(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman

Maggie Gallagher
Symposium

Federal Marriage Amendment: Yes or No?

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Fides et Iustitia
In his provocative essay, Andrew Koppelman reiterates the new conventional wisdom: arguments against gay marriage are failing, and the future of gay marriage is practically assured. Opponents of same-sex marriage are, he says, “tongue tied”:

Life in a democratic and pluralist society tends to promote more egalitarian attitudes toward differences of gender and sexual orientation. That’s reflected in the generational divide over same-sex marriage: while most Americans oppose it, most 18-to-29-year-olds are in favor.

The story of opposition to same-sex marriage is one of steady decay.¹

Indeed, Koppelman describes the case against gay marriage as so irrational as to be something close to evidence of mental illness. Those of us opposed to gay marriage are: “blasting away at invisible phantoms . . . insulated from reality,” displaying an unseemly “eagerness to scapegoat innocent people,” and rather like those ignorant Salem villagers who hunted down witches, “unable to understand the forces . . . transforming their world.” Opposition to gay marriage is thus merely “a report of a mental association,” which amounts to “magical thinking”:

“Gay people appear to be in some way associated in many people’s minds with social trends that they dislike.”²

Scholars don’t usually talk like this.

Predicting the future is an inherently chancy, and perhaps even an essentially unscholarly enterprise. But let me plunge ahead anyway and sug-

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¹ Andrew Koppelman, The Decline and Fall of the Case against Same-Sex Marriage, 2 U. St. Thomas L.J. 5, 32 (2004).
² Id. at 30.
gest that to the contrary: Support for gay marriage may have peaked in 2003 in the United States, and intellectually the arguments against it are powerfully resurgent.

What do I mean by this? How can I possibly believe this? Before my mental competence is called into question by the good professor, let me explain. In small part, I mean the supposed inevitability of gay marriage is belied by recent developments in public opinion, particularly next generation opinion.³

But more substantively, I suggest that the arguments in favor of gay marriage, developed over the last thirty years, have largely stopped developing. These arguments have had a powerful impact on public opinion, particularly legal elites, over the same period. But to these now well-worn arguments, little new has been added in recent months or even years.

This may be because for many years, the same-sex marriage debate has been a legal debate, mostly confined to lawyers, judges, and legal scholars, few of whom have any particular background in marriage at all. With the advent of Goodridge v. Department of Public Health, a debate that was once theoretical and primarily about homosexuality is beginning to attract new attention from a broader array of serious marriage scholars and thinkers.⁴ A more serious consideration of the consequences of same-sex marriage for marriage is thus only in the beginning stages.

Let me add: the apparent inability of same-sex marriage advocates to recognize or respond to this newer critique is powerfully on display in Koppelman’s own essay.

I hope at a minimum to persuade scholars like Prof. Koppelman that at its core the case against same-sex marriage has little to do with any mental associations about gay folk, positive or negative. I hope in short, to at least “achieve disagreement,” to spark a serious debate about the public purposes of marriage and of how the law can and should sustain marriage as a social

3. See infra section IV(D)(4).
institutions, and therefore what the consequences of legally redefining marriage as a unisex relationship are likely to be.

I. What is marriage? How does the law sustain marriage as a social institution?

In order to seriously consider whether same-sex marriage will help or hurt marriage as a social institution, the first thing we need is some working theory of what role the law currently plays in creating and sustaining marriage.

Advocates of same-sex marriage advance two mostly implicit theories about the relationship between law and marriage. The first is that marriage law consists of a package of benefits we give to reward and facilitate those who undertake marital responsibilities. The second (related) theory is that marriage itself is a product of the laws that produce and define it. Marriage is a legal construct, like the corporation, with no intrinsic purpose or function at all. In this view, marriage does not refer to any larger reality outside the law. Marriage is simply whatever the law defines it as.

A. Marriage as a benefits package

Since the advent of the gay marriage debate, the most prominent way of thinking about the relationship between law and marriage is to say that the law provides important marriage “benefits.”

As the Goodridge majority put it, “tangible as well as intangible benefits flow from marriage. The marriage license grants valuable property rights to those who meet the entry requirements, and who agree to what

5. “Some federal and state laws, as well as many private entities, encourage marriage by providing potentially valuable and unique incentives to couples who marry, while withholding these benefits from individuals and couples who do not. Although such incentives may not have a strong effect on a couple’s decision to marry, they are valuable, tangible privileges attendant to participation in marriage.” Kara S. Suffredini & Madeleine V. Findley, Speak Now: Progressive Considerations on the Advent of Civil Marriage for Same-Sex Couples, 45 B.C. L. Rev. 595, 598 (2004) (Suffredini is co-chair of the National Lesbian and Gay Law Association and Findley is also on the board of directors of that organization). See also Richard Lacayo, For Better or for Worse?, Time 26 (Mar. 8, 2004) (“[President George Bush and Senator John Kerry] both oppose gay marriage and would oppose extending the 1,138 federal rights and privileges to gay couples, but support the right of states to grant civil unions.”); Dennis M. Mahoney, Ex-Local Minister Calls Gay Marriages Just, Columbus Dispatch 4E (Apr. 2, 2004) (“There are over 1,000 benefits that come with civil marriage that are recognized by state and federal government that we don’t have access to,” [Rev. Kay Greenleaf] said.”); Chuanpis Santilukka, Same-Sex Benefits Key to Marriage Debate, St. Cloud Times 4A (Mar. 24, 2004) (“In 1997, congressional accountants identified 1,049 federal laws that gave benefits, rights or privileges to married couples.”); Evelyn Nieves & Jim VandeHei, Kerry Backs Benefits for Legally United Gays, Wash. Post A6 (Mar. 4, 2004); Dean E. Murphy, For a Day, Same-Sex Pairs Get a Warm Reception, N.Y. Times A14 (Feb. 23, 2004) (quoting a woman who with her lesbian partner had recently obtained a marriage license in San Francisco); Gen. Acctg. Off. Rept., 1,049 Federal Laws in which Marital Status Is a Factor (Jan. 31, 1997) (available at http://www.marriageequality.org/facts.php?page=1049_federal).
might otherwise be a burdensome degree of government regulation of their activities.\textsuperscript{6}

Andrew Koppelman divides the marriage debate into two parts: (1) a "sanctification" narrative or "normative" meaning of marriage, which he calls a debate over "what relationships to value or even to sanctify"; and (2) an "administrative" debate, or: "the more mundane questions of how resources should be allocated and unfair disruption of people's lives prevented."\textsuperscript{7}

Note that under even the allegedly "mundane" and merely administrative debate, Koppelman, being human, cannot help smuggling in an important moral question: what exactly constitutes "unfair disruption" of people's lives?\textsuperscript{8}

One could argue, and it would be true, that Koppelman cannot even answer his own question about the unfairness of giving marriage benefits only to married husbands and wives, without some alternate theory about what kind of relationships are entitled to these or similar benefits. He offers a brief attempt (benefits should go to existing relationships of dependency that particular individuals value\textsuperscript{9}) but to this theory questions immediately arise: if same-sex marriage benefits must be granted under this line of reasoning, why not polygamy?\textsuperscript{10} Why do couples caring for each other have to be in a sexual relationship? Why not offer these benefits to adults living in parent-child couples; single moms with their adult sons, for example, who arguably engage in even more caretaking than at least some married folks? Why are best friends who are not sexually intimate excluded from marriage benefits? Why can't I marry my sister and raise kids with her—provided I obey incest laws?

All of these relationships of dependency meet Prof. Koppelman's criteria: They exist right now, whether we like it or not.\textsuperscript{11} People are living in

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\textsuperscript{7} Koppelman, \textit{supra} n. 1, at 11.
\textsuperscript{8} \textit{Id.}
\textsuperscript{9} Like it or not, households, of whatever kind, and relationships of dependency exist. From those relationships, one can reasonably infer what the members of those households would want and need if some unprovided-for contingency arises, such as the illness or death of one of them. From this perspective, law ought to maximize welfare by reflecting people's preferences and providing the default options that they would probably have chosen had they been able to think about it. The task of constructing the law of marriage is analogous to the task of constructing the law of business corporations: How can the state maximize efficiency and satisfy people's preferences about their relationships by constructing sensible 'one size fits all' default rules, while protecting the interests of third parties, notably children? Here it all turns on what we know about the effects of various practices and policies. And issues of sanctification are very far from our minds. \textit{Id.} at 11-12.
\textsuperscript{10} Indeed, Koppelman seems to suggest there is no particular reason why not polygamy, which like same-sex marriage has multiple social meanings and therefore no particularly likely negative consequences. \textit{Id.} at 29.
\textsuperscript{11} \textit{Id.} at 11.
polygamous households, with sisters, with best friends, with aunts, with cousins, with mothers, with fathers, and even (sometimes) raising children in these households. Why doesn’t the law administrate marriage “benefits” to all of them, or at least all who want to claim them?

I am not arguing that same-sex marriage will lead inevitably to expanding the definition of marriage to include these relationships. The point I am making is this: very few things about our marriage traditions, legal or social, are intelligible under the implicit theory of marriage offered by Koppelman and other advocates of same-sex marriage. Advocates of same-sex marriage cannot explain why marriage exists, or why it should continue to exist, as a distinct legal status. In particular Koppelman’s theory of “administrative” marital benefits cannot explain why marriage has existed, or ought to continue to exist, as a distinct legal institution.

What about the other half of marriage that Koppelman proposes, that the law exists to serve a “sanctification” narrative? Here again, Koppelman has difficulty explaining what is distinctive about marriage that would give rise to any special legal treatment, much less a large legal superstructure. If marriage is just another word for a fight about which relationships people socially value, why are so many valuable relationships left out?

