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INTRODUCTION

The gay and lesbian community's response to California's Proposition 8 was strong and quick.¹ Within days of the 2008 election, opponents of the measure had targeted its proponents, in particular the Mormon Church, as subjects for scorn.² Singling out the Mormon Church on this issue was particularly ironic because to the extent that members of the Mormon Church were responsible for the success of Proposition 8, they simply did to the gay community what courts of the United States consistently did to their forebears: defined away their right to marry.³ In striking down individuals' rights to enter into polygamous marriages, courts said that polygamy was not marriage and that monogamy was marriage, but they expended little energy explaining why.⁴ This article does not condone either the forceful effort to pass Proposition 8 or the counter-response from the gay community,⁵ but it will argue that part of the problem that same-sex marriage

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¹ Proposition 8, which the California electorate approved with a 52.3% margin on November 4, 2008, defined marriage as between a man and a woman, thus attempting to overturn the ruling of the California Supreme Court which granted gays and lesbians the right to marry. *See In re Marriage Cases*, 183 P.3d 384, 452-53 (Cal. 2008); Secretary of State Debra Bowen, *California General Election, Proposition 8 – Eliminates the Right of Same-Sex Couples to Marry, 52.3% to 47.7%*, Nov. 4, 2008, <http://vote.sos.ca.gov/>.

² Nicholas Riccardi, *Mormon Church Feels the Heat Over Proposition 8*, L.A. TIMES, Nov. 17, 2008, available at <http://articles.latimes.com/2008/nov/17/nation/na-mormons17>.

³ *See Reynolds v. United States*, 98 U.S. 145, 165 (1878) (polygamy is an "offence [sic] against society"); *Potter v. Murray City*, 760 F.2d 1065, 1070 (10th Cir. 1985) ("Monogamy is inextricably woven into the fabric of our society. It is the bedrock upon which our culture is built."). It should be noted that members of the Mormon Church no longer practice polygamy, and the Church has condemned its practice since 1890.

⁴ *See Reynolds*, 98 U.S. 145. In *Reynolds*, the Court did suggest that polygamy "leads to patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy." *Id.* at 166. The Court didn't expand on this theory and many might question whether it is really the number of spouses in a society's understanding of marriage that marks the difference between despotism and other forms of government.

⁵ To the extent that the gay and lesbian community has argued that the Proposition 8 campaign was really nothing other than homophobia and hate, there is also a parallel to the campaign against polygamy. As Professor Sarah Gordon has explored, anti-Mormonism

(“SSM”) advocates encounter stems from the failure of courts to explain what marriage is. It is very hard to talk about a right to marry without a common understanding of why states license marriage.

In the end, this article will offer a definition of marriage which suggests that marriage can be beneficial to the state, beneficial to the couple, and integrated into the rich social history of marriage without necessarily being gendered. In order to understand why this proffered story is important, the article first evaluates the marriage narratives that have been told to date in the SSM debate and shows how those stories have fared as constitutional claims.

During the course of the last fifteen years, proponents of SSM have proffered several different constitutional arguments in favor of their cause. Most of these arguments have been rooted in either fundamental rights or equality theory. Both of these theories have prevailed in some places. The Supreme Court of Hawaii originally ruled that restricting marriage to opposite-sex couples was gender discrimination, in violation of the State’s Equal Rights Amendment.⁶ The Supreme Courts of Vermont and New Jersey found that gays and lesbians had a right, grounded in equality doctrine, to the same legal treatment as married people, though they did not have a right to have their relationship termed “marriage.”⁷ New Jersey explicitly found that gays and lesbians did *not* have a fundamental right to marry.⁸ The Vermont court did not address that question.

The Supreme Judicial Court of Massachusetts found that the fundamental rights and equality arguments were inextricably intertwined and that gays and lesbians were entitled to get married, but not because they had a fundamental or equal right to do so.⁹ Instead, the Massachusetts court found that there was no rational basis for restricting marriage to opposite-sex couples.¹⁰ Recently, the California, Connecticut and Iowa Supreme Courts have found that gays and lesbians have an equality right to marry because restricting marriage to opposite-sex couples discriminates on the basis of sexual orientation.¹¹ California also found

preceded the anti-polygamist movement. Polygamy became the target, but the original fear was of moral diversity and difference. See Sarah Barringer Gordon, *“Our National Hearthstone”: Anti-Polygamy Fiction and the Sentimental Campaign Against Moral Diversity in Antebellum America*, 8 YALE J.L. & HUMAN. 295, 297 (1996).

⁶ Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993).

⁷ See Baker v. Vermont, 744 A.2d 864, 886 (Vt. 1999); Lewis v. Harris, 908 A.2d 196, 220-21 (N.J. 2006).

⁸ Lewis, 908 A.2d at 211.

⁹ Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003).

¹⁰ *Id.* at 961.

¹¹ See *In re Marriage Cases*, 183 P.3d 384, 440-41 (Cal. 2008); Kerrigan v. Comm’r, 957 A.2d 407, 262-63 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 906 (Iowa 2009). The holding in the California case was overturned by Proposition 8, see *In re Marriage Cases*, 183 P.3d at 452-53, and the California Supreme Court accepted Proposition 8’s ability to restrict marriage to opposite-sex couples in *Strauss v. Horton*, 207 P.3d 48, 122, 93 Cal. Rptr. 3d 591 (Cal. 2009). After *Strauss*, gay men and lesbians in California have neither equality nor a fundamental right to marry, though they do have both an equality and a fundamental right to “public recognition [of their] relationship as a family.” *Id.* at 70-71.

that gays and lesbians had a fundamental right to marry each other.¹² Connecticut and Iowa did not reach that argument.

There has been a good deal of ink spilled over how best to conceptualize the legal claim to SSM. Because most unenumerated fundamental rights arguments are controversial, courts and commentators often prefer equality arguments. Moreover, to some, the fundamental rights argument seems tautological because it assumes a contested definition of marriage.¹³ Presumably, before one says that there is a fundamental right to marriage, one has to define what marriage is. Pro-SSM advocates would define marriage in a way that can include same-sex couples. Anti-SSM marriage advocates would define marriage as between a man and a woman. Thus, saying that there is a fundamental right to marriage does not say anything unless there is a common definition of marriage. Equality arguments, it was thought, avoided that tautological conundrum. But, equality doctrine cannot always do all the work that proponents of SSM claim. At least equality doctrine cannot do this work on its own; it needs a story of marriage to go with it. Ultimately, every argument requires a story about why marriage is important, with a definition of what marriage is.

This article will explore six different stories of marriage. These are not the only stories told about marriage, nor are they mutually exclusive. Indeed, one can believe many of these stories simultaneously. But, different narratives tend to emerge as dominant in different arguments. Part II examines the stories of marriage told by advocates of SSM and explains how those stories fare under both fundamental rights and equal protection analyses. Part III explains the stories told by critics of SSM. These stories suggest that contrary to what the Massachusetts Supreme Judicial Court found in *Goodridge v. Department of Public Health*, restricting marriage to opposite-sex couples almost certainly passes rational basis review; and, despite the racial analogies used by the courts in California, Connecticut and Iowa, racial equality doctrine may not be the most appropriate precedent.

The critical problem with the equality argument for SSM is that marriage, as it currently operates in our culture, is deeply gendered. It is gendered not only in the sense that, in most states, opposite-sex couples have the exclusive right to enter into marriage, it is gendered because of the way in which marriage facilitates, produces, and legitimates gender roles. If the predominant story of marriage is one of an institution that exists to foster differentiated gender role development, then the equality theory rings hollow because same-sex couples and opposite-sex couples are not similarly situated in their ability to reify gender roles in marriage.

¹² *In re Marriage Cases*, 183 P.3d at 448.

¹³ See Andrew Koppelman, *Grading the California Same-Sex Marriage Opinion*, BALKINIZATION (2008), <http://balkin.blogspot.com/2008/05/grading-california-same-sex-marriage.html> ("It won't do to just define marriage as 'the substantive right of two adults who share a loving relationship to join together to establish an officially recognized family of their own.' That's just a bald conclusion masquerading as an argument.").

Many people will scoff at this understanding of marriage as a purposefully gendered institution. How can that be a legitimate definition in an era of gender equality? Perhaps it is not a legitimate definition of marriage, but it is an accurate description of contemporary marriage. Empirical data verifies what critics of SSM celebrate: marriage is a “gender factory.”¹⁴ Part IV explores the social science data showing how marriage makes gender.

At a doctrinal level, the fact that marriage is a gender factory may be constitutionally irrelevant. After all, those who believe that marriage is and should be gendered appear to believe in “the very stereotype the law condemns.”¹⁵ What makes the gendered story relevant to legal discussions of SSM is its accurate reflection of the current state of heterosexual marriage and its ability to explain why and how marriage may be so important to people. As the end of Part IV suggests, for many people, the ability to live into the stereotypes the law (at times) condemns is enormously important to their personal identity. The fulfillment of those socially prescribed gender roles could be so important to a person’s personal and intimate life that the right to enter an institution that reifies those roles triggers constitutional protection. In other words, the gendered story of marriage reveals an inherent tension between that which may make marriage a fundamental right and the gender equality doctrine that may mandate SSM.

A further problem with the equality argument for SSM is that an examination of the law of gender equality, like an examination of the way marriage actually functions in people’s lives, reveals ambivalence about the legitimacy of gender roles.¹⁶ Part V shows how confused the law of sex equality is. Despite the constitutional doctrine suggesting that gender roles, particularly gender roles in the household, are constitutionally suspect,¹⁷ other areas of the law seem to

¹⁴ This term was coined by Sarah Fenstermaker Berk in SARAH FENSTERMAKER BERK, *THE GENDER FACTORY: THE APPORTIONMENT OF WORK IN AMERICAN HOUSEHOLDS* 3-10 (Plenum Press 1985).

¹⁵ The phrase originally comes from *Powers v. Ohio*, 499 U.S. 400, 410 (1991), but is also cited in *J.E.B. v. Alabama*, 511 U.S. 127, 138 (1994) and used by Mary Anne Case to elaborate on how and when the constitution condemns gender stereotypes, see Mary Anne Case, “*The Very Stereotype the Law Condemns*”: *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1452 (2000).

¹⁶ Not one court since *Baehr* has adopted the theory of sex discrimination, notwithstanding the extensive academic literature exploring how restrictions on SSM are sex discrimination. See Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 230-34 (1988); Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 154, 160 (1988); WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* 153-72 (The Free Press 1996); ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW*, 53-55 (The Univ. of Chi. Press 2002). For a more complete list of scholars who have argued that sexual orientation discrimination is sex discrimination, see KOPPELMAN, 98 Yale L.J. at 169, nn.4-6.

¹⁷ See generally Case, *supra* note 15, at 1464 (suggesting that the Supreme Court strikes down any sex differentiation that relies on a gender stereotype unless the stereotype is a perfect proxy for sex difference); Wendy W. Williams, *The Equality Crisis: Some*

accommodate gender roles. Indeed, in both the employment and the marital context, the more pronounced the gender roles and traits, the more the law feels compelled to accommodate them. And, even in the constitutional context, sometimes the law accommodates gender and sex differences.

If enough people believe in or somehow know the gendered story of marriage to be true, equality arguments for SSM, whether rooted in gender or racial analogies, prove difficult. The gender equality doctrine may be willing to accommodate the gendered roles that gendered marriage celebrates, and the racial discrimination analogy may seem inapt in the face of an institution that gets its social and personal import from its ability to reify gender. That is why it is important for proponents of SSM to tell a non-gendered story of marriage. But, it has to be a story of marriage that explains how marriage can retain the symbolic and constitutive potential that gender roles have traditionally provided for it without gender being a part of the story. To paraphrase Gertrude Stein, SSM advocates must tell a story of marriage that suggests there is a “there there” after one takes the gender out of marriage.¹⁸

Part VI of this essay will offer one such story. It is an understanding of marriage as an institution in which dependencies develop, roles are assumed and, for a variety of reasons stemming from the emotional and sexual connections involved, the general rules of property and contract do not work well. A narrative like this deconstructs marriage, but it also celebrates the lack of autonomy, substantial interdependence and role assumption that mark many marriages. It is not a narrative that extols the values—individual expression, freedom from social constraint, personal liberty—that the Constitution is often prized for protecting. When forced to confront this alternative marriage narrative, many people may not feel like celebrating. In that case, we need to ask why we have state-sponsored marriage at all. If we are to have state-sponsored marriage that includes same-sex couples, we need a story of marriage that explains what marriage is after the gender is gone.

I. ONE SET OF STORIES

To date, there have been three main stories told by SSM advocates about what marriage is and why gays and lesbians should be entitled to it. In the first story, marriage is a bundle of rights and obligations pertaining to how each member of the couple must treat each other and how outsiders must treat the couple. These rights and obligations usually include, inter alia, the right to receive a portion of a spouse’s estate if she dies intestate, the right to bring a wrongful death action, the right to access spousal health, disability and accident insurance plans, the right to

Reflections on Culture, Courts and Feminism, 14 WOMEN’S RTS. L. REP. 151, 154 (1992) (noting how the Supreme Court has been particularly vigilant about striking down legal presumptions rooted in the breadwinner-homemaker stereotypes).

¹⁸ GERTRUDE STEIN, *EVERYBODY’S AUTOBIOGRAPHY*, Ch. 4 (1937) (describing Oakland, California as a place for which “there is no there there.”).

assert evidentiary privileges, the right to hospital visitation and other incidents relevant to medical treatment of a family member, and the entitlements and responsibilities pertaining to spousal maintenance and marital property at separation.¹⁹

These rights and obligations can often result in significant financial savings and security for couples. The state provides these incidents of marriage to couples because these incidents afford couples the freedom to divide labor and develop interdependencies that promote stability and protect against dependency on the state. States value stability for a whole host of reasons²⁰ and almost always prefer that dependents' needs are met in private, thereby relieving any responsibility that might fall to the state.

This narrative of marriage suggests that states create and sanction marriage because they benefit from it. It is a narrative that is particularly susceptible to equality arguments for SSM because opponents of SSM have difficulty explaining why gay and lesbian couples need to be denied the concrete benefits of marriage, or how the state could possibly be hurt by providing these stabilizing benefits to gay and lesbian couples.²¹

The problem with this story of marriage is that while it often forces the state to provide all of the legal rights and obligations of marriage, it does not compel the state to provide the symbolic benefits of marriage. Thus, the Supreme Courts of Vermont and New Jersey found that gays and lesbians were entitled to Civil Union status, but not marital status.²² If the bundle of rights and obligations that accompanies marital status is what marriage is, then gays and lesbians are treated equally once they become entitled to that bundle of rights and obligations. The term "marriage" is a peripheral issue in the first narrative of marriage because the first narrative of marriage defines marriage as the legal rights and obligations that accompany it, not the symbolism in the term itself.

The second story of marriage is the one that has been told most prominently by the U.S. Supreme Court, and it focuses much less on the concrete benefits of marriage and much more on the symbolic benefits of marriage—most particularly, its emotional and expressive benefits. Although not precisely clear about why or when this right exists, the Court has ruled that states cannot deny the right to marry

¹⁹ For a more complete list of the legal rights and obligations of marriage, see Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 149-52 (2003).

²⁰ A stable social system is likely to be better poised to accumulate wealth, less prone to violence, and better able to organize in times of peril than an unstable social system.

²¹ The Supreme Courts of Vermont and New Jersey relied on this kind of equality reasoning in ruling that the respective states must provide Civil Union status to gay and lesbian couples. *See Baker v. Vermont*, 744 A.2d 864, 886-89; (Vt. 1999); *Lewis v. Harris*, 908 A.2d 196 213-17. (N.J. 2006).

²² *Baker*, 744 A.2d at 888-89; *Lewis*, 908 A.2d at 423. After Proposition 8 passed, the California Supreme Court reached essentially the same conclusion. *See Strauss v. Horton*, 207 P.3d 48, at 70-71. (Cal. 2009).

to poor people²³ or to prisoners.²⁴ The Court has suggested that the right to enter into marriage is grounded in privacy doctrine because of the critical role that families play in our private lives,²⁵ but it has also emphasized the public aspect of marriage. Thus, marriage can be both “the most important relation in life” and “the foundation of society.”²⁶ It “affects personal rights of the deepest significance . . . [but] . . . [i]t also touches basic interests of society.”²⁷

In *Turner v. Safley*, the Court wrote that marriage is “an expression of emotional support and public commitment . . . [and] an expression of personal dedication.”²⁸ Plaintiffs in New Jersey picked up on this expressive element of marriage: it is the “ultimate expression of love, commitment and honor that you can give another human being.”²⁹ “[O]thers know immediately that you have taken steps to create something special.”³⁰ This story of marriage corresponds with what Peggy Cooper Davis has described as the nineteenth century human rights ideology that supported the recently enslaved’s right to marry. She describes this ideology as grounded in the “conviction that . . . [there is a] . . . human capacity to make life-defining choices, and [a] human drive to do so, . . . such that every person has an inalienable entitlement to construct a life on chosen terms”³¹ The decision to marry is a decision about who one wants to be. This understanding of marriage suggests that the decision to enter into marriage is a personal one because it involves critical issues of self-determination, but it is also a public one

²³ *Zablocki v. Redhail*, 434 U.S. 374, 391 (1978) (striking down Wisconsin law that denied marriage licenses to people who could not show that they would not be in arrears on their child support payments).

²⁴ *Turner v. Safley*, 482 U.S. 78, 79 (1987) (striking down prison regulation that prevented male prisoners from marrying).

²⁵ *Zablocki*, 434 U.S. at 386. In explaining why the right to marry is fundamental, the Court cited almost every constitutional case having anything to do with parenting, procreation, marriage or other family relationships. *Id.*

²⁶ *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

²⁷ *Williams v. North Carolina*, 325 U.S. 226, 230 (1945).

²⁸ *Turner*, 482 U.S. at 95.

²⁹ *Lewis v. Harris*, 908 A.2d 196, 225-26 (Poritz, C.J., concurring and dissenting) (quoting plaintiffs’ briefs).

³⁰ *Id.*

³¹ Peggy Cooper Davis & Carol Gilligan, *Reconstructing Law and Marriage*, 11 THE GOOD SOCIETY 57, 58 (2002), available at http://muse.jhu.edu/journals/good_society/v011/11.3davis.html. Given how strongly gendered most marital lives are, it may seem odd to think of the decision to marry as a decision to construct life on terms of one’s choosing. If marriage gives one little opportunity to avoid gender roles, then choosing to marry hardly seems like a decision to construct one’s own terms, unless marriage offers a unique opportunity to live life in a particularly gendered way. I make use of story #6 to suggest this view. See *infra* notes 87-98 and accompanying text.

because marriage serves as a form of public expression.³² Expressing one's commitment to another helps one become the self one wants to be.

