

# “Teachable Moments”: The Use of Child-Centered Arguments in the Same-Sex Marriage Debate

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## INTRODUCTION

It really is what we call a teachable moment.

—Interim Director of the Creative Arts Charter School in San Francisco, describing a first-grade field trip to City Hall to watch a lesbian wedding<sup>1</sup>

On Friday, October 10, 2008, a group of first-grade children from the Creative Arts Charter School in San Francisco took a field trip to City Hall.<sup>2</sup> The children’s first-grade teacher, a lesbian, was set to marry her longtime girlfriend that morning. The director of the charter school saw the wedding as a “teachable moment”—an opportunity for the children to witness firsthand the progression of civil rights in America.<sup>3</sup>

Many same-sex marriage advocates heralded the first graders’ excursion as another step toward the full acceptance and integration of same-sex individuals in society.<sup>4</sup> But other supporters worried that the field trip, while well intentioned, was ill timed and potentially damaging to the same-sex

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<sup>†</sup> J.D., University of California, Berkeley, School of Law, 2009. I owe infinite thanks to Professor Melissa Murray, who provided thoughtful guidance and challenging feedback at each phase of the writing process. I am also grateful to the members of the *California Law Review*, particularly Jennifer Kim and Michelle Singer, whose detailed and insightful editing elevated this Comment to the place it is now. Finally, I extend a special, heartfelt thanks to Matthew Bourdet for his patience and goodwill throughout the drafting of this comment and beyond.

1. Jill Tucker, *Field Trip to Wedding “A Teachable Moment,”* S.F. CHRON., Oct. 11, 2008, at A1.

2. *Id.*

3. *Id.*

4. See Online Comments to Tucker article, *supra* note 1, available at <http://www.sfgate.com/cgi-bin/article/comments/view?f=/c/a/2008/10/11/MNFG13F1VG.DTL> (“This story, like others with a civil-rights-victory (sic) focus, makes my heart open in joy . . . . This story . . . foster[s] deeper convictions of hope and equality and peace.”).

marriage cause.<sup>5</sup> At that time, the debate over same-sex marriage had reached a significant crossroads. Earlier that year, the California Supreme Court issued a landmark decision declaring that a same-sex marriage ban violated both the due process and equal protection provisions of the California Constitution.<sup>6</sup> Opponents of same-sex marriage responded quickly and forcefully with Proposition 8,<sup>7</sup> a ballot initiative to amend the California Constitution to define marriage solely as a union between a man and a woman.<sup>8</sup> On the day of the field trip, polls on Proposition 8 showed close to a dead heat on the issue.<sup>9</sup> Many same-sex marriage advocates feared that the “teachable moment” played directly into the hands of their opponents, giving them new leverage that could ultimately shift momentum in favor of Proposition 8.<sup>10</sup>

Not surprisingly, just one week later, the field trip became the target of new television advertisements supporting Proposition 8. The leading organization behind the Proposition 8 campaign, ProtectMarriage.com, had cautioned for months that state recognition of same-sex marriage would, among other things, force public schools to include teaching same-sex marriage in their curriculum.<sup>11</sup> In their view, the field trip was concrete and visible evidence that their fears had been realized.<sup>12</sup> Playing on those fears, their ad took advantage of news footage of the wedding, particularly footage of a first-grade girl who appeared sad, and almost confused, by her teacher’s lesbian

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5. See John Diaz, *A Lesson in Political Naiveté*, S.F. CHRON., Oct. 14, 2008, at B6. After describing himself as “someone who regards marriage-equality laws as a basic civil right,” Diaz commented that the field trip “hand[ed] powerful ammunition to the Yes on 8 Campaign, which had been trying to scare Californians with warnings that its defeat would lead to the indoctrination of kindergartners. . . . This outing was just a terrible judgment in every regard.” *Id.*

6. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

7. Opponents, fearing the California Supreme Court would uphold same-sex marriage, had already drafted the language and gathered signatures for Proposition 8 well before the decision was released. Cheryl Wetzstein, *Signatures Pledged for California Marriage Vote*, WASH. TIMES, Apr. 25, 2008, at A6.

8. ELECTIONS DIV., CAL. SEC’Y OF STATE, OFFICIAL VOTER GUIDE (2008), <http://voterguide.sos.ca.gov/past/2008/general>.

9. A poll taken in mid-October by the Public Policy Institute of California showed 52 percent of voters opposed and 44 percent of voters supported Proposition 8. Mark DiCamillo, *Why Prop. 8 Confounded Pre-Election Pollsters*, S.F. CHRON., Nov. 10, 2008, at B5. A poll taken around the same time by SurveyUSA indicated 45 percent of voters opposed and 48 percent of voters supported Proposition 8. See *California Prop 8 Remains a Fierce Fight That Could Be Decided Either Way by Handful of Votes*, SURVEYUSA, Oct. 17, 2008, <http://www.surveyusa.com/client/PollReport.aspx?g=0d4fd538-5834-4c18-98c8-6e58da254976>.

10. See Diaz, *supra* note 5; see also Erin Allday, *Newsom Becomes Campaign Tool for Prop. 8 Backers*, S.F. CHRON., Oct. 14, 2008, at A1 (noting that political insiders say images of children attending a same-sex wedding play right into the hands of the proponents of a same-sex marriage ban).

11. ProtectMarriage.com, *Why Proposition 8*, <http://www.protectmarriage.com/about/why> (last visited Mar. 12, 2009) (“[Legalizing gay marriage] has far-reaching consequences. For example, because public schools are already required to teach the role of marriage in society as part of the curriculum, schools will now be required to teach students that gay marriage is the same as traditional marriage, starting with kindergarteners.”).

12. Tucker, *supra* note 1.

wedding.<sup>13</sup> This lasting image was paired with the warning that “children *will* be taught about gay marriage unless we vote yes on Proposition 8.”<sup>14</sup> The ad first aired on October 28, 2008;<sup>15</sup> Proposition 8 passed by a 52-48 margin exactly one week later on November 4, 2008.<sup>16</sup>

Appeals to child welfare are neither new nor exclusive to the same-sex marriage debate. Such appeals have also been raised in other family law disputes, most notably the fight for interracial marriage during the era of *Loving v. Virginia*,<sup>17</sup> the United States Supreme Court decision striking down Virginia’s ban on interracial marriage. Opponents of interracial marriage claimed that the “mixed-race” children produced by interracial couples were biologically inferior, suffered abnormal social and psychological development, and endured stigmatization by their peers.<sup>18</sup> Similarly, opponents of same-sex marriage have wielded such claims for almost two decades, although the substance of their child-based fears has evolved. Like the early arguments used by interracial marriage opponents, the first child-centered arguments in the same-sex marriage debate focused on the harms to children raised by same-sex parents—specifically, that such children suffer stunted social and psychological development and face stigmatization by their peers.<sup>19</sup> Over the years, these concerns gradually morphed into fears about how same-sex marriage harms *all* children, because the increasing prevalence of same-sex marriage in society and its integration into school curricula confuse children about gender roles and the true meaning of marriage.<sup>20</sup>

This Comment examines modern views of marriage and how child-centered appeals have influenced the discourse on expanding marital rights, particularly within the context of *Loving v. Virginia*,<sup>21</sup> *Goodridge v. Dep’t of Public Health*,<sup>22</sup> *Hernandez v. Robles*,<sup>23</sup> *In re Marriage Cases*,<sup>24</sup> the battle over Proposition 8 in California, and supporting case law and legislation.<sup>25</sup> These

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13. ProtectMarriage.com, Finally the Truth (television advertisement), <http://www.protectmarriage.com/video> (last visited Aug. 26, 2009).

14. *Id.*

15. *Id.*

16. ELECTIONS DIV., CAL. SEC’Y OF STATE, STATEMENT OF VOTE: NOVEMBER 2008 GENERAL ELECTION 12 (2008), [http://www.sos.ca.gov/elections/sov/2008\\_general/sov\\_complete.pdf](http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf).

17. 388 U.S. 1 (1967).

18. *See infra* Section I.A.

19. *See infra* Section I.B.

20. *See* discussion of the “Yes on 8” campaign ads, *infra* text accompanying notes 206–29.

21. 388 U.S. 1 (1967).

22. 798 N.E.2d 941 (Mass. 2003).

23. 855 N.E.2d 1 (N.Y. 2006).

24. 183 P.3d 384 (Cal. 2008), *superseded by state constitutional amendment*, CAL. CONST. art. I, § 7.5, *as recognized in* *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

25. During the drafting of this Comment, the California Supreme Court issued its opinion in *Strauss v. Horton*, which upheld Proposition 8 (formally entitled the Marriage Protection Act) and invalidated same-sex marriages sought after Proposition 8 passed, but also found that same-sex marriages performed before Proposition 8 was adopted were valid. 207 P.3d at 610–11. The

sources evince an evolution in judicial conceptions of marriage and the child-based arguments that have been used to expand or constrict such conceptions, from anxiety over “mixed-race” children during the fight for interracial marriage to concerns in the same-sex marriage debate about the psycho-social well-being of children raised by same-sex parents and, ultimately, the effects of same-sex marriage on public school curricula. The Comment concludes with an analysis of modern marriage as defined by courts and society today, the intersection of Proposition 8’s success with contemporary marital attitudes, and the role of the judiciary in the fate of same-sex marriage.