We do not typically demonstrate the intrinsic value of personal relationships by subjecting them to legal regulation. In fact, the general rule in law is: the closer, more intimate, more intrinsically valued the relationship, the less likely it is to be regulated by law. I am a best friend, a sister, an aunt, a niece, a neighbor, a granddaughter, and a godmother. All of these relationships are extremely important to me personally, and highly valued socially. Yet they share one characteristic: they are almost totally unregulated by law.

This is true even of personal relationships that give rise to considerable dependency, like the relationships between adult children and aging parents. If my mother is old and sick and in need of my care, I can choose to walk away from her completely and the law cannot touch me; the law will not even try to transform filial obligations into legal ones. It is impersonal relationships—especially commercial ones—that typically give rise to legal regulation, not personal, intimate ones. The one great exception to this general rule in adult relationships is marriage. Why?

The inability to explain why the law is involved in sanctifying this relationship and not others is a core problem with Koppelman’s theory of marriage. But there is a deeper problem with Koppelman’s idea of dividing marriage into a sanctification narrative and a separate benefits package. It is a problem with all legal theories that assume the law “incentivizes” mar-

12. In my opinion the most likely result of same-sex marriage will not be the expansion of marriage benefits to more and more relationships, but the elimination of marriage as a legal status.
riage by distributing a package of legal goodies to married couples to reward those who accept its responsibilities. It simply is not true.

Once it was true. Once, two very great legal goodies were distributed exclusively to married couples by the law: First, the right to have sex. Having nonmarital sex subjected a person to potential criminal penalties, however rarely enforced, from fornication through adultery and sodomy. Second, legal paternity, meaning for men the right to care and custody of one's children, and for women the right to claim a father's financial support.

For several generations, for better or for worse (or both), these two former marital benefits have ceased to exist in law. In law (if not in reality), parental support obligations have been severed from marital status, and the concept of legitimacy itself ruled unconstitutional.\(^{14}\) With \textit{Lawrence v. Texas}, the law not only permits nonmarital sex, it has conferred upon it the sacred status of a constitutional right.\(^{15}\)

Most of what are now routinely described as marriage benefits are more accurately described as legal incidents of marriage: ways in which the law treats a couple differently if they are married than if they are not.\(^{16}\) The legal incidents of marriage benefit some couples, but penalize other couples. Or, they benefit one partner and burden the other. Many affect only a tiny fraction of couples (or none at all, such as federal law making provisions for Spanish-American War widows).\(^{17}\) Very few of them can be described in any straightforward way as a "benefit" of marriage.\(^{18}\)

What are these legal incidents of marriage? Generally speaking, the law treats you differently if you are married, because the law presumes that marriage makes you and your spouse three things: (a) next of kin, (b) financial partners, and (c) exclusive sexual partners.

Why, for example, must the coroner get the consent of a spouse to perform an autopsy? Why does a wife have the power to direct medical


\(^{15}\) 539 U.S. 558 (2003).

\(^{16}\) In reviewing federal statutes, the General Accounting Office in 1997 found 1,049 federal statutes "in which marital status is a factor." The GAO specifically notes, however: "no conclusions can be drawn . . . concerning the effect of [a] law on married people versus single people. A particular law may create either advantages or disadvantages for those who are married, or may apply to both married and single people." Gen. Acctg. Off. Rept., \textit{supra} n. 5, at 2.


treatment if the patient is unable to do so? Is this really a special incentive written into the law in order to encourage people to get married?

In reality, such legal consequences are not benefits or incentives, but rather reflect the law's perception of spouses as each others' closest kin. The law is doing justice to the relation that actually exists between spouses, in our conception of marriage, rather than creating a basket of legal goodies to help reward married couples.

In other cultures, the law may sometimes privilege parent-child relationships over spousal ones—the wife can be lower down the food chain in terms of "next of kin" status. American law treats spouses as "next of kin" because of the influence of our specific religious traditions, which gave rise to the basic normative ideas about marriage encoded in law: "Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh."  

Marriage makes a husband and wife legally next of kin. But everyone, single or married, has a legal next of kin, and American law provides many other ways for a person to contract around the default next of kin rules provided by the law (wills, medical powers of attorney, and adoption come to mind). If the current legal devices are inadequate (as some testimony suggests) there is no reason why these methods cannot be strengthened or updated to meet contemporary needs, that is if "helping people live their lives" in the purely administrative sense is the main goal of same-sex marriage advocates.

By describing this cluster of legal consequences of marriage as an administrative "benefit" unfairly denied others, Koppelman probably misunderstands why this package of benefits matters. The automatic granting of "next-of-kin" status is important not because the right to consent to an autopsy is experienced by married couples as a powerful benefit, but because being treated as "next of kin" by the law reinforces—both for the couple and for every person and institution that interacts with the couple—the underlying norm of what marriage is.

This bundle of legal incidents primarily serves, in other words, not an "administrative" purpose, but the underlying normative function—i.e., the "sanctification narrative" of marriage. If the law views marriage seriously as a one-flesh union, with husband and wife becoming each others' closest relative, joined in a permanent financial, parenting, and sexual union, then

19. Genesis 2:24 (King James). This points, by the way, to the difficulties of any clear and facile distinction between "religious marriage" and "civil marriage." In the U.S., people have always been able to marry without a religious ceremony. But the legal structure of marriage is deeply influenced by our specific religious traditions about marriage. Which of these conceptions are we allowed to keep and which must be discarded as unduly religious? Monogamy? Mutual fidelity? Primacy of husband and wife over other relations? None of these are human universals. They are the products of a specific marriage tradition deeply rooted in religious ideas. Creating a truly "neutral" marriage system, uninfluenced by any religion, would mean eliminating from the law most of what people mean by marriage.
this is how the law (in doing justice) treats the married couple, regardless of whether the consequences of this legal bundle is experienced by spouses as a benefit or a burden, or both. The law treats the couple as married, because that is what they are. In treating them as married, in insisting that other institutions treat them as married, the law helps sustain the public shared (normative) meaning of what marriage is.

Consider similarly the financial implications of marriage law. Married people are often treated by the law as a financial unit, not because this is a benefit that incentivizes marriage (it mostly does not), but because doing so is the only just way to treat the married couple: being financially responsible for each other and sharing income and assets ("all my worldly goods") is part of what marriage means.

Far from benefiting marriage, the federal tax code, for example, continues to "penalize" many married couples: couples who merely live together will often pay lower taxes than a couple who is married because their joint income pushes them into a higher tax bracket.20 It is true that the husband in some situations—mostly a one-earner married couple with children—will pay less in taxes than he would as a single man. But in these situations the woman must, because of the legal status of marriage, give up an extensive government entitlement package (income support, food stamps, public housing, and medical insurance) that would be available to her as a single mother without either a spouse or an income. What the tax code giveth, the welfare system taketh away. It is not clear in what, if any, circumstance the law provides a net financial benefit based on marital status.21 Even health insurance is not a clear benefit. Yes, marriage may give access to your spouse’s medical insurance. But it can also make you ineligible for free or low-cost medical care from the government.22


21. Two scholars argue in the forthcoming journal The Future of Children that the net effect of the legal status of marriage is large marriage penalties for most couples. Id.

22. There is some very limited evidence that Medicaid’s marriage penalties have contributed to the rise in out of wedlock births. See Aaron S. Yelowitz, Will Extending Medicaid to Two-Parent Families Encourage Marriage?, 33 J. Human Resources 833, 858 (1998) (noting that the effects of Medicaid policy on marriage appears to drop when mothers of infants are excluded).
The phantom nature of the marriage-as-administrative-benefits-package promised by same-sex marriage advocates can be seen every time a new jurisdiction offers marriage benefits to same-sex couples. Having been promised that a cornucopia of important benefits resides in marital status, gay people are often dismayed to discover how empty or full of penalties the marriage basket can be. Consider for example a story in the September 20, 2004 San Francisco Chronicle about gay couples surprised to find there may be substantial financial penalties in being treated as married under the law.\textsuperscript{23}

In 2003, California passed Assembly Bill 205, expanding its domestic partnership law into a full “marriage equivalent.”\textsuperscript{24} But Randy Cupp of San Francisco has decided not to register with his partner: “If you’re going to give us the responsibilities, you need to give us the benefits as well,” said Cupp.\textsuperscript{25} (Note that Cupp assumes an extensive benefit package associated with marriage must exist somewhere, if not in state law, then in federal law still currently denied to him.)

Cupp and his partner, Jeff Tarvin, are both HIV positive and on disability. If the law were to treat them like a married couple, they would risk losing their Medi-Cal health insurance and/or lose income from California’s disability income program because their combined incomes and assets would be used to determine their eligibility for government benefits.\textsuperscript{26}

Gay rights advocates acknowledge the concern. “It is absolutely certain that AB205 will affect some public benefits. It’s unclear which ones and how,” Jane Gelfand, an attorney and benefits counseling program director at Positive Resource Center, a nonprofit for people affected by HIV and AIDS, told the Chronicle.\textsuperscript{27}

The article also notes concerns about the financial impact of being treated as a married couple under the law among more affluent gays as well: “On the other end of the financial spectrum, some wealthy gays and lesbians are blanching at the prospect of their income, assets—and debt—turning into community property. Under the new law, ending a partnership could entail losing half one’s assets, just like divorce.”\textsuperscript{28}

Patricia Robertson, a professor at UCSF Medical Center and co-director of the Center for Lesbian Health Research, told the reporter that marriage as a legal structure may not be consistent with the best interest or expectation of many same-sex couples:

\textsuperscript{25} Marech, supra n. 23.
\textsuperscript{26} Id.
\textsuperscript{27} Id.
\textsuperscript{28} Id.
Gay and lesbian relationships have not been as financially intertwined as marriage historically, which was traditionally structured on the basis that women were the property of men. For a lot of LGBT (lesbian, gay, bisexual, and transgender) people, being independent financially is an important part of who they are. To be told by the law that their financial relationship is now expected to mimic that of a married couple is unknown territory.29

Finally, she notes that some in the gay community are referring to AB205 as the “gay divorce law.” Under current law, breaking up is as simple as filling out a form. With AB205, most couples will have to face court proceedings and spend money on lawyers.30

I do not mean to single out gay couples for some sort of special opprobrium for having these very reasonable financial concerns. But I do want to point out that the very concerns they are expressing highlight how difficult it is to imagine that voluntarily subjecting yourself to a burdensome and potentially expensive set of legal regulations called “marriage” can best be understood as signing on for a package of “administrative benefits” to help you live your life.

