

Nos. 12-144, 12-307

In the Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL., *Petitioners*,

v.

KRISTIN M. PERRY, ET AL., *Respondents*.

UNITED STATES, *Petitioner*,

v.

EDITH SCHLAIN WINDSOR, ETC.,

AND

BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES, *Respondents*

On Writs of Certiorari to the United States Court of Appeals for the Ninth and Second Circuits

AMICUS CURIAE BRIEF OF COALITION FOR THE PROTECTION OF MARRIAGE IN SUPPORT OF HOLLINGSWORTH AND BIPARTISAN LEGAL ADVISORY GROUP ADDRESSING THE MERITS AND SUPPORTING REVERSAL

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QUESTIONS PRESENTED

No. 12-144:

Whether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman.

Whether petitioners have standing under Article III, §2 of the Constitution in this case.

No. 12-307:

Whether Section 3 of DOMA violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their state.

Whether the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case.

Whether the Bipartisan Legal Advisory Group of the United States House of Representatives has Article III standing in this case.

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INTEREST OF AMICUS¹

The Coalition for the Protection of Marriage (“Coalition”) is a Nevada non-profit corporation created in 1999 to propose and campaign for an initiative to amend Nevada’s constitution to add its article 1, section 21: “Only a marriage between a male and female person shall be recognized and given effect in this state” (“Marriage Amendment”). In the campaigns leading up to the successive general elections of 2000 and 2002, the Coalition provided leadership and resources to support the initiative. In both elections, Nevada’s voters overwhelmingly approved the Marriage Amendment, giving state constitutional protection to the man-woman meaning that since territorial days had been at the core of Nevada’s marriage institution and of its marriage statutes.

In April 2012, a group of eight same-sex couples represented by Lambda Legal Defense Fund and O’Melveny & Myers initiated in Nevada’s federal district court a 42 U.S.C. § 1983 civil action, asserting that the Marriage Amendment deprives them of equal protection of the laws in violation of the Fourteenth Amendment and seeking by force of law to change the meaning of marriage from the union of a man and a woman to the union of any two persons so that they can either be legally married in

¹The parties to these two cases have consented to the filing of this brief. Copies of the consent letters are being filed herewith. No counsel for any party authored this brief in whole or in part. No person or entity aside from the Coalition, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The Coalition has no parent corporation and no shareholders.

Nevada or have their foreign marriages legally recognized there. *Sevcik v. Sandoval*, Case No. 2:12-CV-00578-RCJ (PAL).

As the proponent of the ballot initiative leading to the Marriage Amendment, the Coalition timely moved to intervene as a party defendant. The district court granted that motion, and thereafter the Coalition played a major role in defense of the Marriage Amendment. Of particular importance to this *amicus* brief, the Coalition presented to the district court in fully substantiated and elaborated form certain social institutional realities regarding contemporary American marriage. Those realities constitute what is known in the literature as the “social institutional argument for man-woman marriage.” This argument is of extraordinary importance to this Court’s consideration of the merits in both *Perry* and *Windsor* because:

- it demonstrates that society and hence government (i) have compelling interests in perpetuating the man-woman meaning constitutive of the social institution of marriage and (ii) can preserve those interests in no way other than by preserving that meaning; hence, man-woman marriage can withstand all constitutional attacks regardless of the level of judicial scrutiny applied;
- the building blocks of the argument are supported by and indeed are uncontroversial in contemporary institutional studies; and
- the social institutional argument defeats every legal argument advanced by proponents of the

two-persons definition of marriage (“genderless marriage”).

The district court granted the Coalition’s motion for summary judgment and denied the plaintiffs’ motion. *Sevcik v. Sandoval*, ___F. Supp.3d___, 2012 WL 5989662 (D. Nev. Nov. 26, 2012). The plaintiffs appealed to the Ninth Circuit Court of Appeals. On December 5, 2012, the Coalition filed with this Court a petition for writ of certiorari before judgment. *Coalition for the Protection of Marriage v. Sevcik*, No. 12-689. That petition is still pending.

This Court should not rule on the fundamental marriage issue without carefully engaging the social institutional argument in support of man-woman marriage. The fundamental marriage issue is whether constitutional norms of equality and liberty require that the legal definition of marriage be changed from the union of a man and a woman to the union of any two persons so as to enable otherwise eligible same-sex couples to marry. That issue may be the most nationally important and consequential issue to come before this Court in many years. Over the past twenty years, the level of judicial and extra-judicial engagement with that issue has been extraordinarily high. In the midst of all this engagement with the legal meaning of marriage, a crucial question is whether federal constitutional norms require marriage’s redefinition. For the authoritative answer to that question, the people of the Nation now look to this Court. Yet if this Court mandates genderless marriage, the resulting social divisions and political contentions will probably equal and may surpass those resulting

from *Roe v. Wade*, 410 U.S. 113 (1973). In such a situation where public respect for this Court generally and its marriage decision in particular is especially important, prudence counsels that the Court's marriage decision (however it comes down) reflect engagement with the strongest argument for man-woman marriage. We respectfully submit that means engagement with the social institutional argument.

The Coalition presents that argument in this *amicus* brief.

SUMMARY OF ARGUMENT

A fundamental issue in the contest over the constitutionality of man-woman marriage is: What *is* marriage? All advocacy for genderless marriage is built upon a narrow view that marriage is *no more than* love and friendship, security for adults and their children, economic protection, and public affirmation of commitment. Although genderless marriage proponents rarely express that notion of “no more than,” the notion is *always* implicit in their arguments. At the same time, proponents of man-woman marriage advance a broader view of marriage. That broader view encompasses the social benefits (“goods”) identified with the narrow view but also much more. The broader view encompasses the marriage institution's vital role and social goods (i) centered in children (those now living and for generations to come), including making meaningful the child's bonding right, providing adequate private welfare to the vast majority of children (those conceived through passionate, heterosexual coupling), and perpetuating the optimal childrearing

mode; (ii) essential in the statuses and identities of *husband* and *wife*; and (iii) necessary for protection of the fundamental rights of natural parenthood and family relations.

The narrow view is misleading because it is materially incomplete. The broader view is more factually accurate in answering the question: What *is* marriage?

