually productive, this article critically examines both. In preparation for doing so, and as an aid to the reader, this article also summarizes central aspects of the social institutional argument as set forth in the Judicial Elision article.

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

2. *Id.*

3. Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 DUKE J. CONST. L. & PUB. POL’Y 1 (2006).

I. A CONCISE SUMMARY OF THE SOCIAL INSTITUTIONAL ARGUMENT

It has been called, cleverly but aptly, “The War of the Ring.”⁴ It is being waged all across the public square, but the hottest and most consequential battles are in the courts. On one side are those who want marriage legally redefined to “the union of any two persons,” with the law treating the parties’ gender as irrelevant to the civil meaning of marriage—hence, *genderless marriage*. On the other side are those who want to preserve “the union of a man and a woman” as a core meaning of the marriage institution—hence, *man/woman marriage*.

The social institutional argument is emerging as the clearest and strongest explication of society’s (and, hence, government’s) compelling interests in man/woman marriage. Before summarizing that argument, however, certain of its extraordinary aspects merit note.

Each building block in the argument is uncontroversial. Virtually all serious students of social institutions accept the validity of the understandings comprising it.⁵

To date, the argument remains unrefuted. The appellate courts that have mandated genderless marriage (in Massachusetts and Canada), in order to reach that result, ignored or otherwise evaded the argument, and these courts’ elision of the argument is now well demonstrated in the scholarly literature.⁶ In contrast, the courts that have engaged the argument have rejected genderless marriage.⁷ Likewise, none of the serious legal scholars supporting genderless marriage have genuinely engaged and countered the argument.⁸

The argument fully qualifies as Rawlsian “public reason”⁹ and satisfies even Linda McClain’s high standard: “The requirements of

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

5. Stewart, *supra* note 3, at 8–27.

6. *Id.* at 28–60.

7. *E.g.*, Lewis v. Harris, 875 A.2d 259 (N.J. Super. Ct. App. Div. 2005); *id.* at 275–78 (Parrillo, J., concurring); *see also* Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 983–1005 (Mass. 2003) (Cordy, J., dissenting).

8. Stewart, *supra* note 3, at 60–77.

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

public reason would . . . require the delineation of precisely how same-sex marriages threaten the institution of marriage in terms of public reasons and political values implicit in our public culture.”¹⁰ This achievement of the social institutional argument merits emphasis exactly because of what Margaret Somerville has accurately observed:

One strategy used by same-sex marriage advocates is to label all people who oppose same-sex marriage as doing so for religious or moral reasons in order to dismiss them and their arguments as irrelevant to public policy. [Further,] good secular reasons to oppose same-sex marriage are re-characterized as religious or as based on personal morality and, therefore, as not applicable at a societal level.¹¹

Because the argument demonstrates that adoption of genderless marriage will necessarily de-institutionalize man/woman marriage, and thereby cause the loss of its unique social goods, the argument effectively refutes the notion that the proponents of man/woman marriage have only one “real” motive: animus towards gay men and lesbians.¹²

Because the argument demonstrates society’s (and hence the government’s) compelling interests in preserving the vital social institution of man/woman marriage, the argument is a sufficient response to all constitutional challenges leveled at the laws sustaining that institution, and that is so regardless of what standard of review the court applies.¹³

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

11. Margaret Somerville, *What About the Children?*, in *DIVORCING MARRIAGE*, *supra* note 4, at 70–71. She goes on to note that these tactics “do not serve the best interests of either individuals or society in this debate.” *Id.* at 71.

12. *See, e.g., Goodridge*, 798 N.E.2d at 968 (“The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual.”); Editorial, *For Gay Marriage*, *Boston Globe*, July 8, 2003, at A18 (“For all the legal acrobatics offered by opponents, it is hard to see how anything other than an animus toward gays and lesbians prevents them from obtaining the same ‘benefits and protections’ enjoyed by heterosexual couples.”); *GAY & LESBIAN ADVOCATES & DEFENDERS, IS DOMA DOOMED?: THE FEDERAL “DEFENSE OF MARRIAGE ACT” AND STATE ANTI-GAY, ANTI-MARRIAGE LAWS 13* (2001), available at <http://www.glad.org/rights/IsDOMADoomed.pdf> (“DOMA’s sheer breadth and its lack of any connection to a legitimate legislative end demonstrates that it can only be explained by anti-gay animus.”).

13. Stewart, *supra* note 3, at 27–28.

The social institutional argument for man/woman marriage is a sufficient response because of what it succeeds in demonstrating.¹⁴ It demonstrates that marriage, like all social institutions, is constituted by a web of shared public meanings; that these meanings teach, form, and transform individuals, providing identities, purposes, and projects; and that in this way, these meanings provide vital social goods. Across time and cultures, a core meaning constitutive of the marriage institution has virtually always been the union of a man and a woman. 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. The man/woman marriage institution is:

Society's best and probably only effective means to make real the right of a child to know and be brought up by his or her biological parents (with exceptions justified only in the best interests of the child, not those of any adult).

The most effective means humankind has developed to maximize the private welfare provided to children conceived by passionate, heterosexual coupling (with "private welfare" meaning not just the basic requirements like food and shelter but also education, play, work, discipline, love, and respect).

The indispensable foundation for that child-rearing mode—that is, married mother/father child-rearing—that correlates (in ways not subject to reasonable dispute) with the optimal outcomes deemed crucial for a child's—and therefore society's—well being.

Society's primary and most effective means of bridging the male-female divide.

Society's only means of conferring the identity of, and transforming, a male into husband/father and a female into wife/mother statuses and identities particularly beneficial to society.

Social and official endorsement of that form of adult intimacy—married heterosexual intercourse—that society may rationally value above all other such forms. That rationality has been demonstrated in the scholarly literature and remains, to date, unrefuted.

The social institutional argument further demonstrates that, with its power to suppress social meanings, the law can radically change

14. Because the remainder of this section is a summary of the *Judicial Elision* article, Stewart, *supra* note 3, it is presented without further footnoting.

and even deinstitutionalize man/woman marriage, with concomitant loss of the institution's social goods. Further, genderless marriage is a radically different institution than man/woman marriage, as evidenced by the large divergence in the nature of their respective social goods (in the case of genderless marriage, only promised, not yet delivered). Indeed, observers of marriage who are both rigorous and well-informed regarding the realities of social institutions uniformly acknowledge the magnitude of the differences between the two possible institutions of marriage, and this is so regardless of the observer's own sexual, political, or theoretical orientation or preference.

Another social institutional reality is that a society can have, at any one time, only one social institution denominated *marriage*. 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 "the union of a man and a woman" *and* "the union of any two persons." A society, as a simple matter of reality, cannot, at one and the same time, tell people, and especially children, that *marriage* means "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. But to suppress, by force of "constitutional" law no less, the shared public meanings constituting the old institution is to lose the valuable social goods flowing from those institutionalized meanings. Thus, the social institutional argument refutes the "no-downside" argument advanced by genderless marriage proponents and seen in the famous tactic of asking: "How will letting Jim and John marry hurt Monte's and Anne's marriage?"