Couples who have been taught to view marriage this way are bound to be deeply disappointed by what the legal consequences of marriage actually are. Judges, lawmakers, and family scholars who conceptualize marriage in this way are bound to make some pretty big errors about what family law and public policy should be.

None of which is to deny that some same-sex couples in some circumstances will obtain a material benefit if they were allowed to marry and that questions about the justice of the current definition of marriage are perfectly appropriate.31 My goal here is to dispute the idea that providing something called “benefits” to married couples has very much at all to do with how and why the law of marriage matters to couples, or the larger project of sustaining a marriage culture.

What I am contesting is Koppelman’s central assumption that marriage can be intelligibly divided into two halves: a normative function or “sanctification narrative” and a merely administrative benefits package. The legal incidents of marriage arise from and exist to serve the “sanctification” narrative embedded in the law. The law starts with a certain assumption of

29. Id.
30. Id.
31. There are some legal incidents of marriage that do look like benefits. Those available in the state of Massachusetts, cited in Goodridge, include pension benefits, special payments to spouses of firefighters and policemen killed in the line of duty, and joint tenancy-in-common. Goodridge, 798 N.E.2d at 955-56. In federal law, similar benefits include the Social Security spousal benefit. 42 U.S.C. § 402 (2004) (old-age and survivors insurance benefit payments). If legislatures crafted these legal provisions as a benefits package in order to help people live their lives together, it is at least a little odd that so many of the visible financial benefits are triggered by the death of the partner or of the marriage.
what marriage is: a “one-flesh” union of husband and wife, and then rea­
sons from the existence of this union to how in justice the law must act if
that “one-flesh” union really does exist. In the process, the law helps to
make the “one-flesh” union real, requiring the state and other institutions to
treat the couple as if their marriage really exists.

Marriage is not a benefits package. One cannot strip the normative
from the administrative functions of marriage without making marriage law
largely unintelligible. Laws about marriage do not function primarily as an
administrative distributor of benefits that help provide incentives to get and
stay married, or even help people lead the kind of life they choose. Mar­
riage requires consent, but marriage is not about helping people live any
way they choose. The purpose of marriage law is inherently normative, to
create and force others to recognize a certain kind of union: permanent,
faithful, co-residential, and sexual couplings.

The goal of marriage law, in other words, is not to make two people’s
lives easier, it is to marry them.

II. WHY MARRIAGE?

The central question raised by the same-sex marriage debate is there­
fore the question that Koppelman cannot answer: why this sanctification
narrative and not some other, or no sanctification narrative at all? What
right does the government have, and what interests of the state are served
by singling out this one kind of relationship for special legal attention?
What business is it of the government to sustain or reinforce norms about
people’s private, intimate lives?

As we’ve seen, this is a very hard question for advocates of same-sex
marriage to answer. Dependency, love, “like it or not people already live
like this,” none of these can reliably discriminate between the kinds of rela­
tionships that are legally defined as marriage and the kinds that, however
intrinsically valued and socially important, are legally unregulated.

So what is the answer? Why does marriage exist as a legal institution?
What justifies its continued existence?

A. The historical answer in the American legal tradition

Historically, the reason marriage exists as a legal institution is clear. A
virtually uninterrupted series of both lower court decisions32 and Supreme

32. See Dean v. D.C., 653 A.2d 307, 337 (D.C. Cir. 1995) (finding that this “central pur­
pose . . . provides the kind of rational basis . . . permitting limitation of marriage to heterosexual
couples”); Feren, J., concurring and dissenting); Adams v. Howerton, 486 F. Supp. 1119, 1124
(C.D. Cal. 1980), aff’d 673 F.2d 1036 (9th Cir. 1982) (observing that a “state has a compelling
interest in encouraging and fostering procreation of the race”); Standhardt v. County of Maricopa
ex rel. Jeanes, 77 P.3d 451, 463-64 (Ariz. App. Div. 1 2003) (“We hold that the State has a
legitimate interest in encouraging procreation and child-rearing within the marital relationship,
and that limiting marriage to opposite-sex couples is rationally related to that interest.”); Marvin v.
Court decisions until quite recently affirmed the primary purpose of marriage as a legal institution is to manage the sexually-based phenomenon known as “procreation.” This is not quite the same as saying “marriage is in order to produce children.” Marriage is not a factory for childbearing. Marriage existed to encourage men and women to create the next generation in the right context and simultaneously to discourage the creation of children in other contexts—out of wedlock in fatherless homes.

The reason marriage was singled out for special legal attention is that it is the only human relationship that can both (a) produce the next generation of babies and (b) connect those babies to both their mother and father.

Note that throughout this period, some married couples have not had children and older couples were allowed to marry. Yet legislators, courts, and the public continued to understand marriage’s prime purpose as regulating sexual relationships in the interests of managing procreation. They understood that because sexual relationships between men and women outside of marriage regularly give rise to children, “narrowly tailoring” marriage would defeat its core public purpose. When men and women engage in extended sexual careers outside of marriage, pregnancy is the almost invariable result. At any age getting men and women attracted to the opposite sex into stable marital unions was understood to protect the interests of children and society in a stable social order.

Marvin, 557 P.2d 106, 122 (Cal. 1976) (blending the expressive and emotional value of marriage to the individual with its social function: “the structure of society itself largely depends upon the institution of marriage. . . . The joining of the man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime.”); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971) (“The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.”); Carris v. Carris, 24 N.J. Eq. 516, 524 (N.J. 1873) (“One of the leading and most important objects of the institution of marriage under our laws is the procreation of children, who shall with certainty be known by their parents as the pure offspring of their union.”) (quoting Reynolds v. Reynolds, 85 Mass. 605, 610 (1862)); Williams v. Witt, 235 A.2d 902, 903 (N.J. Super. App. Div. 1967) (“[S]ince procreation is considered to be an essential element of the marriage, there exists an implied promise at the time of the marriage to raise a family. An undisclosed contrary intention, therefore, constitutes a fraud going to an essential of the marriage.”).

33. See e.g. Skinner v. State ex rel. Williamson, 316 U.S. 535, 541 (1942) (“Marriage and procreation are fundamental to the very existence and survival of the race.”); Maynard v. Hill, 125 U.S. 190, 211 (1888) (“[M]arriage is the foundation of the family and of society, without which there would be neither civilization nor progress.”).

34. Koppelman raises this argument only in his discussion of the intrinsic value arguments provided by new natural law theorists. Koppelman, supra n. 1, at 16-17. The infertility argument is more commonly treated (by the Goodridge Court and others) as the ultimate proof either that (a) marriage does not now and never had anything to do with making children, or giving them mothers and fathers, since older couples and infertile couples have always been allowed to marry (this is not really a tenable proposition historically speaking) or more subtly (b) evidence that same-sex marriage won't produce dramatic changes in the meaning of marriage, since marriage as a legal category already includes infertile and older couples who are just like same-sex couples in this important respect.
B. The cross-cultural answer: Marriage as a universal human institution

Nor was it only American society that understood marriage in these terms. Marriage is a virtually universal social institution. It by no means always looks like our own particular marriage system, which is deeply rooted in Judeo-Christian-Roman cultural assumptions. But everywhere marriage 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 responsibilities of the husband and wife towards each other and any children their sexual union produces are publicly—not privately—defined and enforced.35

As twelve family scholars pointed out recently:
Marriage exists in virtually every known human society.... [A]t least since the beginning of recorded history, in all the flourishing varieties of human cultures documented by anthropologists, marriage has been a universal human institution. As a virtually universal human idea, marriage is about regulating the reproduction of children, families, and society.... [M]arriage across societies is a publicly acknowledged and supported sexual union which creates kinship obligations and sharing of resources between men, women, and the children that their sexual union may produce.36

Other scholars have written:
Marriage is a universal social institution, albeit with myriad variations in social and cultural details. A review of the cross-cultural

35. The small number of exceptions are polygamous tribal societies in which a small number of individuals were permitted to change their social gender (such as the North American Indian berdache) and therefore enter marriages, or one tribe in West Africa (the Igbo) in which barren wealthy women were allowed to function as husbands, taking provisioning responsibility for female wives and their children.

diversity in marital arrangements reveals certain common themes: some degree of mutual obligation between husband and wife, a right of sexual access (often but not necessarily exclusive), an expectation that the relationships will persist (although not necessarily for a lifetime), some cooperative investment in offspring, and some sort of recognition of the status of the couple’s children. The marital alliance is fundamentally a reproductive alliance. 37

I am not arguing that simply because marriage has always been about this it cannot ever be changed. That would be un-American. The question is: Why do so many wildly different kinds of societies come up with some version of marriage? There are not that many universal human social institutions. What is it about human nature that leads culturally separate and distinct societies to independently come up with the same basic idea?