## I CASE STUDIES

### *A. Child-Centered Arguments in the Interracial Marriage Debate*

The legal battles over interracial marriage in the mid-1900s laid the groundwork for future marriage debates, including the current struggle over same-sex marriage. The California Supreme Court’s 1948 decision in *Perez v. Lippold*<sup>26</sup> was the first of many state court decisions overturning interracial marriage bans. In 1967, almost twenty years after *Perez*, the U.S. Supreme Court issued its opinion in *Loving v. Virginia*—the Court’s first decision to substantively expand marriage rights by striking down Virginia’s antimiscegenation laws. Although the unanimous opinion has given rise to varied and conflicting interpretations,<sup>27</sup> *Loving* set forth the basic principles on which many subsequent legal decisions on marriage and the expansion of marital rights have relied. In particular, *Loving* emphasized that marriage is a fundamental constitutional right that exists independent of any of its historical or practical ties to procreation and child rearing. Furthermore, the *Loving* Court abstained from addressing child-based arguments in its opinion, indicating that the bounds of a constitutional analysis of marriage end with the rights of adults, not of children.

#### *I. Loving v. Virginia*

In 1967, the U.S. Supreme Court issued its opinion in *Loving v. Virginia*—the Court’s first decision substantively to expand marriage rights by invalidating Virginia’s antimiscegenation laws.<sup>28</sup> Laws prohibiting interracial marriage initially arose during the seventeenth century, the first enacted by

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court’s decision in *Strauss* is worth noting for its impact on the status of same-sex marriage in California, but because the *Strauss* holding turned largely on statutory interpretation and the scope of constitutional revisions, a substantive discussion of the opinion is unwarranted for the purposes of this Comment.

26. 198 P.2d 17 (Cal. 1948).

27. See *infra* text accompanying notes 58–63.

28. 388 U.S. 1 (1967).

Virginia in 1691.<sup>29</sup> The Virginia Assembly's primary motive in passing such a law was to uphold the honor of white women and protect them from the damnation of giving birth to interracial children, who had been slowly, but increasingly, populating the state.<sup>30</sup> While the notion of interracial intimacy was perverse to most Virginians at the time, it was the specific notion of black men tainting the purity of white women that induced true fear and repulsion in the minds of Virginia citizens—a repulsion so fierce that communities banished offending white women and their interracial offspring.<sup>31</sup> Relationships between white men and black women, on the other hand, were condoned because their offspring increased the slave population without exploiting the sexual vulnerabilities of white women.<sup>32</sup> Thus, while Virginia's interracial marriage ban applied in theory to all white citizens, white women faced the fiercest punishment for violating the statute.<sup>33</sup>

Fear of interracial marriage between white women and black men, and the mixed-race children those relationships produced, thrived throughout the nineteenth and into the twentieth century, despite the abolition of slavery. For example, in 1912, Congress conducted hearings on a proposed constitutional amendment to ban interracial marriage.<sup>34</sup> Anxiety over interracial children again took center stage, with one congressman warning: “[W]hen your great-grandson goes to take himself a companion for life he will wonder and not know whether the bride for his young manhood is a pure American girl or corrupted by a strain of kinky-headed blood.”<sup>35</sup> Thus, it was not just a bare fear of interracial children that fueled efforts against interracial marriage, but also the fear that interracial children and, in some cases, their interracial mothers, would be brought into the bosom of the family—inside the protective and

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29. Carlos Ball, *The Blurring of the Lines: Children and Bans on Interracial Unions and Same-Sex Marriages*, 76 *FORDHAM L. REV.* 2733, 2739 (2008).

30. *Id.* at 2739–40. Specifically, the law's aim was to “prevent . . . that abominable mixture and spurious issue which hereafter may encrease [sic] in this dominion, as well by negroes, mulattoes, and Indians intermarrying with English, or other white women, as by their unlawfull [sic] accompanying with one another.” *Id.* at 2740 (quoting 3 *THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA* 86 (William Waller Hening ed., 1823)).

31. Ball, *supra* note 29, at 2741.

32. *Id.*

33. *Id.* at 2740–41. White women who gave birth to interracial children out of wedlock faced stiff church fines that, if they could not afford to pay, would be satisfied through a five-year service indenture, auctioned off by the church to the highest bidder. *Id.* at 2742. The Virginia statute, as originally written, did not directly punish white men who had interracial children with black women. *Id.* at 2743.

34. Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 *WASH. U. L.Q.* 611, 661 (2004). The proposed amendment, written by Democratic Congressman Seaborn Roddenbery (Georgia), stated that “Inter-marriage between negroes or persons of color and Caucasian [sic] . . . within the United States . . . is forever prohibited . . . .” *Id.* at app. 74 (quoting H.R.J. Res. 368, 62d Cong. (1912)). Roddenbery purported to define “negro” and “person of color” as any individual who had “any trace of African or Negro blood.” *Id.* at 630.

35. *Id.* at 661 (quoting 49 *CONG. REC.* 503 (1912)).

sacred walls of the familial household—without white citizens’ knowledge.<sup>36</sup>

The Supreme Court’s seminal decision in *Brown v. Board of Education* in 1954, which struck down race-based school segregation, also fueled the fight against interracial marriage, as many (mostly white Southerners) feared that allowing black and white students to attend the same school would push the Southern states down a “slippery slope” ending in interracial marriage and social equality.<sup>37</sup> Leander Perez, a powerful Louisiana politician and outspoken opponent of desegregation, explained Southerners’ fears as such:

Beginning at the age of six, little white and Negro children—boys and girls—would be forced into continuous physical contact with each other in public schools and public school activities. They would study together, recite together, sing together, play together, sit together, talk together, and dance together. They would eat lunch together from food provided by the federal government . . . . The social theory behind this procedure is that the close and intimate association during the entire formative period of their lives would, in itself, produce integration or, in other words, amalgamation of the races.<sup>38</sup>

This feared downward spiral of desegregation-integration-amalgamation so permeated Southern literature and media in the 1950s that it was seen by Southerners not as a potential consequence of integration, but rather as an unavoidable fact.<sup>39</sup> In addition to fears of interracial sex and the creation of a “mongrel race,” Southerners were also concerned about the effects that desegregation and the increasing prevalence of interracial marriage would have on white children, particularly on the “purity” of white children and their socialization and understanding of the racial hierarchy.<sup>40</sup>

Given this historical backdrop, it is perhaps unsurprising that when *Loving v. Virginia* came before the Court, the only states that still had interracial marriage bans in place were in the South.<sup>41</sup> The story of *Loving* began when Mildred Jeter, an African American woman, and Richard Loving, a white man, traveled to the District of Columbia to get married in 1958.<sup>42</sup> At that time,

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36. For further discussion of race-based fraud and its connection to racial identities and social boundaries within the family, see Angela Onwuachi-Willig, *A Beautiful Lie: Exploring Rhinelander v. Rhinelander as a Formative Lesson on Race, Identity, Marriage and Family*, 95 CALIF. L. REV. 2393 (2007).

37. See Serena Mayeri, *The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse*, 18 YALE J.L. & HUMAN. 187, 193 (2006).

38. *Id.* at 194 n.23 (citing JAMES CONAWAY, JUDGE: THE LIFE AND TIMES OF LEANDER PEREZ 105 (1973)).

39. *Id.* at 193–94. For a detailed discussion of the form and function of “slippery slope” arguments and the central role such arguments have played in historical debates over interracial marriage and current debates over same-sex marriage, see Courtney M. Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 NW. U. L. REV. 1543 (2005).

40. Mayeri, *supra* note 37, at 193–95.

41. Ball, *supra* note 29, at 2746.

42. 388 U.S. 1, 2 (1967).

Virginia still outlawed interracial marriage, so travel to a neighboring state was Jeter and Loving's only option if they wanted to get married.<sup>43</sup> Upon returning to their home state of Virginia, the couple was charged with and pled guilty to violating Virginia's ban on interracial marriage.<sup>44</sup> The trial judge allowed the Lovings to leave the state as an alternative to their one-year jail sentence, and the couple returned to Washington, D.C.<sup>45</sup> The Lovings filed a lawsuit in 1963, asserting that the Virginia ban on interracial marriage violated the Fourteenth Amendment, a claim that made its way to the U.S. Supreme Court four years later.<sup>46</sup>

In defending its ban on interracial marriage, Virginia appealed to many of the same child-centered arguments that motivated the enactment of the ban 276 years earlier. In its brief to the Supreme Court, Virginia declared that states have an interest in preserving the "purity of the races and in preventing the propagation of half-breed children."<sup>47</sup> Acknowledging the reality of persistent racism, Virginia claimed its interest in keeping the races "pure" stemmed not from the repulsion interracial children invoke in society, but rather from the idea that interracial children were seen as outcasts and would be "burdened . . . with 'a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.'"<sup>48</sup> Virginia also emphasized the socioscientific consequences to interracial children, including the domination of racial inferiorities within children of mixed race and the social tension that it claimed was created when races of different socioeconomic backgrounds formed a family.<sup>49</sup> Interracial couples also experienced higher divorce rates, Virginia argued, which would have negative effects on the (interracial) children produced by and raised within these families.<sup>50</sup>

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43. *Id.* at 3.

44. *Id.* at 2–3.

45. *Id.* at 3. An oft-quoted opinion by the trial judge in the case reveals the depth of anti-integrationists' conviction against interracial marriage: "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix." *Id.* (quoting trial court opinion).

46. *Id.*

47. Brief and Appendix on Behalf of Appellee at 35, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395).

48. *Id.* (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

49. *Id.* at 43–45.

50. *Id.* at 47–48.