Not surprisingly, this story of marriage as expression and self-determination fits quite squarely into fundamental rights analysis.³³ It is a right to express who one is by making a public commitment to another. The right to make this simultaneously personal and public declaration is very important to human development and happiness, and therefore, the state must be very careful not to interfere with it. It is worth noting though, how distinct this theory of entitlement is from the first one. The first story sees marriage as a legal construct, a state-created bundle of rights and obligations. The second story sees marriage as an institution—like religion, perhaps—that serves human interests and values and with which the state should not interfere.³⁴

The problem with this second story of marriage is that what gives marriage its expressive potential and symbolic meaning is its social and historical context. Getting married makes a statement because of what people understand marriage to mean. Marriage has been a part of our social and political structure for a very long time. Marriage and the family that it instantly creates is still an organizing principle for many people's lives. But marriage to someone of the same sex might not be. What "others know immediately"³⁵ about the statement one makes when one gets married depends on what others understand marriage to mean. I do not have, and no one would realistically maintain that I have, a fundamental right to marry my dog. It would be ludicrous for me to maintain such a right because no

³² Cass Sunstein has suggested that the right to marry counts as fundamental "because of the expressive benefits that come from official state-licensed marriage." Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2096 (2005).

³³ In *Loving v. Virginia*, 388 U.S. 1, 12 (1967), the Court declared that marriage was "one of the 'basic civil rights of man,' fundamental to our very existence and survival," (citing *Skinner v. Oklahoma*, 316 U.S. 535 (1942) and *Maynard v. Hill*, 125 U.S. 190 (1888)). *Loving* involved an anti-miscegenation statute, which the court struck down as unconstitutional, but it did so without giving any explanation as to why marriage was a fundamental right. The cases it cited, *Skinner* and *Maynard*, involved, respectively, a law requiring the sterilization of certain criminals and an action for divorce. Thus the Court declared that marriage was a fundamental right in *Loving*, but it made no attempt, as it did in *Zablocki* and *Turner*, to explain why.

³⁴ The relationship between state-sponsored marriage and religion is a long and still extant one. In the Anglo-American tradition, secular authorities began to wrest control over marriage from ecclesiastical authorities starting somewhere around the 16th century, but the state was never too eager to unmoor marriage from its ecclesiastical roots. Hence, the basic understanding of what marriage was (a lifelong union of a man and a woman, for which consent was necessary and one of the primary purposes of which was the rearing of children) did not change significantly when the state began to assert control. Indeed, even today, the degree to which the state cedes control over marriage to religious authorities is striking given the Constitutional commandment to separate church and state. See KATHARINE K. BAKER & KATHARINE B. SILBAUGH, *FAMILY LAW* 6-7, 11-12 (Aspen Publishers 2009).

³⁵ See *Lewis v. Harris*, 908 A.2d at 196 (N.J. 2006).

one would know what it means (sharing a home with my dog? Sharing material goods? A sexual relationship?). Because the expressive value of marriage is dependent on marriage's social meaning and because that social meaning is contested, the right to marry depends, as critics of the theory have maintained, on a common definition of marriage.³⁶

A third story of marriage was told by the California Supreme Court in the *In re Marriage Cases*.³⁷ This story understands marriage to be a state-conferred title, a blessing of sorts, pursuant to which a couple secures status from the state. With this state-conferred status comes the respect and dignity of others. In this version of marriage, the state-conferred benefits of marriage are inextricably intertwined with the emotional benefits of marriage because one helps determine the other. The personal well-being that comes from marriage comes in part from the respect and dignity that is afforded marital status. The California Court wrote that the "core substantive rights [of marriage] include . . . the opportunity of an individual to establish . . . an officially recognized and protected family . . . [that is] . . . entitled to the same respect and dignity as marriage."³⁸ The California Court found this narrative of marriage to be susceptible to both fundamental rights and equality arguments, but the court's reasoning is a little odd.

In California, when the Court decided *In re Marriage Cases*, the legislature had already provided gays and lesbians with the full panoply of rights and obligations that marriage brings (story #1). Domestic Partnership (as it was called in California) was not enough, the court said, because Domestic Partnership did not command the same respect and dignity as marriage. For people who believe that SSM will be disruptive to some of the most important social relations in society, this must just sound strange. As a fundamental rights argument, the court's story of marriage proves too much.

The California court found that it is not just respect and equal treatment from the state that matters for the right to marry, it is respect and dignity from the public.³⁹ But what if someone has no respect for the institution of SSM and does not want to dignify it with her blessing? As a private citizen, surely she has the right to think whatever she wants about SSM. The California Supreme Court may think that a state license means that a married gay couple will be respected in the same way as a straight couple, but given the sizable number of people who oppose SSM, it is not at all clear why the court thinks that respect and dignity from others will automatically follow. Indeed, given the success of Proposition 8, one might be able to say that the California Supreme Court was simply wrong. The respect and

³⁶ See Koppelman, *supra* note 13 ("The fact that you really, really, want to get married can't be the basis for a constitutional right. Otherwise, the incest and polygamy laws would be in trouble too.").

³⁷ *In re Marriage Cases*, 193 P.2d 384 (Cal. 2008).

³⁸ *Id.* at 399.

³⁹ *Id.* at 444 ("[O]ne of the core elements embodied in the state constitutional right to marry is the right of an individual and a couple to have their own official family relationship accorded respect and dignity." A couple is "constitutionally entitled" to "respect and dignity.").

dignity of others does not follow the state's conferral of marriage, yet it was the respect and dignity from others that the Court said was a key part of the fundamental right to marry.⁴⁰

The California Court's marriage narrative seems much less odd in the context of equality theory. The state cannot grant domestic partnerships for gay people and marriage for straight people even if they are identical legal statuses because, as virtually everyone who has ever had a Civics class in this country knows, *separate is not equal*. The cite here is to *Brown v. Board of Education of Topeka*,⁴¹ in which the Supreme Court famously held that African-American children had an equal right to the same education as white children. The Supreme Court did not hold that African-American children had a fundamental right to a decent education.⁴² *Brown* was only an equality case. The maintenance of white and non-white regimes, wrote the Court, "generates a feeling of inferiority . . . and may affect [African-American children's] hearts and minds," because "the policy of separating the races is usually interpreted as demonstrating the inferiority of the negro group."⁴³ According to the California Supreme Court, the maintenance of two marital regimes runs a comparable risk of creating "second class citizenship"⁴⁴ for Domestic Partnerships.

The Supreme Court of Connecticut, in *Kerrigan v. Commissioner*, augmented this equality analysis somewhat by pointing out that "private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."⁴⁵ Just because some people may not afford SSM respect and dignity does not mean that the law can formally acknowledge that lack of respect. The cite here was to *Palmore v. Sidoti*,⁴⁶ a case in which the U.S. Supreme Court ruled that courts could

⁴⁰ To the extent that the Court was trying to say members of the public *should* give same-sex couples respect and dignity, it was expressing an aspiration, not explaining the content of a fundamental right. To the extent that it was saying that the state must encourage members of the public to afford same-sex couples respect and dignity because the state encourages members of the public to do the same for married couples, then it is making an equality argument. See *infra* notes 41-46.

⁴¹ *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 495 (1954).

⁴² *Id.*

⁴³ *Id.* at 494 (quoting district court in Kansas).

⁴⁴ *In re Marriage Cases*, 183 P.3d at 442.

⁴⁵ *Kerrigan v. Comm'r*, 957 A.2d 407, 479 (Conn. 2008) (citing *Palmore v. Sidoti*, 466 U.S. 429, 433-34 (1984)). The Connecticut Legislature, like the California Legislature, had already instituted full Civil Union status when *Kerrigan* was decided. *Id.* The Court in *Kerrigan* suggested that it was using sex equality doctrine, not race equality doctrine to reach its result, see *Kerrigan*, 957 A.2d at 476 (citing *United States v. Virginia*, 518 U.S. 515 (1996)), but its dismissal of Civil Unions as inherently unequal relies on and reads much more like *Brown v. Board of Education* than *United States v. Virginia*. See *Kerrigan*, 957 A.2d at 418-419 (citing *Brown* and *In Re Marriage Cases*, but no sex discrimination cases for the proposition that separate is not equal). For a discussion of the critical differences between *Brown* and *United States v. Virginia*, see *infra* notes 205-225 and text accompanying.

⁴⁶ *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984).

not take into account the fact that a white child raised in a mixed race household might suffer hardship in a way that she would not if she was raised in an all white household because to do so would legitimize racist biases. Together, say the courts of California and Connecticut, *Brown* and *Palmore* demonstrate how parallel marital regimes for same-sex couples violate basic principles of equality because of the way those different regimes will be valued socially, and therefore, gays and lesbians must be entitled to marriage itself.

The Supreme Court of Iowa took a different path to gay marriage. Unlike California and Connecticut, Iowa did not provide either Civil Unions or Domestic Partnership benefits for gay and lesbian couples so the Iowa court was not deciding whether separate could be equal.⁴⁷ It was deciding whether a “mini-DOMA,”⁴⁸ passed by the Iowa legislature in 1998, could define marriage as between a man and a woman. The Iowa Court adopted a story of marriage much like story #1. Relying on an earlier loss of consortium case, the court defined marriage as “rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society.”⁴⁹ But, it also found that gays and lesbian were a suspect class and any classification that singled them out for different treatment deserved heightened scrutiny.⁵⁰

The mini-DOMA probably made the Iowa court’s discrimination analysis easier. Prior to 1993, when *Baehr* was decided in Hawaii, few states had even bothered to restrict marriage to opposite-sex couples. The opposite-sex definition was assumed. Legislative enactments that did so after *Baehr* were clearly designed to prohibit same-sex couples from marrying. As the Iowa Supreme Court wrote, “[b]y purposefully placing civil marriage outside the realistic reach of gay and lesbian individuals, the ban on same-sex civil marriages differentiates implicitly on the basis of sexual orientation.”⁵¹ This kind of “animus toward the class that it affects”⁵² is much more transparent in the mini-DOMAs of the 1990s than in the myriad of marriage statutes that pre-dated them.

By focusing on the 1998 statute, not the historical and almost universal understanding of marriage as between a man and a woman, it was easier for the Iowa court to say that an opposite-sex requirement was discrimination against gays and lesbians. The court never reached the question of whether a comparable status, like civil unions or domestic partnerships, that provide “an institutional basis for

⁴⁷ *Varnum v. O’Brien*, 763 N.W.2d 862 (Iowa 2009).

⁴⁸ Mini-DOMA is the phrase used to refer to the multiple state statutes passed in the wake of *Baehr v. Lewin*, 852 P.2d at 44, 44 (Haw. 1993), and in the wake of the federal Defense of Marriage Act, 1 U.S.C. § 7 (2006), which defined marriage as between a man and a woman.

⁴⁹ *Varnum*, 763 N.W.2d at 883 (citing *Laws v. Griep*, 332 N.W.2d 339, 341 (Iowa 1983)).

⁵⁰ *Id.*

⁵¹ *Id.* at 885.

⁵² *Id.* (citing *Romer v. Evans*, 517 U.S. 620, 632 (1996)).

defining the fundamental relational rights and responsibilities of persons in organized society,” could be equal.⁵³

Thus, the equality arguments for SSM have relied mostly on racial equality doctrine and have focused on gays and lesbians as a class, not on the question of what marriage is. California, Connecticut and Iowa all found that gays and lesbians were a suspect class. California and Connecticut then went on to rule that the alternative marriage regimes for gays and lesbians violated the racial equality principle that separate is not equal. Iowa found that the state statute defining marriage as between a man and a woman was designed to discriminate against gays and lesbians.⁵⁴ Initially, then, it seems that equality arguments more easily avoid the problem of defining marriage. But as the rest of the article will suggest, the strength of equality arguments depends on a genderless conception of marriage.

II. THE OTHER SET OF STORIES

Critics of SSM have their own stories of marriage. The first of these stories has to do with marriage as a procreative institution. This story of marriage has probably received the most attention,⁵⁵ but it is also, I will suggest, the weakest. The second story has to do with marriage as an institution for child-rearing. The third story has to do with marriage as an institution for gender reification. The second and third of these stories have considerable significance for SSM arguments. For consistency sake, I will refer to the critics’ narratives as Stories 4, 5 and 6 and the proponents’ narratives as Stories 1, 2, and 3.

Story #4 suggests that marriage is an institution designed for procreation. For years, the only legal way to engage in the conduct that led to procreation was to do so within the institution of marriage. Recently, a group of Catholic theologians, known to some as the New Natural Law Theorists,⁵⁶ have gone so far as to suggest that marriage can be restricted to opposite-sex couples because married heterosexual sex is an inherent good in a way that no other form of sexual expression is.⁵⁷ Others have done much to refute this latter point about the inherent superiority of married heterosexual sex.⁵⁸ It is, as the authors of the view concede,

⁵³ *Id.* at 883.

⁵⁴ Massachusetts, which had neither an alternative marriage regime nor a mini-DOMA to evaluate, did not apply any heightened scrutiny and simply found that restricting marriage to opposite-sex couples was irrational. *See Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

⁵⁵ *See Varnum*, 763 N.W.2d at 901-02.

⁵⁶ *See KOPPELMAN*, *supra* note 16, at 79.

⁵⁷ *See* Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301, *passim* (1995); *see also* John M. Finis, *Law, Morality, and “Sexual Orientation,”* 69 NOTRE DAME L. REV. 1049, *passim* (1994).

⁵⁸ *See* Mary Becker, *Women Morality and Sexual Orientation*, 8 UCLA WOMEN’S L.J. 165, 185 (1998); Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, 42 AM. J. JURIS. 51, 57-62 (1997).

a viewpoint that one either implicitly understands or one does not.⁵⁹ As one who does not, it makes little sense for me to comment on it here.

Regardless of one's view on the superiority of married heterosexual intercourse, any student of literature or history is well aware that marriage has never been particularly good at policing sexuality. One of the purposes of marriage may have been to channel sexuality into marital relationships, but sex has happened outside of marriage throughout history.⁶⁰ If marriage's primary purpose had been to restrict sexual activity to marriage, marriage would have broken down as an institution. It simply is not up to the defined task. Policing extra-marital sexual activity is and always has been extraordinarily difficult. The activity takes place in private. There are no non-culpable witnesses, and unless the participants are willing to implicate themselves, the activity is virtually impossible to prove. Until very recently, the only way to know whether sex happened was if a pregnancy resulted, but as long as the woman who got pregnant was married to someone, there was no way of proving that the sex was extra-marital.⁶¹

What marriage has been much better at is providing an institution for child-rearing. Marriage is not about making babies (Story #4), but about taking care of them. This is the fifth story of marriage—marriage as an institution designed to ensure optimal child-rearing. A child born to a marriage (regardless of the actual origins of his or her genetic material) has a mother and a father whose responsibility it is to provide materially, emotionally, physically and spiritually. William Blackstone understood and endorsed this view. He wrote “[t]he main end and design of marriage . . . [is] to ascertain and fix upon some certain person to whom the care, the protection, the maintenance and the education of the children should belong”⁶² The marital presumption of paternity, which until quite recently was practically irrebuttable,⁶³ is the strongest indicator of the law's allegiance to the story of marriage as an institution for child-rearing.

⁵⁹ George & Bradley, *supra* note 57, at 307 (“In the end, we think, one either understands that spousal genital intercourse has a special significance as instantiating a basic, noninstrumental value, or something blocks that understanding and one does not perceive correctly.”).

⁶⁰ See generally LAWRENCE STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500-1800* (1977) (documenting extra marital sexual activity); Harold T. Christensen & Christina F. Gregg, *Changing Sex Norms in America and Scandinavia*, 32 J. MARRIAGE & FAM. 616, 616-27 (1970) (summarizing studies of premarital sex); 2 *Samuel* 11:1-5 (Bathsheba and King David).

⁶¹ Genetic testing now allows us to test whether there has been an exchange of bodily fluids and to identify the source of those fluids. DAVID L. FAIGMAN ET AL., *MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY* § 19-1.4 (1997).

⁶² 1 WILLIAM BLACKSTONE, *COMMENTARIES* *443, *455.

⁶³ See generally Katharine K. Baker, *Bargaining or Biology: The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 22-25 (2004) (explaining how, without genetic testing, proving paternity was so difficult that litigants could not overcome the marital presumption).

The problem with this narrative of marriage, for opponents of SSM, is that gays and lesbians can rear children within marriage too. Indeed, the reason that many gays and lesbians want to get married is because they want to raise children. To foreclose that option, opponents of SSM have to add an addendum to Story #5 indicating that the best way to rear children is to provide them with both of their biological parents. Thus, the full version of Story #5 is that marriage is for child-rearing and because child-rearing is done best by biological parents, marriage is for two people who, together, can be biological parents.⁶⁴

The addendum about biological parents may or may not be true. Reliable evaluations about what matters most for optimal child-rearing are very difficult to produce. The studies that scholars do have access to are varied, rarely longitudinal, and wildly disparate in result.⁶⁵ There are no reliable studies suggesting that bi-gendered role modeling really matters; nor are there studies proving that it does not matter, and many people think that a parent of each gender is good for children.⁶⁶

To be reliable, studies of child welfare must have a sufficient number of subjects and sufficient heterogeneity, yet control for class, culture and a host of other differences.⁶⁷ After reviewing the existing studies of gay parenting, the Iowa Supreme Court expressed doubt that children need a mother and a father, but the court did not mention the substantial body of evidence suggesting that children raised by their biological parents perform better on a host of measures.⁶⁸ Probably most significantly, for the SSM issue, recent studies strongly indicate that children growing up in blended families have more trouble than children growing up in biological nuclear families.⁶⁹ Among most demographers and social scientists who study family structure and child well-being, it is now common wisdom that, on

⁶⁴ The one exception to this is adoption, which opponents concede deprives children of their biological parents and provides non-biological parents with children, but adoptions are approved only when in the best interest of the child. See Monte Neil Stewart, *Genderless Marriage, Institutional Realities and Judicial Elision*, 1 DUKE J. CONST. L. & PUB. POL'Y 1, 15-18 (2006).

⁶⁵ See William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America's Children*, 15 THE FUTURE OF CHILD. 97, 100-06 (2005) (explaining the problems with existing studies of children of same-sex couples).