Here is what I think the answer is: Marriage as a universal social institution is grounded in certain universal features of human nature. When men and women have sex, they make babies. Reproduction may be optional for individuals, but it is not optional for societies. Societies that fail to have “enough” babies fail to survive. And babies are most likely to grow to functioning adulthood when they have the care and attention of both their mother and their father.

Marriage arises again and again in some form out of the basic human need for a social institution to manage these basic human sexual realities. Societies that fail to manage these realities fail to survive long enough to be recorded by anthropologists among the human alternatives.

C. Does this marriage idea still matter? Contemporary evidence from the social sciences

Sex makes babies. Society needs babies. Babies deserve mothers and fathers. Together these three ideas explain the public purposes of marriage, its shape and its form. Marriage intrinsically aims at an enduring, exclusive, sexual union between a man and a woman, because managing the procreative consequences of human sexual attraction is at the core of its reason for existence.

37. Margo Wilson & Martin Daly, Marital Cooperation and Conflict, in Evolutionary Psychology, Public Policy and Personal Decisions 197, 203 (Charles Crawford & Catherine Salmon eds., Lawrence Erlbaum Assc. 2004) (cited in Daniel Cere, War of the Ring, in Divorcing Marriage: Unveiling the Dangers in Canada’s New Social Experiment 9, 24 (Daniel Cere & Douglas Farrow eds., McGill-Queen’s U. Press 2004) [hereinafter Divorcing Marriage]); see also Katherine K. Young & Paul Nathanson, The Future of an Experiment, in Divorcing Marriage, supra 41, 45 (“Comparative research on the worldviews of both small-scale societies and those of world religions, both Western and Eastern, reveals a pattern: Marriage has universal, nearly universal, and variable features. Its universal features include the fact that marriage is (a) supported by authority and incentives; (b) recognizes the interdependence of men and women; (c) has a public, or communal, dimension; (d) defines eligible partners; (e) encourages procreation under specific conditions; and (f) provides mutual support not only between men and women, but also between them and children.”).
Notice that all three of the components of the marriage idea are now contested in the public square. So the question arises: Is each of these three core marriage propositions still true? Do we still need a legal and social institution whose purpose is to manage the procreative consequences of sexual attraction between men and women, or have we transcended this great, historic, cross-cultural universal human imperative through technology or other means?

1. Does sex make babies?

Forty years after *Griswold v. Connecticut*, we now have considerable social experience testing these propositions. Does sex still make babies? Yes. Sex between men and women continues to make babies on a regular basis, with or without the conscious intention of the participants. The longer men and women engage in non-marital sexual careers, the greater the risk of a non-marital pregnancy. Despite legal contraception, numerous studies have shown that unintended pregnancy is the common, not rare, consequence of sexual relationships between men and women.

By their late thirties, 60 percent of American women had had at least one unintended pregnancy. Almost 4 in 10 women aged 40-44 had had at least one unplanned birth.

Similarly, a scholarly analysis of contraceptive failure rates in actual use concluded, "almost half of all pregnancies were unintended in 1994. Some 53 percent of these occurred among women who were using contraceptives."

Another analysis of the 1995 National Survey of Family Growth concluded:

The risk of failure during typical use of reversible contraceptives in the United States is not low—overall, 9% of women become pregnant within one year of starting use. The typical woman who uses reversible methods of contraception continuously from her 15th to her 45th birthday will experience 1.8 contraceptive failures. 

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38. 381 U.S. 479 (1965).
40. *Id.* (finding 38.1% of women aged 40-44 had had at least one unplanned birth).
The typical woman who uses contraceptives continuously will experience almost two unintended pregnancies. Contraceptive technology lowers the odds of pregnancy, but never eliminates the risk, especially for people who engage in extended non-marital sexual careers. The existence of contraceptives does not eliminate the state’s interest in preferring voluntary marital sexual unions between men and women to other kinds. Virtually every child born to a married couple will have a mother and a father already committed to caring for him or her. Most children conceived in sexual unions outside of marriage will not.

2. Does society need babies?

The second historic purpose of marriage is to encourage men and women to make the next generation. Does society still need babies? The experience of most of the developed nations of the world makes clear that depopulation, not overpopulation, is the threat most to be feared in the contemporary context. America is one of the only developed nations that has birthrates even close to levels necessary to prevent steep depopulation.

Europe’s total fertility rate (TFR) from 1995 to 2000 was 1.42 children per woman. (Demographers define “very low fertility” as a birthrate below 1.5 children.)

What are the consequences of these very low levels of procreation? At the April 2, 2004 meeting the Population Association of America, U.N. demographer Joseph Charnie warned,

[a] growing number of countries view their low birth rates with the resulting population decline and ageing to be a serious crisis, jeopardizing the basic foundations of the nation and threatening its survival. Economic growth and vitality, defense, and pensions and health care for the elderly, for example, are all areas of major concern.

A paper presented at one recent United Nations conference indicates that fertility levels of 1.5 to 1.8 children per woman constitute a “[s]trong dearth calling for deep revision of population policy . . . . [H]igher risk of

43. Id. ("These high pregnancy rates do not reflect the inherent efficacy of methods when used correctly and consistently . . . but instead reflect imperfect use (because most reversible methods are difficult to use correctly).".


labour shortage and reduced capacity to integrate new immigrants; since the main engine of integration of foreigners is the school, this integration cannot happen if a minimal fertility is not realized among the resident population."

As fertility levels fall to 1.2 to 1.5 children per woman (the European average), the result is "[h]eavy and structural contraction, which digs a deep hole at the [base] of the age pyramid and consequently compromises the future of the society at large. . . . [T]he resident population is progressively replaced by a continuous and bulky inflow of immigrants."47

As fertility falls to less than 1.2 children per woman, as in Spain and Italy, the situation becomes an

[e]xtreme case that is less and less rare, namely in Southern Europe and in the former Eastern bloc. A severe amputation of the base of the age pyramid is taking place under our eyes. . . . Acute and rapid aging process; deep and longlasting migratory dependency that could be unbearable or unmanageable.49

The familiar population explosion is replaced by a population implosion or "exponential decrease."50 Financial consequences include "[t]he growing transfer of resources for the elderly (pension and health costs) to the detriment of younger workers," which can create a "feedback effect, creating a disincentive to fertility."51

Far from making marriage obsolete as a regulator of childbearing, widespread contraceptive and abortion rights may actually make more salient, not less, the traditional role of marriage in encouraging men and women to make the next generation that society needs.

High birth rates may not be better than lower birth rates; but societies that fail to reproduce do not survive. Every society needs an institution that encourages men and women to have children if they want them.

The more legal, cultural, and technological choice individuals have about whether or not to have children, the more need there is for a social institution that encourages men and women to have babies together, and that creates the conditions under which those children are likely to flourish.

3. Do moms and dads matter?

By making marriage a permanent sexual union based on the fidelity of both spouses, the state seeks to increase the likelihood that children will be raised in "intact" families, cared for by their mother and father. State pref-

48. Id.
49. Id.
50. Id. at 2.
51. Id. at 8.
ferences for marriage over other kinds of unions transmit a clear message to the next generation: the man and the woman who make the baby are supposed to stick around, take care of each other and their baby too.

Many scholars have written extensively on the social science evidence of the importance of intact, married biological parents. A Child Trends research brief summed up the scholarly consensus on the family structures that have been well-studied to date.

Research clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes. . . . There is thus value for children in promoting strong, stable marriages between biological parents.

These benefits, it should be noted, are not the results of specific legal incentives to parents or partners. Children whose single mothers remarry, for example, do not do any better on average than children whose mothers remain single. The primary way that legal marriage protects child well-


53. This does not include children raised in households headed by two same-gender parents. The majority of studies of gay parenting have compared children of single lesbian mothers to children of single heterosexual mothers. To date there are no studies of children raised in same-sex households based on nationally representative data. For a review of the literature on same-gender parenting, see Aff. of Stephen Lowell Nock, Halpern v. Atty. Gen. of Canada, [2001] Ont. Sup. Ct. of Just. (Div. Ct.), Ct. File No. 684/00; Robert Lerner & Althea K. Nagai, No Basis: What the Studies Don't Tell Us About Same-Sex Parenting (Marriage Law Project 2001); Diana Baumrind, Commentary on Sexual Orientation: Research and Social Policy Implications, 31 Developmental Psychol. 130 (1995); Gallagher & Baker, Do Moms and Dads Matter?, supra n. 4. In addition, Judith Stacey and Timothy Biblarz, while generally supportive of same-sex parenting, acknowledge important methodological limitations in existing research. For example, the authors acknowledge that "there are no studies of child development based on random, representative samples of [same-sex couple headed] families." Judith Stacey & Timothy Biblarz, (How) Does The Sexual Orientation of Parents Matter?, 66 Am. Sociological Rev. 159, 166 (2001).

54. Moore et al., supra n. 52.

55. For example: "In general, compared with children living with both their parents, young people from disrupted families are more likely to drop out of high school, and young women from
being, social science suggests, is by increasing the likelihood that the child’s own mother and father will stay together in a harmonious household.

While scholars continue to disagree about the size of the marital advantage and the mechanisms by which it is conferred, the weight of social science evidence strongly supports the idea that family structure matters and that children do best when raised by their own mother and father in a decent, loving marriage.