As many predicted,<sup>51</sup> the Supreme Court struck down the Virginia statute.<sup>52</sup> In a short opinion, the Court first denounced the antimiscegenation statutes on equal protection grounds, rejecting Virginia's claim that the law's "equal application" to both whites and blacks gave constitutional legitimacy to the ban.<sup>53</sup> The Court saw the statutes solely as a tool of "invidious racial discrimination" and "White Supremacy," unable to withstand constitutional scrutiny.<sup>54</sup> In striking down the interracial marriage ban on equal protection grounds, the Court precluded substantive discussion of Virginia's other arguments, including the State's "scientific" claims about interracial marriage and children.<sup>55</sup>

Instead, the Court provided a brief analysis of the antimiscegenation statutes under the Due Process Clause. In what would be an oft-quoted passage, representing to many the core of *Loving's* significance, the Court defined the right to marry as a "fundamental freedom" and a "vital personal right[] essential to the orderly pursuit of happiness."<sup>56</sup> The Court further concluded that "the freedom to marry . . . a person of another race resides with the individual and cannot be infringed by the State."<sup>57</sup>

The *Loving* decision was certainly a significant milestone, and few would doubt its importance in the ongoing fight for civil rights in the 1960s.<sup>58</sup> Despite the enormity and social import of the decision, however, *Loving's* legal implications, particularly in the context of same-sex marriage, are disputed.<sup>59</sup>

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51. For an argument that the *Loving* decision was far from a foregone conclusion, see Mark Strasser, *Loving Revisionism: On Restricting Marriage and Subverting the Constitution*, 51 *How. L.J.* 75 (2007).

52. *Loving*, 388 U.S. at 12.

53. *Id.* at 7–8.

54. *Id.* at 11–12.

55. *Id.* at 8. Randall Kennedy suggests that the *Loving* Court was hesitant to expound on the socio-scientific claims proffered by Virginia because of criticism that the Court's opinion in *Brown v. Board of Education* relied too heavily on sociological theory. RANDALL KENNEDY, *INTERRACIAL INTIMACIES* 275 (2003).

56. 388 U.S. at 12.

57. *Id.*

58. For a more comprehensive discussion of *Loving's* legal and cultural impact, see John DeWitt Gregory & Joanna L. Grossman, *The Legacy of Loving*, 51 *How. L.J.* 15 (2007). The *Loving* opinion was also significant for its declaration that states do not have exclusive control over marriage, and that federal courts play an important role in regulating marriage as well. *See* 388 U.S. at 7–8.

59. *See, e.g.*, Mark Strasser, *supra* note 51 (noting that, while it is clear the *Loving* Court used strict scrutiny in its equal protection analysis, many courts and commentators are unclear as to why strict scrutiny applied; thus, *Loving* has been prone to misinterpretation and misapplication); *see also* R.A. Lenhardt, *Beyond Analogy: Perez v. Sharp, Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 *CALIF. L. REV.* 839 (2008). Lenhardt argues that the *Loving* opinion pales in comparison to the California Supreme Court decision in *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948), in which Justice Traynor not only declared marriage a fundamental right, but also stated that "essence of the right to marry is the freedom to join in marriage with the person of one's choice." *Id.* at 21. Counter to the "judicial bravery" espoused in *Perez*, Lenhardt claims, *Loving's* message is "muted," "anemic," and "fails to offer useful insights

Some courts have interpreted *Loving* strictly within the context of racial discrimination, noting that the interracial marriage bans at issue in *Loving* were blatant tools of invidious discrimination and white supremacy.<sup>60</sup> Same-sex marriage bans, these courts contrast, do not pose the same discriminatory “evil” behind antimiscegenation laws, but rather find support in citizens’ legitimate concerns about the integrity of the marriage institution.<sup>61</sup> Other courts emphasize that *Loving*, in upholding marriage as a basic civil right fundamental to individuals’ identity and well-being, transcended race and clearly paved the way for establishing a constitutional right to same-sex marriage.<sup>62</sup> These courts saw no significant difference between the deprivation of the fundamental marriage right based on skin color versus sexual orientation.<sup>63</sup>

But in spite of what some commentators see as *Loving*’s failure to “offer useful insights into the contemporary meaning of civil marriage,”<sup>64</sup> the *Loving* opinion does provide a valuable framework for addressing child-focused arguments in the same-sex marriage debate. This framework arises not from what the *Loving* opinion explicitly stated, but from what it explicitly omitted. The *Loving* Court devoted little attention to Virginia’s arguments about the effects of interracial marriage on children.<sup>65</sup> The issue of interracial marriage, in the Court’s view, was not tied up in the rights or welfare of the children of interracial marriages, but rather stemmed from the fundamental nature of the marriage right and the deprivation of that right based on race. The only statement by the Court that remotely related to children was that marriage is

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into the contemporary meaning of civil marriage,” as it is cabined within the context of race and does not fully articulate the scope of the fundamental marriage right. See Lenhardt, *supra* at 856, 865, 891–92.

60. See, e.g., *Lewis v. Harris*, 908 A.2d 196, 210 (N.J. 2006); *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006); *Baker v. State*, 744 A.2d 864, 887 (Vt. 1999).

61. For a more detailed discussion of courts’ interpretations of *Loving v. Virginia*, see Gregory & Grossman, *supra* note 58, at 27–32.

62. See, e.g., *Baehr v. Lewin*, 852 P.2d 44, 60 (Haw. 1993); *Goodridge v. Dep’t. of Pub. Health*, 798 N.E.2d 941, 957 (Mass. 2003).

63. See, e.g., *Goodridge*, 798 N.E.2d at 958 (“[*Loving* makes clear that] the right to marry means little if it does not include the right to marry the person of one’s choice, subject to appropriate government restrictions in the interests of public health, safety, and welfare. In this case, as in . . . *Loving*, a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance—the institution of marriage—because of a single trait: skin color in . . . *Loving*, sexual orientation here. As it did in . . . *Loving*, history must yield to a more fully developed understanding of the invidious quality of the discrimination.” (internal citations omitted)).

Perhaps motivated by the tangle of *Loving* interpretations, many same-sex advocates turned to *Perez v. Lippold* for substantive support of their claims that the fundamental marriage right necessarily extends to same-sex partners. Issued nineteen years before *Loving*, *Perez* not only established a fundamental right to marriage, but a fundamental right to marry “the person of one’s choice.” See Lenhardt, *supra* note 59, at 859. Proponents of same-sex marriage have used the holding and language in *Perez* to urge the court to demonstrate the sort of “judicial bravery” necessary to effecting change in the civil rights arena.

64. Lenhardt, *supra* note 59, at 891.

65. Neither “child(ren)” nor “family” is referenced even once in the Court’s opinion.

“fundamental to our very existence and survival.”<sup>66</sup> The briefs filed by the Lovings were similarly silent on the issue, focusing instead on the discriminatory underpinnings of Virginia’s antimiscegenation statute and the equal protection and due process questions it raised.<sup>67</sup>

The *Loving* Court’s silence regarding Virginia’s child-based arguments against interracial marriage, and the implications such silence raised about the (non-)role of child-based appeals in discussions of marriage and family rights, gained support in a Supreme Court decision issued seventeen years later: *Palmore v. Sidoti*.<sup>68</sup> *Palmore* involved a white male father/divorcee who petitioned for primary custody of his three-year-old daughter after the mother, also white, moved in with an African American man.<sup>69</sup> The father claimed that his daughter would be traumatized by the stigmatization of being raised in an interracial household.<sup>70</sup> While the Court was sympathetic to the potentially devastating effects of such stigmatization, it found that these harms—even if experienced by children—could not justify removing young children from the care of their mothers.<sup>71</sup> The Court conceded that interracial cohabitation can be and often is harmful to children,<sup>72</sup> but that the Constitution has other concerns, namely with ensuring citizens equal access to fundamental rights.<sup>73</sup>

When read together, *Loving* and *Palmore* suggest that the constitutional debate over expanding marriage rights, though it may involve negative consequences to children, is not a debate over the rights and welfare of children. Rather, it is a debate about the nature of marriage and the ability of adult citizens to fully access and enjoy the benefits of marriage. However, same-sex marriage advocates have failed to take note of such implications and, instead, continue to perpetuate the notion that extending marriage rights to same-sex couples does require consideration of procreation and child welfare. In getting caught up in marriage’s historical connection to children, same-sex

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66. 388 U.S. 1, 12 (1967).

67. The Lovings referenced children in their brief only twice. First, the Lovings briefly touched upon the problems of illegitimacy and inheritance faced by children of nonmarried parents. Brief for Appellants at 12, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395). They also quickly addressed and rejected the state’s contentions that mixed race children are biologically inferior. *Id.* at 37.

68. 466 U.S. 429 (1984).

69. *Id.* at 430.

70. *Id.*

71. *See id.* at 433–34 (“It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated. There is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin. . . . [But] [w]hatever problems racially mixed households may pose for children in 1984[, they] can no more support a denial of constitutional rights than could the stresses that residential integration was thought to entail in 1917. The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.”).

72. *See id.* at 433.

73. *See id.* at 433–34.

marriage proponents have betrayed the essence of the fundamental marriage right embodied in the *Loving* opinion and abandoned a powerful Supreme Court precedent on the issue.

### *B. Child-Centered Arguments in the Same-Sex Marriage Debate*

#### *1. Historical Path to Contemporary Same-Sex Marriage Jurisprudence*

Although child-centered arguments played a role in historical campaigns to ban interracial marriage, same-sex marriage opponents have advanced these arguments with vigor not previously seen.<sup>74</sup> The 1970s saw the first legal challenges to the heterosexual marriage regime, when same-sex couples began filing lawsuits after being denied marriage licenses.<sup>75</sup> None of the lawsuits was successful, primarily because at that point in America's cultural evolution, the notion of gay "marriage" was a conceptual and legal impossibility.<sup>76</sup> Marriage had always been between one man and one woman, and the idea that marriage could mean anything else—particularly a relationship between two spouses of the same sex—was not only strange, but theoretically impossible.<sup>77</sup> Because of this impossibility, neither side of the debate raised any arguments about the effects of same-sex marriage on children, because such arguments were still moot at the time.<sup>78</sup>

During the 1980s, however, same-sex couples began raising children, a trend that only increased throughout the decade and into the 1990s.<sup>79</sup> Thus, when the Hawaii Supreme Court case of *Baehr v. Lewin*<sup>80</sup> brought the fight for same-sex marriage back to national attention in 1993, an opportunity arose to revive the debate with new, child-centered arguments.<sup>81</sup> On remand to the

74. Stein, *supra* note 34, at 660–61 (“[W]hat is perhaps the most frequent argument made for amending the Constitution to prohibit same-sex marriage involves children. . . . [A]rguments about children were not as prominent in past debates about amending the Constitution regarding marriage as they are in present debates . . .”).