⁶⁶ See Margaret Somerville, *What About the Children?*, in DIVORCING MARRIAGE: UNVEILING THE DANGERS IN CANADA'S NEW SOCIAL EXPERIMENT 63, 67 (Daniel Cere & Douglas Farrow eds., 2004) [hereinafter "DIVORCING MARRIAGE"] ("Those who believe that children need and have a right to both a mother and a father, preferably their own biological parents, oppose same-sex marriage because . . . it would mean that marriage could not continue to institutionalize and symbolize the inherently procreative capacity between the partners . . .").

⁶⁷ See Meezan & Rauch, *supra* note 65.

⁶⁸ See generally Amy Wax, *Traditionalism, Pluralism, and Same-Sex Marriage*, 59 RUTGERS L. REV. 377, 403-05 (2007) (citing studies).

⁶⁹ *Id.*

average, children raised by their own married, biological parents have an easier time than children raised in other circumstances.⁷⁰

Nonetheless, the majority of children in this country are raised in other circumstances.⁷¹ The environments in which children are raised are simply too varied for legislators or other policy makers to make reliable categorical rules about optimal child-raising.⁷² That is probably why we allow adoption even though there is strong evidence that adoption is often taxing on children.⁷³ It is why many states allow single parents to adopt even though most people agree that two parents are better than one.⁷⁴ It may be why we countenance step-families even though many children seem to fare worse in step-families than in single-parent families.⁷⁵

Most of the studies of gay families with children suggest that the children are not harmed by the same gender of their parents.⁷⁶ Perhaps, for reasons we have yet to identify, a child raised by a biological mother and her non-biologically related

⁷⁰ Lisa Gennetian, *One or Two Parent? Half or Step Siblings? The Effect of Family Structure on Young Children's Achievement*, 18 J. POPULATION ECON. 415, 415-36 (2005) (for educational outcomes, children reared in traditional nuclear families do much better than those reared in other family structures); Donna K. Ginther & Robert A. Pollak, *Family Structure and Children's Educational Outcomes: Blended Families, Stylized Facts, and Descriptive Regressions*, 41 DEMOGRAPHY 671, 676 (2004); SARA McLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS 1 (1994) (children raised by both biological parents do substantially better along several metrics than children raised by single parent or biological parent and step-parent).

⁷¹ See McLANAHAN & SANDEFUR, *supra* note 70, at 2-3 ("Well over half of the children born in 1992 will spend all or some of their childhood apart from one of their parents.").

⁷² Shelly Lundberg & Robert A. Pollak, *The American Family and Family Economics*, 21 J. ECON. PERSPECTIVES 3, 19 (2007) ("Because family structure is intertwined with other parental characteristics that affect children, a causal relationship between family structure and child outcomes is difficult to establish.").

⁷³ See generally DAVID M. BRODZINSKY ET AL., BEING ADOPTED: THE LIFELONG SEARCH FOR SELF 7-10 (Anchor Books 1992).

⁷⁴ JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW 118 (Columbia Univ. Press 2000) (Describing as "irrefutable" the evidence that, "all else being equal, two parents are better than one," but noting considerable disagreement about what makes "all else equal.").

⁷⁵ See Wax, *supra* note 68, at 403; Gennetian, *supra* note 70, at 431 for outcomes of step-families.

⁷⁶ Judith Stacey & Timothy J. Biblörze, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 162-64 (2001) (most current research indicates that there is no difference in development between children that live with heterosexual parents and children who live with same-sex parents); Katrien Vanfraussen et al., *Family Functioning in Donor Families Created by Donor Insemination* 73 AM. J. ORTHOPSYCHIATRY, 78, 78-90 (2003) (no differences in how parents and children in gay and straight families perceived the quality of their relationships); Raymond Chan et al., *Psychosocial Adjustment Among Children Conceived via Donor Insemination by Lesbian and Heterosexual Mothers*, 69 CHILD. DEVELOPMENT 443, 443-57 (sexual orientation of parents had no significant impact on psychological well-being of their children.).

husband struggles more than a child raised by a biological mother and her female partner or a biological father and his male partner.⁷⁷ Perhaps children that would be raised in a household with two gay parents if a state allows SSM will otherwise be raised in a household with only one parent if the state prohibits SSM. Perhaps having only one parent would be worse. But we do not know. Our predictive power when it comes to optimizing child outcomes given the situations children find themselves in is woefully deficient.

One fact is certain. Children in gay households are not going to be raised in the one family structure that social science has so far identified as being the most likely to be good for children. That fact is hardly dispositive, however. Most children in this country are probably not raised in that optimal family structure. And, there may be other family structures that are comparably good for children, but we have yet to identify them.

The Supreme Courts of Vermont, Massachusetts and New Jersey made much of the fact that their state legislatures had already enacted various protections for gay adoption, and that therefore it made no sense for the legislatures to preference straight over gay parenting.⁷⁸ But, adoptive parents are always treated differently than other parents. A single person is allowed to adopt and parent a child on his or her own, even though we do not give a single person the exclusive right to parent a child born as a result of heterosexual intercourse.⁷⁹ Allowing gay men and women to enter into second-parent adoptions⁸⁰ says that the legislature thinks a child is better off with two parents than with one. It does not necessarily mean that the legislature thinks there is no difference between two parents of the same sex and two parents of the opposite sex.

Most important, all potential adopters have to be screened. No one is allowed to adopt domestically unless they have passed the licensing requirements for parenthood.⁸¹ Non-adoptive parents do not have to get licensed.⁸² They get parental

⁷⁷ One potentially important factor might be when the non-biological parent joined the family unit. Children living in a “blended” family may do just as well as children living in traditional nuclear family if those children never knew any other family structure or any other parent. This kind of non-biological-parent-there-from-the-start arrangement is probably more common in gay and lesbian households.

⁷⁸ *Baker v. Vermont*, 744 A.2d 864,881-82 (Vt. 1999); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 963-64 (Mass. 2003); *Lewis v. Harris*, 908 A.2d 196, 213. (N.J. 2006).

⁷⁹ Both the child and the other genetic contributor have the right to establish parentage in the genetic father. *See* UNIF. PARENTAGE ACT, § 602, ULA PARENTAGE § 602 (2002).

⁸⁰ “Second parent adoptions” refers to the practice of allowing a second same-sex parent to adopt a child who only has one legal parent. *See* LESLIE HARRIS ET AL., *FAMILY LAW* 927, n.10 (3d ed. 2005).

⁸¹ States investigate all potential adoptive parents before approving an adoption. *See, e.g.,* Uniform Adoption Act, §2-203 (1994) (detailing the requirements for investigating a potential adopters home including determining “whether the individual is suited to be an adoptive parent.”).

⁸² *See* Uniform Parentage Act, *supra* note 79, at § 201 (detailing when men and women are presumed to be fathers and mothers of a child).

status by virtue of genetics or marriage. In allowing gay adoptions, legislatures could be saying that gays and lesbians can be parents only if they are genetically related to the child or if they are licensed as a parent. That is very different than what marriage has traditionally done which is to assign parental status to a spouse, regardless of genetic connection or parenting skills.

The ambiguity of the evidence regarding what matters in child-rearing explains why the constitutionality of the SSM issue is so important. Given the inconclusive data, a legislature that thinks that marriage is an institution designed primarily for the rearing of children may rationally reject gay marriage.⁸³ Legislators may not want to channel adults into families that will deprive children born into that family of any chance of being raised by their biological parents. Infertile couples or couples who do not want children may be allowed to marry because no children are born into those marriages.⁸⁴ States cannot prove that more children will be worse off if we further sanction non-biological parenting, but neither can proponents of SSM prove that biological connection makes no difference. The burden of proof becomes critical.

If marriage is a fundamental right, or if gays and lesbians have a constitutionally protected equality right to get married, the burden is on the state to prove that having both a mother and a father is critical.⁸⁵ This the state cannot do.

⁸³ The Supreme Judicial Court of Massachusetts disagreed with this conclusion, finding that there was no rational reason to prevent gays and lesbians from marrying and therefore the strength of either a fundamental right or an equality argument was unimportant. The Court wrote that denying same-sex couples the right to marry would not in any way ensure that more children would be born into marital families because gays and lesbians would just have children outside of marriage, and then the children would not be able to enjoy the benefits of marriage. *Goodridge*, 798 N.E.2d at 963 (“The department has offered no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriage in order to have and raise children.”). The state may not have offered this evidence, but it hardly seems necessary. I know of no one who disputes a strong history of people who may have been inclined to enter into relationships with people of their own sex, but who nevertheless got married to people of the opposite sex and had children. One of the purposes of state sponsored marriage is to channel adults into certain kinds of relationships. See Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 497 (1992). That is what family law does. Binary, monogamous lifelong relationships are hardly artifacts of nature. The law may not succeed in channeling everyone into what it sees as the ideal relationships, but it does not need to be 100% successful (or even narrowly tailored) in order to be considered rational. It would seem fully rational for a legislature to conclude that if there is no SSM, people who might enter into a SSM, will choose instead to enter into an opposite-sex marriage to raise children.

⁸⁴ If those couples “have” children, they adopt them and that is only done if in the best interest of the children. See, e.g., Uniform Adoption Act, *supra* note 81 § 3-703 (“The Court shall grant a petition for adoption if it determines that the adoption will be in the best interest of the minor . . .”).

⁸⁵ *Varnum v. Brien*, 763 N.W.2d 862, 899, n.26. (Iowa 2009). The Iowa Supreme Court reasoned that because gays and lesbians were a protected class, the opposite-sex

But if there is neither a fundamental right nor an equality right to marry, the burden is on SSM advocates to show that a policy favoring one parent of each gender is irrational. This, proponents of SSM probably cannot do. As a matter of policy, it might be extraordinarily wrong-headed to preclude two committed people of the same sex who very much want to parent with each other from doing so, but, given the evidence of what situations are better and worse for children, a reasonable legislator might conclude otherwise.⁸⁶

This leads us then to the sixth marriage narrative, marriage as a promoter and producer of gender roles. This story of marriage will probably be jarring to some. Perhaps because it can be so jarring, courts have not engaged it significantly, except to dismiss it categorically and without discussion.⁸⁷ One finds this discourse of inherently gendered marriage mostly in the academic writings by opponents of SSM. The story goes something like this:

Marriage is the primary institution through which gender is produced and realized. By acting as such, marriage serves as a critical source of identity for both men and women. Marriage creates a home environment marked by complementary, separate but equal gender roles. When men and women fulfill those roles they become more productive, responsible and happy citizens.

This understanding of marriage is gleaned from many different descriptions of marriage. For instance, one scholar claims that marriage is “the central cultural site of male-female relations.”⁸⁸ It is “an institution that interacts with a unique social-sexual ecology in human life. It bridges the male-female divide.”⁸⁹ Another author comments that marriage has “universal features” that include being “supported by

requirement for marriage was subject to heightened scrutiny. *Id.* Therefore, the burden was on the state to show that gay parenting was not as good for children as straight parenting. *Id.*

⁸⁶ Proponents of SSM often also point out that many opposite-sex couples get married without any intention of child-rearing. That fact does not render irrational legislative efforts to try to use marriage to ensure that children are raised by their biological parents. It just shows that marriage restrictions are underinclusive if the purpose is to use marriage to make sure that children are raised by their biological parents. But if stricter scrutiny is not triggered, then that underinclusiveness does not render SSM restrictions unconstitutional.

⁸⁷ Both the California and Massachusetts Supreme Courts simply stated that SSM would not fundamentally change the institution of marriage. *See Goodridge*, 798 N.E.2d at 965 n.28 (dismissing dissent’s claim that the majority was changing the institution of marriage itself because the dissent’s argument hewed too close to the idea that men and women are different); *In re Marriage Cases*, 183 P.3d 384, 421 (Cal. 2008) (stating that SSM would not “change, modify or . . . deinstitutionalize the existing institution of marriage.”).

⁸⁸ Daniel Cere, *War of the Ring*, in *DIVORCING MARRIAGE*, *supra* note 66, at 9, 14.

⁸⁹ *Id.* at 11 (citing the work of evolutionary psychologists Margo Wilson and Martin Daly).

authority and incentives” and the “interdependence of men and women.”⁹⁰ According to these commentators, bringing men and women together has been “the massive cultural effort of every human society at all times and in all places.”⁹¹ Other scholars write that “[t]he status bestowed by marriage is that of ‘wife’ and ‘husband’ and the relation between husband and wife is the form of life that marriage alone creates”⁹²

Marriage creates the “social identities” of husband and wife and those social identities (which are formed by social norms and expectations) are very different than the social identity of “partner.”⁹³ “[B]oth spouses gain from . . . the benefits that come from faithfully fulfilling one’s chosen duties as . . . husband or wife.”⁹⁴ Marriage “sustains a complex form of social interdependency between men and women.”⁹⁵ “Norms of trust, fidelity, sacrifice and providership . . . give [married] men clear directions about how they should act . . . [and] . . . [m]ost men seek to maintain their social status by abiding by society’s norms.”⁹⁶ “Norms of adult maturity associated with marriage encourage adults to spend and save in a more responsible fashion [F]or many men, marriage is a right of passage that introduces them fully into an adult world of responsibility and self-control.”⁹⁷

With an extensive set of cultural norms and expectations about what it means to be married, i.e., to be a husband and wife, marriage channels men and women into gender roles that allow each to identify with and achieve the cultural ideals of masculine and feminine. If we allow people of the same sex to marry, we alter the essentially gendered nature of marriage and we put at risk the separate but equal masculine and feminine roles that marriage has traditionally reified. Having people live into and fulfill those roles has proven to be immensely beneficial for both

⁹⁰ Katharine Young & Paul Nathanson, *The Future of an Experiment*, in *DIVORCING MARRIAGE*, *supra* note 66, at 41, 45.

⁹¹ *Id.* at 43.

⁹² F.C. DeCoste, *The Halpern Transformation: Same-Sex Marriage, Civil Society, and the Limits of Liberal Law*, 41 ALTA. L. REV. 619, 625 (2003).

⁹³ Stewart, *supra* note 64, at 19.

⁹⁴ THE WITHERSPOON INSTITUTE, *MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES* [hereinafter “WITHERSPOON”] 12 (2006), *available at* [http://www.princetonprinciples.org/files/Marriage and the Public Good.pdf](http://www.princetonprinciples.org/files/Marriage%20and%20the%20Public%20Good.pdf).

⁹⁵ COUNCIL ON FAMILY LAW, *THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA* 20 (New York: Institute for American Values 2005).

⁹⁶ WITHERSPOON, *supra* note 94, at 21.

⁹⁷ *Id.* at 20. As these last few quotes indicate, much of the argument against SSM suggests that it is the benefits that married men receive individually and provide to the social whole that makes marriage so valuable. Married men measure significantly higher for psychological and physical health than do single men. Married women measure higher than single women, but not as much higher as men. *See infra* note 98. Non-married adult men are less happy, more violent, less responsible and less integrated into their communities. *See* STEVEN NOCK, *MARRIAGE IN MEN’S LIVES* 6-8 (Oxford Univ. Press, Inc. 1998).

society as a whole and individuals in particular.⁹⁸ As Steven Nock writes, “It is in the intimacy of married life that men and women define themselves as persons rather than employees, students, voters, faithful believers or any number of other public identities. One of the most important dimensions of personal identity is gender.”⁹⁹

One response to this story may be that SSM will not destroy gendered marriage; it will just allow for an alternative. If heterosexual people still want to live gendered lives, SSM will not prevent them from doing so. The rejoinder to this argument is subtle, but not necessarily weak. By unmooring marriage from its gendering effects, SSM puts in jeopardy the way in which most married people have learned to express themselves as spouses, the way in which they have learned to live in a loving sexual relationship, and the way in which they have come to understand who they are as participating, responsible members of society. What allows marriage to do this is the rich set of norms, many of them gendered, which define how married people are to behave. The strong social pressure to conform to these norms restricts people’s freedoms but allows them to live into responsible masculinity and femininity.¹⁰⁰ Adhering to the social norms of marriage and accepting the responsibilities of marital roles allows for a kind of self-expression and self-development that is both confining and ennobling.¹⁰¹ Those social norms

⁹⁸ There is fairly consistent evidence that marriage makes both men and women happier, healthier and wealthier. Steven Nock writes “The many beneficial effects of marriage are well-known. Married people are generally healthier; they live longer, earn more, have better health and better sex lives, and are happier than their unmarried counterparts. . . . Some disagreement may exist about the magnitude of such effects, but they are almost certainly the result of marriage, rather than self-selection.” See NOCK, *supra* note 97, at 3 (citing numerous studies). For a more recent study, see Alois Stutzer & Bruno S. Frey, *Does Marriage Make People Happy or do Happy People get Married?*, 35 J. SOCIO-ECON. 326, 327-34 (2006) (finding that marriage continues to be highly correlated with happiness for both men and women and that “[i]t is unlikely that . . . selection effects can explain the entire difference in well-being between singles and married people.”); see also Walter R. Gove et al., *Does Marriage Have Positive Effects on the Psychological Well-Being of the Individual?*, 24 J. HEALTH & SOC. BEHAV. 122, 125 (1983) (marital status is the most powerful predictor of mental health for both men and women).

⁹⁹ NOCK, *supra* note 97, at 42.

¹⁰⁰ Bruce Hafen writes about the restrictions of family life this way, “the same relationships . . . that seem to tie us down are, paradoxically, the sources of strength most likely to lift us up.” Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 BYU L. REV. 1, 41 (1991).

¹⁰¹ For more on how accepting the roles in marriage is both an expressive and constitutive act, see Milton C. Regan, Jr., *Spousal Privilege and the Meanings of Marriage*, 81 VA. L. REV. 2045, 2088-89 (1995). Regan’s work builds on Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959, 959-1001 (1992) (articulating and analyzing the constitutive responsibility paradigm) and it is similar to how Katharine Bartlett has described parenthood. See Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 301 (1988) (citing the work of Nel Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* 14 (Univ. of Cali. 1984), and

will change if, for instance, husband will not necessarily mean “provider” and wife will not necessarily mean “caretaker.”¹⁰²

Admittedly, some couples already alter aspects of these roles. But few couples abandon them completely.¹⁰³ The more marriage’s gendered conventions are challenged, the less stable they become and the less likely they are to be reinforced by broad social consensus. Without that broad social understanding of marriage as gendered, the gendered norms that go with it will die and so will the roles through which many people have found meaning in their lives.