III. HOW DOES MARRIAGE LAW MATTER?

Laws do more than incentivize or punish, as Mary Ann Glendon has pointed out. They educate directly and indirectly. They define the boundaries of organizations, institutions, and relationships in the public square. One of the most basic ways that the law of marriage helps regulate out-of-wedlock births, for example, is by defining a socially shared category of married births, without which the very idea of unmarried childbearing disappears.

If we cannot tell who is married, we cannot tell who is an unwedparent. We therefore cannot, in any shared public fashion, teach our children that it is best to wait until marriage before risking pregnancy. If we cannot tell who is married, we cannot tell who is committing adultery, either.

Thus one of the core ways the law of marriage protects marriage as a shared social institution is by defining its boundaries: clearly marked entry and clearly marked exits mean that the category of marriage is sharply defined and contrasted with non-marriage.

By requiring a divorce, we clearly communicate that leaving a marriage is not just a private matter, a question of taste, like other love relationships. Marriage law helps sustain the core public (as opposed to private or sectarian) understandings of what marriage is and what purposes it serves.

The most important legal purpose of defining marriage is to communicate to the young the essential, broad characteristics of the normative (or ideal) sexual union. Marriage law actively reflects and communicates shared norms about marriage, and these allow marriage to function as a

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51. See e.g. E. Mavis Hetherington & John Kelly, For Better or For Worse: Divorce Reconsidered (W. W. Norton & Co. 2002).

52. Mary Ann Glendon, Abortion and Divorce in Western Law: American Failures, European Challenges 7-8 (Harv. U. Press 1987). Glendon notes, for example: "In England and the United States the view that law is no more or less than a command backed up by organized coercion has been widely accepted. The idea that law might be educational, either in purpose or technique, is not popular among us. . . . [L]aw is not just an ingenious collection of devices to avoid or adjust disputes and to advance this or that interest, but also a way that society makes sense of things. It is 'part of the distinctive manner of imagining the real.'” Id.
social institution, changing the behavior of men and women in ways that benefit not only them, but their children and the larger community.\textsuperscript{58}

To summarize the argument so far: Marriage law is important not because it distributes administrative benefits that help people live their private lives. The law of marriage serves the "sanctification narrative," sustaining the boundaries of marriage and the basic norms required of married people. The reason the state is justified in "imposing" such norms on people's intimate lives, is that sex makes babies, societies need babies, and children deserve their own mothers and fathers. While marriage and children are optional for individuals, they are not for societies. Managing the sexually-based phenomenon known as "procreativity" is not optional, but essential if a civilization is to perpetuate itself over the long term. At least it has been in every known human society and (the evidence suggests) still is in our own.

IV. How will same-sex marriage weaken marriage as a social institution?: Some general concerns

How will redefining marriage as a unisex institution affect marriage? Let me lay out some general concerns.

A. Change the public meaning of "marriage"

Social institutions, as Dan Cere has pointed out, are essentially "public markers of social meaning."\textsuperscript{59} They aren't simple, solid things. They consist largely of interlocking sets of ideas that regulate or affect the way people actually behave and the way they understand their relationships with others. "Meaning matters, and the institutions that bear it serve to structure our experiences and to steer them in a particular direction. They define our goals, focus attention on those goals, and direct us toward them."\textsuperscript{60} Similarly, Barbara Dafoe Whitehead pointed out the power of words as markers of shared meaning in a 1992 essay (on a different subject), "The Experts' Story of Marriage":

\begin{quote}
[T]he marriage critics seek to devalorize marriage by stripping away its inherited mantle of meaning and by erasing the linguistic boundaries between marriage and non-marriage. This amounts to cultural hardball. For language—or more precisely, normative vocabulary—is one of the key cultural resources supporting and regulating any institution. Nothing is more essential to the integ-
\end{quote}
rity and strength of an institution than a common set of understandings, a shared body of opinion, about the meaning and purpose of the institution. And, conversely, nothing is more damaging to the integrity of an institution than an attack on this common set of understanding with the consequent fracturing of meaning.\(^6\)

Change the public meaning of a social institution, and you change the institution itself. As a matter of definition, if you widen the class of objects to which a category applies, you necessarily make the fit between the category and the object less tight.

How can we translate this general intellectual insight into specific terms that critics like Prof. Koppelman can perceive (if not necessarily agree with)?

Put it this way: Words, like social institutions, have no fixed meanings. There is no reason in the world why we—or the law—cannot redefine “cat” to mean “furry, domestic animal with four legs and a tail.” Defining “cat” in this way has certain advantages. It reveals the deep underlying similarities for example between those two formerly opposite classifications: “dog” and “cat.” Not to mention “gerbil,” “rabbit,” and “guinea pig.”

What is lost in redefining “cat” in this way?

Well, there is one little thing: we now no longer have a word that means “cat.” If we want to speak to each other about cats, we will either have to invent a new term, and hope it will still communicate the full valence of the old word (rich with historic associations and symbolic overtones), or we will have to do without a word for “cat” at all. One might reasonably foresee, without charting all the particular specific mechanisms, that it might become harder to communicate an idea for which we no longer have any word.

Instinct doesn’t take human beings very far. Social institutions like marriage are created, sustained, and transmitted by words, and the images, symbols, and feelings, that surround words. Change the meaning of the word, and you change the thing itself.

One thing same-sex marriage indubitably does is displace certain formerly core public understandings about marriage: such as, that it has something to do with bringing together male and female, men with women, husbands and wives, mothers with fathers. Husband will no longer point to or imply wife. Mother no longer implies father.

Many thoughtful supporters of same-sex marriage recognize that some profound shift in our whole understanding of the world is wrapped up in this legal re-engineering of the meaning of marriage.

As Ladelle McWhorter acknowledged: "[Heterosexuals] are right, for example, that if same-sex couples get legally married, the institution of marriage will change, and since marriage is one of the institutions that support heterosexuality and heterosexual identities, heterosexuality and heterosexuals will change as well."62

B. The legal "misfit": some specific concerns

What is true for the word itself is also true for the underlying legal apparatus. As the legal category of marriage is broadened to include both same- and opposite-sex couples, the fit between the legal forms of marriage and the thing being regulated will also become less good. This is a necessity of widening the definition of a legal class, widely understood in other contexts.

To see what I mean by this, take another look at the San Francisco Chronicle story. Patricia Robertson says registering as a marriage-like couple:

may not be the most prudent decision for everyone. . . . Gay and lesbian relationships have not been as financially intertwined as marriage historically, which was traditionally structured on the basis that women were the property of men. . . . For a lot of LGBT (lesbian, gay, bisexual and transgender) people, being independent financially is an important part of who they are. . . . To be told by the law that their financial relationship is now expected to mimic that of a married couple is unknown territory.63

The rules for marriage are continually revised and updated, but they are deeply grounded in assumptions that have arisen from experience in managing opposite-sex relationships.

Rules assuming financial obligations of spouses, for example, stem from the deep economic vulnerabilities imposed on women by pregnancy and childbearing. Even today, women with children cannot compete as effectively in the marketplace (on average) as childless women or men, and unwed mothers face the most serious economic risks of all.64

63. Marech, supra n. 23.

The latter is what the Ontario Court of Appeals explicitly demanded: that the legal and public meaning of marriage be revised to take into account the “needs, capacities and circumstances of same-sex couples, not . . . the needs, capacities and circumstances of opposite-sex couples.”\footnote{Halpern v. Toronto, [2003] 65 O.R.3d 161 at ¶ 91 (cited in Cere, supra n. 37, at 14).} Many advocates for gay marriage, for example, now question the “rule of two” limiting marriage and its associated benefits to faithful couples, in part because of dramatic differences in how same-sex couples “generate” children.

Right after Goodridge, two members of the board of the National Gay and Lesbian Law Association warned of the dangers of accepting the “primacy” of the “married, two-parent model”:
Some same-sex couples may desire recognition of multiparty relationships. For example a same-sex couple who have a child with a known sperm donor or surrogate mother may wish to form a three-party relationship, with each party having recognized rights vis-a-vis the other parties and the child. Alternatively, a bisexual individual may wish to maintain a co-parenting relationship with a former partner even after each has formed a new primary relationship. Some LGBT individual may form polyamorous or ethically nonmonogamous relationships. It is therefore important to remain mindful of the diversity of real partnerships and households, and to engage critically the primacy of the married, two-parent model.

Or consider, to give another related suggestive example, the fit between the same-sex marriage and the “presumption of paternity,” which is the legal presumption that the husband is the father of the wife’s children. Traditionally, no one else has standing under the law to challenge the husband’s claim to be the legal father of his wife’s children if he asserts it—not even the wife. The law will automatically impose the legal obligation of paternity on the husband, unless he contests it on the grounds the children are not biologically his. The presumption of paternity is thus rooted in fused biological and social reality. In having sex with his wife, the husband assumes the risks of paternity. In promising sexual exclusivity to the husband, the wife accepts his right to claim her children as his own. The presumption of paternity accords not only with biological reality but with social reality as well: It is marriage to the mother that creates effective social fatherhood for most men. Outside of marriage to the mother of their child, only a minority of men remain effective fathers in their children’s lives.