75. Ball, *supra* note 29, at 2751; *see also* Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974).

76. Ball, *supra* note 29, at 2751–52 (“[P]laintiffs were seeking a remedy that was both legally and definitionally impossible to provide. As the courts saw it, the very definition of marriage required that the two prospective spouses be of different sexes/genders. Whatever it was that the plaintiffs were seeking through their lawsuits, it could not be ‘marriage’ as that term was defined legally and culturally.” (internal citations omitted)).

77. *Id.*

78. *Id.* at 2752–53.

79. *See id.* at 2753; *see also* GEORGE CHAUNCEY, WHY MARRIAGE? THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY 105 (2004) (describing “the lesbian baby boom” of the 1980s, during which lesbian women began exploring and pursuing parenthood through adoption, artificial reproductive technology, and intercourse with “male friend[s].”).

80. 852 P.2d 44 (Haw. 1993), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993).

81. Because the central issue was whether the circuit court properly granted the State's motion for judgment on the pleadings, the Hawaii Supreme Court did not discuss or analyze the child-centered arguments proffered by either party. Leaving such discussion for the circuit court

circuit court, opponents of same-sex marriage targeted the welfare of children raised by same-sex parents, presenting four expert witnesses in the fields of medicine and the social sciences who discussed the inherent ideal of opposite-sex parenting and the “burdened” upbringing of children raised by same-sex couples.<sup>82</sup> The circuit court dedicated more than half of its opinion to summarizing these and other expert conclusions, from both advocates and opponents of same-sex marriage, about the optimal environment for raising children.<sup>83</sup>

Ultimately, the court found these child-centered arguments unpersuasive and held that Hawaii’s law banning same-sex marriage violated the state’s constitution.<sup>84</sup> In particular, it found that couples decide to marry for reasons beyond raising children, including “stability and commitment,” “emotional closeness,” “intimacy and monogamy,” “the establishment of a framework for a long-term relationship,” “personal significance,” “recognition by society,” and “certain legal and economic protections, benefits and obligations.”<sup>85</sup> And while it found that a cohesive household with both a mother and a father is a “less burdened environment” for child development, the court concluded that “the single most important factor in the development of a happy, healthy and well-adjusted child is the nurturing relationship between parent and child.”<sup>86</sup> The court further held that lesbian and gay parents are able to develop these critical relationships and that the State failed to demonstrate a connection between same-sex marriage and abnormal child development.<sup>87</sup>

As the first state supreme court opinion to uphold same-sex marriage, *Baehr* incited hope among same-sex marriage advocates and powerful retaliation from citizens seeking to preserve the traditional definition of marriage.<sup>88</sup> In 1998, just two years after the court issued the final *Baehr*

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on remand, the court held only that Hawaii’s ban on same-sex marriage amounted to sex-based discrimination meriting strict scrutiny and further review by the lower court after a full presentation of the evidence. *See id.* at 67–68.

82. *Baehr v. Miike*, Civ. No. 91-1394, 1996 WL 694235 at \*4–5 (Haw. Cir. Ct. Dec. 3, 1996) (citing to the trial transcript and describing the conclusions of one expert that children in same-sex households receive an “overabundance of information about one gender and little information about the other gender.”).

83. It is probable that the court dedicated such a large portion of its opinion to the child-centered aspects of same-sex marriage as a result of evidence presented to it by the State. Although the State asserted five “compelling” state interests for preserving marriage as male-female institution, the circuit court described the State’s proffered evidence for the non-child-related interests as “meager,” failing in sufficiency and, at times, nonexistent. *Id.* at \*3, 20, 21.

84. *Id.* at \*22.

85. *Id.* at \*18.

86. *Id.* at \*17.

87. *Id.* at \*21.

88. *See* Lamba Legal, Landmark Cases, <http://www.lambdalegal.org/in-court/cases/baehr-v-miike.html> (describing the *Baehr* decision as the launch pad for the modern gay marriage movement, but noting that the decision “unleashed one of the most profound examples of backlash in our movement’s history”).

decision, Hawaiians passed a state constitutional amendment<sup>89</sup> granting the Hawaii legislature the authority to define marriage as a union between one man and one woman—authority on which the legislature promptly acted.<sup>90</sup> The decision also prompted Congress to pass the Defense of Marriage Act (DOMA)<sup>91</sup> in 1996, which defines marriage, for federal purposes, as a “legal union between one man and one woman as husband and wife” and permits individual states to deny recognition of marriages validly procured in other states.<sup>92</sup> The momentum of DOMA, coupled with the anxiety stirred up by *Baehr* and the subsequent Vermont and Massachusetts Supreme Court opinions upholding same-sex marriage,<sup>93</sup> motivated forty states to pass their own “mini-DOMAs” similarly banning same-sex marriage.<sup>94</sup>

The 2003 Supreme Court opinion in *Lawrence v. Texas*, in which the Court struck down a Texas ban on sodomy and made a rare pronouncement upon the rights of same-sex couples, further fueled the momentum of the same-sex marriage opponents.<sup>95</sup> The Court’s opinion in *Lawrence*, authored by Justice Kennedy, emphasized the sacred nature of private sexual intimacy and the dignity of allowing consenting adults their sexual freedom.<sup>96</sup> Although Justice Kennedy explicitly stated that the ruling had no implications for same-sex marriage,<sup>97</sup> a dissenting Justice Scalia warned that the opinion paved the way for the legitimization of same-sex marriage, as well as for a host of other impliedly undesirable acts.<sup>98</sup> Several legal scholars also predicted that *Lawrence* would take the country another significant step toward recognition of same-sex marriage.<sup>99</sup>

89. HAW. CONST. art. I, § 23.

90. Ball, *supra* note 29, at 2754.

91. Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2006)).

92. Stein, *supra* note 34, at 654.

93. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 957 (Mass. 2003); *Baker v. State*, 744 A.2d 864, 887 (Vt. 1999).

94. *See* Stein, *supra* note 34, at 654.

95. 539 U.S. 558 (2003). *Lawrence* struck down the Court’s previous ruling in *Bowers v. Hardwick*, which had upheld a Georgia sodomy law banning oral and anal sex between consenting adults. The *Bowers* court framed the discussion around whether there was a fundamental right to have homosexual intercourse—a framework denounced by *Lawrence* in favor of an analysis of the broader issue of sexual privacy and freedom. *See id.* at 566–67.

96. *Id.* at 567 (“It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”).

97. *Id.* at 578 (“It [the present case] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”).

98. *Id.* at 590 (Scalia, J., dissenting) (“State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are . . . called into question by today’s decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding.”).

99. *See, e.g.,* Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1945–46 (2004) (“Same-sex marriage . . . is bound

The *Lawrence* decision prompted Congress to conduct a hearing in 2004 to address anew the viability and desirability of DOMA.<sup>100</sup> During the hearing, several commentators argued that the country needed DOMA to stabilize families and ensure children are raised in ideal familial households. Reverend Richard Richardson made the following declaration, proclaiming marriage as an institution for children:

Children are raised expecting to have a biological mother and father . . . [I]t is basic human instinct. . . . Marriage is about children, not just about adult love . . . It is about finding the best arrangement for raising children, and as history, tradition, biology, sociology and just plain common sense tells us, children are raised best by their biological mother and father. . . . The traditional institution of marriage is not discrimination . . . Marriage was not created to oppress people. It was created for children.<sup>101</sup>

Professor Katherine Spaht also emphasized marriage's function as providing the ideal environment for raising children:

As a public institution, marriage serves society's most basic function—the acculturation of children, which is a time-intensive, exceedingly expensive proposition—marriage serves that societal purpose efficiently, and we have all understood it to be a union of a man and a woman . . . [M]arriage is not about discrimination—it's about

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to follow [after *Lawrence*]; it is only a question of time. For what, after all, could be the rationale for permitting an otherwise eligible same-sex couple to enjoy the tangible benefits and assume the legal obligations of some version of civil union but withholding from them that final measure of respect—that whole that plainly exceeds the mere sum of its component legal parts?"); Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184, 1185 (2004) ("*Lawrence* is helpful to those who argue that the right to marry, as protected by the Due Process Clause, includes within its ambit couples of the same gender because the opinion removes an important obstacle that has stood in the way of that argument, namely, that as long as the state was free to criminalize same-gender sexual conduct under *Bowers v. Hardwick*, it was also free to refuse to recognize the personal relationships that often accompany the underlying criminal acts."); Mark Strasser, *Lawrence and Same-Sex Marriage Bans: On Constitutional Interpretation and Sophistical Rhetoric*, 69 BROOK. L. REV. 1003, 1036 (2004) ("The [*Lawrence*] decision adopts a much more respectful tone towards members of the LGBT community and may provide the basis for someday recognizing a right to marry a same-sex partner.").

100. Nat'l Conference of State Legislatures., Measures Before Congress on Same-Sex Marriage, July 15, 2004, <http://www.ncsl.org/statefed/humserv/congressact.htm>. *Lawrence* also prompted President George W. Bush to propose a federal marriage amendment explicitly denying recognition of same-sex marriage—a proposal the President discussed in his 2004 State of the Union address. It was President Bush's State of the Union speech that prompted San Francisco Mayor Gavin Newsom, who attended the event, to start issuing marriage licenses to same-sex couples less than a month later. See Sylvia A. Law, *Who Gets to Interpret the Constitution? The Case of Mayors and Marriage Equality*, 3 STAN. J. C.R. & C. L. 1, 5–6 (2007).