These social institutional realities further reveal phrases like *gay marriage* or *same-sex marriage* to be misleading. These phrases get people thinking that a society will keep its old kind of marriage and just get a new and separate kind. But that is not so because of the social institutional realities just reviewed; a society can have one or the other but never at the same time both possible kinds of civil marriage. And after a judicial decree of genderless marriage, made in the name of constitutional norms of equality, liberty, dignity, or autonomy, an American state will certainly *not* be the happy home of

many different marriage norm communities, each doing its own marriage thing, each equally valid before the law, and each equally secure in its own space. Rather, that state will have one marriage norm community (genderless marriage) officially sanctioned and officially protected; all other marriage norm communities will be officially constrained, officially disdained, and sharply curtailed. Moreover, there are profound problems with the notion that supporters of the old marriage institution can, if they want, just huddle together in some linguistic, social, or religious enclave to preserve the old institution and its meanings. Social institutional studies teach that the dominant society and its language and meanings will, like an ocean and its waves, inevitably wear down and cause to disappear any island enclave of an opposing norm. To the degree that members of the enclave were to adopt the speech of the dominant society, they would lose the power to name, and in large part the power to discern, what once mattered to their forbears. To that degree, their forbears' ways would seem implausible to them, and probably even unintelligible.

II. THE NEW YORK GENDERLESS MARRIAGE LITIGATION

In New York, genderless marriage proponents prosecuted five different civil actions in five different state trial courts.¹⁵ In each action, the claim was that the state constitution required that marriage be redefined from the union of a man and a woman to the union of any two persons.¹⁶ Four trial courts rejected the claim¹⁷ (and garnered

15. *Hernandez v. Robles*, 794 N.Y.S.2d 579 (N.Y. Sup. Ct. 2005); *Kane v. Marsolais*, Index No. 3473-04 (N.Y. Sup. Ct. 2005) (unpublished); *Samuels v. N.Y. State Dep't of Health*, Index No. 1967-04 (N.Y. Sup. Ct. 2004) (unpublished); *Seymour v. Holcomb*, 790 N.Y.S.2d 858 (N.Y. Sup. Ct. 2005); *Shields v. Madigan*, 783 N.Y.S.2d 270 (N.Y. Sup. Ct. 2004).

16. The organizations supporting these and similar state court actions across the country are united in a firm resolve that the definition-of-marriage issue not be raised now or in the foreseeable future, whether in state or federal court, as a *federal* constitutional claim. This resolve is based on the organizations' judgment that for now and in the foreseeable future the federal courts, including the United States Supreme Court, will reject such a federal genderless marriage claim. Maverick lawyers and plaintiffs (that is, those not acting under the control of these organizations) have nevertheless made the federal claim three times, losing twice in federal district court and once in federal bankruptcy court. *Smelt v. Orange County*, 374 F. Supp. 2d 861 (C.D. Cal. 2005); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 137–38 (Bankr. W.D. Wash. 2004). The losing lawyer and plaintiffs in the Florida federal action initially vowed publicly to appeal the adverse decision all the way to the Supreme Court but subsequently bowed to organizational pressure in foregoing any appeal. When the losing lawyer and plaintiffs in the California federal action did not bow to similar

little media attention), while one, in the case of *Hernandez v. Robles*¹⁸ in the Borough of Manhattan, accepted the claim (and garnered massive media attention). On appeal, the Third Department of the Appellate Division, by a 5-0 vote, affirmed three of the four trial court decisions in favor of man/woman marriage,¹⁹ the fourth is still pending before the Second Department.²⁰ The First Department, with a three-judge majority opinion²¹ and a one-judge concurring opinion,²² reversed the trial court decision in *Hernandez*. One judge, however, dissented, arguing that the state constitution required the redefinition of marriage.²³ That dissenting opinion (“the AD dissenting opinion”) is the first of the two that I examine.

All these Appellate Department decisions were appealed to the Court of Appeals, the state’s highest court. On July 6, 2006, the Court of Appeals, by a 4-to-2 vote, held that the state laws defining marriage as the union of a man and a woman did not violate the New York constitution.²⁴ The court issued three opinions. Three justices joined the plurality opinion.²⁵ A fourth justice wrote a concurring opinion, which one of the three in the plurality also joined.²⁶ The chief justice’s dissenting opinion was joined by one other justice (“the COA dissenting opinion”).²⁷ (The seventh justice had previously recused himself.) Like the AD dissenting opinion, the COA dissenting opinion

pressure but pursued an appeal to the Ninth Circuit Court of Appeals, one of the organizations, Equality California, moved to intervene before the Ninth Circuit to urge that the appeal be dismissed on justiciability grounds. Opening Brief of Proposed Intervenor Equality California at 3, *Smelt v. County of Orange*, No. 05-56040 (9th Cir. 2005). The Ninth Circuit denied the intervention motion but ultimately ruled as the proposed intervenor desired; that is, the court avoided the federal constitutional issue by ordering dismissal on justiciability grounds. *Smelt v. County of Orange*, 447 F.3d 673, 685–86 (9th Cir. 2006).

17. *Kane*, Index No. 3473-04; *Samuels*, Index No. 1967-04; *Seymour*, 790 N.Y.S.2d at 858; *Shields*, 783 N.Y.S.2d at 270.

18. 794 N.Y.S.2d at 579.

19. *Kane v. Marsolais*, 808 N.Y.S.2d 566 (N.Y. App. Div. 2006); *Samuels v. N.Y. State Dep’t of Health*, 811 N.Y.S.2d 136 (N.Y. App. Div. 2006); *Seymour v. Holcomb*, 811 N.Y.S.2d 134 (N.Y. App. Div. 2006).

20. *Shields v. Madigan*, --- N.Y.S.2d --- (N.Y. App. Div. ---).

21. *Hernandez v. Robles*, 805 N.Y.S.2d 354 (N.Y. App. Div. 2005).

22. *Id.* at 363–77 (Catterson, J., concurring).

23. *Id.* at 377–89 (Saxe, J., dissenting).

24. *Hernandez v. Robles*, No. 86, 2006 WL 1835429 (N.Y. July 6, 2006).

25. *Id.* at *1–7.

26. *Id.* at *7–14 (Grafteo, J., concurring).

27. *Id.* at *14–23 (Kaye, C.J., dissenting).

is also interesting and engagement with it intellectually productive. Accordingly, I also examine it.

III. THE APPELLATE DEPARTMENT DISSENTING OPINION AND ITS ELISIONS

In rejecting the state constitutional claim for genderless marriage, the three-judge majority opinion and the one-judge concurring opinion in *Hernandez AD* acknowledged fundamental aspects of the social institutional argument; this occurred primarily by citation to and approving quotation from²⁸ Justice Cordy's articulation of the argument in *Goodridge*.²⁹

With respect to the AD dissenting opinion, it is interesting that the social institutional argument engages most points attempted by it. But that is not to say that the AD dissenting opinion engages the social institutional argument. Although the AD dissenting opinion uses the word *institution* in connection with marriage twenty-one times, that opinion, other than acknowledging that marriage is a valuable social institution, otherwise ignores the social institutional argument. In doing so, it makes assertions about the nature of the marriage institution that appear to be rather clearly at odds with understandings provided by social institutional studies.