69. Suffredini & Findley, supra n. 5, at 605.
70. See e.g. 14 C.J.S. Children Out-of-Wedlock § 30 (1991) (describing the different approaches adopted in various jurisdictions); Gossett v. Ullendorff, 154 So. 177, 181 (Fla. 1934) (“[A] wife is not permitted to deny the parentage of children born during wedlock. She cannot repudiate their legitimacy. That right belongs only to the father, because maternity is never uncertain.”); Eldridge v. Eldridge, 16 So. 2d 163, 163 (Fla. 1944) (“Where a child is born in wedlock the law extends the right to the reputed father, to contest the parentage, but the mother has no such right.”); Phillips v. Phillips, 467 So. 2d 132, 134 (La. App. 3rd Cir. 1985) (“On prior occasions the presumption of legitimacy accorded a child born during the existence of a marriage has been declared one of the strongest presumptions known to law. Indeed, the presumption is so strong and conclusive, even the mother is precluded from stigmatizing such a child as illegitimate by contesting her lawful husband is not the child’s father.”).
71. 14 C.J.S. Children Out-of-Wedlock §§ 13, 14 (1991) (Section 13 states: “It is the policy of the law to favor the legitimacy of children and to declare them legitimate if it may be fairly done, and a child is presumed to be legitimate until the contrary is shown.”).
72. Studies show that two out of three children born out of wedlock have nonresident fathers at birth. This percentage climbs as children grow older (though some couples eventually marry). See e.g. Sara McLanahan et al., Unwed Fathers and Fragile Families 7 (Ctr. for Research on Child Wellbeing Working Paper No. 98-12, 1998). An Urban Institute policy brief explains the impact: “Parents who do not live with their children are unlikely to be highly involved in their
The Goodridge court listed the presumption of paternity as one of the prime benefits of marriage. Except that in order to make the presumption “fit” the new paradigm of unisex marriage, it transformed the traditional presumption of paternity into something entirely new, called a presumption of “parentage.”

What will the presumption of parentage do? Well, no one knows exactly, as this is uncharted legal ground. But presumably the law will now grant a lesbian partner the status of co-parent of any children her spouse bears. Presumably it will apply as well to a gay man who has children with a surrogate mother, or when one man adopts a child. If one husband becomes a father, the other will be a father, too.

Immediately, however, one can see problems even with this adaptation of the presumption of paternity to a unisex right. First, there is the problem of “too many” parents. What happens to the parental rights of the other biological parent under the presumption of parentage? Then there is the problem of consent to parenthood (particularly acute in a system which elevates decisions about whether or not to have children into a constitutional right). Unlike heterosexual couples, who are presumed to consent to co-parenting by having marital sex, spouses in same-sex marriages will be able to impose parental obligations on their spouse without any expression of consent on their part at all. Either that, or the “presumption of parentage” in the law will now be contestable, not because the spouse is not the biological parent, but because the spouse did not consent to the child. Can these new grounds for contesting parenthood be limited only to same-sex couples? Or will all men (thanks to the new presumption of parentage) have a new legal standing to reject the obligations of fatherhood on the grounds they only consented to sex and not to parenthood?

children’s lives.” Elaine Sorensen & Chava Zibman, To What Extent Do Children Benefit from Child Support? 3, http://www.urban.org/UploadedPDF/discussion99-19.pdf (January 2000). According to the National Survey of America’s Families, one in three (34%) children with a nonresident parent saw that parent on a weekly basis in 1997. Another 30 percent saw their nonresident parent at least once during the year, though not on a weekly basis. Fully 28 percent of children with a nonresident parent had no contact with that parent during the course of the year. Id. Another review of several national surveys found that, by their mothers’ estimates, roughly 40 percent of children with nonresident parent had no contact with that parent during the course of the year. See also Valerie King, Variations in the Consequences of Nonresident Father Involvement for Children’s Well-Being, 56 J. Marriage & Fam. 963, 966 (1994) (finding half of children with nonresident fathers see their fathers only once a year, if at all, while just 21 percent see their fathers on a weekly basis).

73. 798 N.E.2d at 956.

74. See e.g. Zablocki v. Redhail, 434 U.S. 374 (1978) (describing right to marry as incident to right of procreation); Roe v. Wade, 410 U.S. 113 (1973) (right to abort an unborn child prior to viability); Eisenstadt v. Baird, 405 U.S. 438 (1972) (right to contraceptive use by unmarried persons); Griswold v. Conn., 381 U.S. 479 (1965) (right to contraceptive use by married couples).
Either the legal incidents of marriage will be designed around opposite-sex sexual reality, or they will be designed around the allegedly more generic "gender neutral" same-sex sexual reality. In either case, one of the two groups is going to find the "fit" between the legal form and the relationship being regulated is not as good.

If the idea of marriage really does matter—if society really does need a social institution that manages opposite-sex attractions in the interests of children and society—then taking an already weakened social institution, subjecting it to radical new redefinitions, and hoping that there are no consequences is probably neither a wise nor a compassionate idea. Particularly since the class of people to be benefited is so small,75 and alternative mechanisms for meeting their social needs (ones perhaps even better designed for them than marriage) have hardly been seriously tried, much less exhausted.

C. The refusal to seriously engage the risk

To all the rich reasons we might have for viewing the redefinition of marriage with deep concern, Koppelman offers only one real response: "It's hard to imagine how legal recognition of same-sex marriage would affect even one father's deliberations about whether to stay with his children. . . . I have three kids, and I don't think I stick around because I'm mystified or confused."76 This is a soundbite, not a serious thought. It amounts to a rejection of the idea that the social meanings encoded in law matter. The law interacts only by directly punishing or directly benefiting free and disparate individuals. The law is an administrator alone. Its ideas do not have any consequences.

I think it is hard for any serious legal scholar to consistently sustain such an impoverished vision of the law's potency, certainly not an intelligent scholar such as Koppelman himself. Notice, when the subject becomes civil unions, Koppelman does a radical about-shift in his understanding of how and why the law matters. Here, all his talk about the multiple meanings of law individually determined and changing randomly over time in ways impossible to predict as the meaning of social institutions change suddenly vanishes. He shows little doubt about what the public meaning of a separate civil unions system for same-sex couples will be: "Separate but equal has an unattractive history."77

77. Id. at 15.
When the question becomes the public message sent by reserving marriage to opposite-sex couples, Koppelman recovers his capacity to recognize that social institutions matter, that they send messages that affect the way people think, act, and behave, and indeed experience their own relationships.

The *Goodridge* court itself acknowledged the primacy of this underlying normative or "sanctification" narrative (which the state legislature did not and cannot create on its own) over marriage-as-administrative-benefits-package at least twice: when it rejected the state legislatures' attempt to create a full civil unions alternative (civil unions "foster[ ] a stigma of exclusion . . . deny[ing] to same-sex ‘spouses’ only a status that is specially recognized in society")\(^{78}\) and in *Goodridge* itself, when Justice Greaney, in his concurring opinion instructed the good people of Massachusetts not only what they must do (obey the new marriage law), but how they should feel about it:

I am hopeful our decision will be accepted by those thoughtful citizens who believe that same-sex unions should not be approved by the State. I am not referring here to acceptance in the sense of grudging acknowledgment of the court’s authority to adjudicate the matter. . . . We share a common humanity and participate together in the social contract that is the foundation of our Commonwealth. Simple principles of decency dictate that we extend to the plaintiffs, and to their new status, full acceptance, tolerance, and respect. We should do so because it is the right thing to do. The union of two people contemplated by G.L. c. 207 is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). Because of the terms of art. 1, the plaintiffs will no longer be excluded from that association.\(^{79}\)

Same-sex marriage in Massachusetts is not merely about opening a new set of legal benefits to more individuals. It is an attempt by the court to create a new sanctification narrative about gay people, by transferring the marriage sanctification narrative to same-sex couples. Unfortunately, because same-sex couples and opposite-sex couples are in fact different, the court can only do so by simultaneously changing the "sanctification narrative" surrounding marriage. The meaning of marriage itself must change if the sanctification narrative about gays and lesbians is to be successful, that

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\(^{78}\) Opinions of the Justices to the Senate, 802 N.E.2d 565 (2004).

\(^{79}\) 798 N.E.2d at 973-74.
is if citizens are to believe that both same- and opposite-sex married couples are both really equally married.

D. The meaning of same-sex marriage

What must go?

What must go is the one great, big fact about sexual unions between men and women, the big fact that colors many other aspects of intimate relations between men and women: when men and women have sex, they sometimes make babies. The procreative potential of sexual unions must be reduced from the great, brute, obvious, important fact it has been through most of human history, to a minor, not very significant feature of human relationships, largely unrelated to any key purpose of marriage. In the process, the idea that mothers and fathers are the norm for children must also go.

How do I know this is true?

1. What same-sex marriage advocates say

First consider what major advocates for same-sex marriage have said about the purpose of marriage.

William Eskridge argues that procreation is relatively unimportant to marriage, to people, and to society:

Post-Freudian society understands sexual expression as an important goal of personhood, the modern liberal state guarantees its citizens substantial liberty to make choices about their own sexuality, and an earth that struggles to feed its existing population is not an earth that should overemphasize procreation. Procreation is good and important, but procreation is no longer central to either relationships or to social welfare.\(^8^0\)

Again, “[i]n today’s society the importance of marriage is relational and not procreative.”\(^8^1\)

E.J. Graff understands the power of marriage as a social institution to influence how people think and behave, and the transforming power of same-sex marriage.

Marriage is an institution that towers on our social horizon, defining how we think about one another, formalizing contact with our families, neighborhoods, employers, insurers, hospitals, governments. Allowing two people of the same sex to marry shifts that institution’s message. . . . If same-sex marriage becomes legal,

80. William N. Eskridge, Jr., The Case for Same Sex Marriage: From Sexual Liberty to Civilized Commitment 98 (Free Press 1996).