101. *Proposed Constitutional Amendment to Preserve Traditional Marriage: Hearing Before S. Comm. on the Judiciary*, 108th Cong. 128 (2004) (prepared statement of Rev. Richard Richardson, Assistant Pastor at the St. Paul African Methodist Episcopal Church, Director of Political Affairs for The Black Ministerial Alliance of Greater Boston, and President and Chief Executive Officer, Children's Services of Roxbury, Boston).

children . . . State experimentation as fifty individual laboratories has not been permitted when the question is as fundamental as what is marriage. . . . Denying such experimentation is especially prevalent if there is concern for the welfare of children. . . . Children's welfare is central and at stake in a common understanding of marriage . . . [We] need to know if we live in and can rely on a strong marriage culture focused on the welfare of children free from the risk of experimentation.<sup>102</sup>

As the 2004 DOMA hearings revealed, same-sex marriage opponents are deeply concerned that allowing states to “experiment” with marriage will hinder the states’ ability to socialize and acculturate children. Traditional marriage is the ideal, they argue, because it provides children with one mother and one father, “living models of what both a man and a woman are like.”<sup>103</sup> Same-sex marriage opponents claim that raising children in traditional households allows them to learn from these living models, internalize the gendered structure of the home and greater society, and begin to practice their gender-specific roles and responsibilities within the home.<sup>104</sup> Opponents of same-sex marriage thus see the expansion of marriage to same-sex couples not as societal progress, but rather as societal degeneration, because it robs children of their primary place to learn appropriate gender roles.<sup>105</sup>

## 2. Goodridge v. Dep’t of Public Health

In the midst of this renewed debate over same-sex marriage, the Massachusetts Supreme Court issued *Goodridge v. Dep’t of Public Health* in 2003, a landmark decision declaring that the State could not deny marriage to same-sex couples under the state’s constitution.<sup>106</sup> Following the child-focused direction of traditional marriage advocates, the State in *Goodridge* argued

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102. *Id.* at 130–31, 133, 135 (prepared statement of Katherine Shaw Spaht, Law Professor at Louisiana State University).

103. *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006); *see also* Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 860–61 (1997) (“Parents are important as role models for their children of the same gender because [c]hildren learn to be adults by watching adults. . . . The importance of the opposite-gendered parent for the complete emotional and social development of the child is now recognized as well: Boys and girls build their notions of their sex roles from experience with *both* sexes. The loss of cross-gender parenting may have severe emotional consequences for the child. For example, the absence of a father in the home may result in a daughter having trouble relating to men throughout her adult life.” (internal quotations omitted)).

104. *See* Wardle, *supra* note 103, at 861; Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, at 23–24 (manuscript on file with author).

105. *See* Wardle, *supra* note 103, at 863–64; Murray, *supra* note 104, at 23–24; *see also* Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 DUKE J. CONST. L. & PUB. POL’Y 1, 18–24 (arguing that “man/woman marriage” provides the optimal environment for children’s social, emotional, and physical development and bestows the “beneficial” social identities of “husband” and “wife” to each partner, whereas “genderless marriage” “cannot deliver the same social goods.”).

106. 798 N.E.2d 941, 949 (Mass. 2003).

before the trial court that same-sex marriage was not compatible with notions of enduring commitment and family integrity.<sup>107</sup> In particular, the State claimed that its marriage statutes were originally written to “foster[] procreation” and “ensure that children would not only be born in wedlock but also reared by their mothers and fathers in one self-sufficient family unit with specialized roles for wives and husbands.”<sup>108</sup> Acknowledging that the intended familial division of labor no longer prevailed, the State asserted that it was nonetheless rational for the legislature to uphold opposite-sex marriage as the “optimal setting for raising children.”<sup>109</sup> The State also called attention to a study suggesting that girls raised by lesbian parents are more promiscuous than girls raised by opposite-sex parents.<sup>110</sup> Relying on this study, the State declared that the “strong state interest” in preventing teenage pregnancy was reason enough to deny same-sex marriage.<sup>111</sup> The State further argued that legal, technological, and ethical problems created by artificial reproductive procedures, particularly as to third-party surrogates and child contracts, provided another legitimate basis for limiting marriage to opposite-sex individuals.<sup>112</sup>

An amicus brief authored by several family and religious organizations took the child-centered argument against same-sex marriage a step further, asserting that children raised by same-sex parents are at higher risk of being molested, experiencing domestic violence, and “being drawn into homosexual behavior themselves.”<sup>113</sup> Amici also attacked the methodological and analytical integrity of studies denying the adverse effects of same-sex parenting. They argued that these supposedly flawed studies failed to “confirm” that same-sex

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107. Memorandum in Opposition to Plaintiffs’ Motion for Summary Judgment and in Support of Defendants’ Motion for Summary Judgment, *Goodridge v. Dep’t of Pub. Health*, No. 20011647A, 2002 WL 1299135 (Mass. Super. Ct. May. 7, 2002) (No. 01-1647A), 2001 WL 35920960. The state claimed that “permitting same-sex marriage might undermine the institution of marriage as a life-long commitment” and encourage heterosexual same-sex friends to get married merely for the convenience or financial benefits that marriage offers. *Id.* at 61–62.

108. *Id.* at 63.

109. *Id.* at 63.

110. *Id.* at 64 (citing Judith Stacey & Timothy J. Biblarz, (*How*) *Does the Sexual Orientation of Parents Matter*, 66 AM. SOC. REV. 159 (2001)).

111. *Id.* The state disregarded any findings indicating that children of same-sex marriages develop the same or “arguably ‘better’” than children of opposite-sex marriage, noting that Stacey, Biblarz, and other “experts” have questioned the validity of such studies because of their small, homogenous samples. *Id.*

112. *Id.* at 65.

113. Brief of Amici Curiae Focus on the Family et. al. in Opposition to Plaintiffs’ Motion for Summary Judgment at 23–24, 30–31, *Goodridge* 2002 WL 1299135 (No. 01-1647A). Amici referenced several studies, including one in *Developmental Psychology* finding that daughters of lesbian couples were four times more likely to become “active lesbians” than daughters of heterosexual unions. *Id.* at 23–24. Amici also referenced a 1991 study by the Bureau of Justice, *Violence Between Intimates*, which found that “married women in traditional families” faced the lowest threat of domestic violence among women. *Id.* at 30. They further cited P. Cameron & K. Cameron, *Homosexual Parents*, *ADOLESCENCE* 31 (1996), a study which concluded that “[h]aving a homosexual parent appears to increase the risk of incest with a parent by a factor of about 50.” *Id.* at 31.

marriage would not damage society, and that same-sex marriage should not be recognized until advocates provide reliable data that children and society will be unharmed in its wake.<sup>114</sup>

The *Goodridge* opinion marked an important milestone in same-sex marriage jurisprudence. *Goodridge* is particularly noteworthy for its conceptualization of marriage as an institution based on adult commitment, not on family and children. The opinion is also significant because the court transformed the child-based arguments set forth by same-sex marriage opponents, shifting the focus from the innate differences between child rearing in same-sex and opposite-sex households to the key similarities between the two—similarities which merit the equal provision of marriage and its benefits.

The majority opened its opinion by heralding marriage as a “vital social institution” and by enumerating the myriad benefits—both public and private—that marriage provides, from tax benefits and property distribution to the “deeply personal” relationship that fulfills humanity’s “yearnings for security, safe haven, and connection.”<sup>115</sup> Drawing from the essence of *Lawrence*, the majority noted that marriage is at once a “momentous act[] of self-definition” and also an expression of one’s “common humanity.”<sup>116</sup>

The *Goodridge* majority also made clear throughout its opinion that, despite the State’s assertion to the contrary, marriage is not primarily, let alone exclusively, devoted to procreation.<sup>117</sup> While noting that many marriages produce children, the majority determined that “it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the *sine qua non* of civil marriage.”<sup>118</sup> And although it acknowledged marriage’s importance to children’s welfare—particularly that “marital children reap a measure of family stability and economic security based on their parents’ legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children,”<sup>119</sup>—it also found the State’s “marriage equals procreation” argument a thinly veiled attempt to extract the one immutable difference between same-sex and opposite-sex couples and proclaim it as the “essence of legal marriage.”<sup>120</sup> Under such a framework, the majority observed, the fate of same-sex marriage is a foregone conclusion.<sup>121</sup>

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114. *Id.* at 24–26.

115. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948, 954–55 (Mass. 2003).

116. *Id.* at 955. The court had earlier recalled the central principles of *Lawrence*, particularly its role in “reaffirm[ing] the central role that decisions whether to marry or have children bear in shaping one’s identity.” *Id.* at 948.

117. *Id.* at 961.

118. *Id.*

119. *Id.* at 956–57.

120. *Id.* at 962.

121. *Id.*

The *Goodridge* majority also challenged the State's claim that banning same-sex marriage would advance state interests by increasing the number of "optimal" child-rearing environments.<sup>122</sup> While it agreed that upholding child welfare was a vital state goal, the court did not see how prohibiting same-sex marriage advanced such a policy, especially in light of changing demographics and the State's recent efforts to "strengthen the modern family in its many variations."<sup>123</sup> Even if the "optimal" setting for child rearing was, in fact, an opposite-sex marital household, the court did not see how a same-sex marriage ban would encourage opposite-sex couples to marry before having children.<sup>124</sup> Instead, the court warned that:

[e]xcluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which children will be reared, educated, and socialized.<sup>125</sup>

The *Goodridge* dissents, including separate opinions by Justices Spina, Cordy, and Sosman, were at unmistakable odds with the majority's view of marriage's role in society.<sup>126</sup> As the dissent saw it, marriage is a civil institution designed to encourage and stabilize procreation, linking the act of intercourse to the responsibilities of its (often unintended) consequences.<sup>127</sup> Justice Cordy's dissenting opinion is particularly revealing. He claimed that without the "regulation of heterosexual behavior" that marriage provides, a mother and father would not be formally bound as parents, and the resulting society "would be chaotic."<sup>128</sup> He further asserted that marriage plays a vital role in educating citizens about this social ideal, communicating to society that "marriage is a (normatively) necessary part of [its] procreative endeavor . . . [Allowing same-sex marriage] might result in the mistaken view that civil marriage has little to do with procreation."<sup>129</sup> Justice Cordy found it rational to conclude that opposite-sex parents provide the comparatively optimal environment for child rearing because same-sex parents are unable to present each child with a "parental authority figure of each gender."<sup>130</sup> He further opined that until

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122. *Id.* at 962.