A. *The "Convenient False Assumption" Elision*

An important aspect of the AD dissenting opinion is its bold use of what may fairly be called the "convenient false assumption" elision. Although positing the institutional nature of marriage and the institution's high value, the AD dissenting opinion proceeds throughout on the assumption that the institution is not constituted by its shared public meanings or, perhaps, on the more narrow assumption that "the union of a man and a woman" is not now one of those constitutive meanings or, perhaps, on the even more narrow assumption that the man/woman meaning, although present, is not productive of anything socially valuable.

28. *Hernandez*, 805 N.Y.S.2d at 360; *id.* at 375–76 (Catterson, J., concurring).

29. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 995–96 (Mass. 2003) (Cordy, J., dissenting).

Regarding the broadest possible assumption explanatory of the AD dissenting opinion's performance, it is true that the opinion nowhere acknowledges that social institutions of betterment are constituted by shared public meanings, which in turn teach, form, and transform individuals in ways productive of social goods valuable to society. But the opinion nowhere expressly denies that particular and uncontroversial social institutional reality. So, fairness seems to dictate that the AD dissenting opinion not be taken to task for proceeding on the broadest possible assumption.

Regarding the more narrow assumption, that the man/woman meaning is not now constitutive of the marriage institution, the AD dissenting opinion does make an explicit effort in that direction:

It is fair to say that both the law and the population generally now view marriage, at least in the abstract ideal, as 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. . . . [T]he gender of the two partners to a marriage is no longer critical to its definition.³⁰

The AD dissenting opinion then refers to this asserted model as “a widely held view”³¹ of marriage and a bit later calls it “our current understanding of the definition and purpose of marriage.”³²

What the AD dissenting opinion is doing here is asserting that marriage is nothing more than a close personal relationship, meaning a relationship stripped of any goal or end beyond the intrinsic emotional, psychological, or sexual satisfaction that the relationship brings to the two adults involved.³³ But it has become clear that a judge intent on redefining marriage through an equality argument must assert, as the AD dissenting opinion does, that marriage is nothing more than a close personal relationship.³⁴ That is because to

30. *Hernandez*, 805 N.Y.S.2d at 381 (Saxe, J., dissenting).

31. *Id.*

32. *Id.* at 382.

33. For an excellent summary of the close personal relationship model of marriage, see DANIEL CERE, *THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA* 14–15 (Council on Family Law, 2005), available at http://www.marriagedebate.com/pdf/future_of_family_law.pdf.

34. If the AD dissenting opinion were to assert (it clearly does not) that the close personal relationship model is all that marriage “ought” to be, it would have distinguished company. That “ought” is what drove the drafters of the American Law Institute’s *Principles of the Law of Family Dissolution* and, in Canada, the Law Commission’s *Beyond Conjugalilty: Recognizing*

reject that model because it is factually inadequate (that is, true as far as it goes but going not nearly far enough) is to reject the equality argument for genderless marriage. That is exactly what we see in the court decisions sustaining the man/woman marriage institution.³⁵ The other side of the coin is that judicial acceptance of the close personal relationship model's accuracy and adequacy is the always-present foundation for judicial acceptance of the equality argument.³⁶ But, to date, judicial acceptance of the close personal relationship model has been an unexamined and unproven starting point of analysis, not the result of thoughtful examination.³⁷

When the AD dissenting opinion asserts that the close personal relationship model is *now*—after a process of evolution—*all* that marriage *is*, it is just wrong as a matter of fact. Although it is *not* wrong in some American communities or in portions of that world created by Hollywood, it is wrong, on the ground, across New York and the nation. The fundamental inadequacy in the descriptive power of the close personal relationship model is recognized by the *Hernandez AD* majority and the other courts and judges who have actually and seriously examined that supposedly complete description of marriage.³⁸ Although the contemporary social institution of marriage undoubtedly includes the “ideal” of “a partnership of equals with equal rights, who have mutually joined to form a new family unit,

and Supporting Close Personal Adult Relationships. See CERE, *supra* note 33, at 16–20. But, of course, there are competing social theories as to what marriage “ought” to be, both in the academy and across the electorate, and at least since the time of Justice Oliver Wendell Holmes, Jr., it has been considered bad judicial form to anoint, in the name of constitutional equality or liberty or whatnot, one social theory and to suppress the competing social theories, especially those embedded in democratically promulgated laws—like the state and federal “defense of marriage” acts and constitutional amendments. Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 CAN. J. FAM. L. 11, 95-99 (2004).

35. *E.g.*, *Hernandez*, 805 N.Y.S.2d at 360; *Lewis v. Harris*, 875 A.2d 259, 276 (N.J. Super. Ct. App. Div. 2005) (Parrillo, J., concurring) (“This distillation of marriage down to its pure ‘close personal relationship’ essence, however, strips the social institution ‘of any goal or end beyond the intrinsic emotional, psychological, or sexual satisfaction which the relationship brings to the individuals involved. . . .’ Yet, the marital form traditionally has embraced so much more . . .”).

36. Stewart, *supra* note 34, at 97–98.

37. This obvious feature of cases such as Ontario's *Halpern v. Toronto*, [2003] D.L.R. 529, and Massachusetts' *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), has led Douglas Farrow to label, and fairly so, their approach as “obviously circular, and viciously so.” Douglas Farrow, *Rights and Recognition*, in *DIVORCING MARRIAGE*, *supra* note 4, at 98–99. See also Stewart, *supra* note 34, at 95–99.

38. See, *e.g.*, *Hernandez*, 805 N.Y.S.2d at 359–60; *Lewis v. Harris*, 875 A.2d 259, 275–76 (Parrillo, J., concurring).

founded upon shared intimacy and mutual financial and emotional support,”³⁹ enduring aspects of the institution go far beyond that limited and limiting description of transformative meanings:

Conjugal marriage [i.e., man/woman marriage] has several characteristics. First, it is inherently normative. Conjugal marriage cannot celebrate an infinite array of sexual or intimate choices as equally desirable or valid. Instead, its very purpose lies in channeling the erotic and interpersonal impulses between men and women in a particular direction: one in which men and women commit to each other and to the children that their sexual unions commonly (and even at times unexpectedly) produce.

As an institution, conjugal marriage addresses the social problem that men and women are sexually attracted to each other and that, without any outside guidance or social norms, these intense attractions can cause immense personal and social damage. . . . [Man/woman marriage] provides an evolving form of life that helps men and women negotiate the sex divide, forge an intimate community of life, and provide a stable social setting for their children

Another characteristic of conjugal marriage is that it is fundamentally child-centered, focused beyond the couple towards the next generation. Not every married couple has or wants children. But 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 result, and those babies, on average, seem to do better when their mother and father cooperate in their care. Conjugal marriage attempts to sustain enduring bonds between women and men in order to give a baby its mother and father, to bond them to one another and to the baby.⁴⁰

39. *Hernandez AD*, 805 N.Y.S.2d at 381 (Saxe, J., dissenting).

40. CERE, *supra* note 4, at 12–13. Further descriptions of the meanings and purposes inhering in contemporary man/woman marriage—meanings beyond those few comprising the close personal relationship model—can be found. *See, e.g.*, Stewart, *supra* note 34, at 41–58; Stewart, *supra* note 3, at 16–20; Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 U. ST. THOMAS L.J. 33, 43–51 (2004); and Maggie Gallagher, *Does Sex Make Babies? Marriage, Same-Sex Marriage and Legal Justifications for the Regulation of Intimacy in a Post-Lawrence World*, 23 QUINNIAC L. REV. 447, 451–71 (2004).