Marriage is a vital and fundamental social institution. Like all important social institutions, it consists of a web of interrelated public *meanings*. One of those core meanings is the union of a man and a woman. Institutionalized meanings, including the man-woman meaning at the core of marriage, teach, form, and transform individuals, providing them with statuses, identities, perceptions, aspirations, and projects and guiding their conduct. By forming and transforming individuals in these ways, institutionalized meanings provide the social goods that society needs and that justify society's expenditure of resources to perpetuate the institution.

The institutionalized man-woman meaning provides materially and even uniquely a number of valuable social goods. The man-woman marriage institution is:

- the social predicate indispensable to advance and make meaningful the child's interest in knowing and being raised by her own mother and father, with exceptions made only in the best interests of the child, not for the gratification of any adult desires ("child's bonding interest");

- the social predicate indispensable to advance the interests of natural parents and of society in defining and constructing parenthood on the basis of the parent-child biological bond;
- the real-world foundation of the natural family as a buffer between family members and the state and as the situs of relationships and rights independent of the state;
- the only source of the personally and socially valuable statuses and identities of *husband* and *wife*;
- humankind's best means for maximizing private welfare to the vast majority of children (those conceived by passionate, heterosexual coupling); and
- the irreplaceable foundation of the optimal child-rearing mode.

Because of the role of language in creating and sustaining social institutions, society cannot have at the same time two institutions denominated *marriage* with different core meanings or a single institution denominated marriage with different, conflicting core meanings. Society can have an institution of marriage with the core meaning of the union of a man and a woman or an institution of marriage with the core meaning of the union of any two persons, but not both (any more than society can have monogamy as a core, institutionalized meaning if it also allows polygamy).

Although interacting with and influenced by other institutions such as law, property, and religion, marriage in our society is a distinct, unitary

social institution and does not have two separate, independent existences, one “civil” and one “religious.”

In material ways, genderless marriage will be an institution radically different from the man-woman marriage institution. This radical difference between the two possible marriage institutions could not be otherwise: fundamentally different meanings, when magnified by institutional power and influence, produce divergent social identities, aspirations, projects, or ways of behaving, and thus different social goods. To say otherwise would be to ignore the undisputed effects that social institutions have in the formation and transformation of individuals. The reality is that changing the meaning of marriage to that of “any two persons” will transform the institution profoundly, if not immediately then certainly over time as the new meaning is mandated in texts, in schools, and in many other parts of the public square and voluntarily published by the media and other institutions, with society, especially its children, thereby losing the ability to discern the meanings of the old institution.

The law did not create the man-woman marriage institution. However, the law has the power to suppress the now widely shared man-woman meaning. By mandating a genderless marriage regime, the law will over time indeed suppress that meaning by displacing it with the different any-two-persons meaning. By suppressing and displacing the man-woman meaning in that way, the law will cause

the diminution over time and then the loss of the valuable social goods that meaning now provides.

A genderless marriage regime is and will be socially hostile and politically adverse to:

- the child's bonding interest;
- natural parenthood as the foundation for the construction of parenthood in our society;
- the concept that relational rights within the natural family are not created, dispensed, and withdrawn at the will of the state; and
- the personally and socially valuable statuses and identities of *husband* and *wife*.

Even though this summary of the relevant social institutional realities of contemporary American marriage is necessarily compressed,² it serves to illuminate the profound importance and the broad and deep social consequences of this Court's resolution of the fundamental marriage issue. Regarding consequences: First, if federal constitutional law were to suppress the man-woman meaning at the core of the marriage institution, society would see first the diminution over time and then the loss of the valuable social goods that

²For a full treatment of that argument and those realities, see, e.g., Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 Duke J. Const. L. & Pub. Pol'y 1 (2006) [hereinafter *Institutional Realities*]; Monte Neil Stewart, *Marriage Facts*, 31 Harv. J.L. & Pub. Pol'y 313 (2008) [hereinafter *Marriage Facts*]; and Monte Neil Stewart, Jacob Briggs & Julie Slater, *Marriage, Fundamental Premises, and the California, Connecticut, and Iowa Supreme Courts*, 2012 BYU L. Rev. 193 [hereinafter *Fundamental Premises*].

meaning uniquely provides. Those valuable social goods have no source in our society other than the man-woman marriage institution, and a genderless marriage regime will not produce them; indeed, it will be inimical to them. Second, at the same time, a constitutionally mandated genderless marriage regime will effectively advance a particular conception of the moral equality of forms of sexuality, a conception grounded in the influential “comprehensive doctrines”³ of some Americans, particularly among the Nation’s elites, but one contested by the comprehensive doctrines of many other Americans.

ARGUMENT

I. The man-woman meaning at the core of the marriage institution provides multiple valuable social goods that society has a compelling interest in perpetuating.

This *amicus* brief does not address the level-of-judicial-scrutiny issue. Although the Coalition sees rational-basis review as clearly the correct approach in both *Perry* and *Windsor*, we need not engage that question for two reasons. One, society has a compelling interest in perpetuating the valuable social goods materially and even uniquely provided by the man-woman meaning at the core of the marriage institution—and which over time will diminish and then be lost if this Court mandates a

³See John Rawls, *Political Liberalism* 13 (1995); see also Matthew B. O’Brien, *Why Liberal Neutrality Prohibits Same-Sex Marriage: Rawls, Political Liberalism, and the Family*, 1 *Brit. J. Amer. L. Studies* 411 (2012); John Rawls, *The Idea of Public Reason Revisited*, 64 *Chi. L. Rev.* 765 (1997).

nationwide genderless marriage regime. Two, society has no way of perpetuating those social goods other than by preserving the man-woman meaning of marriage. In other words, even if this Court were to apply the most rigorous form of judicial scrutiny, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 432–33 (1984), it should still rule in favor of man-woman marriage.

Although virtually everyone, from personal life experiences, has substantial knowledge about some aspects of marriage, most do not think about marriage as the social institution that it is. This is understandable because, although important social institutions like marriage affect individuals and societies greatly, we are largely unconscious of them.