123. *Id.* at 963.

124. *Id.* at 963.

125. *Id.* at 964 (internal quotations omitted).

126. In his dissent, Justice Cordy stated that "[i]t is difficult to imagine a State purpose more important and legitimate than ensuring, promoting, and supporting an optimal social structure within which to bear and raise children." *Id.* at 997 (Cordy J., dissenting).

127. *Id.* at 996. As Justice Cordy later expounds, "civil marriage is the product of society's critical need to manage procreation as the inevitable consequence of intercourse between members of the opposite sex. Procreation has always been at the root of marriage and the reasons for its existence as a social institution." *Id.* at 1003 n.34.

128. *Id.* at 996.

129. *Id.* at 1002.

130. *Id.* at 1000. Justice Cordy provides the example:

[A] boy raised by two lesbians as his parents has no male parent. . . . [C]oncern about

scientific studies prove that same-sex parenting is “as optimal” as opposite-sex parenting, Massachusetts’s refusal to recognize same-sex marriage “remains prudent.”<sup>131</sup>

Perhaps in response to the language emphasizing the non-child-centered benefits of marriage in the majority opinion, Justice Cordy also disclaimed that civil marriage is about adult interests:

[The majority] emphasizes the personal and emotional dimensions that often accompany marriage. It is, however, only society’s interest in the institution of marriage as a stabilizing social structure that justifies the statutory benefits and burdens that attend to the status provided by its laws. Personal fulfilment [sic] and public celebrations or announcements of commitment have little if anything to do with the purpose of the civil marriage laws, or with a legitimate public interest that would justify them.<sup>132</sup>

As the first state supreme court decision to give same-sex couples an absolute, unqualified right to legal marriage, same-sex marriage advocates and legal scholars praised *Goodridge* as a revolutionary decision and as the first significant step toward achieving nationwide marriage equality for the lesbian, gay, bisexual, and transgender (LGBT) community.<sup>133</sup> The *Goodridge* opinion is also significant for its approach to addressing the child-focused arguments against same-sex marriage. Instead of challenging the State’s claims that children raised by same-sex parents have substandard development, as the *Baehr* court did, the *Goodridge* court focused on the State and amici’s claims that marriage is an institution for children. The *Goodridge* court conceded that marriage is indeed beneficial to children, but subsequently reasoned that, because same-sex couples are now raising children, their families also deserve the rights and protections that flow from marriage.<sup>134</sup> The court’s logic was simple: yes, marriage benefits children, so we must offer it to same-sex couples because they have children now, too.

The *Goodridge* court’s cooptation of the State’s child welfare rhetoric represents an important shift in the same-sex marriage debate. In focusing its

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such an arrangement remains rational [because a child might feel that] neither of his parents “understands” him, or that they “don’t know what he is going through,” particularly if his disagreement or dissatisfaction involves some issue pertaining to sex. *Id.* at 1000 n.29.

131. *Id.* at 1000.

132. *Id.* at 997.

133. See, e.g., Mary L. Bonauto, *Goodridge in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 37 (2005) (“I stand with those who predict that the *Goodridge* decision will come to be regarded as a triumph of freedom. It will increasingly be seen as some people already experience it: a beacon of hope, fairness, and equality—America at a crossroads and choosing the path of fairness.”); Cass R. Sunstein, *Federal Appeal: Massachusetts Gets It Right*, NEW REPUBLIC, Dec. 22, 2003, at 21 (describing the *Goodridge* opinion as “extraordinary” and a “stirring tribute to individual rights.”).

134. 798 N.E.2d at 963–64 (noting that several of the plaintiffs were parents and, as such, deserve access to the “cornucopia” of state benefits provided to married couples and their children).

analysis on the familial benefits of marriage, the court diverted attention from the debate over the alleged abnormal social development of children raised by same-sex couples. The court thereby sidestepped the State's request for findings "beyond reasonable scientific dispute" that no significant differences exist between the development of children raised in same-sex and opposite-sex households—an arguably impossible task for same-sex marriage advocates—before legalizing same-sex marriage.<sup>135</sup>

Although the rhetorical transformation of child-based arguments was a significant turning point and a successful strategy in *Goodridge*, the long-term wisdom of appealing to the similarities between same-sex and opposite-sex couples is a problematic long-term strategy for the same-sex marriage movement. First, as the discussion of *Hernandez v. Robles* will show, highlighting the similarities between same-sex and opposite-sex couples only invites opponents of same-sex marriage to respond with more forceful claims about their differences.<sup>136</sup> Second, in arguing that "we deserve marriage because we're just like you—we have children, too," same-sex marriage advocates trap themselves within a traditional, procreation-based notion of marriage that still excludes many members of the LGBT community.<sup>137</sup> If the same-sex marriage movement is seeking legal protection and dignity for all committed relationships regardless of gender and reproductive choice, a more robust and inclusive marital institution is best suited to fulfill this goal.

### 3. *Hernandez v. Robles*

In 2006, the New York high court considered whether the State's denial of marriage licenses to same-sex individuals violated the state constitution.<sup>138</sup> The majority in *Hernandez v. Robles* determined that the plaintiffs had no fundamental right to same-sex marriage<sup>139</sup> and that the State had the constitutional authority to restrict marriage and its benefits to opposite-sex couples.<sup>140</sup> While it acknowledged the occurrence of sexual orientation discrimination, the majority found that the classification at issue—between couples who can produce children through sexual intercourse and those who cannot—was justified, as it relates to the State's legitimate interest in "fostering relationships that will serve children best."<sup>141</sup>

The *Hernandez* court was upfront about its view of marriage. It opened its substantive discussion by referencing "the undisputed assumption that marriage

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135. See Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendants' Motion for Summary Judgment, *supra* note 107, at 64.

136. See *infra* text accompanying notes 138–68.

137. See *infra* text accompanying notes 255–56.

138. *Hernandez v. Robles*, 855 N.E.2d 1, 5 (N.Y. 2006).

139. *Id.* at 9, 11.

140. *Id.* at 6–7. Justice Graffeo concurred in the opinion.

141. *Id.* at 11.

is important to the welfare of children,”<sup>142</sup> and later describing it “primarily or solely as an institution for the benefit of children.”<sup>143</sup> From this foundation, the court determined that the State could rationally choose to limit marriage to opposite-sex couples exclusively because they can procreate naturally.<sup>144</sup> Because so many children of opposite-sex couples are the products of “casual or temporary” relationships, the majority reasoned, they face a unique danger of instability and impermanence.<sup>145</sup> Since children of same-sex couples, on the other hand, are rarely conceived accidentally or impulsively, the court presumed, they face little danger of familial vulnerability, and thus have less need for the stabilizing institution of marriage.<sup>146</sup>

The *Hernandez* court also concluded that children fare “better” in opposite-sex marital households.<sup>147</sup> “Intuition” and “common-sense” suggested, in the majority’s view, that children need “living models of what both a man and a woman are like.”<sup>148</sup> The court discredited studies submitted by the plaintiffs showing positive results from same-sex parenting, as the studies “on their face [did] not establish beyond doubt that children fare equally well in same-sex and opposite-sex households.”<sup>149</sup> However, the court discounted the suggestion that marriage should be limited to opposite-sex couples who are likely to have children—despite its view that marriage’s core purpose is procreative—as it “would require grossly intrusive inquiries, and arbitrary and

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142. *Id.* at 7.

143. *Id.* at 12.

144. *Id.* at 7.

145. *Id.*

146. *Id.* The Indiana Court of Appeals made a more vigorous version of this argument in its 2005 decision on the same issue, *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005). Framing the issue as whether state recognition of same-sex marriage would serve “all of the same state interests that opposite-sex marriage does, including the interest in marital procreation,” the *Morrison* court concluded that same-sex couples who have children via artificial reproduction techniques or adoption are “by necessity, heavily invested, financially and emotionally, in those processes” and will likely provide their children a stable familial environment “with or without the ‘protections’ of marriage.” 821 N.E.2d at 23–24. In contrast, “‘accidents’ do happen” within the casual relations of opposite-sex couples, thus meriting an opposite-sex marriage institution that promotes “responsible procreation.” *Id.* at 24–25. Because the court saw the central purpose of marriage (“its deep logic”) as “regulat[ing] the consequences of man/woman intercourse,” it did not touch on the relative parenting abilities of same-sex couples, finding such a discussion irrelevant. *Id.* at 30.

147. *Hernandez*, 855 N.E.2d at 7.