On this issue of “the union of a man and a woman” subsisting or not as a core and constitutive meaning of the contemporary American marriage institution, the AD dissenting opinion falters badly. That the man/woman meaning is no longer a constituent of the contemporary institution is, after all, an assertion of supposed fact—an *is*, not an *ought*.⁴¹ And facts are stubborn things. The continuing force of that meaning in the institution seems no less factual in the face of the AD dissenting opinion’s bald assertions to the contrary. After all, those assertions are just that, bald; they appear unsupported by proof of any type.⁴² In contrast, proof is present that “the union of a man and woman” continues as a strongly *shared* public meaning among the complex of other meanings constitutive of the contemporary institution. One such proof is the simple social fact that forty states and the federal government, within just the past decade or so, have enacted “defense of marriage” acts and/or constitutional amendments expressing that shared meaning and declining to deviate from it in cases of foreign genderless marriages.⁴³ It bears repeating that these laws are very recent social expressions, not the vestiges of “long-accepted assumptions that . . . have eroded.”⁴⁴ Moreover, there is this reality:

[I]nstitutions 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 [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.⁴⁵

In 2004, nearly 4.5 million Americans made such an intentional renewed expression of their commitment to the man/woman marriage institution by marrying and thereby becoming a husband or a wife.⁴⁶

41. *See supra* note 34.

42. Serious scholarship provides no supporting proof, although some popular literature does. *E.g.*, STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY, OR HOW LOVE CONQUERED MARRIAGE (2005).

43. William C. Duncan, *Marriage Amendments and the Reader in Bad Faith*, 7 FLA. COASTAL L. REV. 234, 234–35 nn.2, 3 (2005) (collecting citations to statutes and amendments defining marriage as the union of a man and a woman).

44. *Hernandez*, 805 N.Y.S.2d at 381 (Saxe, J., dissenting).

45. JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 57 (1995).

46. The number of people who married in the United States in 2004 was 4,558,000. Subtracting the people who married in Massachusetts (83,098), the number would be 4,474,902.

Thus, it seems difficult to take seriously the AD dissenting opinion's apparent assumption that the man/woman meaning is not now constitutive of the marriage institution across the nation, including New York.⁴⁷

I turn now to the narrowest possible assumption explanatory of the judicial performance reflected in the AD dissenting opinion: that the man/woman meaning still constitutive of the marriage institution is, quite simply, without value. But here again, unfortunately, the opinion relies exclusively on bald assertions. It asserts: "It is marriage itself, the institution by which two individuals join together to form a family unit, that contains the virtues the state may legitimately seek to protect. The traditional limitation of that institution to heterosexual couples is not similarly valuable."⁴⁸ Furthermore, it states: "This availability of the institution to opposite-sex couples neither encourages opposite-sex couples to choose to marry, nor encourages them to procreate only within marriage."⁴⁹

The judicial performance reflected in these assertions must be adjudged at least disappointing because of the reliance on *ipse dixit*, the resulting failure to marshal any supporting proof, and so forth. The performance is disappointing most fundamentally because the assertions are breathtakingly erroneous. In a rather straightforward manner, the *Judicial Elision* article demonstrates how the man/woman meaning is not just important but essential to the marriage institution's production of at least six valuable social goods.⁵⁰ And the assertion that the man/woman marriage institution is not effective in encouraging "opposite-sex couples to choose to marry . . . [or] to procreate only within marriage" is—if given a straightforward reading—beyond the pale. Certainly, the institution is not completely successful with those two social tasks, but to say (as the AD dissenting opinion rather clearly seems to say) that the man/woman marriage institution in this nation utterly fails with those two tasks is

Brady E. Hamilton et al., Ctrs. for Disease Control & Prevention, Births, Marriages, Divorces, and Deaths: Provisional Data for 2004, 53 NAT'L VITAL STAT. REPORTS NO. 21, at 1, 6 (June 28, 2005), available at http://www.cdc.gov/nchs/data/nvsr/nvsr53/nvsr53_21.pdf.

47. Of course, the man/woman meaning is currently being suppressed in Massachusetts by force of law. In those circumstances, the deinstitutionalization of man/woman marriage seems likely to be accomplished sooner rather than later, absent a change in the law.

48. *Hernandez*, 805 N.Y.S.2d at 388 (Saxe, J., dissenting).

49. *Id.* at 390.

50. Stewart, *supra* note 3, at 16–20.

indefensible. A substantial majority of Americans choose to enter man/woman marriage,⁵¹ and a substantial majority of American births are legitimate.⁵²

The question arises whether the AD dissenting opinion really intended to say that a social institution denominated *marriage*, but devoid of the man/woman meaning, would be equally successful with those two social tasks. If so, then the opinion is engaging in a somewhat different elision of social institutional realities, one seen in other parts of the opinion and fairly called the “institution-apart-from-its-meanings” elision. I turn to that now.

B. The “Institution-Apart-From-Its-Meanings” Elision

The following is, rather clearly, central to the AD dissenting opinion’s analysis: Substitution of the new constitutive meaning—“the union of any two persons”—for the old meaning—“the union of a man and a woman”—leaves the marriage institution the same for all important purposes, with the corollary being that there is no “downside” to the substitution. Thus, the opinion denies that “allowing same-sex couples to marry will have any effect on the continued survival of the institution itself or even its ongoing vitality among heterosexuals. Marriage remains”⁵³ In the same vein, it rejects “the conclusion that excluding same-sex couples from marrying will substantially assist in achieving the protection of the institution generally.”⁵⁴ Further, it asserts: “It is marriage itself, the institution by which two individuals join together to form a family unit, that contains the virtues the state may legitimately seek to protect. The traditional limitation of that institution to heterosexual couples is not similarly valuable.”⁵⁵

The social institutional argument demonstrates the problematic nature of the AD dissenting opinion’s view of the matter. That

51. The National Marriage Project report for 2005 states, “[f]or the generation of 1995, assuming a continuation of then current marriage rates, several demographers projected that 88 percent of women and 82 percent of men would ever marry.” National Marriage Project, *The State of Our Unions 2005*, at 16–17 (2005), <http://marriage.rutgers.edu>.

52. The births to married women in 2004 were 64.3 percent of all births. Brady E. Hamilton et al., Ctrs. for Disease Control & Prevention, Births: Preliminary Data for 2004, 54 NAT’L VITAL STAT. REPORTS NO. 8, at 3 (Dec. 29, 2005).

53. *Hernandez*, 805 N.Y.S.2d at 388 (Saxe, J., dissenting).