81. Id. at 11.
that venerable institution will ever after stand for sexual choice, for cutting the link between sex and diapers. 82

Same-sex marriage, she argues, "does more than just fit; it announces that marriage has changed shape." 83

Andrew Sullivan:
Because marriage is such a central institution in so many people’s lives, because it forms such an integral part of our own self-understanding, any change in it opens up a host of questions about what the union of two people means, what it has become, and what it could stand for—for everybody . . . . It is at moments like this that we realize that marriage itself has changed. . . . From being a means to bringing up children, it has become primarily a way in which two adults affirm their emotional commitment to one another. 84

Jonathan Rauch argues that the essential purpose of marriage is to provide adults with caregivers:
I hope I won’t be accused of saying that children are a trivial reason for marriage. They just cannot be the only reason . . . . There is a lot of intellectual work to be done to sort the essential from the inessential purposes of marriage. It seems to me, however, the two strongest candidates are these: settling the young, particularly young men; and providing reliable caregivers. Both purposes are critical to the functioning of a humane, stable society, and both are better served by marriage—that is, by one-to-one lifelong commitment—than by any other institution. 85

Mark Strasser downgrades both the importance of procreation and its relationship to marriage, and the significance of family structure:
In Skinner, the Court held that ‘[m]arriage and procreation are fundamental to the very existence and survival of the race.’ Yet there is no reason to think that the very existence and survival of the human race should or will rest on the shoulders of only those individuals who are raised by both of their biological parents. Otherwise, the human race would be in great danger indeed, given the number of individuals raised by single parents or by two parents, at least one of whom is not biologically related to the child. 86

Evan Wolfson:

83. Id. at 137.
84. Andrew Sullivan, Introduction, in Same-Sex Marriage: Pro and Con: A Reader, supra n. 82, at xix.
86. Mark Strasser, Legally Wed: Same-Sex Marriage and the Constitution 60 (Cornell U. Press 1997) (internal citation omitted).
[T]here is no evidence to support the offensive proposition that only one size of family must fit all. Most studies—including ones that [Maggie] Gallagher relies on—reflect the common sense that what counts is not the family structure, but the quality of dedication, commitment, self-sacrifice, and love in the household. 87

Judith Stacey, who testified before Congress that social science evidence showed “what places children at risk is not fatherlessness, but the absence of economic and social resources that a qualified second parent can provide, whether male or female,”88 also speculated with approval on the likelihood that gay marriage would inaugurate a new, more expansive embrace of family diversity:

Legitimizing gay and lesbian marriages would promote a democratic, pluralist expansion of the meaning, practice, and politics of family life in the United States, helping to supplant the destructive sanctity of The Family with respect for diverse and vibrant families. . . . Subjecting the conjugal institution to this sort of heightened democratic scrutiny could help it to assume varied, creative and adaptive contours. If we begin to value the meaning and quality of intimate bonds over their customary forms, people might devise marriage and kinship patterns to serve diverse needs. . . . Two friends might decide to “marry” without basing their bond on erotic or romantic attachment. . . . Or, more radical still, perhaps some might dare to question the dyadic limitations of Western marriage and seek some of the benefits of extended family life through small group marriages arranged to share resources, nurturance, and labor. After all, if it is true that “The Two-Parent Family is Better” than a single-parent family, as family-values crusaders proclaim, might not three-, four-, or more-parent families be better yet, as many utopian communards have long believed?89

If same-sex marriage were merely a benefits package, I can imagine some advocates who might argue,

[Y]es, children need moms and dads in general, and we don’t want to disturb that social norm. But we can’t do that for our kids and what we do is a pretty good second-best, especially considering the millions of kids being raised by single moms, etc. Give us the legal help we need to raise our kids well.

2004] (HOW) WILL GAY MARRIAGE WEAKEN MARRIAGE 63

But because same-sex marriage, like marriage itself, is primarily about the sanctification narrative, this will not do. Same-sex marriage is an expression of a powerful public commitment to the ideal that there are no important differences between gay and straight, between same-sex relationships and other kinds of relationships. Getting to that commitment necessarily requires us to consistently deny or downgrade the significance of the biggest, most obvious and intractable difference between same-sex and opposite-sex unions: that only the latter are capable of producing children and uniting the child with his own mother and father.

2. What courts have ruled

Another reason to believe that moving to same-sex marriage requires downgrading or eliminating the idea that mothers and fathers matter, or that marriage is symbolically related to procreation: courts that adopt same-sex marriage say so. Observing that “many opposite-sex couples marry for reasons unrelated to procreation, that some of these couples never intend to have children, and that others are incapable of having children,”90 and again that “increasing numbers of same-sex couples are employing increasingly efficient assisted-reproductive techniques to conceive and raise children,”91 the Vermont Supreme Court in 1999 rejected the state’s assertion that marriage laws were intended to promote children, or a connection between children and their biological parents.92 The Massachusetts Supreme Judicial Court was even more dismissive:

It is hardly surprising that civil marriage developed historically as a means to regulate heterosexual conduct and to promote child rearing, because until very recently unassisted heterosexual relations were the only means short of adoption by which children could come into the world, and the absence of widely available and effective contraceptives made the link between heterosexual sex and procreation very strong indeed. . . . But it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been. As one dissent acknowledges, in ‘the modern age,’ ‘heterosexual intercourse, procreation, and child care are not necessarily conjoined.’93

Similarly, every court decision moving us towards gay marriage downgrades procreation, explicitly and rigorously.94 People who argue that this

91. Id. at 882.
92. Id.
93. Goodridge, 798 N.E.2d at 961 (quoting portions of Justice Cordy’s dissenting opinion).
94. See e.g. id. (“[I]t is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.”); Baker, 744 A.2d at 882 (“The State also argues that because same-sex couples cannot conceive a child on their own, their exclusion promotes a ‘perception of the link between procreation and child rear-
procreative potential has anything important to do with what marriage is for are only fooling themselves, or trying to fool others, about their real motivations. So the Goodridge court, for example, argues:

The 'marriage is procreation' argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage. Like 'Amendment 2' to the Constitution of Colorado, which effectively denied homosexual persons equality under the law and full access to the political process, the marriage restriction impermissibly 'identifies persons by a single trait and then denies them protection across the board.' Romer v. Evans, 517 U.S. 620, 633, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996). In so doing, the State's action confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect.95

In order to make gay relationships fully equal, the state—through the courts—must repress from its own consciousness (and hopefully eventually from the people of the state) the idea that the procreative potential of opposite-sex couples is worthy of special attention. It is a difference that ought to make no difference. The court's commitment to demoting procreation leads it to demote as well the most obvious product of sexual procreation: the norm that every child has (or ought to have) a mother and a father. Parenthood as a legal construct is rooted in deep ways in human biology and the social realities to which it gives rise. Who are the parents? The people who make the baby.

95. Goodridge, 798 N.E.2d at 962.
Each child therefore has a mom and a dad. As with marriage, the law of parenthood is not creating something from scratch, but recognizing and therefore regulating a key pre-existing social institution. When neither parent is able or willing to live up to their responsibilities, the state steps in and tries to give children other parents (foster or adopted) to do what their own original parents have failed to do.96

That only sexual unions of men and women make babies is one great fact of human existence. The fact that only sexual unions of men and women can, therefore, give babies both their mother and their father is a second great corollary fact of existence that must be downgraded before the same-sex marriage advocates’ equality dream can be realized.

And, sure enough, the Goodridge majority moves to aggressively combat this idea as well. According to Goodridge, the state of Massachusetts is indifferent to family structure. It cares not even one little bit about whether children have the support, love, and attention of both their mothers and their fathers: “Massachusetts has responded supportively to ‘the changing realities of the American family,’ and has moved vigorously to strengthen the modern family in its many variations.”97

This is the promise that courts are making to gay people in creating a civil right to same-sex marriage: their relationships are no different than anyone else’s. Making good on that promise will require a fair amount of judicial policing on the part of courts, since most people do not share the court’s new marriage narrative (marriage is about adult love and children are irrelevant) fully, and a very large chunk reject it absolutely.

3. The stigmatization effect: thinking through the Loving v. Virginia analogy

But courts are doing more than downgrading or privatizing the older view of marriage—they are stigmatizing it. In Halpern v. Toronto, for example, the Ontario Court of Appeals declared the historic understanding of marriage as the union of husband and wife “offends the dignity of persons in same-sex relationships.”98 The Goodridge court ruled that our current marriage system is “caste-like” resting upon “invidious distinctions” that are “totally repugnant.”99 No rational reason can explain why any individual would support such a marriage idea. Therefore support for the older meaning of marriage as the union of husbands and wives is “rooted in per-

96. The one exception to the general rule that the people who make the child are the parents, unless they are unable or unwilling to assume the responsibility, is artificial insemination of single women. Here, the state affirmatively steps in to cut off the child’s relationships with its biological father, merely because the mother wishes the child to have no father.
97. 798 N.E.2d at 963 (quoting Troxel v. Granville, 530 U.S. 57, 64 (2000)).
99. 798 N.E.2d at 972.
sistent prejudices against persons who are...homosexual,” which the Constitution “cannot control” but “neither can it tolerate them.”

Similarly, virtually all advocates for same-sex marriage—including Koppelman—argue vigorously that the exclusion of same-sex couples from the legal status of marriage is hateful and discriminatory in precisely the same way that bans on interracial marriage are hateful and discriminatory.

On the merits, I disagree. But let us assume for the sake of argument that I am wrong. What if the Goodridge court and other advocates of same-sex marriage are correct that this historic, cross-cultural, feature of marriage represents a discriminatory, bigoted idea based only on animus towards homosexuals? What if we take the analogy to Loving v. Virginia seriously?