For those who find this understanding of marriage somewhat alienating or just alien, it is important to recognize two distinct but important points. First, the gendered narrative fits very easily into much of the pre-existing constitutional discourse on marriage. One can see how marriage could be “the foundation of society,” “the most important relation in life,”¹⁰⁴ and “fundamental to the very existence and survival of the race”¹⁰⁵ because of the way in which it reifies gender, serving both the states interest in stability and protection against dependence (Story #1) and individuals’ interests in expression and self-determination (Story #2). What may make marriage so important to people is the sense of belonging and purpose that comes from accepting the restrictions and accolades that accompany marital gender roles. These restrictions and accolades have an enormous effect on one’s sense of self.¹⁰⁶ They help one understand who one is. They are, as Stephen Nock suggested, a critical part of one’s identity.¹⁰⁷

suggesting that accepting the responsibilities of parenthood is a means of adults striving to realize their “ennobled selves.”).

¹⁰² The argument made by opponents of SSM here is akin to those highlighted by Jorge Aseff and Hector Chade, in an article addressing the problem of identity externalities. One’s ability to get value out of a given institution may depend on who else is part of that institution and thereby giving it an identity. See Jorge Aseff & Hector Chade, *An Optimal Auction with Identity-Dependent Externalities*, 39 RAND J. ECON. 731, 731-32 (2008).

¹⁰³ One study famously found that though the percentage of unpaid work that a wife does in the home decreases as she earns more money relative to her husband, in those couples where the wife actually earns more than her husband, the wives begin to do a greater share of the housework. The authors attribute this phenomenon to the greater importance of conforming to gendered roles with regard to unpaid work if the couple is not conforming to those roles with regard to paid work. See Theodore N. Greenstein, *Economic Dependence, Gender, and the Division of Labor in the Home: A Replication and Extension*, 62 J. MARRIAGE & FAM. 322, 333 (2000).

¹⁰⁴ See *Maynard v. Hill*, 125 U.S. 190, 205 (1888); see also *Williams v. North Carolina*, 325 U.S. 226, 230. (1945).

¹⁰⁵ *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 539 (1942).

¹⁰⁶ Our sense of self comes, in part, from how others define us and most people use some sense of social norms to guide their judgment. Think, for instance, about how good it may feel to be called a “good husband” or a “good mother.” Or consider how bad it feels to be called a “bad husband” or “bad mother.”

¹⁰⁷ See NOCK, *supra* note 97, at 42 (“one of the most important dimensions of personal identity is gender”).

Thus, marriage's ability to channel people into gender roles works at both a private and public level. The identity that comes from being married feels like the "intimate and personal" realm that is "central to the liberty protected by the Fourteenth Amendment."¹⁰⁸ But, the norms that shape that identity are social. Part of what it means to be married is to accept roles defined by others. That is how we know what it means to "be a good wife" or "be a good husband"—because these terms have social meaning. And that social meaning is gendered. According to Story #6, the identity benefits from marriage stem from accepting assigned roles, not creating new ones.

The second, and potentially more important, observation that flows from Story #6 is that a great deal of social science data confirms what this gendered story of marriage celebrates. The next Part explores more fully what the social science data indicates about the tendency of marriage to reinforce gender.

III. THE GENDER FACTORY

As Story #1 suggested, one of the advantages of marriage is that it allows for a division of labor and an allocation of roles within households.¹⁰⁹ This role division provides stability for the household, for the individuals within it and for society as a whole.¹¹⁰ In the vast majority of households, this role division is also gendered. As Sarah Berk showed in her classic book, *The Gender Factory*, standard economic explanations for how and why unpaid work *might* be divided in a household cannot explain the social reality of how work *is* divided in households.¹¹¹ Gender can. Gender predicts who does what, how much each married partner does and why husbands and wives do not negotiate more over who does what or how much.¹¹² Couples do not fight over what jobs they will do because the allocation is so patterned into who they are as gendered selves. And the more those gendered work patterns are replicated, the more entrenched gender roles become. Thus, the home and the marriages that define it not only reflect gender, they create it. "[G]ender both *affects* and is perhaps effected *through* the division of household labor. It is around household work that gender relations are produced and reproduced on a daily basis."¹¹³

¹⁰⁸ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992).

¹⁰⁹ See BERK, *supra* note 14, at 165 ("[W]ith respect to the apportionment of household tasks . . . men and women may share a work environment, but do not share much of its work.").

¹¹⁰ See *supra* text accompanying note 20.

¹¹¹ See BERK, *supra* note 14, at 162-65.

¹¹² *Id.* at 191 ("[H]ow people *interact* about who does what is as stable a phenomenon as the division of the work itself.").

¹¹³ *Id.* at 165.

Marriage increases the amount of domestic work that women do and decreases the amount that men do.¹¹⁴ Married women, regardless of whether they also work outside the home, do much more household work than their husbands.¹¹⁵ Studies find that even in the most egalitarian households, women perform 59% of the domestic work.¹¹⁶

Marriage, particularly marriages with children, decrease women's commitment to paid work and increase their commitment to unpaid work. A strong majority of married mothers work outside the home,¹¹⁷ but in the most recent exhaustive study of time allocation in households with children, Suzanne Bianchi and her colleagues found that mothers average 67% of the unpaid work in a household, while fathers average 64% of the paid hours for a household.¹¹⁸ Mothers do twice as much child care as fathers.¹¹⁹

Mothers may be able to do more child care because they do less paid work than fathers. Married women often leave the labor force for a short or long period. Between 1983 and 1998, 50% of women, but only 16% of men, reported being out of the labor force for one full year.¹²⁰ Thirty percent of women, but only 5% percent of men reported more than four years of zero earnings.¹²¹ Women with the strongest commitment to paid labor, i.e., those who reported earnings for every year of their prime earning years (ages 26-59), still reported working almost 500 fewer hours per year than men.¹²² Some women may work less than the standard work week or standard work year; others may forego overtime opportunities when men do not.

These differing work patterns are starkly reflected in the gender wage gap. Most wage gap measures usually only account for workers who work full time on an annual basis (thus excluding part-time or part-year workers, most of them

¹¹⁴ Beth Anne Shelton & Daphne John, *Does Marital Status Make a Difference?: Housework Among Married and Cohabiting Men and Women*, 14 J. FAM. ISSUES 401, 417 (1993) (women's domestic labor goes up with marriage); Sanjiv Gupta, *The Effects of Transitions in Marital Status on Men's Performance of Housework*, 61 J. MARRIAGE & FAM. 700, 700-01 (1999) (men's domestic labor goes down with marriage).

¹¹⁵ David Demo & Alan Acock, *Family Diversity and the Division of Domestic Labor: How Much Have Things Really Changed?*, 42 FAM. RES. 323, 323-31 (1993).

¹¹⁶ Greenstein, *supra* note 103, at 333.

¹¹⁷ Press Release, Bureau of Labor Statistics, *Employment Characteristics of Families in 2005*, tbl.4 (Apr. 27, 2006), available at http://www.bls.gov/news.release/archives/fame_04272006.pdf (Approximately 66% of married mothers worked outside the home in 2004-2005).

¹¹⁸ SUZANNE M. BIANCHI ET AL., *CHANGING RHYTHMS OF AMERICAN FAMILY LIFE* 91 (Douglas L. Anderson et al. eds., 2006).

¹¹⁹ *Id.*

¹²⁰ HEIDI HARTMANN ET AL., *HOW MUCH PROGRESS IN CLOSING THE LONG-TERM EARNINGS GAP? IN THE DECLINING SIGNIFICANCE OF GENDER?* 125-31 (Francine D. Blau et al. eds., Russell Sage Foundation 2006).

¹²¹ *Id.*

¹²² *Id.*

women). When one includes those part-time and part-year workers and looks at just prime earning years, women earn 38 cents for every dollar men earn.¹²³

Most women who currently make the choice to do less paid work were raised during what might be described as a time of maximum gender equality, with all the benefits that Title VII, Title IX, and constitutional gender equality doctrine afforded them.¹²⁴ Yet almost half of all married mothers with children under the age of one leave the labor force.¹²⁵ One study found that mothers born after 1965 in households earning more than \$120,000 a year, were more likely than not to be at home full-time.¹²⁶ Another study found that “[e]ven wives with graduate and professional degrees do not usually work full time if their husband’s income exceed[s] \$75,000.”¹²⁷

Marriage affords many women the opportunity to not work, or to work less. It does not appear to afford men the same choice. The labor supply curve for married women is very elastic, yet it is starkly inelastic for married men.¹²⁸ If anything, marriage increases men’s commitment to the paid labor force because if their wives choose not to do paid work or do less of it, married men do more of it.¹²⁹

¹²³ *Id.* at 131.

¹²⁴ Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000h-6 (1965) (Title VII refers to the prohibition on sex discrimination in employment); Educational Amendments of 1972, 20 U.S.C. §§ 1681-88 (1974) (Title IX refers to the prohibition on sex discrimination in education). Constitutional gender discrimination doctrine is discussed *infra* in Part IV.

¹²⁵ Claudia Wallis, *The Case for Staying Home*, TIME, Mar. 22, 2004, at 52. The number of working married mothers with children under age one “fell from 59% in 1997 to 53% in 2000” and stayed “roughly the same in 2002.” That drop was most pronounced among white well-educated women over thirty. Although six percentage points may not seem like a huge drop in the number of working women, economists suggest that it is significant. *Id.*

¹²⁶ *Id.* Women of the same income level, raised without the benefits of legally recognized gender equality, i.e., those born between 1946 and 1964 or baby-boomers, are significantly less likely to be home full-time (51% of post-baby-boomer mothers are home full-time versus 33% of baby-boomer mothers).

¹²⁷ Ira Mark Ellman, *Marital Roles and Declining Marriage Rates*, 41 FAM. L.Q. 455, 474 (2007). This finding is based on data from the 1997 Current Population Survey. Ellman also found that “as economic pressures decline, married American mothers increasingly choose to work part time rather than full time, regardless of their educational level.” *Id.* at 475.

¹²⁸ EDWARD J. MCCAFFERY, TAXING WOMEN 176-77 (1997).

¹²⁹ Men with non-wage-earning spouses work more than men whose wives earn wages, though they also earn considerably more per hour. One study found that men with non-working spouses work 4% more than men with working spouses, but that they earn 20% more than their peers with working spouses. Tamar Lewin, *Men Whose Wives Work Earn Less, Studies Show*, N.Y. TIMES, Oct. 12 1994, at A1; see also Joy A. Schneer & Frieda Reitman, *Effects of Alternate Family Structures on Managerial Career Paths*, 36 ACAD. MGMT. J. 830, 840 (1993) (what was once thought to be a marital bonus paid to married men is more accurately seen as a “traditional family bonus.” Men whose wives are home full-time earn more per hour than men whose wives work.).

Thus, marriage propels men into the paid labor force, even as it offers women a path out of it.¹³⁰

Neither men nor women seem particularly upset by this differential response to marriage. Despite their spending significantly different amounts of time on paid and unpaid work, married mothers and fathers report “feeling very successful in balancing work and family life.”¹³¹ Married fathers are more likely than married mothers to report making sacrifices in family time for the sake of their job, but they are also slightly more likely to report making sacrifices in their job for the sake of the family.¹³² It is *unmarried* mothers who are by far the most likely to report making sacrifices in both job and family for the sake of the other.¹³³ Married mothers, who work the fewest paid hours, are the most content with their role balance.

The gendered differential in time allocation and married parents’ satisfaction with it does not conform particularly well with what parents say they believe about a gendered division of work. Of people born between 1965 and 1981, 82% believe that “both parents should be equally involved in care giving.”¹³⁴ Putting those beliefs together with the data on actual hours devoted to caretaking, it is striking that more parents are not dissatisfied with their role allocation. Also interesting, is the correlation between belief in gender egalitarianism and gendered work patterns. Education level is highly correlated with belief in gender equality, as is income level.¹³⁵ Yet, the more wealth a married couple has, the more profound

¹³⁰ Whether the total number of hours that men and women work is equal seems to depend on how completely they specialize along gender lines. In households where women perform no paid labor, men, on average, work more hours than women. In households in which women work outside the home (and do the bulk of unpaid labor), it is the women who work more hours. BIANCHI ET AL., *supra* note 118, at 56.

¹³¹ BIANCHI ET AL., *supra* note 118, at 139 (50% of married fathers and 52% of married mothers report feeling very successful in achieving work/family balance); *see also* Alan J. Hawkins et al., *The Orientation Toward Domestic Labor Questionnaire: Exploring Dual-Earner Wives’ Sense of Fairness About Family Work*, 12 J. FAM. PSYCHOL. 244, 244 (1998) (“although dual-earner wives [in the United States] do two to three times the amount of domestic work their husbands do, less than one third of wives report the division of daily family work as unfair.”).

¹³² BIANCHI ET AL., *supra* note 118, at 139 (20% of married men report sacrificing family time for career, versus only 14% of married women. 32% of married men report sacrificing job for family, versus 30% for married women.).

¹³³ *Id.*

¹³⁴ *Id.* at 128 fig.7.2.

¹³⁵ *See* Richard J. Harris & Juanita M. Firestone, *Changes in Predictors of Gender Role Ideologies Among Women: A Multivariate Analysis*, 38 SEX ROLES 239, 240 (1998) (linking commitment to gender equality and education); Dep’t of Health and Human Services, *Cohabitation, Marriage, Divorce, and Remarriage in the United States* 4 (2002), available at http://www.cdc.gov/nchs/data/series/sr_23/sr23_022.pdf (linking marriage rate to education stating, “[i]n addition to race and employment status, other characteristics of individuals that have been found to be related to a higher probability of getting married include higher education and earnings.”). Education may teach people to believe in gender

their gender specialization tends to be.¹³⁶ What can account for a feeling of success if one's behavior so clearly deviates from one's beliefs about gender equity?

One answer may be capaciousness in the term "equality." It is not precisely clear what people mean when they say that both parents should share equally. Perhaps people mean that the investment in caretaking should be comparable, or equal-on-major-decision-making, or at least close. Any of those understandings of equality, though, may muddle claims for SSM. Civil Unions are comparable and close to marriage. Is that enough?

Another reason people may not be concerned about deviating from their reported beliefs about gender roles is that they underestimate the importance of gender in their own lives. Women may feel like they have successfully negotiated a paid/unpaid balance even though they do twice as much unpaid work as their spouses because norms of motherhood encourage them to do so much unpaid work. Interviews with mothers who have left or significantly diminished their paid work suggest as much. "I have more of a link [to my children] than my husband does." "You can't get away from the fact that women bear children." "The day-to-day stuff is harder for men." "He doesn't have the same guilt that I have. He doesn't worry that it's going to hurt them."¹³⁷

Men may feel comfortable doing so much less unpaid work in the home because masculinity norms strongly encourage them to participate in the workforce. Participating in the workforce allows men to compete, usually with other men, and competition is a hallmark of masculinity.¹³⁸ Earning the bulk of the family's money also allows men to define themselves as breadwinners and providers. As numerous scholars of fatherhood and masculinity have concluded, "the breadwinner role is socially defined as men's primary family role."¹³⁹

equality, but it also enables them to make more money and the more money a couple makes, the more likely they are to lead gendered lives. *See infra* note 136.

¹³⁶ In addition to the figures cited above regarding women who can afford to be at home full-time, see Wallis, *supra* note 125, at 53; Ellman, *supra* note 127, at 459-60, consider these figures: 22% of women with professional degrees do not work at all so that they can stay home with their children, see Wallis, *supra* note 125, at 53, and only 41% of married mothers with post-graduate education work full-time. Bianchi, *supra* note 118, at 58. Only 33% of women with post-graduate education and at least one child under age six work full-time. *Id.* It is possible that all of these women with professional degrees are living off of their part-time salaries or accumulated wealth, but it is probably much more likely that the primary source of income to their household comes from a husband.

¹³⁷ All of these quotes are taken from women interviewed by Mary Blair-Loy in her book on women executives. *See* MARY BLAIR-LOY, *COMPETING DEVOTIONS: CAREER AND FAMILY AMONG WOMEN EXECUTIVES* 83-84 (Harvard Univ. Press 2003).

¹³⁸ ALLEN G. JOHNSON, *THE GENDER KNOT: UNRAVELING OUR PATRIARCHAL LEGACY* 34 (1997) (men compete with each other for women and power in society).

¹³⁹ Joseph H. Pleck, *Husbands' Paid Work and Family Roles: Current Research Issues*, in *RESEARCH IN THE INTERWEAVE OF SOCIAL ROLES: JOBS AND FAMILIES* 251, 305 (Helena Z. Lopata & Joseph H. Pleck eds., JAI Press, Inc. 1983).

“[B]readwinning has remained the great unifying element in fathers’ lives. Its obligations . . . shape their sense of self, manhood and gender.”¹⁴⁰

In accounts of why and how many well-educated, formerly egalitarian couples divided roles along gender lines, participants report that paid work is simply more psychologically important to fathers than mothers.¹⁴¹ As Steven Nock writes in his study of how marriage functions in men’s lives, “[a husband] in his role as primary provider for the family, has committed himself to instrumental tasks that contribute to his gender identity as a man.”¹⁴² “[S]ome amount of differentiation (or inequality) in marriage contributes to what it means to ‘be’ a husband, and . . . what it means to conform to cultural ideals of masculinity.”¹⁴³ If that inequality within marriage is essential to how marriage provides identity for its participants, will gay and lesbian couples be able to access comparable notions of identity through marriage?

The importance of gender roles is evident in the incidence of marriage as well. Data collected on those who do not marry suggests that marital gender roles are more robust than marriage itself. Women who are likely to earn equal to or more than their husbands are much less likely to marry.¹⁴⁴ This phenomenon is most profound at either end of the income scale. Studies of unmarried poor women indicate that though many of these women want to marry and have turned down marriage proposals from men, they remain single because they cannot find a suitable spouse.¹⁴⁵ A suitable spouse, for them, would be one who would remain faithful, stay employed, and provide for the family.¹⁴⁶ An unemployed spouse or a spouse who could not be relied upon, was not worthy of marriage. These women continue to believe in marriage, but marriage for them is an institution that requires men to assume certain roles.

High-earning women have a related problem. One study found that for women between the ages of forty and forty-four, the percentage who have never

¹⁴⁰ ROBERT L. GRISWOLD, *FATHERHOOD IN AMERICA: A HISTORY* 2 (Basic Books 1993).