We live in a sea of human institutional facts. Much of this is invisible to us. Just as it is hard for the fish to see the water in which they swim, so it is hard for us to see the institutionality in which we swim. Institutional facts are without exception constituted by language, but the functioning of language is especially hard to see. . . . [W]e are not conscious of the role of language in constituting social reality.⁴

Nevertheless, scholars have long addressed questions like what constitutes institutions, what sustains or changes them, what their influence is on human behavior, what good they do, why societies even have them, etc. In making our argument for

⁴John R. Searle, *Making the Social World: The Structure of Human Civilization* 90 (2010) [hereinafter “Searle, *Social World*”].

preserving the man-woman meaning in marriage and the valuable social benefits that flow from it, we draw from a rich body of academic literature on social institutions that to date has been insufficiently attended to in the legal debate over marriage.

In resolving the issue whether society has sufficiently weighty reasons for perpetuating the man-woman meaning in marriage, the legislative facts are what really matter, and the most consequential legislative facts are the social institutional realities of contemporary American marriage.

Generally speaking, advocacy for genderless marriage elides those institutional realities. All advocacy for genderless marriage, including the arguments for it in *Perry* and *Windsor*, is built upon a narrow description of contemporary American marriage.⁵ That description, however, is materially incomplete because it refuses to acknowledge the social institutional realities encompassed by the competing broad description. In the narrow description, marriage's social goods are *no more than* "love and friendship, security for adults and their children, economic protection, and public affirmation of commitment."⁶ Although genderless marriage proponents rarely expressly state that notion of "no

⁵The narrow description of marriage and the phenomenon of its ubiquitous role in all advocacy for genderless marriage are examined in detail at *Marriage Facts*, *supra* note 2, at 320–38, and *Fundamental Premises*, *supra* note 2, at 197–212.

⁶Linda C. McClain, *The Place of Families: Fostering Capacity, Equality, and Responsibility* 6 (2006); see generally David Blankenhorn, *The Future of Marriage* 12–19 (2007).

more than,” it is *always* implicit in their arguments, as the literature demonstrates.⁷

In reality, the social institution of contemporary American marriage encompasses much more than just the social goods described by the narrow description. It also encompasses the marriage institution’s vital role and social goods (i) centered in children (those now living and for generations to come), including making meaningful the child’s bonding interest, providing adequate private welfare to the vast majority of children (those conceived through passionate, heterosexual coupling), and perpetuating the optimal childrearing mode; (ii) essential in the statuses and identities of *husband* and *wife*; and (iii) inherent in the fundamental rights of natural parenthood and family relations.

The following sections address those additional social goods and their connection to the man-woman meaning at the core of the marriage institution.

a. Changing the definition of marriage would eliminate valuable social benefits that this vital social institution provides.

Marriage is a vital social institution,⁸ and like all social institutions, is constituted by a unique

⁷See *supra* note 5.

⁸*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.”).

web of shared public meanings.⁹ For important institutions, including marriage, many of those meanings rise to the level of norms.¹⁰ Such social institutions affect individuals profoundly. Institutional meanings and norms teach, form, and transform us. They supply identities, purposes, practices, and projects. They guide conduct.¹¹

Those meanings, as the constitutive elements of social institutions, are the source of the social goods that any institution provides. In other words, an institution's constitutive meanings generate social goods by teaching and transforming individuals across society.¹² These social goods justify the institution's perpetuation.¹³

⁹See, e.g., John R. Searle, *The Construction of Social Reality* 32 (1995) [hereinafter "Searle, *Construction*"]; see also *Institutional Realities*, *supra* note 2, at 8–28.

¹⁰See, e.g., Victor Nee & Paul Ingram, *Embeddedness and Beyond: Institutions, Exchange, and Social Structure*, in *The New Institutionalism in Sociology* 19 (Mary C. Brinton & Victor Nee eds., 1998) ("An institution is a *web of interrelated norms*—formal and informal—governing social relationships.") (emphasis added).

¹¹See, e.g., Helen Reece, *Divorcing Responsibly* 185 (2003); Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 *Can. J. Fam. L.* 11 (2004) [hereinafter *Judicial Redefinition*].

¹²According to Douglass North, institutions perform three unique tasks. They establish public norms or rules of the game that frame a particular domain of human life. They broadcast these shared meanings to society. They shape social conduct and relationships through these authoritative norms. See generally Douglass C. North, *Institutions, Institutional Change, and Economic Performance* (1990).

¹³This link between the value of institutionally produced social goods and perpetuation of the institution is both definitional and essential. See Monte Neil Stewart, *Eliding in*

Just as a society can create and sustain social institutions (by the use of language),¹⁴ a society can change its social institutions. Because social institutions are constituted by shared public meanings, they are necessarily changed when those meanings are changed or are no longer sufficiently shared. Indeed, that is the only way a social institution can be changed.¹⁵ When previously institutionalized public meanings and norms are no longer sufficiently shared by a society, through whatever means and for whatever reason, the social institution constituted by those meanings and norms disappears.¹⁶ This is called *de-institutionalization*.

Across time and cultures, a core meaning constitutive of the marriage institution has nearly always been the union of a man and a woman.¹⁷ Marriage's man-woman *meaning* provides materially and even uniquely many valuable social goods, which we address in some detail later on.

Washington and California, 42 Gonzaga L. Rev. 501, 503 (2007).

¹⁴See Searle, *Construction*, *supra* note 9; Searle, *Social World*, *supra* note 4.

¹⁵See, e.g., Eerik Lagerspetz, *The Opposite Mirrors: An Essay on the Conventionalist Theory of Institutions* 28 (1995); Eerik Lagerspetz, *On the Existence of Institutions*, in *On the Nature of Social and Institutional Reality* 70, 82 (Eerik Lagerspetz et al. eds., 2001).

¹⁶See, e.g., Searle, *Construction*, *supra* note 9, at 117.

¹⁷See, e.g., Claude Lévi-Strauss, *The View from Afar* 39–42 (Joachim Neugroschel & Phoebe Hoss trans., 1985); G. Robina Quale, *A History of Marriage Systems* 1–3 (1988); Institute for American Values, *Why Marriage Matters: Thirty Conclusions from the Social Sciences* 25–26 (3d ed. 2011) [hereinafter *Thirty Conclusions*].

Another important social reality is that a society can have *only one* social institution denominated *marriage*. Society cannot simultaneously 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”—any more than it can have monogamy as a core meaning if it also allows polygamy. One meaning necessarily displaces or at least precludes the other. 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.¹⁸ Thus, every society must choose either to retain man-woman marriage or, by force of law, replace it with a radically different genderless marriage regime.¹⁹

The law did not create the marriage institution.²⁰ Nevertheless, the law has the power to de-

¹⁸See, e.g., *Institutional Realities*, *supra* note 2, at 24–25.