148. *Id.*

149. *Id.* at 8. The court continued: “What [the studies] show, at most, is that rather limited observation has detected no marked differences.” *Id.* In its amicus brief, the American Psychological Association (APA) cited over twenty empirical studies, which it claimed were “impressively consistent in their failure to identify deficits in the development of children raised in a lesbian or gay household.” Brief of Amici Curiae American Psychological Association et. al. in Support of Plaintiffs-Respondent at 34–35, *Hernandez*, 855 N.E.2d 1. Interestingly, the APA includes in this group the same study by Stacey and Biblarz on which amici in *Goodridge* relied to assert that there were several significant differences in the development of children raised in same-sex and opposite-sex households. *Id.*; see *supra* notes 110–11.

unreliable line-drawing.”<sup>150</sup>

In a lengthy dissent, Chief Judge Kaye expressed her dismay at the majority’s fixation on the traditional definition of marriage, which necessarily excludes same-sex couples.<sup>151</sup> She denounced the majority’s framing of the issue—whether there was a “new” fundamental right to same-sex marriage—as a direct assault on the nature of the marital right.<sup>152</sup> “Simply put,” Judge Kaye concluded, “fundamental rights are fundamental rights. They are not defined in terms of who is entitled to exercise them.”<sup>153</sup>

Judge Kaye also challenged the majority’s fixed, nonevolving conception of marriage as misleadingly selective and flying in the face of historical context and legal precedent.<sup>154</sup> The role and meaning of marriage, she claimed, has in fact evolved throughout history, progressing from what once was an institution of coverture and male dominance to one that is a “relationship between two equal partners, founded upon shared intimacy and mutual financial and emotional support.”<sup>155</sup> Judge Kaye cited numerous marital benefits that inure to the adults in the relationship, from property and inheritance rights to employment and wrongful death benefits, to support her claim that marriage is a dynamic legal and personal union.<sup>156</sup> She also emphasized the emotional and expressive elements of marriage, which support the notion that marriage is a fundamental, individual adult right that may not be restricted without due consideration. In so doing, Judge Kaye invoked the essence of *Turner v. Safley*,<sup>157</sup> a Supreme Court decision striking down prison regulations that required inmates to seek the warden’s permission before marrying, in which the Court explained that:<sup>158</sup>

[I]nmate marriages, like others, are expressions of emotional support and public commitment. . . . In addition, many religions recognize marriage as having spiritual significance; for some inmates and their

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150. See *Hernandez*, 855 N.E.2d at 11–12.

151. Judge Kaye compared the majority’s adherence to traditional notions of marriage to the approach used by opponents of interracial marriage in pre- *Loving* times, specifically that history demanded marriage remain a relationship between spouses of the same race. *Id.* at 24–25 (Kaye, J., dissenting).

152. *Id.*

153. *Id.* at 24. Judge Kaye’s framing the issue as the right to marriage (not the right to same-sex marriage) echoes the precedent set in *Lawrence v. Texas*, discussed *supra* text accompanying notes 95–99, in which Justice Kennedy was clear in defining the rights involved as the broader right to sexual privacy and intimacy, not the specific right to same-sex intimacy.

154. *Id.* at 26 (“The claim that marriage has always had a single and unalterable meaning is a plain distortion of history. In truth, the common understanding of ‘marriage’ has changed dramatically over history.”).

155. *Id.*

156. *Id.* at 25, 31.

157. 482 U.S. 78 (1987). Despite the constitutional restrictions on prison life, the Court in *Safley* found that inmates may enjoy several core aspects of marriage without compromising the effectiveness of their imprisonment. *Id.* at 95.

158. *Hernandez*, 855 N.E.2d at 31 (Kaye, J., dissenting).

spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication.<sup>159</sup>

Given the nature and importance of marriage, Judge Kaye concluded, the State lacked any rational basis for upholding the same-sex marriage ban.<sup>160</sup> While acknowledging the State's legitimate interest in encouraging procreation within marriage, Judge Kaye noted that denying same-sex couples the right to marry would not encourage more opposite-sex couples to marry before having children.<sup>161</sup> Nor would prohibiting same-sex marriage incentivize procreation in general, Judge Kaye reasoned, as "no one rationally decides to have children because gays and lesbians are excluded from marriage."<sup>162</sup> As for the State's proffered interest in ensuring the welfare of children, Judge Kaye warned that preventing same-sex couples from marrying, and thus denying them innumerable civil and legal protections, only destabilizes families and undermines the security and wellbeing of their children.<sup>163</sup> According to Judge Kaye, "The State's interest in a stable society is rationally advanced when families are established and remain intact irrespective of the gender of the spouses."<sup>164</sup>

The *Hernandez* decision provided an important juxtaposition to *Goodridge*, particularly as to the precedent established on child-centered arguments. The *Hernandez* court acknowledged *Goodridge*'s finding that same-sex couples raise children, just as opposite-sex couples do, but it emphasized the distinct manner and circumstances that often surround same-sex and opposite-sex parenting.<sup>165</sup> Because same-sex couples often proactively choose to procreate, the majority implied that they are necessarily thoughtful and invested parents.<sup>166</sup> Because opposite-sex couples, on the other hand, can easily and accidentally have children, there is no assurance that they will be fit parents.<sup>167</sup> This difference in the innate parenting abilities of same-sex and opposite-sex couples, the *Hernandez* court reasoned, merits heightened support and protections, in the form of marriage, for opposite-sex parents.<sup>168</sup>

The *Hernandez* opinion exposed the weakness of justifying a same-sex marriage right based on the similarities between same-sex and opposite-sex couples: this approach effectively invites same-sex marriage opponents to emphasize the differences between these couples. The opinion also signaled to same-sex marriage activists that a more vigorous and innovative approach

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159. *Turner*, 482 U.S. at 95–96.

160. *Hernandez*, 855 N.E.2d at 29–30 (Kaye, J., dissenting).

161. *Id.* at 31.

162. *Id.*

163. *Id.* at 32.

164. *Id.* Judge Kaye further challenged the majority's holding, noting that moral disapproval, tradition, and uniformity were constitutionally unjustifiable reasons for prohibiting same-sex marriage. *Id.* at 32–34.

165. *See id.* at 359 (majority opinion).

166. *See id.*

167. *See id.*

168. *See id.*

would be necessary in the future to secure marriage rights for the LGBT community. As the following discussion of *In re Marriage Cases* and the ensuing battle over California Proposition 8 will reveal, however, same-sex marriage advocates faltered, in both the innovation and the execution of their campaign.

#### 4. In re Marriage Cases

On February 12, 2004, the city of San Francisco, under the direction of Mayor Gavin Newsom, began issuing marriage licenses to same-sex couples.<sup>169</sup> In the days that followed, more than three hundred same-sex couples formed a line to San Francisco City Hall that wrapped around an entire city block.<sup>170</sup> But just as quickly as the lines formed, opponents of same-sex marriage came together the next day to challenge Mayor Newsom's directive, filing two separate actions to dissolve the same-sex marriages that had occurred and to prohibit any further licenses being issued to same-sex couples.<sup>171</sup> On March 11, 2004, the California Supreme Court ordered San Francisco to stop issuing licenses pending a court decision on the cases, after roughly four thousand same-sex couples had already been married.<sup>172</sup>

The opponents' actions were ultimately combined and the first decision on the issue in superior court held that limiting marriage to opposite-sex couples violated the California Constitution.<sup>173</sup> The court of appeals reversed, finding that prohibiting same-sex marriage only merited rational basis review and that limiting marriage to opposite-sex couples was a rational means to the legitimate state goal of preserving the tradition of marriage as a heterosexual institution.<sup>174</sup>

Oral arguments before the California Supreme Court took place on March 4, 2008, more than four years after Mayor Newsom directed the city to provide licenses to same-sex couples.<sup>175</sup> Two interest groups, Campaign for California Families<sup>176</sup> and Proposition 22 Legal Defense Fund,<sup>177</sup> were the primary

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169. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded by state constitutional amendment*, CAL. CONST. art. I, § 7.5, *as recognized in* *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

170. Simone Sebastian & Tanya Schevitz, *Marriage Mania Grips S.F. as Gays Line up for Licenses*, S.F. CHRON., Feb. 16, 2004, at A1.

171. *See Marriage Cases*, 183 P.3d 384 at 402.

172. *Id.* at 402–4.

173. *Id.* at 404; *see also In re Coordination Proceeding*, Special Title Rule [1550(c)], *Marriage Cases*, No. 4365, 2005 WL 583129, at \*11–12 (Cal. Super. Ct. Mar. 14, 2005), *rev'd in part*, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006), *rev'd*, 183 P.3d 384 (Cal. 2008).

174. *Marriage Cases*, 183 P.3d at 404; *see also* 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006).

175. Bob Egelko, *Court Appears Split on Same-Sex Marriage*, S.F. CHRON., Mar. 5, 2008, at A1.

176. According to its website, Campaign for California Families is “dedicated to defending and representing the values of parents, grandparents and concerned citizens who believe in family, faith and freedom. . . . God is the source of [its] imagination, love and vision for children and families in California and America.” SaveCalifornia.com, <http://savecalifornia.com/about.html> (last visited Dec. 2, 2009).

organizations that based their arguments against same-sex marriage on its allegedly negative impact on children and the family. The brief by Campaign for California Families reiterated many of the arguments previously made by same-sex marriage opponents in Massachusetts and New York: that same-sex couples' inability to naturally procreate precludes their need for the stability of civil marriage; that children thrive best with opposite-sex parents; and that children of same-sex couples face a higher risk of social/emotional problems, promiscuity, suicide, and homosexual behavior.<sup>178</sup> The brief also discussed the importance of "double origin," the notion that each child is born of one man and one woman, emphasizing that "[i]n a good society, the double origin of every child is recognized and respected. Unalterably denying or effacing a child's double origin in the name of adult freedom is morally wrong."<sup>179</sup>

Proposition 22 Legal Defense Fund also rehashed old arguments regarding the negative effects of same-sex marriage on children. The organization's brief lamented that "regardless of how much [same-sex couples] love a child or how good they are at parenting, they cannot provide a child the same benefits as the child's own biological parents. Every child raised in a same-sex home has been deliberately made to be motherless or fatherless."<sup>180</sup>

The same-sex marriage advocates' response to their opponents' child-based conception of marriage both echoed and challenged the sentiments expressed in *Goodridge*. Advocates first argued that the assertion that opposite-sex parents are "superior" to same-sex parents is both "repugnant" to California's longstanding policy against discrimination and scientifically unsubstantiated, noting that research has been "remarkably consistent in showing that lesbian and gay parents are every bit as fit and capable as heterosexual parents."<sup>181</sup> Recalling *Goodridge*, the same-sex marriage proponents also challenged any purported scientific or intuitive link between banning same-sex marriage and ensuring optimal child-rearing households.<sup>182</sup>

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177. The Prop 22 Legal Defense Fund was formed to promote the passage of Proposition 22 in California in 2000. The proposition, which passed by a roughly sixty percent majority and was codified in CA FAM. CODE § 308.5 (2006), declared that "[o]nly marriage between a man and a woman is valid or recognized in California."