¹⁴¹ BLAIR-LOY, *supra* note 137, at 68, 72, 84 (“[M]y husband loves his work. For him to make a change would be change of such magnitude, such importance to him personally . . .” “I’m much more apt to be thinking about my kids than I am about work and I think that’s the difference . . . He’s just more distracted by work . . .” “He would find it very difficult [to be the primary parent] . . . He’d be very antsy to get back to work.”); JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 25-31 (Oxford Univ. Press 2000) (describing how women assume the burden of unpaid work because it is so important for their spouses to keep working long hours in paid work).

¹⁴² NOCK, *supra* note 97, at 62.

¹⁴³ *Id.* at 132.

¹⁴⁴ Ellman, *supra* note 127, at 458-59.

¹⁴⁵ KATHRYN EDIN & MARIA KEFALAS, *PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE* 130 (Univ. of Cal. Press 2005).

¹⁴⁶ *Id.* at 126, 130.

married increases with education for every year beyond one year of college.¹⁴⁷ This may be because, like poor women, high-earning women seek men who can perform the traditional provider role and the more women provide for themselves, the higher the standard they will set for their prospective spouses. Alternatively, it may be that men do not want to relinquish the traditional marital role and, therefore, prefer not to marry women who might earn as much as them. It may be both. Regardless, the patterns suggest that gender roles continue to play a prominent role in people's understanding of what marriage is.

The prevalence of gendered marital roles is often thought to be beyond the law's reach. The law—and many people—view the marital relationship as a private one, entitled to a norm of non-interference.¹⁴⁸ An individual couple's decision to specialize along gender lines probably feels personal to them and a function of their unique attributes as a couple, even though if an employer or the government specialized in that same way it would raise serious equality concerns. Legal attempts to interfere with a couple's allocation of marital roles would probably strike many as impermissibly invasive.

Yet the gender patterns that continue to reproduce themselves in these seemingly private relationships have indisputable social force. They shape our understanding of what it means to be a mother and wife or a husband and father. This is precisely the point that critics of SSM make: by facilitating gender differentiation, the social institution of marriage helps reify gender roles. Marriage affords men and women the opportunity to live into separate gender roles in which both find satisfaction, and through which gender roles are perpetuated.

Even if one thinks that the prevalence of gender roles simply represents revealed preferences in a situation in which the law is neutral, the current restrictions on SSM keep marriage gendered. If the expressive and constitutive benefits of marriage are inexplicably intertwined with the gendered nature of marriage, and if allowing same-sex couples to marry will undermine that gendered nature of marriage, then the state's role cannot be considered neutral with regard to gender roles. By licensing marriage and restricting it to straight couples, the state reifies gender. But the state reifies gender precisely because the expressive and constitutive benefits of marriage are so important to people. In other words, that which makes marriage a fundamental right may, in and of itself, create a gender equality problem.

Given that background of what marriage is and how it operates, it is appropriate to ask what same-sex couples are asking for when they ask for SSM. Are they claiming that marriage must not be gendered—that the law must interfere

¹⁴⁷ Elaina Rose, *Education, Hypergamy, and the "Success Gap,"* 10 (Univ. of Wash., Dep't of Econ., Working Paper No. 353330, 2006), available at http://www.econ.washington.edu/user/erose/hypergamy_solew.pdf.

¹⁴⁸ This norm of non-interference has pedigree in both the common law, see *McGuire v. McGuire*, 59 N.W.2d 336, 345 (Neb. 1953) (court will not assume jurisdiction over parties' distribution of resources within an ongoing marriage), and the Constitution, see *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965) (state cannot interfere with sanctity of marital decision-making about contraception).

to prevent the reproduction of traditional gender? Or, are they asking for a right to enter into an institution that will allow each to assume a gendered role, albeit a gender role that, for at least one-half of each couple, will not map onto his or her biological sex? As Part V will show, gender equality doctrine has often been reticent to eradicate gender roles altogether, particularly when they manifest themselves in private settings, and it has been quite ambivalent about allowing people to be alternatively gendered (i.e., to assume a role that does not map onto his or her biological sex).

IV. EQUALITY DOCTRINE

This Part reviews the law of gender equality in three different contexts: employment cases involving dress codes, employment cases involving privacy and sexual preferences, and constitutional cases involving gender discrimination. As a doctrinal matter, only the constitutional doctrine is relevant. Sanctioning and licensing some marriages and not others involves quintessential state action. And, as a constitutional matter, the argument that the state cannot mandate certain gender roles within marriage seems quite strong.¹⁴⁹ But, just as Part IV suggested that there was *cultural* ambivalence about what gender equality might mean and require, the doctrine explored here suggests that there is *legal* ambivalence over what gender equality may mean or require.

A. *The Grooming Cases*

The law of gender equality is most routinely tested and created under Title VII of the Civil Rights Act of 1964, the federal statute that prohibits discrimination in employment on the basis of sex.¹⁵⁰ Within this field, in a set of cases known as the “dress” or “grooming” cases, employers are allowed to establish separate but equal rules on the basis of gender and they are allowed to take into account private biases, i.e., community norms, when hiring and retaining workers. Admittedly, the permitted accommodation of gender roles is bounded. Employers are not allowed to segregate job categories (employers cannot channel women into traditionally female jobs and men into traditionally male jobs);¹⁵¹ nor are they allowed to exaggerate gender roles in ways that may be detrimental to one sex.¹⁵² But, they

¹⁴⁹ See *supra* notes 15-16 and accompanying text; *infra* notes 190-193.

¹⁵⁰ See Civil Rights Act of 1964, *supra* note 124, at §2000a.

¹⁵¹ Though employers are not required to adjust pay across categories if employees' personal preferences are such that women choose to work in some of the less lucrative, non-commissioned fields (selling apparel and cosmetics) and men choose to work in the more lucrative, commissioned fields (selling major items like appliances and furnaces). *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 320-21 (7th Cir. 1988).

¹⁵² *Magnuson v. Peak Technical Services Inc.* 808 F. Supp. 500, 506 (E.D. Va., 1992) (denying summary judgment to employer who told employee to wear high heels because her legs were sexy); *Carroll v. Talman Fed. Sav. & Loan Ass'n of Chi.*, 604 F.2d 1028,

are allowed to impose separate hair length requirements on men and women.¹⁵³ They can require women, but not men, to wear skirts,¹⁵⁴ and men, but not women, to wear neckties.¹⁵⁵ Men are not necessarily entitled to wear effeminate clothing,¹⁵⁶ and men can be prohibited from wearing jewelry.¹⁵⁷

One of the most recent “grooming” cases involved a bartender who complained about a company policy that made her wear make-up and cut her hair in a certain style.¹⁵⁸ Her male co-workers were not required to wear make-up or wear their hair in that style.¹⁵⁹ Sitting en banc, the Ninth Circuit wrote, “[t]he material issue under our settled law is not whether the policies are different, but whether the policy imposed on the plaintiff creates an unequal burden for [her] gender.”¹⁶⁰ In other words, difference itself does not constitute inequality. Separate can be equal as long as it is not unduly burdensome.

In a well-publicized grooming case involving a broadcast journalist who was fired because of declining audience approval numbers attributable to her appearance, the court wrote that different specific appearance criteria for women and men “do not implicate the primary thrust of Title VII, which is to prompt employers to ‘discard outmoded sex stereotypes posing distinct employment disadvantages for one sex.’”¹⁶¹ The District Court had made clear that there was nothing wrong with tailoring grooming requirements to conform to “community standards.”¹⁶² In other words, private biases can matter and it is only outmoded stereotypes that must go.

The grooming cases’ blatant rejection of equality principles that seem core in the racial context has, not surprisingly, generated a fair amount of commentary. Some writers feel strongly that the accommodation of gender roles, no matter how understandable, is pernicious and ultimately undermines what should be the thrust of equality doctrine. To this group, the manifestation of gender is the problem; gender distinction and sex discrimination are one in the same thing.¹⁶³ Mary Anne

1032-33 (7th Cir. 1979) (striking down employer policy that required women to wear sexually revealing uniform when men could wear street clothes).

¹⁵³ *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1337 (D.C. Cir. 1973).

¹⁵⁴ *Lanigan v. Bartlett & Co. Grain*, 466 F. Supp. 1388, 1391-92 (W.D. Mo. 1979).

¹⁵⁵ *Devine v. Lonschein*, 621 F. Supp. 894, 897 (S.D.N.Y. 1985).

¹⁵⁶ *Doe v. Boeing Co.*, 846 P.2d 531, 538 (Wash. 1993) (denying claim of a man fired for wearing “‘excessively’ feminine attire,” including a string of pearls).

¹⁵⁷ *Lockhart v. Louisiana-Pacific Corp.*, 795 P.2d 602, 604 (Or. Ct. App. 1990).

¹⁵⁸ *Jaspersen v. Harrah*, 444 F.3d 1104, 1110 (9th Cir. 2006) (citing *Frank v. United Airlines, Inc.*, 216 F.3d 845, 854-55, and *Gerdorn v. Continental Airlines, Inc.*, 692 F.2d 602, 605-06).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1110.

¹⁶¹ *Craft v. Metromedia*, 766 F.2d 1205, 1215 (8th Cir. 1985) (quoting *Knott v. Mo. Pac. R.R.*, 527 F.2d 1249, 1251 (8th Cir. 1975)).

¹⁶² *Craft v. Metromedia*, 572 F. Supp. 868, 877 (D.C. Mo. 1983) *aff’d in part, rev’d in part* by *Craft v. Metromedia*, 766 F.2d 1205 (8th Cir. 1985).

¹⁶³ See Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 3 (1995)

Case argues that “the world will not be safe for women in frilly pink dresses . . . unless and until it is made safe for men in dresses as well.”¹⁶⁴ Taylor Flynn suggests that employer bans on male employees wearing earrings are nothing more than penalties on men for failing to conform “to the masculine gender role expectation that men do not accessorize.”¹⁶⁵ Katherine Franke suggests that “Title VII should recognize the primacy of gender norms as the root of . . . sex discrimination, and . . . prohibit all forms of normative gender stereotyping”¹⁶⁶

Others have taken a more accommodating approach. Katharine Bartlett uses the grooming cases to point out the indeterminacy of the term equality. She writes “[t]here can be no abstract all-purpose definition of equality that fits all times and places.”¹⁶⁷ Instead she says the focus of equality doctrine should be on whether gender classifications further gender-based disadvantages and this, she argues, requires more, not less, attention to community norms (i.e., private biases).¹⁶⁸ Robert Post writes that

[i]t is . . . implausible to read Title VII as mandating that gender conventions be obliterated [We should not be required] to imagine a world of sexless individuals, but . . . [should] instead . . . explore the precise ways in which Title VII should alter the norms by which sex is given social meaning.¹⁶⁹

Kimberly Yuracko suggests that courts use a “power-access approach” that “makes actionable those, and only those, types of sex-specific trait discrimination that arise out of gender norms and gender scripts that reinforce sex hierarchy in the workplace.”¹⁷⁰ She goes on to argue that if courts were to prohibit all forms of gender role distinction and force a convergence “toward an androgynous mean,”

(“We are in danger of substituting for prohibited sex discrimination a still acceptable gender discrimination . . .”).

¹⁶⁴ *Id.* at 7-8.

¹⁶⁵ Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 401 (2001).

¹⁶⁶ Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 95 (1995).

¹⁶⁷ Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms and Workplace Discrimination*, 92 MICH. L. REV. 2541, 2579 (1994).

¹⁶⁸ *Id.* at 2545 (“Because what constitutes disadvantage, as well as what it takes to reduce that disadvantage and even what reducing that disadvantage means, can only be determined in context . . . I conclude that the evaluation of equality claims under Title VII requires more, not less, attention to community norms.”).

¹⁶⁹ Robert Post, *Prejudicial Appearances, The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 20 (2000) (emphasis added).

¹⁷⁰ Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 172 (2004).

women would likely be disadvantaged because they would be forced into a male norm that would inhibit their freedom without materially increasing anyone else's.¹⁷¹

Gendered dress codes serve no other purpose than to accommodate social norms, that is, private biases, and thereby reify and reproduce gender. If, as the current law and numerous commentators seem to suggest, dress codes do not necessarily offend equality principles, some institutional reification of gender must be permissible. Perhaps marriage serves a comparable purpose.

To be sure, there is Title VII jurisprudence that seems to cabin the grooming cases. In *Price Waterhouse v. Hopkins*¹⁷² the Supreme Court suggested that Title VII prohibited all sex stereotyping by employers.¹⁷³ The plaintiff in that case, Mary Ann Hopkins, was denied partnership at a prestigious accounting firm because, the trial court found, partners at the firm disapproved of her masculine behavior.¹⁷⁴

It seems unlikely that in protecting Mary Ann Hopkins' right to mimic the aggressive style of the men who had made partner at Price-Waterhouse, the Supreme Court meant to rid the workplace of all manifestations of gender conformity.¹⁷⁵ The Ninth Circuit, in *Jespersen v. Harrah*,¹⁷⁶ found reasonable

¹⁷¹ *Id.* at 202-03.

The employer who does not want to employ men in bob haircuts will simply not make this an option under its dress code, even if it does not mind women wearing them. The result is not more options for men to gender bend but fewer traditionally gender-conforming options for women.

Consider also the case of Shannon Faulkner, who did not want to get a buzz cut when she entered The Citadel precisely because the deleterious effects of getting a buzz cut would be much greater on her (given socially accepted gender roles) than it would be on men. See Valorie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 BERKELEY WOMEN'S L.J. 68, 70-71 (2002) At a preliminary injunction hearing, the district court refused to enjoin the buzz cut and Faulkner got one, shortly before she withdrew from The Citadel because the harassment she received once there was overwhelming. See *id.* Presumably, the gender-role eliminators, see *supra* notes 163-166, would approve of the district court's decision, but others, see *supra* notes 167-170, might want a more nuanced approach.

¹⁷² *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* *Stender v. Lucky Stores, Inc.*, 780 F.Supp. 1302 (N.D. Cal. 1992).

¹⁷³ "We are beyond the day when an employer can evaluate employees by assuming or insisting they match the stereotypes associated with their group." *Price Waterhouse*, 490 U.S. at 251.

¹⁷⁴ For a more detailed description of the *Price Waterhouse* case, see Yuracko, *supra* note 170, at 180.

¹⁷⁵ *Id.* at 171, 188-202 (suggesting that *Price Waterhouse* is better thought of "as an articulation of a trait equality requirement" and going on to explore the problems with a trait equality approach).

¹⁷⁶ *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104 (9th Cir. 2006). For a discussion of this case, see *supra* text accompanying notes 158-160.

gendered grooming requirements to be consistent with *Price-Waterhouse*.¹⁷⁷ The problem in *Price-Waterhouse*, according to the Ninth Circuit, was that gender conformity would have undermined Mary Ann Hopkins' attempt to make partner.¹⁷⁸ In contrast, wearing make-up would not have interfered with Darlene Jespersen's ability to bartend.¹⁷⁹

The Sixth Circuit in *Smith v. City of Salem*,¹⁸⁰ a case involving a male-to-female transsexual, seems to have reasoned differently, stating "discrimination against a plaintiff who is transsexual—and therefore fails to act and/or identify with his or her gender—is no different from discrimination directed against Mary Ann Hopkins."¹⁸¹ The full meaning of *Smith* is indeterminate though. Smith's superiors attempted to fire him only after they learned of his intention to complete a male to female physical transformation. It may have been his intention to actually become a woman, not stay a man who tended to act in a feminine manner, that triggered the employment action.¹⁸² And there is something deeply ironic about prohibiting employers from demanding some conformity to gender stereotypes in the name of protecting a plaintiff who desperately wanted to conform to a gender stereotype—albeit one different than the one society had originally assigned to him.

As scholar Anna Kirkland observes after discussing these cases "gender stereotyping as a legal idea lives quite comfortably with inconsistency."¹⁸³ The simple point to be emphasized in the SSM context is that anti-discrimination law, as articulated in Title VII jurisprudence, sends mixed messages about the extent to which the law is willing to condone gender stereotypes and mandatory gender conformity.

B. Privacy and Sex

The other contexts in which Title VII condones gender distinctions have to do with customer preferences that are explicitly linked to customer privacy concerns or sexual preferences. Thus, nursing homes, hospital delivery room nursing staff, and agencies that hire nursing aides or others who are likely to have physical contact with clients (or see them nude), can discriminate on the basis of sex.¹⁸⁴ In

¹⁷⁷ *Id.* at 1109-11.

¹⁷⁸ *Id.* at 1110.

¹⁷⁹ *Id.*

¹⁸⁰ *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004).

¹⁸¹ *Id.* at 575.

¹⁸² Management may have simply been prejudiced against transsexuals. *Id.* at 569.

¹⁸³ ANNA KIRKLAND, *FAT RIGHTS: DILEMMAS OF DIFFERENCE AND PERSONHOOD* 89 (N.Y. Univ. Press 2008).

¹⁸⁴ See, e.g., *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 133 (3d Cir. 1996) (permitting sex to be a bona fide occupational qualification (BFOQ) for psychiatric hospital staff treating emotionally disturbed and sexually abused children and adolescents, noting that because "[c]hild patients often [had to be] accompanied to the bathroom, and sometimes . . . bathed"); *Jones v. Hinds Gen. Hosp.*, 666 F. Supp. 933, 935 (S.D. Miss.

explaining these cases, Robert Post suggests that courts may take sex into consideration, especially in some contexts, because “[g]ender is highly salient in matters of privacy. The sex of the person by whom we are seen or touched normally matters very much to us.”¹⁸⁵ Whatever our commitments to gender equality, they do not necessarily trump the values we place on protecting personal privacy preferences.¹⁸⁶

Commentators and courts have also suggested that jobs can be segregated on the basis of sex when sexual titillation goes to the essence of the service provided, be it burlesque, lap dancing or Playboy Bunny service.¹⁸⁷ Courts are less willing to suspend equality principles in the sexual titillation context than in the privacy context, but the more explicitly sexual the business, the more acceptable the sex discrimination. Most commentators concede that being a woman is a bona fide occupational qualification (BFOQ) for working in a strip club, at least one that caters to men.¹⁸⁸

Two things are worth noting about the privacy and sexual titillation cases. First, in neither context would the racial preferences of consumers be allowed to trump. No one suggests that an obstetric patient could request a white nurse over an African-American nurse, even though she can request a female nurse over a

1987) (The job duties of male and female nurse assistants and male orderlies often require that such employee view or touch the private parts of their patients.); *Fesel v. Masonic Home of Del., Inc.*, 447 F. Supp. 1346, 1352-53 (D.C. Del. 1978) (“The Home has the responsibility of providing twenty-four hour supervision and care of its elderly guests. Fulfillment of that responsibility necessitates intimate personal care including dressing, bathing, toilet assistance, geriatric pad changes and catheter care. Each of these functions involves a personal touching . . .”). *But see Olsen v. Marriott Int’l, Inc.*, 75 F. Supp. 2d 1052, 1068 (D. Ariz. 1999) (finding against using gender as a BFOQ for a massage therapist position).