¹⁹A society actually has three options: man-woman marriage, genderless marriage, or no normative marriage institution at all. Contemporary American political reality likely precludes the third option for now; however, many of the most influential advocates of genderless marriage correctly and gladly see that as leading quite naturally to no normative marriage institution at all. For a clear example of high-level advocacy for such, see *Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families & Relationships* 1 (2006), http://www.beyondmarriage.org/full_statement.html.

²⁰Man-woman marriage is unquestionably a pre-political institution. See, e.g., John Locke, *Second Treatise of Government* 47 (Richard H. Cox ed., 1982) (1690). In Professor Searle’s explanation:

[I]n human languages we . . . have the capacity to create a new reality by representing that reality as existing.

institutionalize it by suppressing the shared public meanings that constitute it.²¹ The law’s power arises from its expressive or educative function that is magnified by its authoritative voice.²² The *Perry* respondents seek to use the law’s power to suppress the man-woman meaning by replacing it with the any-two-persons meaning. (That is the only way that they can “marry” in any intelligible sense.) The reach of that power to suppress is large and sufficient, especially in light of the fact that, after

We create private property, money, government, marriage, and a thousand other phenomena by representing them as existing. . . . [O]nce you have linguistic commitments, it is inevitable that you will have the extension of those to the forms of institutional realities [such as the law and government] that are the extensions of the biologically primitive forms [of institutions], such as family, marriage, property, and status hierarchies.

Searle, *Social World*, *supra* note 4, at 86; *see also* Richard W. Garnett, *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children*, 76 *Notre Dame L. Rev.* 109, 114 n.29 (2000) (the law’s provisions regulating marriage no more “created” the marriage institution than the Rule Against Perpetuities “created” dirt).

²¹*See, e.g.*, Nancy F. Cott, *The Power of Government in Marriage*, 11 *The Good Soc’y* 88 (2002); The Witherspoon Institute, *Marriage and the Public Good: Ten Principles* 7 (2008); Institute for American Values, *Marriage and the Law: A Statement of Principles* 7 (2006) [hereinafter *Marriage and the Law*]; Institute for American Values (Dan Cere, principal investigator), *The Future of Family Law: Law and the Marriage Crisis in North America* 10–11 (2005) [hereinafter *Marriage Crisis*].

²²*See, e.g.*, Joseph Raz, *The Morality of Freedom* 162 (1986); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 *Harv. L. Rev.* 4, 69–71 (1996).

redefinition, the old meaning would be deemed “unconstitutional” and the mandate imposing the new meaning would be seen as vindicating some important “right.” In those circumstances, suppression would be a legal imperative of a very high order.

Despite its power to de-institutionalize man-woman marriage, the law does *not* have the power to give same-sex couples access to the marriage institution we have always known because the very act of changing that institution’s core, constitutive man-woman meaning will necessarily transform the old institution and make it into a profoundly different institution, one whose meanings, value and vitality are speculative. Some same-sex couples look to the law to let them into the privileged institution, and the law may want to, but it cannot; it can only give them access to a different institution of different value. That different institution will become the only legally sanctioned “marriage” into which any couple, whether man-woman or same-sex, can enter.²³

Such a law-mandated change would not be “incremental” or “evolutionary” but rather radical and revolutionary. Genderless marriage is a profoundly different institution than man-woman marriage.²⁴ This does not mean, of course, that

²³See Brian Bix, *Reflections on the Nature of Marriage*, in *Revitalizing the Institution of Marriage for the Twenty-First Century* 111, 112–13 (Alan J. Hawkins et al. eds., 2002); Sherif Girgis, Ryan T. Anderson & Robert P. George, *What Is Marriage?* 54–55 (2012); *Institutional Realities*, *supra* note 2, at 26–27.

²⁴See, e.g., O’Brien, *supra* note 3, at 414–15; *Marriage Facts*, *supra* note 2, at 323–24.

there is no overlap in formative instruction between the two “marriage” institutions; the significance is in the divergence. This significant divergence is seen in the nature of the two institutions’ respective social goods and also in the two institutions’ respective norms: man-woman marriage advances norms of biological kinship in the construction of parenthood,²⁵ of permanence and exclusivity in marriage,²⁶ and of preference for the statuses and identities of *husband* and *wife*,²⁷ while genderless marriage does just the opposite.²⁸ Further, the man-woman marriage institution is essentially child-centered;²⁹ a genderless marriage regime “neutralizes the law’s ability to say that children need their mothers and fathers and reifies a new conception of marriage that is centered on the couple rather than children,” teaching that marriage is a “private relationship between two people created primarily to satisfy the needs of adults.”³⁰

This radical difference between the two institutions could not be otherwise: fundamentally different meanings, when magnified by institutional power and influence, produce divergent social

²⁵ See *infra* section I.b.

²⁶ See Girgis et al., *supra* note 23, at 32-36.

²⁷ See *infra* section I.d.

²⁸ See *infra* sections I.b–d; Girgis et al., *supra* note 23, at 68–72.

²⁹ See, e.g., *Marriage and the Law*, *supra* note 21, at 6–7; Don Browning & Elizabeth Marquardt, *What About the Children? Liberal Cautions on Same-Sex Marriage*, in *The Meaning of Marriage: Family, State, Market, and Morals* 36 (Robert P. George & Jean Bethke Elshtain, eds., 2006) [hereinafter “Meaning of Marriage”]; Blankenhorn, *supra* note 6, at 11–20, 91, 99–102.

³⁰ *Marriage Crisis*, *supra* note 21, at 6–7.

identities, aspirations, projects, or ways of behaving, and thus different social goods.³¹ To say otherwise would be to ignore the undisputed effects that social institutions have in the formation and transformation of individuals. Indeed, well-informed observers of marriage—regardless of their sexual, political, or theoretical orientations—uniformly acknowledge the magnitude of the differences between the two possible institutions of marriage.³²

³¹See, e.g., *Thirty Conclusions*, *supra* note 17, at 7; *Marriage and the Law*, *supra* note 21, at 7.