54. *Id.*

55. *Id.*

argument demonstrates most fundamentally that institutional meanings matter, that those meanings constitute the institution, and, magnified by institutional power and influence, those meanings form and transform individuals in ways productive of valuable social goods.⁵⁶ The argument further demonstrates that a “social institution defined at its core as the union of any two persons is unmistakably different from the historic marriage institution between a man and a woman.”⁵⁷ It also demonstrates that the profound difference between the two possible marriage institutions is uniformly acknowledged by “[o]bservers of marriage who are both rigorous and well informed regarding the realities of social institutions” regardless of their own “sexual, political, or theoretical orientation or preference.”⁵⁸ In addition, “the radical difference between the two possible marriage institutions [is further evidenced by] . . . the profound difference in social goods provided.”⁵⁹ The argument further demonstrates that our society or any society can, by force of law, choose and sustain one or the other possible marriage institution but cannot have both at the same time.⁶⁰ Finally, for the law to set up the new institution and suppress the old one is to assure the loss of the valuable social goods uniquely provided by man/woman marriage. Although that loss may not happen immediately, it will happen sooner rather than later.⁶¹

These social institutional realities rather thoroughly undermine the AD dissenting opinion’s foundational notion that, for all purposes that matter, the marriage institution will be unchanged regardless of which of the two possible core meanings constitute it, “the union of any two persons” or “the union of a man and a woman.” The AD dissenting opinion’s analysis falters exactly because fundamentally different meanings, when magnified by institutional power and influence, do not produce the same social identities, aspirations, projects, or ways of behaving. In other words, the man/woman marriage institution will socially construct a people and hence a society different from the people and society socially constructed by the genderless marriage institution. It could not be otherwise because

56. Stewart, *supra* note 3, at 8–10, 16–20.

57. *Id.* at 20.

58. *Id.* at 20 n.53.

59. *Id.* at 21.

60. *Id.* at 24–25.

61. *Id.* at 6.

the genderless marriage institution is radically different in what it aims for and in what it teaches. To say that the result will be otherwise (as the AD dissenting opinion does) is to say that the core meanings constitutive of powerful social institutions do not matter in the formation and transformation of individuals, and no rational and informed observer says that.

These social institutional realities also rather completely refute the corollary that underpins the AD dissenting opinion's analysis—that society will lose nothing of value if it chooses (or has imposed on it by judicial mandate) genderless marriage. That corollary is invalid because, as has been demonstrated, the man/woman meaning is both a constitutive core of the institution not just important but essential to the institution's production of a number of valuable social goods. To lose the man/woman meaning must mean the loss of those goods, which would seem to qualify as a very big “down-side” indeed.

C. *The “Evolving Marriage Institution” Counter*

The *Judicial Elision* article considered at length the “evolving marriage institution” counter to the social institutional argument.⁶² The AD dissenting opinion uses that counter. Thus, “[t]he institution of marriage has changed remarkably over the centuries,”⁶³ and judicial support for man/woman marriage now “fails to recognize the extent to which the fundamental characteristics of the institution have changed, and continue to change, over time.”⁶⁴ The *Hernandez* majority makes “a determined effort to avoid acknowledging these fundamental changes in the institution of marriage as well as in our society generally.”⁶⁵

For the “evolving marriage institution” counter to carry the day for genderless marriage, it must do one of two things. Either it must show that the “evolution” has removed the constitutive meaning of “the union of a man and a woman” from the contemporary marriage institution so that the law's task is simply to “adjust accordingly,”⁶⁶ or it must demonstrate that the change not yet (and maybe never to be)

62. Stewart, *supra* note 3, at 61–70.

63. *Hernandez*, 805 N.Y.S.2d at 381 (Saxe, J., dissenting).

64. *Id.* at 381–82.

65. *Id.* at 382.

66. *Id.* at 381 (“As the institution of marriage has been redefined within modern American society, the law has adjusted accordingly.”).

chosen or “evolved” by society is so wise that a court ought to impose it on society by no less than the force of “constitutional” law. The AD dissenting opinion makes neither showing. Its failure regarding the first task is examined in the preceding subsections. Its failure to see its own failure with that first task is apparently what prevents any genuine effort toward the second task. But then, the best academic advocates of the “evolving marriage institution” counter have likewise failed with both tasks.⁶⁷

As demonstrated in the *Judicial Elision* article, the arrival of genderless marriage in North America is not the result of institutional changes (evolution) resulting from forces other than the law; rather, it is the result of law-mandated institutional change.⁶⁸ “[I]t was *EGALE*, *Halpern*, and *Goodridge* that switched the meaning of marriage at its core, not society.”⁶⁹ Nor has anyone yet demonstrated that the net benefit (if any) to society from the imposition of genderless marriage and the suppression of man/woman marriage is so great that constitutional doctrine justifies such a judicially mandated change. These two serious deficiencies in the “evolving marriage institution” counter to the social institutional argument appear fatal to the counter. In failing to engage or, apparently, even consider these deficiencies, the judicial performance reflected in the AD dissenting opinion disappoints, and not a little.⁷⁰

D. A Pre-Political Institution and John Locke

The AD dissenting opinion’s opening words are intriguing: “Civil marriage is an institution created by the state”⁷¹ Whether the state created the marriage institution or whether, once the state emerged in human society, it simply acted on or interacted with a pre-existing marriage institution (hence, a “pre-political institution”) is the subject

67. See Stewart, *supra* note 3, at 61–70.

68. *Id.* at 63–64.

69. *Id.* at 64.

70. Another aspect of the AD dissenting opinion also implicates social institutional understandings: the opinion deploys repeatedly the argument of the racial analogy, also known as the argument of the *Perez/Loving* analogy. *Hernandez*, 805 N.Y.S.2d at 379–81, 381 n.3, 382 (Saxe, J., dissenting). Because the COA dissenting opinion does the same, that matter is discussed *infra* in section IV.E.

71. *Hernandez*, 805 N.Y.S.2d at 377 (Saxe, J., dissenting).

of some reflection and debate.⁷² With its opening words, the AD dissenting opinion votes for the “state-created” conclusion. Joseph Raz seems to best capture the more widely-supported view, using language that describes state support for a pre-political institution:

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.⁷³

In any event, the AD dissenting opinion, soon after boldly asserting the “state-created” conclusion and apparently not aware of the inconsistency, actually supports rather powerfully the contrary conclusion. It does so by stating that “concepts of natural law that pre-existed our constitution” were influentially advanced by “such distinguished thinkers as . . . John Locke” and thereby became the source of the contemporary constitutional notion of fundamental rights, with one of those being the “fundamental right to marry.”⁷⁴ That fundamental right, according to the AD dissenting opinion, requires judicially-mandated genderless marriage.⁷⁵ Yet Locke, like other Enlightenment thinkers, appreciated the value of forms of social order separate from the state, “institutions of civil society” or “civil institutions,” that, in Locke’s view, included what he called “conjugal society,” meaning marriage and family.⁷⁶ Locke viewed conjugal

72. See, e.g., F.C. DeCoste, *The Halpern Transformation: Same-Sex Marriage, Civil Society, and the Limits of Liberal Law*, 41 ALTA. L. REV. 619, 621–28, 633–35 (2003).

73. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 161 (1986); see DeCoste, *supra* note 72, at 635.

74. *Hernandez*, 805 N.Y.S.2d at 378 (Saxe, J., dissenting).

75. *Id.* at 379 (“It is therefore unassailable that the due process clause of New York’s Constitution, like the Federal Constitution, protects, as fundamental, the right to marry, and more particularly, to marry the person of one’s choosing.”).