¹⁸⁵ Post, *supra* note 169, at 26.

¹⁸⁶ Although, Kimberly Yuracko points out that allowing privacy concerns to trump equality principles in the privacy cases is not likely to have a disparate impact on one particular sex. Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 147, 181 (2004). “[W]hile women may be denied certain jobs to protect men’s privacy, men will be denied the same range of jobs to protect women’s privacy.” *Id.*

¹⁸⁷ See ARTHUR LARSON & LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 43.02(2) (1992) (citing burlesque, go-go dancers and chorus line kicker as jobs for which authenticity requires distinguishing on the basis of sex). Although changing norms in the last thirty years have made Playboy Clubs all but obsolete, when Title VII first passed, New York administrative commissions found it permissible for the Clubs to discriminate in hiring Bunnies. *St. Cross v. Playboy Club*, Case No. CSF 22618-70, Appeal No. 773 (N.Y. Hum. Rts. Appeal Board Dec. 17, 1971); *Weber v. Playboy Club*, Case No. CSF 22619-70, Appeal No. 774 (N.Y. Hum. Rts. Appeal Board Dec. 17, 1971).

¹⁸⁸ Title VII allows discrimination in cases where being a particular sex is considered a necessary part of the job. See Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 205-06 (1992) (citing LARSON & LARSON, *supra* note 187, at § 15.10) (discussing strip clubs).

male one. Comparably, the Hefner organization would not be allowed to discriminate on the basis of race in hiring Playboy Bunnies. Second, recall that this is an article about marriage. Whatever else marriage is, it is an institution that people strongly associate with privacy and sex, yet those are areas in which the doctrine suggests that equality interests may be trumped.

C. Constitutional Gender Equality

As suggested above, notwithstanding the Title VII jurisprudence accommodating gender roles, the Supreme Court has repeatedly struck down as unconstitutional sex-based classifications that were rooted in provider/caretaker stereotypes. The armed services cannot assume that wives of service men are dependent on their spouses if they do not make the same assumption about husbands of service women.¹⁸⁹ The Social Security Administration cannot differentiate between widows and widowers when awarding survivor benefits.¹⁹⁰ All statutes authorizing courts to order alimony or spousal maintenance payments must be sex neutral.¹⁹¹ States cannot distinguish between male and female children's entitlement to child support.¹⁹²

Not that long after these cases were decided, Professor Wendy Williams suggested that the Supreme Court struck down so many of these sex-based distinctions so quickly in the 1970s because it "recognize[d] that the real world outside the courtroom had already changed. Women were in fact no longer chiefly housewife-dependents. The family wage no longer existed"¹⁹³ Williams was certainly right that the real world had changed by the early 1970s, but that change, to the extent it has continued, has not resulted in the elimination of gender roles. Women may not be as dependent on men as they were in 1965, but as a relative matter, most married women are still dependent on their husbands. The marital home may not produce the same gender roles as it did in 1965, but the sociological data strongly suggest that it still produces gender. And, importantly, many men and women are content with the way in which marriage does so.

If the Supreme Court were to look at the real world now and realize that gender roles have proved so remarkably resilient, would that be relevant constitutionally? Would marriage's role in reifying gender roles require a degendering of marriage or an acceptance of its gendered nature? The constitutional jurisprudence regarding sex-based classifications in other areas does not necessarily render a clear answer.

¹⁸⁹ See *Frontiero v. Richardson*, 411 U.S. 677, 679 (1973).

¹⁹⁰ *Weinberger v. Wiesenfeld*, 420 U.S. 636, 639 (1975); *Califano v. Goldfarb*, 430 U.S. 199, 202 (1977).

¹⁹¹ *Orr v. Orr*, 440 U.S. 268, 281 (1979).

¹⁹² *Stanton v. Stanton*, 421 U.S. 7, 8 (1975).

¹⁹³ Williams, *supra* note 17, at 155 (citing U.S. Dep't of Labor, Bureau of Labor Statistics News 1 (Nov. 15, 1981)). (Williams' article was published in 1992, but she started working on it in 1982, a date closer to when the sex discrimination cases were decided than to the present.).

First, the initial question that the Supreme Court asks when it is addressing questions of whether a certain statute or policy violates the Constitution's prohibition on sex discrimination is whether men and women are similarly situated. The Equal Protection Clause requires that men and women be treated comparably only if they are similarly situated.¹⁹⁴ Sometimes they are not. Rules that assign citizenship differently based on whether it is a foreign-born child's mother or father who is a United States citizen do not violate the Equal Protection clause because mothers and fathers are not similarly situated with regard to parenthood of newborns.¹⁹⁵ Comparably, states are allowed to have gendered rules with regard to relinquishing one's parental rights (usually in the context of adoption) because, unless fathers have developed a relationship with their children, they are not similarly situated to mothers, who have a relationship by virtue of pregnancy.¹⁹⁶ Thus, the constitutional question for SSM may be whether same-sex couples are similarly situated to opposite-sex couples. If one of the primary purposes of marriage is to help produce and reify gender identity, then same-sex couples are not similarly situated to opposite-sex couples with regard to marriage. Indeed, the existence of SSM may undermine the purpose of marriage by making gender role construction more a matter of personal choice than socially accepted norms.

In other contexts, the Supreme Court has suggested (as did some of the courts in the grooming cases) that gender discrimination is constitutional as long as it is not the result of rank, non-contemplative stereotyping. Thus, in *Rostker v. Goldberg*, the Court upheld a compulsory draft registration system for men because "Congress did not act 'unthinkingly' or 'reflexively'"¹⁹⁷ "[T]he decision to exempt women from registration was not the 'accidental by-product of a traditional way of thinking about females.'"¹⁹⁸ "The question of registering women for the draft . . . received considerable national attention and was the subject of wide-ranging public debate"¹⁹⁹ Comparably, whatever the origins of prohibitions on SSM (which may well have been reflexive and unthinking), gay

¹⁹⁴ See *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) (longer periods for promotion acceptable for women because men and women were "not similarly situated with respect to opportunities for professional service.").

¹⁹⁵ *Nguyen v. INS*, 533 U.S. 53, 54 (2001) (son of Vietnamese mother and American father not a citizen even though son of Vietnamese father and American mother would be).

¹⁹⁶ Cf. *Caban v. Mohammed*, 441 U.S. 380, 392 (1979) (biological father could block adoption of child by mother's husband because biological father and mother had shared parenting duties once the children are born), with *Lehr v. Robertson*, 463 U.S. 248, 250 (1983) (biological father of child could not block the adoption by mother's husband because biological father had not developed a relationship with child).

¹⁹⁷ *Rostker v. Goldberg*, 453 U.S. 57, 72 (1981); see also *Craft v. Metromedia*, 766 F.2d 1205, 1216 (8th Cir. 1985) (suggesting Title VII's primary thrust was only to "discard *outmoded* sex stereotypes") (emphasis added) (quoting *Knott v. Mo. Pac. R.R.*, 527 F.2d 1249, 1251 (8th Cir. 1975)).

¹⁹⁸ *Rostker*, 453 U.S. at 74 (quoting *Califano v. Webster*, 430 U.S. 313, 320 (1977)).

¹⁹⁹ *Id.* at 72.

marriage has now been the subject of wide-ranging political dialogue. Few states that continue to ban SSM are doing so as an “accidental by-product of traditional ways” of thinking about marriage. They are doing so in the midst of a vigorous debate about what marriage means.²⁰⁰ Most of the states that prohibit SSM have had recent referenda on the issue.²⁰¹ If the social meaning of marriage is contested in an open and deliberative way, then a discrimination doctrine aimed at prohibiting reflexive stereotypes may not require that marriage be defined in one way or another.

Ironically, while those states that have had referenda on SSM may shield themselves from claims of non-contemplative stereotyping, they open themselves up to claims of animus against gays and lesbians. The recent attempts to codify marriage as heterosexual were born in a movement in which open antipathy to gays and lesbians was commonplace.²⁰²

A finding of animus makes the analogy to race more salient, thus bolstering the claim that separate cannot be equal and the level of scrutiny a court is likely to use in evaluating marriage statutes. Still, given how scholarship has argued that discrimination against gays and lesbians is sex discrimination,²⁰³ and given the lack of animus in Story #6, one would expect courts to exert more effort in explaining why race and not sex discrimination doctrine should control. As Professor Stephen Clark has succinctly summarized, “classifications based on sex are not inherently suspect”²⁰⁴ Classifications based on race are. To the extent that the Supreme Courts in Iowa, Connecticut and California are saying that classifications based on sexual orientation are inherently suspect, one would think they would need to explain why discrimination on the basis of sexual orientation is more like race discrimination than sex discrimination.

The strongest and most helpful gender discrimination case for SSM advocates is *United States v. Virginia*²⁰⁵ (“VMI”). In that case, the Supreme Court ruled that the Virginia Military Institute’s interest in keeping an environment in which “[p]hysical rigor, mental stress, absolute equality of treatment, [and] absence of privacy . . .” were stressed—an environment that was much easier to maintain with an all-male population—could not justify excluding women.²⁰⁶ The Court ruled

²⁰⁰ See Human Rights Campaign, Statewide Marriage Prohibitions, http://www.hrc.org/documents/marriage_prohibitions.pdf (last visited Nov. 17, 2008) (map of the U.S. showing which states have a constitutional amendment, or a state law limiting marriage to one man and one woman).

²⁰¹ See *id.*

²⁰² See *supra* notes 50-52 and accompanying text.

²⁰³ See *supra* note 16 (articles suggesting that discrimination on the basis of sexual orientation is sex discrimination).

²⁰⁴ Stephen Clark, *Same-Sex but Equal: Reformulating the Miscegenation Analogy*, 34 *RUTGERS L.J.* 107, 165 (2002).

²⁰⁵ *United States v. Virginia*, 518 U.S. 515 (1996).

²⁰⁶ *Id.* at 522.

that the state must proffer an “exceedingly persuasive justification” for excluding women from this bastion of masculinity.²⁰⁷ Virginia could not meet this burden.

Under one reading of VMI, the Supreme Court held that the Equal Protection Clause ensured women access to state-sponsored environments that promote and reify masculinity. Under this reading, same-sex couples should be entitled to enter into the institution of marriage because those couples have a right to access state-sponsored environments that promote gender roles even if those roles do not map onto a particular person’s biological sex. What this account fails to consider though is how readily the Supreme Court conceded that equality principles required nothing more than separate but equal accommodations.

The acceptance of separate but equal standards is most obvious in the discussion that occupied most of the VMI Court’s opinion, to wit, whether the alternative program that Virginia had made available to women interested in a military-like education provided equal opportunity. In response to early losses in the litigation, Virginia had developed a program—Virginia Women’s Institute for Leadership (“VWIL”)—at Mary Baldwin College, which offered an all-female option for women who wanted a militaristic experience.

Justice Ginsburg’s opinion details how VWIL did not offer anywhere near as rigorous military training as VMI did. The women students did not need to “live together . . . eat meals together . . .,” or experience the “spartan living arrangements designed to foster an ‘egalitarian ethic’”.²⁰⁸ Moreover, Mary Baldwin College had vastly inferior sports facilities, a faculty that held “significantly fewer Ph.D.s, and receive[d] substantially lower salaries,” and “no courses in engineering or . . . advanced math and physics . . .”²⁰⁹ In short, the Court readily found that separate was not equal because the separate schools were funded and supported at completely different levels.²¹⁰

The Court’s discussion in VMI is distinctly different than the Court’s discussion forty-two years earlier in *Brown v. Board of Education*. In *Brown* the Court wrote “there are findings below that the Negro and white schools involved have been equalized, or are being equalized with respect to . . . ‘tangible’ factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors”²¹¹ Instead, the court focused on the “hearts and minds” of the African-American children and on the psychological harm they were likely to suffer because “[t]o separate them . . . solely because of their race generates a feeling of inferiority.”²¹²

Separating genders is not usually so interpreted. Unisex bathrooms are rarer than gendered ones. Neither women nor men walk through a department store

²⁰⁷ *Id.* at 524.

²⁰⁸ *Id.* at 548 (quoting *United States v. Commonwealth*, 766 F. Supp. 1407, 1424 (W.D. Va. 1991)).

²⁰⁹ *Id.* at 551-52.

²¹⁰ *Id.*

²¹¹ *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 492 (1954) (citing *Brown v. Bd. of Educ. of Topeka*, 98 F. Supp. 797, 798 (D.C. Kan. 1951)).

²¹² *Id.*

feeling inferior because women's clothes are in one place and the men's clothes in another.²¹³ In VMI, the Supreme Court gave no indication that the VWIL option was inherently unequal because it was separate.²¹⁴ If a fully funded, adequately staffed Mary Baldwin College facility would have passed constitutional muster, then VMI cannot be read to hold that women are necessarily entitled to be alternatively gendered.²¹⁵

There are further indications of slippery notions of equality in VMI. When explaining that VMI was obligated to open its programs to women the Court dropped a curious footnote: "admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other in living arrangements, and to adjust aspects of physical training programs."²¹⁶ Why would equality doctrine *undoubtedly* require this? Shouldn't equality doctrine prevent such an accommodation? Is this another example of privacy trumping equality? Presumably, the Court was concerned about women's safety,²¹⁷ but that concern leads one to conclude that equality requires protecting women from violent masculinity even as equality entitles women to it.²¹⁸

²¹³ The degree of outrage stemming from gender distinction appears to be contextual. Many people are upset when children's toy stores segregate toys on the basis of gender even if they are not upset by the segregation of adult apparel. Perhaps this is because people recognize that adult women and adult men have "real" physical differences that necessitate different clothing styles, while boy and girl children are thought to have fewer "real" differences. But undoubtedly, the difference in style between men and women's clothing vastly exceeds any "real" difference in body type and many, many parents watch in amazement as boy and girl children seem to demonstrate "real" differences.

²¹⁴ See Clark, *supra* note 204, at 166-67 ("[S]ex equality law has no analogue to *Brown v. Board of Education* or any parallel proposition that merely drawing a sex-based line is inherently unequal or necessarily stamps one sex or the other with a badge of inferiority.").

²¹⁵ Chief Justice Rehnquist concurred separately to show his support for single-sex education and to demonstrate that Virginia could solve the dilemma by providing a fully comparable facility for women. See *United States v. Virginia*, 518 U.S. at 564-66 (Rehnquist, C.J., concurring). Apparently, Chief Judge Rehnquist was unsure whether the majority would ever accept a separate but equal facility. But the majority spends most of its analysis demonstrating how the separate facility is inferior, not explaining—as the *Brown* court did—why a separate facility must be inferior.

²¹⁶ *Id.* at 550, n.19.

²¹⁷ The level of sexual assault and harassment at some military academies has proven to be astounding. See Vojdik, *supra* note 171, at 101-02.

²¹⁸ It is worth noting that the masculinity usually reified at military academies is very different than the masculinity that marriage is supposed to produce. Indeed, believers in the inherently gendered nature of marriage might argue that marriage is necessary precisely because it provides for men a much more caring, cooperative and responsible masculine template. Military academies are infamous for their misogynistic norms. Pursuant to those norms, women are seen as weak; if men are to interact with them at all it is to abuse or rape them. See Vojdik, *supra* note 171, at 68-69.

Modern marriage suggests something very different about male and female interactions. According to the gender norms of marriage, men and women are different but

A rich conception of gender equality can reconcile the apparent contradiction of women being entitled to both protection from and access to masculinity norms. Arguably, women must be granted entrance to those institutions that have afforded men power precisely because men have gained that power at women's expense. The process of integration into those institutions will be dangerous and difficult. Therefore, women must be protected from private individuals who will seek to thwart their access to power. Women's access to power is what equality doctrine protects.

This richer conception of equality is not necessarily applicable in the SSM context. What is it that equality doctrine will protect for same-sex couples? Is it the right to be alternatively gendered or the right to degender marriage? The benefits that opposite-sex couples gain in marriage have not necessarily come at same-sex couples' expense. For sure, as the California Supreme Court recognized, there is a respect and dignity that accompanies most opposite-sex marriages and same-sex couples have been denied that respect and dignity, but so has everyone who does not get married. Many marriage critics have argued that the respect and dignity that accompanies married people has come mostly at the expense of single people.²¹⁹

The accolades that accompany marriage may also be a function of the social praise that accompanies living into one's socially programmed gender identity. Marriage is much more about the absence of choice than the exercise of it. The purpose of opposite-sex marriage may be to make good men and women, with responsible masculine and feminine characteristics. This is only possible (according to Story #6) if the individuals are *not* free to choose their own gender identity. Entering marriage is seen as a rite of passage because it involves accepting the more restrictive world of roles. Living within those roles is celebrated as a sign of maturity.

that difference is to be respected. One's job is to love the other, not denigrate it. One's responsibility is to care for and nurture the other and to let the other care for and nurture you. In historical context, or in the context of a broad understanding of how gender reflects power, gendered marriage may just be misogyny more pleasingly dressed up as a separate-but-equal regime, but many people would reject the idea of gendered marriage as misogynistic, even while accepting that the masculinity of the military academies is misogynistic. Those social understandings of gender roles and how they operate may matter in political and legal discussions of who is entitled to marriage and why. For many, gendered marriage offers a non-misogynistic alternative for masculine identity and therefore gendered marriage has tremendous social value. And, equality doctrine (sometimes) suggests that as long as gender norms are benign, they are acceptable.

²¹⁹ See Rachel F. Moran, *How Second-Wave Feminist Feminism Forgot the Single Woman*, 33 HOFSTRA L. REV. 223 *passim* (2004) (exploring the advantages of non-married life and questioning why the law should support marriage); Laura Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, *passim* (2007) (exploring how "friends might serve many of the functions that the law reserves for family."); Katherine M. Franke, *Sexuality and Marriage: The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 244-45 (2006) (criticizing the "lesbigay" movements' adoption of marriage norms at the expense of celebrating sexuality unbound by marriage).