³²See, e.g., Blankenhorn, *supra* note 6, at 167 (“I don’t think there can be much doubt that this post-institutional view of marriage constitutes a radical redefinition. Prominent family scholars on both sides of the divide—those who favor gay marriage and those who do not—acknowledge this reality.”); Daniel Cere, *War of the Ring*, in *Divorcing Marriage: Unveiling the Dangers in Canada’s New Social Experiment* 9, 11–13 (Daniel Cere & Douglas Farrow eds., 2004) [hereinafter “*Divorcing Marriage*”]; Douglas Farrow, *Canada’s Romantic Mistake*, in *Divorcing Marriage*, *supra*, at 1–5; Ladelle McWhorter, *Bodies and Pleasures: Foucault and the Politics of Sexual Normalization* 125 (1999); Joseph Raz, *The Morality of Freedom* 393 (1986); Judith Stacey, *In the Name of the Family: Rethinking Family Values in the Postmodern Age* 126–28 (1996); Katherine K. Young & Paul Nathanson, *The Future of an Experiment*, in *Divorcing Marriage*, *supra*, at 48–56; Angela Bolt, *Do Wedding Dresses Come in Lavender? The Prospects and Implications of Same-Sex Marriage*, 24 *Soc. Theory & Prac.* 111, 114 (1998); Devon W. Carbado, *Straight Out of the Closet*, 15 *Berkeley Women’s L.J.* 76, 95–96 (2000); Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 *St. Thomas L.J.* 33, 53 (2004); E.J. Graff, *Retying the Knot*, *The Nation*, June 24, 1996, at 12 (“The right wing gets it: Same-sex marriage is a breathtakingly subversive idea. . . . Marriage is an institution that towers on our social horizon, defining how we think about one another [S]ame-sex marriage . . . announces that

The reality is that changing the meaning of marriage to that of “any two persons” will transform the institution profoundly, if not immediately then certainly over time. Certainly the new meaning will be mandated in texts, in schools, and in many other parts of the public square and voluntarily published by the media and other institutions, with the result that society, especially its children, will lose the ability to discern the meanings of the old institution.³³

If the law were to suppress the man-woman *meaning* at the core of the marriage institution, the valuable social goods that meaning uniquely provides would diminish over time and then be lost. Those valuable social goods have no source in our society other than the man-woman marriage institution, and a genderless marriage regime will not produce them; indeed, it will be inimical to them.

In light of these realities, California’s citizen-voters made an eminently reasonable choice in putting Proposition 8 into their state’s constitution; likewise with respect to Congress and DOMA. Both those voters and Congress chose to protect, to the greatest extent they could, the institutionalized man-woman meaning against legal suppression. The only alternative to that choice was to leave the institutionalized man-woman meaning unprotected

marriage has changed shape.”); Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 *Law & Sexuality* 9, 12–19 (1991); Andrew Sullivan, *Recognition of Same-Sex Marriage*, 16 *Quinnipiac L. Rev.* 13, 15–16 (1996).

³³See, e.g., *Judicial Redefinition*, *supra* note 11, at 111; Girgis et al., *supra* note 23, at 55.

and therefore leave that meaning's valuable social goods in genuine danger.

b. Man-woman marriage protects the child's bonding interest and the concept of natural parenthood.

One of the social goods produced uniquely by the man-woman *meaning* at the core of the marriage institution is protection of the child's interest in knowing and being brought up by his or her biological parents, with exceptions being justified only in the best interests of the child, not for the gratification of any adult desires ("child's bonding interest").³⁴ Man-woman marriage not only supports the birthright of children to be connected to their mothers and fathers, it is the indispensable social predicate for that birthright to have meaning and reality.³⁵ Where marriage is a strong social institution, it is much more likely that a child knows and is raised by the man and the woman whose sexual union created her, exactly because the parents are married. Where the institution is weaker, such an outcome is less likely. Where the marriage ethos is weak or nonexistent, a child

³⁴See, e.g., Margaret Somerville, *Children's Human Rights to Natural Biological Origins and Family Structure*, 1 Int'l J. Jurisprudence Fam. 35 (2010); Margaret Somerville, *Children's Human Rights and Unlinking Child-Parent Biological Bonds with Adoption, Same-Sex Marriage and New Reproductive Technologies*, 13 J. Fam. Stud. 179, 179–201 (2007) [hereinafter Somerville, *Unlinking*]; Margaret Somerville, *What About the Children, in Divorcing Marriage*, *supra* note 32, at 63–78.

³⁵See, e.g., *Marriage and the Law*, *supra* note 21, at 6; Witherspoon Institute, *supra* note 21, at 6; *Fundamental Premises*, *supra* note 2, at 243–56.

knowing and being raised by his mother and father is a mere fortuity—unless the society has expended resources in a way effective to otherwise involve the father in the child's life, a problematic undertaking.³⁶

The *child's* bonding interest matters to *children*. Prof. Katharine K. Baker perceived this in her analysis of bionormativity—that is, of the norm that parental rights and obligations align with biological parenthood.³⁷ She perceived that the interests served by that norm must be analyzed separately for the state, parents, and children.³⁸ Children's interests in bionormativity differ from the state's and from the parents'; children “seem to have what is potentially the strongest interest in the biology of biological parenthood.”³⁹ Professor Baker explains that this may be because there are “psychological benefits associated with being raised by one's biological parents.”⁴⁰ These considerations are luminous of some of the deep roots of the child's bonding interest recognized in our domestic and international legal regimes.⁴¹

³⁶See, e.g., *id.* at 247; *Thirty Conclusions*, *supra* note 17, at 14; Witherspoon Institute, *supra* note 21, at 6; *Marriage and the Law*, *supra* note 21, at 7. Regarding state efforts to involve fathers in their children's lives (other than through marriage), see Allan Carlson, *Deconstruction of Marriage: The Swedish Case*, 44 San Diego L. Rev. 153 (2007).

³⁷Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 Ga. L. Rev. 649 (2008).

³⁸*Id.* at 682.

³⁹*Id.*

⁴⁰*Id.* at 686.

⁴¹See, e.g., Blankenhorn, *supra* note 6, at 188–90.