76. Seana Sugrue, *Soft Despotism and Same-Sex Marriage*, in *THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, & MORALS* 172, 173, 175 (Robert P. George & Jean B. Elshtain eds., 2006) [hereinafter *THE MEANING OF MARRIAGE*]. Locke defined conjugal society as follows:

[Conjugal society] is made by a voluntary compact between man and woman; and though it consist[s] chiefly in such a communion and right in one another’s bodies, as is necessary to its chief end, procreation; yet it draws with it mutual support, and

society as one of those “forms of social order the existence of which are independent of the state.” He used the term, “pre-political social order.”⁷⁷ Indeed, “Locke’s political philosophy . . . does have the merit of being of historical importance [relative to American constitutions, as recognized by the AD dissenting opinion] and of stipulating clearly that rights and responsibilities, including those pertaining to conjugal society, are not created by the state”⁷⁸ but are “[n]ormative institutions . . . exist[ing] because they are compelling forms of social order that advance basic human goods.”⁷⁹ Thus, by invoking Locke in the context of the “natural” or “fundamental” right to marry (probably rightly), the AD dissenting opinion appears to be rather unknowingly and effectively refuting its own opening words about a state-created institution. This bizarre judicial performance may well be explained by this insight: “Institutions of civil society are too often ignored by judges and political theorists alike who tend to focus almost exclusively on the state and its relation to individuals, as though the state were the only desirable form of social order for the advancement of human goods.”⁸⁰

The AD dissenting opinion is probably doing even more than refuting its own opening words; by invoking Locke, it is probably laying well the foundation for rejection of its own ultimate conclusion—that the court should redefine marriage from the union of a man and a woman to the union of any two persons:

To function effectively, each of these [civil] institutions [identified by Locke, including marriage and conjugal society] requires the state to maintain a measure of respectful distance and *to uphold their core norms*. There is no guarantee, however, that the state will do so, and when it does not, the governance that results in these spheres tends to range from the inept to the despotic

assistance, and a communion of interest too, as necessary not only to unite their care and affection; but also necessary to their common offspring, who have a right to be nourished and maintained by them, till they are able to provide for themselves.

JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 47 (R. Cox ed., Harlan Davidson, Inc. 1982) (1690).

77. Sugrue, *supra* note 76, at 176.

78. *Id.*

79. *Id.*

80. *Id.* at 173–74.

As marriage is a normative institution, the move to redefine it by erasing one of its constitutive norms is a potent attack, one that can be expected to have long-term and far-reaching consequences. By taking upon itself the power to change the definition of marriage, the state, through judicial action, is effectively dismantling the connection between marriage and family. The state gains power through this move, while the family, and its most defenseless members, our children, lose their bearings.⁸¹

[Each case mandating genderless marriage] makes of marriage a legal form. That is, by putting aside both the history of the institution and its place and meaning in ordinary moral and social commerce, the Court reduces marriage entirely to law. With this, marriage is not only fully politicized, but, in a very real sense, becomes territory conquered by state law. This conquest comes at a very great cost, both for liberty and for the plurality that is its test and expression.⁸²

IV. THE COURT OF APPEALS DISSENTING OPINION AND ITS ELISIONS

As with the majority in *Hernandez AD*, the majority in *Hernandez COA* acknowledged key aspects of the social institutional argument, again primarily by citation to and approving quotation from⁸³ Justice Cordy's articulation of the argument in *Goodridge*.⁸⁴ And, as with the *AD* dissenting opinion, the *COA* dissenting opinion fails to engage that argument but rather proceeds as if oblivious to the social institutional realities demonstrated by it. In so doing, the *COA* dissenting opinion both repeats some of the *AD* dissenting opinion's elisions and deploys elisions not seen there.

A. Repeating Elisions

The *COA* dissenting opinion uses the "close personal relationship" component of the "convenient false assumption" elision, and does so in connection with its use of the "evolving social

81. *Id.* at 174–75 (emphasis added); see DeCoste, *supra* note 72, at 632–37.

82. DeCoste, *supra* note 72, at 639–40.

83. *Hernandez v. Robles*, No. 86, 2006 WL 1835429, at *13–14 (N.Y. July 6, 2006) (Graffeo, J., concurring).

84. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 995–96 (Mass. 2003) (Cordy, J., dissenting).

institution” counter. Even more baldly than does the AD dissenting opinion, the COA dissenting opinion asserts that marriage is nothing more than the close personal relationship model. “Only since the mid-twentieth century has the institution of marriage come to be understood as a relationship between two equal partners, founded upon shared intimacy and mutual financial and emotional support.”⁸⁵ But, as already shown, that proffered description of the contemporary American marriage institution is so incomplete as to be fundamentally false.⁸⁶ Thus, the same criticism fairly leveled at the AD dissenting opinion’s use of this elision applies with at least equal force to the COA dissenting opinion’s similar performance.⁸⁷

The same can be said of the COA dissenting opinion’s use of the related “evolving social institution” counter. That opinion says that “the common understanding of ‘marriage’ has changed dramatically over the centuries”⁸⁸ But like the AD dissenting opinion, the COA dissenting opinion fails to show either that the “evolution” has removed the constitutive meaning of “the union of a man and a woman” from the contemporary marriage institution so that the law’s task is simply to “adjust accordingly”⁸⁹ or that the change not yet (and maybe never to be) chosen or “evolved” by society is so wise that a court ought to impose it on society by no less than the force of “constitutional” law. Indeed, the COA dissenting opinion does not even attempt either intellectual task; this aspect of its judicial performance is thus rather woefully deficient.

B. *The “Armless Stick-Figure” Elision*

Perhaps nowhere does the COA dissenting opinion elide the social institutional realities of marriage more than in its discussion of the due process/fundamental right issue.

Federal and state courts have long recognized as “fundamental” the right of a person to participate in the man/woman marriage

85. *Hernandez*, 2006 WL 1865429, at *17 (Kaye, C.J., dissenting).

86. *See supra* section III.A.

87. *See supra* section III.A.

88. *Hernandez*, 2006 WL 1865429, at *17 (Kaye, C.J., dissenting).

89. *Hernandez*, 805 N.Y.S.2d at 381 (Saxe, J., dissenting) (“As the institution of marriage has been redefined within modern American society, the law has adjusted accordingly.”).

institution,⁹⁰ and that is how the majority of the Court of Appeals saw that right.⁹¹ On that basis, and because our society has never recognized a personal right to enter—and a corresponding governmental duty to create and sustain—the genderless marriage institution, the majority held that no such personal right exists.⁹²

The COA dissenting opinion’s simple but startling tactic relative to this issue was to ignore or otherwise cast aside all aspects of the fundamental right to enter the man/woman marriage institution except the one sliver that can apply to same-sex couples: “Central to the right to marry is the right to marry the person of one’s choice.”⁹³ That “central” aspect of the right then quickly became, in the opinion’s treatment, the only aspect.⁹⁴

Any defensible analysis of a “right to marry” must address what marriage is. Otherwise the right has no external or objective referent; it becomes nothing other than a purely personal construct, one free-floating form among others in a solipsistic vision of the universe. And as to what marriage is, the majority proceeded on the uncontroversial understanding that marriage is a vital social institution that, like all social institutions, is constituted by a web of shared public meanings. For the marriage institution, one of these core meanings is “the union of a man and a woman,” with that meaning being uniquely productive of a variety of valuable social goods mostly centered in the creation and rearing of children.