In his very thoughtful explication of the miscegenation analogy in the SSM context, Stephen Clark argues that because *Brown* has no analogue in sex discrimination doctrine,²²⁰ the determination of whether SSM restrictions are sex discrimination must be based on pre-*Brown* discrimination doctrine, particularly *Sweatt v. Painter*,²²¹ from which the majority quoted liberally in *VMI*.²²² The operative question that emerges from the pre-*Brown* era is whether a classification affords different groups “substantially equal” opportunities.²²³ Clark concludes that SSM bans and even civil union options do not afford gay individuals substantially equal opportunities.

Critical to Clark’s analysis is his observation that equal protection rights are “personal rights” that ensure that individuals must be entitled to opportunities that are substantially equal to the opportunities that other individuals (of different races or sexes) enjoy.²²⁴ But in the marriage context, they are individual rights to a legal status that gets much of its import and significance, and therefore, much of its constitutional stature, from social norms. If, given the gendered nature of modern marriage, marriages between same-sex partners will not be experienced as substantially equal or the same as marriages between opposite-sex partners, does that mean that same-sex couples do not have a right to them? Are same-sex couples even asking for a right to the same institution? Once again, the legal analysis of the SSM question depends on the story one tells about marriage.

Whether consciously or not, the reason the courts of California, Connecticut and Iowa may have latched onto race, not sex, discrimination doctrine is that there is much less ambivalence about the meaning of equality in the race context. Separate is not equal when it comes to race and the law does not accommodate racist biases. If prohibiting SSM is discrimination against gays and lesbians because they are gays and lesbians, and sexual orientation is a suspect classification like race, then courts can avoid the ambivalent nature of sex equality doctrine and at least elide the hard task of defining marriage. Still, given the well-known argument that sexual orientation discrimination is sex discrimination²²⁵ given how central gender has always been to marriage, and given how a gendered understanding of marriage undermines the applicability of the racial analogy, it is a bit surprising that the predominant analogy has been to race. At a minimum, one would expect courts to explain why the more accommodating approach to gender discrimination should not be adopted in equality discussions of SSM.

²²⁰ See Clark, *supra* note 204, at 165 (“[c]lassifications based on sex are not inherently suspect.”).

²²¹ See *Sweatt v. Painter*, 339 U.S. 629 (1950).

²²² Clark, *supra* note 204, at 173-74.

²²³ *Id.* at 174.

²²⁴ Clark, *supra* note 204, at 178-79 (citing *Shelley v. Kramer*, 334 U.S. 1, 22 (1948)).

²²⁵ See sources cited, *supra* note 16.

D. The Law of Marriage

Finally, a note on the irony of using equality doctrine to secure rights to marriage. Much of the law of marriage, and particularly the law of marriage dissolution exists because gender roles exist. Arguably, the reason marital property regimes assume that all income and property earned during the marriage should be split equally, and the reason spousal maintenance regimes require one spouse to support the other after the marriage is over, is because of the strong likelihood that spouses will be dissimilarly situated. The law of marital dissolution is designed to treat “unalikes alike.”²²⁶ The more similarly situated the spouses are, the less we need a law of marital dissolution.

Few people advocate dispensing with marital property or maintenance rules. Treating unalikes as comparably entitled at the end of a marriage strikes most people as justified, necessary, and fair, but it has little to do with traditional equality doctrine.²²⁷ This does not preclude plaintiffs from making equality claims to enter the institution,²²⁸ but it does shed light on how and why equality arguments may seem inapt.

What is it that SSM couples are being deprived of if the purpose of marriage is to make sure that women get compensated for the unpaid work that they do, and that men retain responsibilities for the dependencies they have enabled? Won't most same-sex couples look much more similarly situated than most husbands and wives, and might that realization undermine the family law rules that have protected women because they are not similarly situated? The modern trend—even in non-community property states—to distribute property equally at divorce and the modern defense of spousal maintenance almost always makes explicit reference to the need to protect women.²²⁹ Will the arguments for joint property and spousal maintenance seem as compelling if the dependent role is chosen in

²²⁶ Aristotle famously described equality as treating likes alike and unalikes unlike. See ARISTOTLE, *ETHICA NICOMACHEA* v. 3 1121a-1131b, 113 (J.L. Ackrill & J.O. Urmson eds & W. Ross trans., 1980) (“this is the origin of quarrels and complaints – when either equals have and are awarded unequal shares, or unequals equal shares.”) For more discussion of Aristotle’s influence on the law of gender equality, see CATHARINE MACKINNON, *SEX EQUALITY* 4-10 (2001).

²²⁷ See June Carbone, *The Futility of Coherence: The ALI’s Principles of the Law of Family Dissolution, Compensatory Spousal Payments*, 4 J.L. & FAM. STUD. 43, 78 (2002); Ann Laquer Estin, *Maintenance, Alimony and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721 *passim* (1993); Joan Williams, *Is Coverture Dead, Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227 *passim* (1994); Jana Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103 *passim* (1989) (all arguing that maintenance is necessary as a way of compensating women for their unpaid family work).

²²⁸ *Loving v. Virginia*, 388 U.S. 1, 2 (1967), the case in which the Supreme Court struck down miscegenation laws is an example of when an equality claim could be made in a way that would have no bearing on the law of marital dissolution.

²²⁹ See sources cited, *supra* note 227.

defiance of social norms instead of in compliance with them? Will we need more proof from gay couples than we do from straight ones that their marital roles were explicitly negotiated such that one person promised to provide and the other promised to do more unpaid work? Or, will we assume that it is marriage, not gender, that leads to role specialization? Why, after all, should the law condone marital roles given their tendency to leave so many people so vulnerable?

Infusing equality principles into the law of marriage leads to a host of these disruptive questions. People eager to understand what marriage is, how it functions, and whether it is worth the acclaim it receives may welcome these questions, but proponents of SSM cannot realistically assert that the questions are not disruptive. Sorting through the answers to these questions might well change marriage as we know it.

V. ANOTHER STORY

Story #6 accurately describes the way marriage functions in many married people's lives. But it need not represent a marital ideal and its descriptive accuracy does not preclude people from believing that the essence of marriage is about something other than its gendering function. Marriage may be a gender factory, but it does not have to be. And, if a competing story of marriage can emerge as dominant, the descriptive accuracy of Story #6 becomes less important.

In this last Part, I offer another story of marriage, one that incorporates aspects of many of the previous marriage narratives, one that can be reconciled with the doctrine that suggests that marriage is a fundamental right, yet one that would compel states to license SSM. However, it is a discourse that challenges many modern understandings of what marriage should be.

A. *Story #7*

Marriage marks the creation of a legal family. That family serves as a critical source of identity for its members. The law assumes and facilitates both material and emotional interdependence within that family in order to make it more stable and efficient. Material interdependence arises from the roles that are assumed when the parties specialize in different kinds of marital contributions, and from the reliance that develops over time in a relationship marked by sharing. Emotional interdependence—which usually includes a sexual relationship—arises from the sense of connection that leads the parties to want to marry. One of the main purposes of marriage is to raise children.

1. Marriage as a Fundamental Right and an Equality Right

If Story #7 describes marriage, gays and lesbians should have a right to it both because marriage is a fundamental right and because gays and lesbians are similarly situated to straight couples with regard to marriage. Just as Story #1 suggested, the state has an interest in defining and maintaining the legal institution

of marriage because of the way in which legal marriage promotes stability and efficiency. The state facilitates marital interdependence by providing the rights and obligations that bind the parties to each other and enable marital role development. As various courts and legislatures have found, there is no good reason to deny same-sex couples access to these rights and obligations.²³⁰

As Story #2 suggested, because of the role marriage plays in shaping peoples' identities and because of the expressive and constitutive benefits that flow from marriage, marriage cannot be viewed as only this bundle of rights and obligations. It is a lasting social institution, accompanied by a rich set of norms and expectations that both restrict and enrich its participants. These restrictions and expectations have traditionally included, *but need not include* gender role conformity. The enrichment that marriage provides does not need to come from living into a responsible masculinity or femininity (Story #6), but can come from living into a responsible role as spouse.

As with the traditional masculine and feminine roles, the role of spouse requires a relinquishment of self, a doing for others, and a conformity with external norms that involves subjugating autonomy and self-interest.²³¹ But also, as with the traditional masculine and feminine roles, fulfilling the role of spouse allows for transcendence of self and a realization of a new identity.²³² Thus, marriage involves a kind of self-realization that stems from connection, not gender.²³³ Through this connection, which is re-inforced by both social and legal norms, married people become something new. If the state is to deny people the ability to tap into this rich set of norms in order to express and constitute themselves through

²³⁰ See *Baker v. Vermont*, 744 A.2d 864, 911 (Vt. 1999); *Lewis v. Harris*, 908 A.2d 196 218 (N.J. 2006), (requiring the states to provide Civil Union status to gay and lesbian couples). The state legislatures of New Hampshire, Connecticut, and California have also granted Civil Union status based on this reasoning. See Lambda Legal, *Status of Same-Sex Relationships Nationwide*, Oct. 5, 2009, <http://lambdalegal.org/nationwide-status-same-sex-relationships.html>, providing a summary of state legislation giving same-sex couples relationship status.

²³¹ See Regan, *supra* note 101, at 2088-89, and Bartlett, *supra* note 101, at 301 (discussing the ways in which accepting the responsibility of certain roles can be a sign of growth and ennoblement.).

²³² As Milton Regan writes, "spouses . . . don't simply help each other construct separate individual identities . . . [T]hey participate in the creation of a shared identity." MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 94 (1993); see also Kenneth Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 636 (1980) ("our intimate associations are powerful influences over the development of our personalities."); GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* 81 (1993) (discussing loyalty to one's spouse as an instance where the self and other blend together).

²³³ Objections relations theory has long taught us that human beings have very strong desires for strong emotional attachments. "People are constructed in such a fashion that they are inevitably and powerfully drawn together . . . wired for intense and persistent involvements with one another." STEPHEN A. MITCHELL, *RELATIONAL CONCEPTS IN PSYCHOANALYSIS: AN INTEGRATION* 21 (Harvard Univ. Press 1988).

marriage, it must have a very good reason. This is why marriage is a fundamental right.

The legal rights and obligations that accompany marriage facilitate interdependence and commitment, but they do not define the social meaning of spouse. That social meaning comes from the social norms that accompany state-sponsored marriage. Civil Unions or Domestic Partnership may not trigger the same set of norms and, thus, they may not demand of their participants the same kinds of commitments.²³⁴ The problem is not that separate or different cannot be equal, but that alternative marriage forms are likely to be materially different because of the different social norms that will accompany them. It is those social norms that make marriage a fundamental right because they are what give marriage its expressive and constitutive qualities.

In order for same-sex couples to be entitled to that fundamental right, the social meaning of marriage must have more to do with being a spouse, than being a husband or wife. If marriage is about making two spouses, not making a husband and wife, same-sex and straight couples are similarly situated with regard to their ability to achieve that spousal status. Therefore, same-sex couples have an equality right to marriage.

2. *Marriage and Children*

Marriage also often produces children. It can produce them by having one of the spouse's get pregnant; it can produce them by adopting them; it can produce them by entering into some form of reproductive technology contract. My use of the impersonal pronoun here is deliberate. The law used to think of marriage itself as producing children. Custody jurisdiction at divorce extended to "children of the marriage."²³⁵ Courts in intestacy proceedings routinely referred to "children of the marriage."²³⁶ Today, we tend to think of parents and spouses separately. Individuals produce children; marriages do not. But marriage retains more importance as an institution when the law gives it credit for producing children and same-sex parents have much to gain in giving that credit to marriage.

The opponents of SSM are surely right in Stories #4 and #5 when they say that children have something to do with marriage. For many people, the desire for children probably motivates the decision to marry. And that makes sense. It may

²³⁴ Elizabeth Scott, *A World Without Marriage*, 41 FAM. L.Q. 537, 537 (2007) (questioning whether the social norms and expectations for marriage—commitment, fidelity, full emotional intimacy—will be retained for Civil Unions and Domestic Partnerships).

²³⁵ For a list of states that define custody jurisdiction as pertaining to "children of the marriage," see Bryce Levine, Note, *Divorce and the Modern Family: Providing In Loco Parentis Stepparents Standing to Sue for Custody of Their Stepchildren in a Dissolution Proceeding*, 25 HOFSTRA L. REV. 315, 336, n.149 (1996).

²³⁶ See *Cary v. Buxton*, 1793 WL 256, 5 (Va. 1793) ("father[']s intention to provide for all the children of the marriage . . ."); *Peyton v. Hallett*, 1 Cai. R. 363, n.(a) (interests of "children of the marriage" not affected.).

be for children's sake that we channel adults into the restrictive institution of marriage.

Critics to the left of the SSM movement have mocked the use of children in the SSM litigation as a transparent attempt to make same-sex couples look "normal."²³⁷ This same criticism of marriage dismisses it as inherently boring, sexually stifling, and autonomy-denying.²³⁸ Proponents of SSM may need to concede that marriage is all those things. But so is parenthood. For those who question why straight adults burden themselves with the restrictions of marriage, and why so many gay adults are expending so many resources so that they have the opportunity to burden themselves with the restrictions of marriage, it helps to remember children. The limited reliable data that we have on child-rearing suggests that children probably benefit from their parents' boredom and lack of autonomy, from the cabined sexuality, and from the stability and interdependence that marks marriage.²³⁹

Embracing the link between marriage and children is particularly important for many same-sex families. As discussed in Part III, traditionally, marriage determined parenthood, especially for fathers.²⁴⁰ Opponents of SSM are wrong when they suggest that traditional marriage ensures that children are raised by their biological parents. As Blackstone said, traditional marriage ensures that children have legal parents.²⁴¹ Marriage was never able to make the biological link secure. Instead, the person married to the woman who gave birth was the father.

The marital presumption has waned in importance as genetic science has made it increasingly easy to determine genetic parenthood. This has led to a wave of cases involving non-genetic parenthood. A divorcing woman can now reliably inform her soon-to-be-ex-husband that he is not the genetic father of "their" child, and then argue that he should be denied custody.²⁴² Divorcing men find out they

²³⁷ See Franke, *supra* note 219, at 239-40 (noting "the deployment of children as props that attest to our normalcy . . .").

²³⁸ *Id.* ("It's a tired argument by now that the problem with these staged spectacles [of gay couples looking 'normal'] . . . is that they are boring, though of course they are."); see also MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE*, 87-95 (Harvard Univ. Press 1999) (discussing how supporting SSM ignores the best principles of Stonewall, which included, "diversity in sexual and intimate relations" and "resistance to state sanctioned legitimacy of consensual sex.").

²³⁹ See Gennetian, et al., *supra* note 70, at 417; Ginther & Pollack, *supra* note 70, at 691; MCLANANAHAN & SANDEFUR, *supra* note 70, at 134.

²⁴⁰ See Baker, *supra* note 63, at 22-23 ("For most of western history, marriage, not blood, determined fatherhood. . . . A child born out of wedlock was *fillius nullius*, or child of nobody.").

²⁴¹ See Blackstone, *supra* note 62, at 443 ("the main end and design of marriage [is] to ascertain [parenthood]").

²⁴² See, e.g., *Matter of Marriage of Sleeper*, 929 P.2d 1028, 1030 (Or. Ct. App. 1996) (mother estopped from denying husband's paternity); *In re Marriage of Roberts*, 649 N.E.2d 1344, 1346 (Ill. 1995) (biological mother estopped from denying husband's paternity of the child when she represented to him that he was the father and, relying on that representation, he developed a relationship with the child.).

are not the genetic fathers and argue that they should not have to pay child support.²⁴³ Divorcing men find out they are not genetic fathers but still want parental rights.²⁴⁴

These cases have bred new doctrines involving equitable parenthood, de facto parenthood, and much more expansive visitation options for non-legal parents,²⁴⁵ but defining parenthood through marriage would render many of these doctrines unnecessary. Gay parents have benefited from these doctrines to a certain extent, but they would find much more protection in the traditional link between marriage and parenthood. If marriage defined parenthood, courts would not have to struggle nearly so much with these equitable and ill-defined doctrines.²⁴⁶ Courts would not need to look for parenting contracts or implicit intent to share parental rights between gay partners.²⁴⁷ More important, non-biological gay parents would have access to what non-biological straight parents have always been awarded—custody, not just visitation.²⁴⁸ Custodial rights and child support responsibilities would be part of the rights and obligation of marriage because children are a part of the definition of marriage.

A strong link between marriage and parenthood could also protect gay parents from the potential dangers involved in the increasingly strong call to make genetic parenthood more relevant. The United States is one of the few major industrialized countries that still allows anonymous gamete donation.²⁴⁹ Canada, the UK, and Sweden all require that children born through artificial insemination be given access to information that allows them to find their donor parents.²⁵⁰ This means

²⁴³ See, e.g., *Markov v. Markov*, 758 A.2d 75, 76 (Md. 2000) (husband who found out he was not the biological father still responsible for child support if biological father cannot be found); *M.H.B. v. H.T.B.*, 498 A.2d 775, 777 (N.J. 1985) (husband who found out he was not the father of third child of the marriage still responsible for child support).

²⁴⁴ See, e.g., *In re Marriage of Gallagher*, 539 N.W.2d 479 (Iowa 1995) (husband could seek custody of child even though he had found out he was not the genetic father); *In re Marriage of Roberts*, 694 NE2d at 1346 (same).

²⁴⁵ See *Baker*, *supra* note 63, at 31-35 (describing the variety of contexts in which courts have used equitable parent doctrines to provide visitation rights); AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* § 2.03(b)-(c) (2002) (recommending the adoption of the terms equitable parent and de facto parent).

²⁴⁶ There is often vigorous debate over the applicability of these doctrines. See the dissents in *Markov*, 758 A.2d at 84 (citing the dissent in *Knill v. Knill*, 510 A.2d 546, 552); *MHB*, 498 A.2d at 781, and *Gallagher*, 539 N.W.2d at 483.

²⁴⁷ See *E.N.O. v. L.M.M.* 711 N.E.2d 886, 891-92 (Mass. 1999); see generally *J.A.L. v. E.P.H.*, 682 A.2d 1314, 1317 (Pa. Super. Ct. 1996).

²⁴⁸ Cf. *E.N.O.*, 711 N.E.2d at 891, and *J.A.L.*, 682 A.2d at 1317 with the husband whose wife is estopped from denying biological fatherhood, thus allowing the husband to petition for custody, not just visitation.

²⁴⁹ See Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 688 (2008) (discussing the trend to identify gamete donors as an outgrowth of a belief in the importance of biological connection).