A recent study confirms Prof. Baker’s suggestion regarding the “psychological benefits associated with being raised by one’s biological parents.” That study was the first look into the minds and hearts of adults conceived by donated sperm.⁴² The study found that, compared to adopted adults and adults raised by their biological parents, donor offspring are much more: troubled by the circumstances of their conception, saddened when they see friends with their biological fathers and mothers, hurt when people talk about their genealogical background, and likely to depend on friends than family.⁴³ “When controlling for socio-economic factors, gamete donor offspring are significantly more likely than their peers raised by their biological parents to manifest delinquency, substance abuse, and depression. Gamete donor offspring are 1.5 times more likely to suffer from mental health problems.”⁴⁴

A genderless marriage regime is not just neutral towards the child’s bonding interest; as a matter of public policy and by force of law, it thwarts that interest.⁴⁵

Marriage is a compound right: the right to marry and to found a family. Giving same-sex couples the right to found a family, as same-

⁴²Institute for American Values (Elizabeth Marquardt, Noval D. Glenn, & Karen Clark, co-investigators), *My Daddy’s Name is Donor: A New Study of Young Adults Conceived Through Sperm Donation* (2010).

⁴³For a fuller summary of the study’s findings, see O’Brien, *supra* note 3, at 450–51.

⁴⁴*Id.*

⁴⁵See, e.g., *Marriage Crisis*, *supra* note 21, at 33–36; Blankenhorn, *supra* note 6, at 201.

sex marriage automatically does, unlinks parenthood from biology. In doing so, it unavoidably takes away [a child's] right to both a mother and a father and [his] right (unless an exception is justified as being in the best interests of that particular child, as in adoption) to know and be reared within his own biological family. . . . The primary rule becomes that a child's parents are who the law says they are The exception to biological parenthood . . . becomes the norm.⁴⁶

That has occurred in Canada; the same bill redefining marriage to the union of any two persons also contained, in order to maintain the coherence of the scheme, a provision ending in law the concept of "natural parenthood" and replacing it with the concept of "legal parenthood" (a child's parents are who the state says the parents are).⁴⁷ After implementation of genderless marriage, a child knowing and being raised by her biological parents would be a mere fortuity, not the result of cultural, political, and institutional aspirations and objectives.

Laws enshrining the man-woman meaning in marriage, such as Proposition 8 and DOMA, protect the child's valuable bonding interest for the benefit of generations of children to come by providing

⁴⁶Somerville, *Unlinking*, *supra* note 34, at 180–81 (footnotes omitted).

⁴⁷*See id.*; Institute for American Values et al. (Elizabeth Marquardt, principal investigator), *The Revolution in Parenthood: The Emerging Global Clash Between Adult Rights and Children's Needs* 10–11 (2006).

maximum legal protection to the institutionalized man-woman meaning that is the indispensable social predicate for the advancement of that interest. It also protects bionormativity in the construction of parenthood, something of value to children but also of value in differing ways to the state and to biological parents. This last point merits further elaboration.

c. Man-woman marriage protects rights in family relations against the state's impulse to act as if it were the source and dispenser of those rights and hence to infringe them.

A genderless marriage regime is inimical to the concept of natural parenthood, as Canada's experience demonstrates. It is likewise necessarily inimical to the concept of the natural family as an institutional buffer between family members and the state and as the situs of rights on which the state cannot impinge. Genderless marriage "is nothing more than a legal construct. Its roots run no deeper than positive law. It therefore cannot present itself to the state as the bearer of independent rights and responsibilities, as older or more basic than the state itself. Indeed, it is a creature of the state."⁴⁸ As a consequence, a genderless marriage regime "de-naturalize[s] the family by rendering familial relationships, in their entirety, expressions of law. But relationships of that sort—bled as they are of

⁴⁸Douglas Farrow, *Why Fight Same-Sex Marriage?*, Touchstone, Jan./Feb. 2012, available at <http://www.touchstone.com/archives/article.php?id=25-01-024-f>; see also Seana Sugrue, *Soft Depotism and Same-Sex Marriage*, in *The Meaning of Marriage*, *supra* note 29, at 172, 180–81, 186–91.

the stuff of social tradition and experience—are no longer family relationships at all. They are rather policy relationships, defined and imposed by the state.”⁴⁹ The chilling consequence is that, by displacing man-woman marriage, genderless marriage

does away with the very institution—the only institution we have—that exists precisely in order to support the natural family and to affirm its independence from the state. In doing so, it effectively makes every citizen a ward of the state, by turning his or her most fundamental human connections into legal constructs at the state’s gift and disposal.⁵⁰

This reality constitutes yet another compelling societal interest in preserving man-woman marriage.

d. The man-woman marriage institution is the sole source of the socially and personally valuable statuses and identities of *husband* and *wife*.

Man-woman marriage is the *only* institution that can confer the status of *husband* and *wife*. Only that institution can prepare a male for the role, status and identity of *husband*, transform him into a husband, and sustain him over time in his performance of that role. The same is true for a female relative to *wife*.

⁴⁹F.C. DeCoste, *Courting Leviathan: Limited Government and Social Freedom in Reference re Same-Sex Marriage*, 42 Alberta L. Rev. 1099, 1122 (2005).

⁵⁰Farrow, *supra* note 48.

Social practices are only intelligible in terms of their “point,” and any given practice can only (continue to) exist if its practitioners or participants are seized of some “sense” of the overall point of the “form of life” which the practice brings into the world. Marriage is a social practice that in life and subsequently, in law, has a point that constitutes it as a distinct practice. The point of marriage is the bestowal of a certain status on those who choose and are otherwise capable of entering into it and the creation of relations between them. The status bestowed by marriage is that of “wife” and “husband,” and the relation between husband and wife is the form of life that marriage alone creates and of which it alone is the practice.⁵¹

Husband and *wife* each “is a distinct mode of association and commitment that carries centuries and volumes of social and personal meaning.”⁵² Each of those two statuses exists in association with and by reference to the other.⁵³ The thick, deep meanings of *husband* pertain to relationship with *wife* (and vice versa) and, relative to that relationship, shape and inform a wide range of projects, purposes, and possibilities. As one

⁵¹F.C. DeCoste, *The Halpern Transformation: Same-Sex Marriage, Civil Society, and the Limits of Liberal Law*, 41 *Alberta L. Rev.* 619, 625 (2003).