The binary nature of marriage—its inclusion of one woman and one man—reflects the biological fact that human procreation cannot be accomplished without the genetic contribution of both a male and a female. Marriage creates a supportive environment for procreation to occur and the resulting offspring to be nurtured. Although plaintiffs suggest that the connection between procreation and marriage has become anachronistic because of scientific advances in assisted reproduction technology, the fact remains that the vast

90. *E.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Cooper v. Morin*, 399 N.E.2d 1188, 1194 (N.Y. 1979).

91. *Hernandez*, 2006 WL 1865429, at *4–5; *id.* at *8–11 (Grafteo, J., concurring).

92. *Id.*

93. *Id.* at *15 (Kaye, C.J., dissenting).

94. *Id.* at *15–17.

majority of children are conceived naturally through sexual contact between a woman and a man.⁹⁵

In contrast, the dissent proceeded on the notion that marriage is nothing other than state sanction of an intensely personal adult desire and choice to bond to another adult.⁹⁶ In an effort to support this childless take on the nature of marriage, the dissent said that “the protections that the State gives to couples who do marry—such as the right to own property as a unit or to make medical decisions for each other—are focused largely on the adult relationship, rather than on the couple’s possible role as parents.”⁹⁷ But that assertion is problematic; it simply does not follow that legal recognition of familial property and familial responsibility for health care is unconnected to the great human endeavor of child-begetting and child-rearing, an endeavor undertaken by a substantial majority of adult Americans.⁹⁸ This problem with the dissent’s approach is actually just a small part of what is the larger problem of the entire genderless marriage project. That project simply cannot, by any means, get past the uncontroversial social institutional reality that societies across cultures and millennia—including contemporary American society, limited enclaves excepted—have sustained the man/woman marriage institution in large measure because it effectively connects a man and a woman and the children resulting from their passionate coupling in ways (many unique) that well perpetuate not just the species but the society itself, including all its valuable social institutions.⁹⁹

95. *Id.* at *9 (Grafteo, J., concurring).

96. *Hernandez*, 2006 WL 1865429, at *14 (Kaye, C.J., dissenting) (speaking of how the same-sex couple plaintiffs “grew up hoping to find that one person with whom they would share their future, eager to express their mutual lifetime pledge through civil marriage.”).

97. *Id.* at *21.

98. Jane Lawler Dye, *Fertility of American Women: June 2004*, CURRENT POPULATION REPORTS P20-555 (U.S. Census Bureau Dec. 2005); Suzanne M. Bianchi & Lynne M. Casper, *American Families*, Population Bull. 55(4), 18 (2000).

99. See, e.g., Don Browning & Elizabeth Marquardt, *What About the Children? Liberal Cautions on Same-Sex Marriage*, in THE MEANING OF MARRIAGE, *supra* note 76, at 29–52; Maggie Gallagher, *(How) Does Marriage Protect Child Well-Being?*, in THE MEANING OF MARRIAGE, *supra* note 76, at 197–212; W. Bradford Wilcox, *Suffer the Little Children: Marriage, the Poor, and the Commonwealth*, in THE MEANING OF MARRIAGE, *supra* note 76, at 242–54; Katherine K. Young & Paul Nathanson, *The Future of an Experiment*, in DIVORCING MARRIAGE, *supra* note 4, at 41–62; Somerville, *supra* note 11, at 63–78; Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 ST. THOMAS L. REV. 33, 45 (2004) (“Marriage is a virtually universal social institution. . . . [M]arriage [everywhere] has something to do with bringing together a man and a woman into a public—not merely private—sexual union, in which the rights and

So when analyzing “a right to marry,” and therefore necessarily considering what marriage is, the majority does a rather good job of depicting the institution while the dissent clearly does not, exactly because it elides institutional realities.¹⁰⁰ It is as if, when requested to represent the human form, one responds by bringing forth Michelangelo’s *David* and another responds with an armless stick-figure drawing.

C. The “Child Welfare” Elision

The COA dissenting opinion attempts to characterize the “state interest” in man/woman marriage as “mandating” or “encouraging” or “promoting” procreation.¹⁰¹ Here, the opinion is merely deploying the same tactic used in the Canadian and Massachusetts cases ordering genderless marriage but since discredited.

[Those] cases elide the States’ argument from one premised on marriage as society’s mechanism for the regulation and amelioration of the consequences of passionate and procreative heterosexual intercourse (children) to one premised on the silly view of marriage as a mechanism mandating procreation. [Those] majority opinions do not acknowledge the elision and, consequently, do not seek to justify it, and no justification independently presents itself.¹⁰²

responsibilities of the husband and wife towards each other and any children their sexual union produces are publicly—not privately—defined and enforced.”); 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); Maggie Gallagher, *Rites, Rights, and Social Institutions: Why and How Should the Law Support Marriage?*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 225, 231–34 (2004); Maggie Gallagher, *What Is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773, 781–91 (2002).

Likewise, the genderless marriage project cannot get past the uncontroversial social institutional reality that a society cannot have both—but must choose between—the child-centered man/woman marriage institution and the adult-centered genderless marriage institution. See Stewart, *supra* note 3, at 24–26.

100. The COA dissenting opinion sets up and knocks down a straw man when it asserts that the man/woman meaning in marriage is a mere legal, artificial definition that, because invidiously discriminatory, cannot be allowed to preclude any longer same-sex couples from marrying. *Hernandez*, 2006 WL 1865429, at *17 (Kaye, C.J., dissenting). The social institutional argument for man/woman marriage does not include or advance any notion of “definitional preclusion”; rather, it demonstrates the essential bond between the man/woman meaning and the marriage institution’s nature, purposes, and social goods. See Stewart, *supra* note 3, at 15–24.

101. *Hernandez*, 2006 WL 1865429, at *20–21 (Kaye, C.J., dissenting).

102. Stewart, *supra* note 34, at 62.

The COA dissenting opinion's use of this particular elision is doubly troubling in light of the fact that the majority in *Hernandez COA* clearly articulated society's genuine interest not to mandate or even necessarily to encourage procreation but to provide support to the social institution that best ameliorates the consequences of procreation resulting from passionate heterosexual coupling.¹⁰³

A closely related elision seen in the COA dissenting opinion is this: It ignores one government endeavor relevant to marriage and speaks only of a much different one. Those two different governmental endeavors are, on one hand, sustaining the child-centered and child-protective social institution of man/woman marriage and, on the other hand, assuring equal legal benefits to all children, regardless of who heads their domicile. Here is how the COA dissenting opinion ignores the former and speaks as if only the latter advances legitimate societal interests:

The State plainly has a legitimate interest in the welfare of children, but excluding same-sex couples from marriage in no way furthers this interest. In fact, it undermines it. Civil marriage provides tangible legal protections and economic benefits to married couples and their children, and tens of thousands of children are currently being raised by same-sex couples in New York. Depriving these children of the benefits and protections available to the children of opposite-sex couples is antithetical to their welfare The State's interest in a stable society is rationally advanced when families are established and remain intact irrespective of the gender of the spouses.¹⁰⁴

But this analysis is valid, of course, only to the extent that sustaining the child-centered and child-protective institution of man/woman marriage is the same governmental endeavor as protecting "the welfare of children" (as the dissenting opinion uses that concept). This is not at all clear. Reflection suggests that the two endeavors are substantially different. Protecting the present welfare of individual children found in varying circumstances is, in the way the COA dissenting opinion addresses it, the provision of legal benefits to individuals (or their care-takers). By contrast, sustaining man/woman marriage entails the protection and perpetuation of a social

103. *Hernandez*, 2006 WL 1865429, at *2-4; *id.* at *13-14 (Graffeo, J., concurring).