²⁵⁰ *Id.*

that, in many gay families, there are clearly identifiable alternative parent figures.²⁵¹ If a gay couple is divorcing, and perhaps even if they are not, that alternative parent figure may be able to secure some sort of parental rights. Allowing a sperm donor or surrogate mother to secure rights dissipates the rights of the gay parents. A strong link between marriage and parenthood diminishes the relative importance of genetics to parenthood and strengthens gay parental rights.

3. Summary

Story #7 incorporates many of the previously offered stories of marriage. It explains why the state confers marital rights and obligations, why marriage has meaning beyond those rights and obligations, and why children should be relevant to discussions of marriage. What Story #7 rejects is Story #6. Marriage is not a forum for gender production. Marriage makes spouses, not husbands and wives. Becoming a spouse has social meaning that gives marriage its constitutive and expressive qualities, which, in turn, make marriage a fundamental right. Gay couples are just as able to become spouses as are straight couples. Gay couples do not have an equality right to degender the gender factory, but if marriage is not inherently gendered, then gay couples have an equality right to the institution.

B. Some Implications

Social conservatives often assume that the SSM movement is the inevitable outgrowth of the loosening of marriage and gender norms that started with the divorce reform movement in the 1960s.²⁵² Story #7 reflects liberalized gender norms—it rejects the role of marriage in producing gender at all—but it does not reflect the ideology of the divorce reform movement of the 1960s and 1970s. Indeed, as the following discussion suggests, the story of marriage offered here rejects much of what is considered the modern ideology of marriage.

1. Spousal Maintenance

First, the divorce revolution's theory of divorce involved both "end[ing], as far as possible, all personal and economic ties between the spouses" and emphasizing that "both spouses should become equal and independent social and economic actors after divorce and that neither spouse should be especially burdened by the divorce decree."²⁵³ Because, in the 1960s and 1970s, women were

²⁵¹ *Id.* at 714 (suggesting that the movement to identify genetic parents may lead to a more fluid understanding of parenthood, one in which the traditional two-parent model gives way to a model involving more parents. This new model would necessarily weaken the parental rights of the traditional parents).

²⁵² See WITHERSPOON, *supra* note 94, at 9 ("[I]n the last forty years, marriage and family have come under increasing pressure from the modern state, modern economy, and modern culture.").

²⁵³ HARRIS ET AL., *supra* note 80, at 389.

coming to be viewed as equally able to earn money, and because personal growth and individual autonomy came to be valued more highly than they once were,²⁵⁴ the law's willingness to bind two divorced people together dissipated. "Neither [spouse] should be shackled by the unnecessary burdens of an unhappy marriage."²⁵⁵ The ideal of letting the couple go their separate ways was consistent with the emerging understanding of marriage as a relationship between autonomous equals, either of whom could choose to leave if he or she was unhappy. Virtually every state amended their spousal maintenance statutes to encourage more limited alimony awards as a way of minimizing long-term entanglement between ex-spouses.

Few people today quarrel with the idea that marriage is a relationship between equals, and few more argue for a return to fault-based divorce.²⁵⁶ But, it did not take long for courts or commentators to realize that divorce reform's vision of the parties being able to completely separate after divorce simply would not work. In marriages of significant duration or with differentiated roles, both members of the couple usually cease being autonomous. The primary wage earner depends on the non-wage earner for unpaid, familial labor—most of which usually benefits the parties' children—and the primary caretaker depends on the primary wage earner for financial well-being. Those dependencies cannot be addressed adequately with a simple edict that directs the parties to go their separate ways.

When men's marital contributions are primarily monetary and women's marital contributions are primarily nonmonetary, ending all personal and economic ties between the parties leaves ex-wives extraordinarily vulnerable. Even if a wife does make monetary contributions to the marriage, if they are less than her husband's (which, as part IV shows, they usually are), encouraging the two parties to go their separate ways can leave a woman in economic circumstances far less desirable than those she enjoyed while married. Some judges realized this after the initial divorce reforms were adopted. They began rejecting limited-term maintenance because they recognized the hardship it imposed on women.²⁵⁷ Recent

²⁵⁴ See Carl Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1807-08 (1985) (describing how growing concern for individuals' psychological happiness affected family law).

²⁵⁵ *Turner v. Turner*, 385 A.2d 1280, 1282 (N.J. Super. Ct. Ch. Div. 1978) *overruled by* *Petersen v. Petersen*, 428 A.2d 1301 (N.J. 1981).

²⁵⁶ See generally Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719, *passim* (1997) (some states have re-introduced fault based divorce with the idea of covenant marriage, but the idea has not spread very far). See generally STEVEN L. NOCK ET AL., COVENANT MARRIAGE: THE MOVEMENT TO RECLAIM TRADITION IN AMERICA *passim* (2008).

²⁵⁷ See *Heim v. Heim*, 763 P.2d 678, 683 (Nev. 1988) (looking to standard of living, not contribution in awarding alimony to wife after a thirty-five-year marriage and awarding long-term maintenance); *In re Marriage of LaRocque*, 406 N.W.2d 736, 741-42 (Wis. 1987) (same for twenty-five-year marriage); *Rosenberg v. Rosenberg*, 595 N.E.2d 792, 793-94 (Mass. App. Ct. 1992) (same for twenty-nine-year marriage).

reform work also acknowledges the failure of the divorce revolution in this regard, making clear that in marriages of sufficient duration or with significant role division, the clean break theory of divorce should not apply.²⁵⁸

The movement away from a more individualistic view of marriage, and back toward a recognition that marriage creates lasting interdependencies can be seen by some as a step in the wrong direction. People eager to see women assume equally prominent roles in the public sphere resist this step backwards because awarding maintenance to women who opt out of competition in the public sphere may encourage them to opt out. People concerned about maximizing women's presence in prominent and powerful public positions may think that marriage should not encourage traditional gender roles in any way.

The story of marriage offered here encourages traditional gender roles because it acknowledges the efficiency and stability that can stem from marital roles. It rewards the spouse who assumes the traditionally female role. In doing so, it gives same-sex couples the right to marry, but at the cost of celebrating the roles that lead to such a glaring gender wage gap. It accepts marriage as a union of equals—it understands marital roles as rooted in marriage, not gender—but, it suggests that one of the main reasons for marriage is to allow for the creation of a separate but equal regime.

In the long term, SSM may help reduce the correlation between gender roles and marital roles. If enough same-sex couples assume marital roles that are inconsistent with their socially defined gender roles, the gender roles themselves may be destabilized. This is the fear of opponents of SSM.²⁵⁹ If enough men become primary caretakers and enough women become primary wage earners, then the likelihood that straight couples will fall into traditional gender roles may dissipate. Marriage will still facilitate roles, just not sex-based gender roles. This will take time, however. In the interim, the acceptance of roles is likely to enable or encourage married women to continue to commit less time to the paid labor force and more time to unpaid work.

2. *Premarital Agreements*

Second, the idealization of emotional interdependence in marriage undermines modern trends to rely more on contract doctrine in marriage. Acknowledging the emotional interdependence of marriage is critical to explaining why marriage should be viewed as a fundamental right because it is the emotional interdependence that gives marriage its expressive and constitutive qualities. But the emotional connection between the parties undermines the ability of traditional contract law to order affairs between them. Thus, Story #7 casts doubt on some courts' willingness to enforce premarital agreements.

²⁵⁸ See generally AMERICAN LAW INSTITUTE, *supra* note 245, at §§ 5.01-.14 (suggesting that maintenance should be awarded based on the length of marriage and the degree to which the couple adopted marital roles).

²⁵⁹ See *supra* notes 99-101 and accompanying text.

Many states still require a finding of procedural fairness before enforcing premarital agreements, but most states have dispensed with any substantive review of premarital contract terms.²⁶⁰ As long as there was a full disclosure of assets prior to execution, and as long as the parties had a chance to secure independent legal representation, courts will enforce the contracts.²⁶¹

If part of what we celebrate in marriage is its ability to alter the individuals who enter the institution, its ability to make two into one, it is not clear that we should honor a contract made between the two. It is not, as the traditional non-enforcement policy presumed, that such an agreement is made in contemplation of divorce and therefore against public policy.²⁶² Rather, it is that the self one is acting on behalf of when one signs a prenuptial agreement is supposed to be changed by marriage. If one acts to protect the premarital self, one is undermining the emotional transformation that marriage is supposed to enable and encourage. The purpose of marriage is to change its participants, to make them less autonomous, more duty-bound, and more defined by others. A premarital agreement protecting the premarital self enables one to avoid the emotional and material work of marriage. If one avoids that work, one should not be entitled to the respect and dignity that accompanies marriage.

For some this may be too harsh a response to premarital agreements, many of which are entered into by older couples seeking to protect their offspring's inheritance. These seemingly sensible and non-problematic estate planning devices protect for the decedent's children the share of her estate that otherwise would go to her spouse at her death.²⁶³ Because the marriages involved in these agreements often do not last that long, perhaps the emotional transformation that marriage is supposed to produce need not bar the agreements' enforcement. Or perhaps courts should be allowed to enforce the agreements, but review them carefully for substantive fairness. A very strong endorsement of the argument above suggests that marital contracts cannot be enforced at all.

²⁶⁰ See HARRIS ET AL., *supra* note 80, at 728.

²⁶¹ *Id.* (There may be reason to doubt how willing courts really are to enforce any procedurally fair prenuptial agreement. Most of the people using these contracts have great wealth and much, though not half, of it ends up being shared. Even parties that are not wealthy usually draft the agreements understanding the background rules of maintenance and property division. Though lawyers may secure for the more advantaged party a better percentage of marital property or a lesser maintenance obligation, they virtually never draft agreements that relieve their clients of any substantial financial obligation at divorce. If lawyers thought that prenuptial agreements were enforced as readily as some commentators and courts have suggested, presumably many more people would push the envelope to explore how little actually had to be shared (though parties may be concerned about signaling stinginess and therefore resist pushing the envelope)).

²⁶² See Brian Bix, *Domestic Agreements*, 35 HOFSTRA L. REV. 1753, 1764 (2007) (premarital agreements thought to encourage divorce).

²⁶³ See generally Katharine B. Silbaugh, *Marital Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 72 (1998).

A more moderate (and realistic) endorsement of the argument above suggests that courts should simply return to a comprehensive substantive review of the agreements, to ensure that the contract reflects the background norms of marriage, including sharing and sacrifice. If the state licenses marriage because it wants to encourage sharing and sacrifice, it is not clear that people who want to avoid sharing and sacrifice should be able to marry. Some contracting, or baseline-setting, could still be allowed, but the wealthier party would need to be prepared to show that the agreement was substantively fair.²⁶⁴

3. *Less Autonomy*

At a more abstract level, the story of marriage offered here simply rejects an individualistic, more casual approach to marriage. Story #7 sounds more in the language of *Griswold v. Connecticut*, marriage is “intimate to the degree of being sacred . . . an association that promotes a way of life . . . a harmony in living . . . an association for as noble a purpose as any,”²⁶⁵ than *Eisenstadt v. Baird*, “the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.”²⁶⁶ Case law subsequent to *Eisenstadt* suggests that the right protected in that case, for single people to receive contraceptives, can be found in an individual’s liberty interest in reproductive decision-making.²⁶⁷ Thus, the marriage narrative offered here does not reject the holding of *Eisenstadt*, only its dicta suggesting that marriage is nothing more than an association of two individuals.²⁶⁸

Nor does Story #7 suggest that we should return to the days of fault-based divorce because marriages must be permanent and harder to exit. The ideal of marriage presented here is just that, an ideal. What is celebrated in marriage is the potential to live into that changed life, to experience the difference of two becoming one. For sure, many married people will not experience that. They will divorce too early or they will live a married life marked by much more autonomy and independence than merger. The state cannot compel the emotional interdependence that is reified in marriage; it can only endorse and encourage it.

By explicitly encouraging that emotional interdependence, Story #7 goes further than most other stories of marriage in explaining why polyandrous arrangements are not entitled to constitutional protection. The state courts granting same-sex couples the right to marry have been notably weak in their explanation of

²⁶⁴ This would permit wealthy individuals to continue to use pre-nuptial agreements as they often do now. Pre-nuptial agreements usually limit what an ex-spouse will receive but still afford them substantial amounts of wealth.

²⁶⁵ *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

²⁶⁶ *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972).

²⁶⁷ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851-53 (1992) (“Our law affords constitutional protection to personal decisions relating to . . . choices central to personal dignity and autonomy . . .”).

²⁶⁸ See *Eisenstadt*, 405 U.S. at 453 (finding the right to privacy violated by state restrictions on the distribution of contraceptives to non-married people).

why marriage need not be extended to multiple spouse arrangements. The Massachusetts Court dropped a footnote noting that no party had suggested that the rules barring polygamy would be implicated if the Court legalized SSM.²⁶⁹ Presumably though, if the Court could find no rational reason for restricting marriage to a man and a woman despite the numerous studies suggesting that children tend to do best in a married household with both of their biological parents,²⁷⁰ it would want some evidence suggesting that the restriction on multi-party marriage was necessary before dismissing a right to polyandrous marriage.

Comparably, in a footnote and without evidence, the California Court dismissed any potential arguments about polyandry noting the “potentially detrimental effect on a sound family environment.”²⁷¹ Why the Court thought that more than one spouse would have obviously detrimental effects on the family environment went completely undiscussed. For a Court that so adamantly declared the constitutionality of the right to marry, the Court’s willingness to summarily dismiss the right to a different kind of marriage—one that is probably the most widely practiced form of marriage in the world—is quite remarkable.

The reason why polyandrous relationships should not command the same constitutional respect is because it is extraordinarily difficult for three or four, or five or six to become one. Relationships of more than two people are so much less likely to achieve the kind of transcendence and intimacy that is celebrated in marriage that the state should not endorse those relationships. It is the emotionally interdependent connection that creates the separate marital entity as a unity. It is that unity that serves the interests of both individuals and the state.

There is plenty to criticize in this ideal of marriage. Many people reject it because they reject the idea of state-sponsored marriage.²⁷² Many people may believe that people would be better off if the state chose to treat everyone as an individual and nothing as a unity. Others probably reject Story #7 as too hopelessly rooted in a patriarchal past, one in which the “we” really represents nothing other than the “I” of the husband.²⁷³ Still others can dismiss this ideal as fanciful. If so

²⁶⁹ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969, n.34 (Mass. 2003).

²⁷⁰ See Gennetian, *supra* note 70, at 419; Wax, *supra* note 68, at 388-90.

²⁷¹ *In re Marriage Cases*, 183 P.3d at 434 n.52. (Cal. 2008).

²⁷² See Franke, *supra* note 219, at 239 (“the rights-bearing subject of the lesbian/gay right movement has now become ‘the couple.’”); Moran, *supra* note 219, *passim* (celebrating the advantages of non-married life, particularly for women); Rosenbury, *supra* note 219, at 212 (criticizing the way the law privileges family relationships, particularly marriage, over friendships).

²⁷³ Emma Goldman, *Marriage and Love*, in RED EMMA SPEAKS 158, 164-65 (Alix Kates Shulman ed., 1972) (“The institution of marriage makes a parasite of woman.”); Nancy Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,”* 79 VA. L. REV. 1535, 1536 (1993) (the role division in marriage is “inherently problematic”); see also Lee Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1173-74 (questioning idea of treating family as a unit, a “we,” because “the practical consequence . . . [is to] confer or ratify the power of one family member over others.”).

many marriages end in divorce, the ideal is so rarely realized, that it is pointless to reify it.²⁷⁴

All of these criticisms may be valid, but all of them also leave one struggling to answer why marriage is a fundamental right or why gays and lesbians may have an equality right to the institution. If marriage does not serve expressive and constitutive functions, then why aren't states free to deny it to prisoners²⁷⁵ and to men too poor to pay child support?²⁷⁶ If there is no legal ideal of marriage, why can't four people get married? Alternatively, if the problem with Story #7 is that it is a fanciful ideal, not a real description of marriage, then supporters of SSM are left to argue that what they are fighting for is real marriage. But real marriage, as Part IV shows, is a gender factory. It is an institution that promotes stability and interdependence and self-fulfillment by enabling and reproducing gender roles. If that is what SSM advocates are fighting for, they cannot have an equality right to it because they are not similarly situated with regard to the ability to reify those gender roles.

CONCLUSION

The stories of marriage offered in this article do not constitute an exhaustive list. State-sponsored marriage may mean many other things to other people. But words and social institutions do have common meanings informed by common norms. Nobody thinks I have a right to marry my pet. Everybody understands what it means when a prisoner claims a right to get married. There is commonality in the midst of all the debate over SSM.

The stories that get told about marriage affect that common understanding of marriage as do the practices of people who marry. At present, the practices of married people strongly support the gendered story of marriage. This story posits that what makes marriage so beneficial to its participants and to society is its ability to promote and reproduce gender. This story of marriage proves resilient in the face of both fundamental right and equality challenges because it suggests that same-sex couples are unlikely to achieve or enjoy the marital benefits that come from conforming to gender roles, and they are not similarly situated to straight couples with regard to their ability to reify those gender roles. Proponents of SSM need another story to tell about marriage.

²⁷⁴ The oft-quoted statistic that 50% of all marriages end in divorce is misleading. The most recent demographic data suggests that the divorce rate, as measured by number of marriages that actually end in divorce, has never been higher than 41%. See Dan Hurley, *Divorce Rate: It's Not as High as You Think*, N.Y. TIMES, Apr. 19, 2005, at F7. Moreover, many of those are not first time marriages. The number of first time marriages that end in divorce is lower. *Id.*

²⁷⁵ See *Turner v. Safley*, 482 U.S. 78, 96 (1987) (striking down prison regulation that barred male prisoners from marrying).

²⁷⁶ *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978) (finding the Wisconsin law unconstitutional that hinged the right to marry on paying child support).

Fundamental rights arguments require an articulation of why marriage is more than a bundle of legal rights and obligations, and how it can be that something more without incorporating gender norms. Equality arguments require an explanation of why same-sex couples should be entitled to marriage, not just civil unions. The seemingly cogent maxim offered by courts and commentators, that separate is not equal, reflects neither real world sensibilities with regard to gender nor the totality of the law of gender discrimination. Private biases with regard to gender roles play an important part in courts' acceptance of gender difference and, in many contexts, courts accept separately gendered regimes.

To make those private biases less salient in the context of marriage, SSM proponents must start telling a story of marriage as an institution that is ennobling and restricting, demanding and edifying, without being gendered. It must be a story that explains why the state should encourage both the emotional and material interdependence of marriage. The story offered here is one such story. It is a story that may make marriage unattractive to many, but a right for same-sex couples.