100. Id. at 968.
101. See e.g. Andrew Koppelman, Why Discrimination Against Lesbians and Gay Men is Sex Discrimination, 69 N.Y.U. L. Rev. 197, 236-37 (1994) (“As in the case of miscegenation, the judicial argument may end with a recognition of the homosexuality taboo’s misogynistic implications, which are recognizable by most Americans. Both prohibitions clearly violate the fourteenth amendment as it is understood by the stigma theorists. Implicit in both taboos are the premises—incompatible with equal concern and respect for all citizens—that sexual penetration is a nasty, degrading violation of the self, and that there are some people (in the case of the homosexuality taboo, women) to whom, because of their inferior social status, it is acceptable to do it, and others (men) who, because of their superior social status, must be rescued (or, if necessary, forcibly prevented) from having it done to them. Thus, a court could dispose of a law that discriminates against gays with a brief allusion to well-known cultural meanings, along the lines of Loving v. Virginia.”); Evan Wolfson, Why Marriage Matters: America, Equality, and Gay People’s Right to Marry 59 (Simon & Schuster 2004) (“[T]oday’s battle over gay people’s freedom to marry is not just about gay and lesbian people. It is a chapter in a civil rights struggle as old as the institution of marriage itself, a struggle that has been borne by women seeking equality, people seeking to marry others of a different race, adults seeking to make their own decisions about parenting and sex, and married couples seeking an end to failed or abusive unions.”) (characterizing a column by Eric Zorn); Rauch, supra n. 85 at 173 (“[P]erpetuating the ban on same-sex marriage ... links marriage with discrimination at a time when, throughout the liberal world, discrimination is sinking into disrepute.”); Mark Strasser, Loving in the New Millennium: On Equal Protection and the Right to Marry, 7 U. Chi. L. Sch. Roundtable 61, 90 (2000) (“While Loving of course does not establish that the right to marry a same-sex partner is constitutionally protected, it and the subsequent right to marry cases establish the necessity of closely examining the articulated state interests allegedly justifying such a marital prohibition. It is difficult to understand how the reasons thus far articulated to justify same-sex marriage bans could ever withstand the requisite scrutiny.”); Mary L. Bonauto, Denying Marriage Rights is Unconstitutional, 19 Me. B. J. 78, 82 (2004) (“The decision whether to marry, and who to marry, ‘has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.’ Loving v. Virginia, 388 U.S. 1, 12 (1967). . . . As the cases striking anti-miscegenation laws make clear, ‘the right to marry means little if it does not include the right to marry the person of one’s choice . . . .’ Goodridge, 798 N.E.2d at 958.”).

102. Reserving marriage as the union of husband and wife is no more discrimination than restricting Social Security to people over age 67 is age discrimination. Laws against interracial marriage had nothing to do with the public purposes of marriage. They were about racism. They were about keeping two races distinct so that one race could continue to oppress the other. The distinction the law makes between same-sex and opposite-sex couples is not discrimination because it is neither arbitrary nor invidious. It is rooted in the nature and public purpose of the institution.
If the older understanding of marriage is inherently discriminatory, the law will begin, necessarily and inexorably, to exert strong chilling effects on a variety of people and institutions of civil society that might otherwise attempt to transmit this vision of marriage to the next generation.

Relatively little attention from scholars has focused on the consequences to the vast majority of American religious institutions, schools, charities, and ministries if the law imposes same-sex marriage as a civil right. Marriage is not a private act; it is a public, legal status.

But Mary Ann Glendon and several legal scholars recently warned:

[C]hurches and other religious organizations that fail to embrace civil unions as indistinct from marriage may be forced to retreat from their practices, or else face enormous legal pressure to change their views. Precedent from our own history and that of other nations suggests that religious institutions could even be at risk of losing tax-exempt status, academic accreditation, and media licenses, and could face charges of violating human rights codes or hate speech laws.103

If same-sex marriage is a right, powerful legal pressures will be brought to bear on religions and other organizations that fail to acknowledge this right. The capacity of schools and faith communities to transmit the marriage idea to the next generation will be sharply curtailed. People who believe that children need mothers and fathers will be treated like bigots in the public square.

4. The argument from despair

Which brings us to the last, most powerful weapon in Koppelman’s and other SSM-advocates’ arsenal: same-sex marriage is inevitable, lie back and get on the right side of history, for we’ve won the debate among young people. Koppelman relies heavily on this, as evidence both of the inevitability of gay marriage and of the utter irrationality of arguments against it. The young, it seems, are wise and morally superior, and ultimately all-powerful, too. As Koppelman explains, “[L]ife in a democratic and pluralist society tends to promote more egalitarian attitudes toward differences of gender and sexual orientation. That’s reflected in the generational divide over same-sex marriage: while most Americans oppose it, most 18-to-29-year-olds are in favor.”

Well, maybe. But maybe, just maybe, the young are inexperienced and even occasionally ignorant. Maybe they’ve been relentlessly propagandized by only one side of the gay marriage debate for years. Maybe if the adults in their lives—parents, teachers, clergy—speak up and explain the importance of marriage as a social institution, why marriage isn’t big-otry, why mothers and fathers both matter to kids, their opinions will change. Maybe, as more and different people begin to speak honestly about the risks of same-sex marriage to the next generation, they will listen.

And maybe, by the way, next generation opinion about same-sex marriage is not nearly as unanimous as Prof. Koppelman and many others believe. Young adults are certainly more likely to favor same-sex marriage than older Americans. But polls find wide variations in young adult support for gay marriage between polls, and some evidence of declining support for gay marriage in recent time periods. The most recent Gallup polls show

104. Koppelman, supra n. 1, at 32.

105. For example, Jason West, the 27-year-old mayor of New Paltz, New York who issued marriage licenses to same-sex couples earlier this year, explained: “It’s inevitable that we’ll have same-sex marriage in this country, because it’s a generational question. . . . Give it 10 or 20 years when we’re holding state legislatures and Congress. It will just be a non-issue.” Carl Weiser, They’re Young, Savvy, Hip: They’re the Government, Cincinnati Enquirer A1 (July 18, 2004). Jonathan Rauch of the Brookings Institution told the Denver Post “[The Federal Marriage Amendment] will get harder to pass over time. . . . People will get used to gay marriages in Massachusetts, the edge will be taken off the issue over time, plus . . . young voters are pro-gay marriage.” Anne C. Mulkern, Gay-Marriage Ban Fails, Procedural Vote Scraps Measure, Denver Post A1 (July 15, 2004). Evan Wolfson, executive director of Freedom to Marry, writing for WashingtonPost.com, claimed that “young people overwhelmingly support marriage equality.” Evan Wolfson, Massachusetts Ruling on Same-Sex Marriage, http://www.washingtonpost.com/wp-dyn/articles/A16097-2004Feb5.html (Feb. 5, 2004). In the Wall Street Journal last October, Andrew Sullivan went so far as to say that 67 percent of young adults “believe that gay marriage would benefit society.” Andrew Sullivan, The State of Our Unions, Wall St. J. A24 (Oct. 8, 2003) (available at http://www.opinionjournal.com/ac/?id=110004130) (The USA Today poll Sullivan cited actually showed 24% of young adults thought gay marriage would benefit society, while 43% thought it would make no difference. Andrew Sullivan later corrected the error on his website but maintained his general point still held.).
that among the “next” next generation (teens aged 13 to 17 years old), 63 percent currently oppose same-sex marriage.106

V. CONCLUSION

Court-created same-sex marriage will transform our shared, public meaning of the word “marriage.” It will disconnect marriage from any further relationship with its great historic task of making the next generation, and connecting those children to both their mothers and fathers. A new unisex language of parenting in the public square will demote the idea that “children need mothers and fathers” to a form of rudeness or bigotry. Organizations that try to transmit in any strong way to the next generation the idea that marriage is about creating and connecting children to their mothers and fathers will be increasingly treated the way bigots who oppose interracial marriages are treated in the public square. Because religious organizations are complex with multiple goals (like saving souls), even fairly minor legal threats to tax exempt status are likely to have major impacts on the willingness of faith-based organizations to advocate strongly for their own vision of marriage or fatherhood in the public square, and within their own faith communities.

You can see the beginning of all these changes in Massachusetts, where the marriage license already reads not Husband and Wife, but “Party A” and “Party B.”107 Where the Health Department has advocated for changing birth certificates so they no longer read mother and father, but “Parent A” and “Parent B.”108 Where Catholic universities are mulling whether or not they have to house gay couples in married student housing,109 and public schools are being warned they have an obligation to educate young people about the goodness of the new marriage law regime.110

106. Support for gay marriage among 18-29 year olds may have peaked in June 2003, when Gallup found young adults favoring gay marriage 61% to 36%. By December of 2003, however, following the Goodridge decision, support had fallen to 44%, with 53% opposed to gay marriage. Polling data in 2004 has continued to fluctuate widely, suggesting uncertainty in the underlying opinions. For further discussion, see Maggie Gallagher & Joshua K. Baker, Same-Sex Marriage: What Does the Next Generation Think?, http://www.marriagedebate.com/pdf/iMAPP.NextGenSSM.pdf (Nov. 23, 2004).


110. Superintendent Thomas W. Payzant, Memorandum to Boston Public Schools Staff re: Supreme Judicial Court Decision on Same-Sex Marriage (May 13, 2004) (“It behooves us, whatever our position may be on this issue, to use this opportunity to help our students understand [this historic moment] as a vital manifestation of some of the principles that have shaped our system of government – such as rule of law, balance of powers, and separation of church and state – as well as another step in our continuing efforts to create a more just society for all of our citizens.”).
These are real and significant potential threats to an extremely important social institution. Of course some may disagree. And some people may judge the reward worth the risk. But simply closing your eyes to the reality that same-sex marriage represents an enormous change in marriage law with potentially large repercussions for American society will not make that reality go away.