104. *Id.* at *21 (Kaye, C.J., dissenting).

institution—which benefits, both now and in the generations to come, the children resulting from passionate, procreative heterosexual coupling, the vast majority of all children. Thus understood, the two different governmental protective endeavors are just that, different. The COA dissenting opinion disappoints in that it provides no demonstration of the equivalency or overlap of the two endeavors and thus provides no justification for its refusal to acknowledge and give due weight to the institution-protecting endeavor.¹⁰⁵

D. The “Over/Under-Inclusive” Elision

The COA dissenting opinion elides other social institutional realities when it invokes and attempts to apply the venerable “over/under-inclusive” doctrine of equal protection jurisprudence.¹⁰⁶ One elided reality is the connection between the man/woman meaning now constitutive of the marriage institution and the valuable social goods produced by that meaning. To acknowledge that reality is to acknowledge that the “fit” between the impugned meaning and the societal objective (those very social goods)—rather than being under- or over-inclusive—is quite precise indeed. After all, to suppress that meaning is to lose those goods; certainly the “any two persons” meaning will not produce them.¹⁰⁷

Another elided reality is this: a society can have at any one time only the man/woman marriage institution or the genderless marriage institution or no normative marriage institution at all. For the Court of Appeals, the choice was actually between the two presently possible normative marriage institutions—man/woman or genderless—because no party was calling for the deinstitutionalization of marriage. The court’s task thus does not seem well-defined as determining whether a hypothetical and more narrowly- or broadly-drawn statutory scheme better “fits” or “suits” or “serves” a specific statutory objective than does the impugned statute. In other words, the judicial task was little akin to sorting through the gender discrimination in a statute allowing females to

105. See Stewart, *supra* note 3, at 37–38.

106. *Hernandez*, 2006 WL 1865429, at *20–21 (Kaye, C.J., dissenting). A good treatment of the doctrine is R. Randall Kelso, *Considerations of Legislative Fit Under Equal Protection, Substantive Due Process, and Free Speech Doctrine: Separating Questions of Advancement, Relationship, and Burden*, 28 U. RICH. L. REV. 1279 (1994).

107. See Stewart, *supra* note 3, at 15–24.

drink beer at age 18 while setting the age for males at 21¹⁰⁸ or to evaluating the line-drawing in a statute that required local franchising of antenna and television facilities, but not other private facilities that also used no public rights-of-way.¹⁰⁹ Rather, the Court of Appeals' task was either to mandate the genderless marriage institution by force of "constitutional" law, and thereby necessarily suppress the man/woman marriage institution, or to leave it to democratic processes to choose one or the other of the two marriage institutions. Seen in this light—a stark choice between one marriage institution and its unique social goods and a radically different marriage institution and its (promised) social goods—the over/under-inclusive doctrine seems ill-suited to the judicial task really at hand.

E. The Racial Analogy and Institutional Realities

Both the COA dissenting opinion and the AD dissenting opinion deployed repeatedly the argument of the racial analogy, also known as the argument of the *Perez/Loving* analogy.¹¹⁰ 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. But in deploying that argument, both dissenting opinions proceeded apparently oblivious to certain social institutional realities implicated by their use of the *Perez/Loving* analogy.

Because marriage is a vital social institution, it performs an important educative and socializing function. As seen, 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. But exactly 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

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

109. *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993).

110. *Hernandez*, 805 N.Y.S.2d at 379–81, 381 n.3, 382 (Saxe, J., dissenting); *Hernandez*, 2006 WL 1865429, at *16–17, 20 (Kaye, C.J., dissenting). In 1948, the California Supreme Court, in *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948), 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*, 388 U.S. 1 (1967), held the same.

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.¹¹¹ In fact, the anti-miscegenation laws were often found in the same legislative package as the laws calling for the sterilization of “idiots” and other so-called “genetic undesirables.”¹¹² 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.”¹¹³ 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.¹¹⁴ 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.¹¹⁵ In the process, those courts restored to marriage the integrity of its institutional purposes and logic, a historic accomplishment.¹¹⁶

Substantial evidence supports the understanding that a primary goal of the gay/lesbian rights movement’s genderless marriage project, like that of the white supremacists, is to appropriate the institution and change it to achieve sociopolitical purposes unrelated to marriage.¹¹⁷ 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.

111. Monte Neil Stewart & William C. Duncan, *Marriage and the Betrayal of Perez and Loving*, 2005 BYU L. REV. 555, 557, 567–70.

112. *Id.* at 567–70.

113. *Id.*

114. The common law had no racial restrictions relative to marriage. *Id.* at 567.

115. *Id.* at 570–75.

116. *Id.* at 575.

117. *Id.* at 581–88.

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.¹¹⁸

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 social institutional realities regarding those means. As already seen, 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.¹¹⁹ And, as also already seen, 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.¹²⁰ The final institutional reality is that when the man/woman marriage institution goes, its array of valuable and unique social goods goes also.¹²¹

Thus, the pressing question with respect to the dissenting opinions' use of the argument from the *Perez/Loving* analogy is whether an “equality” enshrined at such a cost to human development and social welfare is indeed the equality vindicated by *Perez* and *Loving* or otherwise demanded by our constitutional norms. The

118. *Id.* at 558.

119. *See supra* section II.

120. *Id.*

121. *Id.*

dissenting opinions provide no answer, again because they elide rather than engage the social institutional realities relative to marriage. The correct answer is rather clearly “no.”¹²²

V. CONCLUSION

Both the AD dissenting opinion and the COA dissenting opinion failed to engage the social institutional argument for man/woman marriage. Indeed, those opinions repeatedly proceeded on the basis of assumptions or assertions regarding the contemporary American marriage institution that are unsupported in the opinions themselves and, more seriously, that stand contradicted by recent and clearly observable social phenomena. The AD dissenting opinion erred materially when it denied that “the union of a man and a woman” continues as a shared public meaning at the core and constitutive of the institution, when it stated that the man/woman meaning is not productive of valuable social goods, and when it asserted that replacement of that meaning with “the union of any two persons” will result in an unchanged marriage institution and therefore in no “down-side” to society. Moreover, the AD dissenting opinion’s own references to John Locke’s influential writings on government and society materially undercut the opinion’s ultimate conclusion in favor of judicially-mandated genderless marriage. The COA dissenting opinion, when the judicial task relative to a fundamental right to marry called for an adequate description of what marriage is, gave the equivalent of an armless stick-figure drawing. That opinion in its treatment of the welfare of children also elided society’s, and hence government’s, important institution-protective endeavor and elided, in its use of the over/under-inclusive doctrine, the precise fit between the man/woman meaning and the resulting valuable social goods that continue to generate such broad societal support for the man/woman marriage institution.¹²³ Finally, a fair assessment of the social institutional realities relative to marriage rather thoroughly discredits both dissenting opinions’ use of the argument from the *Perez/Loving* analogy.

122. Stewart & Duncan, *supra* note 111, at 588–95.

123. Regarding that broad societal support, see *supra* notes 43–46 and accompanying text.