⁵²Ronald Dworkin, *Is Democracy Possible Here?* 86 (2006); see also Monte Neil Stewart, *Dworkin, Marriage, Meanings—and New Jersey*, 4 *Rutgers J.L. & Pub. Pol’y* 271, 302–05 (2007).

⁵³See, e.g., DeCoste, *Halpern Transformation*, *supra* note 51, at 625–27; *Fundamental Premises*, *supra* note 2, at 257.

consequence of this, “marriage has always been the central cultural site of male-female relations”⁵⁴ and society’s primary and most effective means of bridging the male-female divide—that “massive cultural effort of every human society at all times and in all places.”⁵⁵ And despite issues relative to selection and causation factors, those who enjoy the status and identity of *husband* or *wife* are healthier, wealthier, and happier than those who do not.⁵⁶

An important related social reality is that social institutions, including marriage, not only constrain human conduct but also enable participants to do and become what they could not do and become without the institution; social institutions of benevolence like man-woman marriage enable and empower.⁵⁷

Of necessity, a genderless marriage regime will be inimical to the statuses and identities of *husband* and *wife*. To the extent that a genderless marriage regime even tolerates the words *husband* and *wife*, it will have to greatly shrivel their meanings. Such a regime must suppress the “centuries and volumes of social and personal meaning” inhering in those words because, if it does not, it will reinforce the

⁵⁴Cere, *War of the Ring*, *supra* note 32, at 14.

⁵⁵Young & Nathanson, *Future of an Experiment*, *supra* note 32, at 43; *see also* George Simmel, *The Sociology of George Simmel* 128–32 (Kurt H. Wolff, trans. & ed., 1950).

⁵⁶*See, e.g.*, Steven L. Nock, *Marriage as a Public Issue*, 15 *The Future of Children* 13, 17–21 (2005) (“The accumulated research shows that married people are typically healthier, live longer, earn more, have better mental health, have better sex lives, and are happier than their unmarried counterparts.”).

⁵⁷*See, e.g.*, Searle, *Social World*, *supra* note 4, at 143–44.

man-woman meaning of marriage, something a genderless marriage regime cannot do without jeopardizing its own supremacy and perpetuation.

[T]he effect [of a move to a genderless marriage regime] is plain: marriage no longer has anything at all to do with the bestowal of a status which makes possible relations which, in the absence of the status, are unavailable in our lifeworld. Instead, marriage now has to do with the recognition and endorsement of *pre-existing* dispositions and relations. So viewed, marriage adds nothing to human possibility and is, as a result, de-institutionalized.⁵⁸

Because preserving the valuable statuses and identities of *husband* and *wife* constitutes such a compelling societal interest, genderless marriage proponents make a frontal assault on the validity of this social good. They argue that state sanction of the statuses and identities of *husband* and *wife* constitutes impermissible sex discrimination. This “sexism” argument, however, makes sense only to people who have bought into a particular theory of gender advanced by radical social constructivists. That theory advocates that law not make any gender-based distinctions at all and, therefore, that law redefine marriage from a man-woman relationship to a person-person relationship.⁵⁹ But this Court, although given the opportunity to do so, e.g., *United States v. Virginia*, 518 U.S. 515 (1996),

⁵⁸DeCoste, Halpern *Transformation*, *supra* note 51, at 627.

⁵⁹For analysis of the radical social constructivist theory of gender in the context of judicial advocacy for genderless marriage, see *Judicial Redefinition*, *supra* note 11, at 86–95.

has never enshrined that theory in its equality jurisprudence.⁶⁰ This Court gives due deference to biological facts: “Physical differences between men and women, however, are enduring: ‘[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.’” *Id.* at 533. Because humankind is a two-sex species exactly for purposes of procreation, there is no identity or status more closely tied to the enduring biological facts than *husband* and *wife*. To call those statuses “sex-stereotyping,” as genderless marriage proponents do, is to ignore biological and social reality. It is to say that a woman can be a husband, but that simply cannot be absent a massive and Orwellian governmental intervention in and interference with our language and hence our society’s enduring social realities and institutions.

In declining to accept the radical social constructivists’ theory of gender, this Court has heeded Justice Holmes’s caution against the tendency of judges, consciously or unconsciously, overtly or covertly, to read social theories into the Constitution: “Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions.” *Otis v. Parker*, 187 U.S. 606, 608–09 (1903).⁶¹

⁶⁰See Sunstein, *supra* note 22, at 76.

⁶¹Even more pithy was his statement that the Constitution did not “enact Mr. Herbert Spencer’s *Social Statics*,” a book embodying the social Darwinism that gained considerable currency for awhile in American constitutional law. It is equally certain that the Constitution did not enact Ms. Judith

Because the Fifth and Fourteenth Amendments are not a partisan of radical social constructivism's theory of gender, the "sexism" argument fails.

e. Each of several other social goods produced by the institutionalized man-woman meaning also qualifies as a compelling societal reason for preserving that meaning.

We identify here several other social goods materially produced by the institutionalized man-woman meaning but do so only in short form; other *amici* and the parties we support will elaborate. Our contribution is to re-emphasize two social institutional realities. First, the institutionalized man-woman meaning is what materially and even uniquely produces these vital social goods; the mechanism of production is found in the power of a fundamental institution's core meanings to teach, form, and transform individuals, to supply them with identities, purposes, practices, and projects, and to guide their conduct. Second, if the law suppresses the man-woman meaning—as it must to make way for a genderless marriage regime—then these vital social goods will diminish over time and then be lost to society.

One of those additional, vital social goods is this: The man-woman marriage institution almost certainly qualifies as the most effective means humankind has developed so far to maximize the level of private welfare provided to the children

conceived by passionate, heterosexual coupling.⁶² As used here, the phrase *private welfare* includes not just the provision of physical needs such as food, clothing, and shelter; it encompasses opportunities such as education, play, work, and discipline and intangibles such as love, respect, and security. The provision of this social good constitutes society's deep logic of marriage because child-bearing in a setting of inadequate private welfare corrodes societal interests while child-bearing in a setting of adequate private welfare actually advances those interests. Channelling procreative passion into a social institution that assures—to the largest practical extent—that passion's consequences (children) begin and continue life with adequate private welfare is thus a fundamental and originating purpose of marriage.⁶³

This social good of maximizing the level of private welfare provided to the children conceived by passionate, heterosexual coupling is a unique product of the man-woman marriage institution. Certainly it is not, nor can it be, a meaningful product of a genderless marriage regime, with its ethos of de-linking marriage and procreation.⁶⁴

An additional, vital social good is that man-woman marriage is the irreplaceable foundation of the married mother-father child-rearing mode, and

⁶²See, e.g., Witherspoon Institute, *supra* note 21; *Marriage and the Law*, *supra* note 21, at 15; Lawrence B. Finer & Mia R. Zolna, *Unintended Pregnancy in the United States: Incidence and Disparities, 2006*, 84 *Contraception* 478, 478–85 (2011); *Judicial Redefinition*, *supra* note 11, at 44–52.

⁶³See, e.g., *id.*

⁶⁴See *supra* notes 29–30 and accompanying text.

that mode correlates (in ways not subject to reasonable dispute) with the optimal outcomes deemed crucial for a child's, and hence society's, well-being. These outcomes include physical, mental, and emotional health and development; academic performance and levels of attainment; and avoidance of crime and other forms of self- and other-destructive behaviors such as drug abuse and high-risk sexual conduct.⁶⁵

The institutional provision of the social goods just identified and related social goods often is accurately described at a more general conceptual level as one societal endeavor.

A liberal democratic society needs sufficient children and it needs them to be educated. Therefore, a liberal democratic society needs families headed by two married parents who are the biological mother and father of the children, because such families are (a) intrinsically generative and (b) optimal for childrearing. In other words, sex between men and women makes babies; society needs sufficient babies; babies need moms and dads. Every family arrangement in which children are raised need not and cannot conform to this pattern, but the state has a legitimate interest in encouraging people to form families that do so, which the state can accomplish by enshrining this conception of marriage in the

⁶⁵See, e.g., *Thirty Conclusions*, *supra* note 21.

law, as conferring unique social status, and promoting it with material benefits.⁶⁶

A fair shorthand phrase for this vital social endeavor conducted through and by the man-woman marriage institution is *the orderly reproduction of society*.⁶⁷ The important social reality is that the man-woman marriage institution is humankind's best mechanism for the orderly reproduction of society. Yet that institution and this social good must necessarily disappear over time as the law mandates a genderless marriage regime, the norms of which do not encompass this particular social good.⁶⁸

II. Social institutional realities refute a key pro-genderless marriage argument based on a state's provision of domestic partnerships.

As seen in *Perry*, genderless marriage advocates argue that somehow enactment of domestic partnership legislation renders constitutionally infirm the laws preserving the man-woman meaning in marriage. The argument has two facets: one, the domestic partnership legislation somehow effectively repudiates all the strong public interests advanced by the man-woman marriage laws, leaving thereafter those laws with an insufficiently strong basis in policy; and, two, because all the legislature or voters are doing with the man-woman marriage

⁶⁶O'Brien, *supra* note 3, at 441 (footnotes omitted); *see also Jackson v. Abercrombie*, ___ F. Supp.3d ___, 2012 WL 3255201, at *38–44 (D. Haw. Aug. 8, 2012); *Goodridge*, 798 N.E.2d at 995–1004 (Cordy, J., dissenting).

⁶⁷This phrase comes from O'Brien, *supra* note 3.

⁶⁸*See, e.g.,* Browning & Marquardt, *supra* note 29, at 13–36; *see also supra* notes 29–30 and accompanying text.

laws is withholding from same-sex couples the mere word *marriage*, the state cannot possibly have a good reason for such a course, and therefore all that is at work is the kind of animus prohibited by *Romer v. Evans*, 517 U.S. 620 (1996). This argument is clearly wrong.

The first facet of the argument fails for two reasons. First,

[t]he overwhelming international consensus—including among liberal western democracies with established traditions of concern for the rights of gays and lesbians—is that reserving the formal institution of ‘marriage’ to opposite-sex couples while supporting same-sex couples through other rights and legal mechanisms is sound public policy. That consensus is based not on irrationality, ignorance, or animus toward gays and lesbians but on considered judgments about the unique nature and needs of same-sex couples and children.⁶⁹

Second, this facet of the argument fails because man-woman marriage, even while society recognizes domestic partnerships, continues to provide society with valuable social goods that it cannot get otherwise. We explain this point in our treatment of the second facet of the argument.

Social institutional realities defeat the second facet of the argument (withholding the mere word *marriage* can only be the product of animus).

⁶⁹Brief for Judge Georg Ress and the Marriage Law Foundation as *Amici Curiae* Supporting Petitioners at 2, *Hollingsworth v. Perry*, No. 12-144 (U.S. Aug. 31, 2012).

Because social institutions are constituted by and only by complex webs of widely shared public meanings and are created by language acts, language creates the social reality that marriage unquestionably is. Marriage is an institution as fundamental, influential, and consequential as any. Accordingly, the political/legal power over the “mere word” *marriage* is a massive power. That power flows from the law’s expressive effect and is reinforced by the law’s coercive and pedagogical powers:

What is the same-sex marriage debate really about? The legal institution of marriage has the expressive effect of socially recognizing, promoting and dignifying the nature of the relationships that the law deems eligible for marriage. The expressive effect of legal marriage is what the debate over same-sex unions is really about. As it is playing out in the United States and elsewhere, the debate is about which rival conception of sexual value and identity should harness law’s expressive effect and be reinforced by the law’s coercive and pedagogical powers.⁷⁰

Informed genderless marriage advocates know this. “One sees the role of the vocabulary in the activities of revolutionary and reformist movements. They try to get hold of the vocabulary in order to alter the system”⁷¹ Here the “role of the vocabulary,” that is, the law’s and hence society’s use of the “mere word” *marriage*, will determine the fate

⁷⁰O’Brien, *supra* note 3, at 414.

⁷¹Searle, *Social World*, *supra* note 4, at 104.

of the child's bonding interest, of bionormativity in the construction of parenthood, of natural rights in family relations, of the statuses and identities of *husband* and *wife*, and on and on. Accordingly, a society cannot give up the "mere word" *marriage* without giving up the man-woman marriage institution and the valuable social goods that it uniquely provides. Certainly the preservation of those goods is the wholly legitimate and compelling objective of the man-woman marriage laws attacked in *Perry* and *Windsor*.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgments in both those cases.

Respectfully submitted,

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