178. Answer Brief of Campaign for California Families on the Merits at 65–70, *Marriage Cases*, 43 Cal. 4th 757 (No. S147999).

179. *Id.* at 73 (internal citations omitted). That Campaign for California Families sees marriage as an institution for children, not adults, permeates its brief to the California Supreme Court. At one point, Campaign for California families posited that, without children, adult intimate relationships are akin to those between "drinking buddies and bridge groups" and that "[m]arriage is different largely because of its importance to children, who cannot protect their own interests within the family as drinking buddies and members of bridge groups can." *Id.* at 72.

180. Appellant Proposition 22 Legal Defense and Education Fund's Opening Brief at 31, *In re Marriage Cases*, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006) (No. A110651).

181. Respondents' Consolidated Answer to Amicus Curiae Briefs at 39, *Marriage Cases*, 43 Cal. 4th 757 (No. S147999), 2007 WL 4632425.

182. *Id.* at 40–44 (noting that the number of children raised by both biological parents would not necessarily increase under a same-sex marriage ban, nor would the safety or stability of

Further borrowing from *Goodridge*, they argued that “neither procreation nor childrearing is a *sine qua non* of marriage.”<sup>183</sup> But the advocates of same-sex marriage also challenged the *Goodridge* principal that marriage is fundamentally a relationship focused on adult love and commitment. Finding the distinction between child-centered and adult-centered conceptions of marriage a “false dichotomy,”<sup>184</sup> the plaintiffs clarified that, in reality, “marriage serves multiple purposes and goals.”<sup>185</sup>

Because California allows same-sex couples to register as domestic partners, a civil status that affords “all or virtually all” of the benefits that civil marriage provides,<sup>186</sup> the California Supreme Court focused narrowly on whether the State’s separate designation for same-sex relationships violated the California Constitution.<sup>187</sup> The court held, under both due process and equal protection, that the state constitution required that same-sex couples be allowed to marry. And, unlike the majority opinion in *Goodridge* and Chief Justice Kaye’s dissent in *Hernandez*, the California court integrated *both* the individual/personal aspects *and* the child-based/familial aspects of marriage into its discussion of marriage and constitutional rights.

The California Supreme Court’s due process analysis focused in part on the nature and role of marriage and its effects on society, individuals, and children. The court declared marriage a fundamental right that must be protected not only procedurally (i.e., by giving same-sex couples the right to marry), but also substantively.<sup>188</sup> While the court conceded the important role marriage plays in enhancing family stability and the education and socialization of children, it also stressed that marriage is “of overriding importance to the individual and to the affected couple.”<sup>189</sup> Getting married allows partners to join not only each other’s families, but also the “broader family social structure that is a significant feature of community life.”<sup>190</sup> The public commitment that each marital partner makes, in the court’s view, is an “important element of self-expression that can give special meaning to one’s life.”<sup>191</sup> The court also emphasized the intangible symbolic protection that marriage affords to parents, which justifies and upholds a parent’s relationship to her child in the face of

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children resulting from unintentional procreation be enhanced by such a ban).

183. *Id.* at 46.

184. *Id.* at 45.

185. *Id.* In their brief, same-sex marriage advocates cited to Linda McClain, *God’s Created Order, Gender Complementarity, and the Federal Marriage Amendment*, 20 B.Y.U. J. PUB. L. 313, 336 (2006), in which McClain concludes that “the argument that marriage is not about adult love, but about children, sets up an either/or view of the purposes of marriage that is simply wrong with respect to historical and contemporary understandings of marriage.”

186. *In re Marriage Cases*, 183 P.3d 384, 397 (Cal. 2008).

187. *Id.* at 398.

188. *Id.* at 425–26.

189. *Id.* at 424.

190. *Id.* at 425.

191. *Id.*

adversity.<sup>192</sup>

Having defined marriage as a deeply personal and fulfilling endeavor for each spouse, the court turned to the claims regarding the link between marriage and procreation. The court rejected same-sex marriage opponents' argument that marriage is an institution whose primary aim is encouraging procreation. Instead, the court concluded that "[t]he constitutional right to marry never has been viewed as the sole preserve of individuals who are physically capable of having children."<sup>193</sup> The court cited *Griswold v. Connecticut*,<sup>194</sup> which upheld the right of married couples to use contraception, and *Turner v. Safley*,<sup>195</sup> which protected the marriage rights of prison inmates despite their inability to procreate within prison confines, as proof that marriage does not, at least in the constitutional sense, primarily serve procreative interests.<sup>196</sup>

The court also rejected the assertion that recognizing same-sex marriage would send the message that the State finds no importance in ensuring that biological mothers and fathers raise their children.<sup>197</sup> The court concluded that state support for same-sex marriage would rather "confirm[] that a stable two-parent family relationship, supported by the State's official recognition and protection, is equally as important for the numerous children in California who are being raised by same-sex couples as for those children being raised by opposite-sex couples."<sup>198</sup> The court also considered whether the State avoided an equal protection violation by affording same-sex couples domestic partnership benefits. It concluded that the *title* of marriage is a central element of the fundamental right that same-sex couples sought, as it extends to same-sex relationships the same "dignity, respect and stature" that society (and the State) affords opposite-sex married relationships.<sup>199</sup> Designating same-sex relationships something other than marriage, in the court's view, calls into question not only the dignity of same-sex couples' unions but also their status as equal citizens.<sup>200</sup>

The court then turned to California's equal protection clause, focusing its analysis on sexual orientation discrimination.<sup>201</sup> The court dismissed arguments made by Campaign for California Families and Proposition 22 Legal Defense Fund that the traditional definition of marriage is "constitutionally enshrined," and also dismissed those of the state attorney general that the court could not

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192. *Id.* at 424–25.

193. *Id.* at 431.

194. 381 U.S. 479 (1965).

195. 482 U.S. 78 (1987).

196. *Marriage Cases*, 183 P.3d at 432.

197. *Id.* at 432.

198. *Id.*

199. *Id.* at 434.

200. *See id.* at 434–35.

201. *Id.* at 440–41. The court found no instance of sex discrimination, as it was understood in the context of California's prior sex discrimination jurisprudence. *Id.* at 439.

expand the scope of marriage because voters had already opted to keep marriage between one man and one woman.<sup>202</sup> Ultimately, the California Supreme Court held that the prohibition on same-sex marriage unconstitutionally denied same-sex couples the marital rights and protections afforded to opposite-sex couples, and thus ordered the language limiting marriage to “a man and a woman” be struck from the family code. The court also issued a writ of mandate to state officials, advising them to “take all actions necessary to effectuate [the] ruling” and perform same-sex marriages.<sup>203</sup>

### 5. Proposition 8

The California Supreme Court’s decision incited hope and praise within the LGBT community and among same-sex marriage advocates. However, it also generated a fierce and quick backlash from their adversaries, many of whom had begun soliciting signatures for a constitutional amendment even before the court issued its opinion.<sup>204</sup> These opponents easily gathered the required signatures to place Proposition 8, which called to amend the state’s constitution by declaring that “only marriage between a man and a woman is valid or recognized in California,” on the November 2008 ballot.<sup>205</sup>

Proposition 8 generated record-setting campaign expenditures, amounting to a total of \$85 million. The innovative and aggressive campaign waged by Proposition 8 proponents took the child-focused arguments against same-sex marriage to a new level. Fueled by \$40 million in funds,<sup>206</sup> ProtectMarriage.com, the organization responsible for getting Proposition 8 on the ballot, conducted an intensive television campaign that featured dozens of advertisements, most of which emphasized same-sex marriage’s ostensible effects on children. Many of these ads pertained to education,<sup>207</sup> suggesting that same-sex marriage, if legal, would have to be taught in public schools. One ad suggested that same-sex marriage would be integrated not just into civics, but also into math, science, and reading lessons.<sup>208</sup> Many of the ads also depicted

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202. See *id.* at 446–51.

203. *Id.* at 453. Justices Baxter (joined by Justice Chin) and Corrigan each wrote dissenting opinions. Justice Baxter argued that the court’s decision on same-sex marriage did, in fact, create a new constitutional right and thus violated the separation of powers. *Id.* at 456–57 (Baxter J., dissenting). He concluded that “if there is to be a further sea change in the social and legal understanding of marriage itself, that evolution should occur by [] democratic means.” *Id.* at 456. Justice Corrigan also found that allowing same-sex couples to marry changes the definition of marriage and that such change can only occur by the will of California voters. *Id.* at 468.

204. See Erin Allday, *Newsom Was Central to Same-Sex Marriage Saga*, S.F. CHRON., Nov. 6, 2008, at A1.

205. See CAL. CONST. art. I, § 7.5.

206. See John Wildermuth, *Prop 8 Opponents Unhappy with Campaign Leaders*, S.F. CHRON., Jan. 25, 2008, at B1.

207. See generally ProtectMarriage.com, <http://www.protectmarriage.com> (last visited Dec. 2, 2009).

208. ProtectMarriage.com, *Robb and Robin Wirthlin’s Story*, <http://www.protectmarriage.com/video> (last visited Dec. 2, 2009).

family scenarios, such as children running home to tell their parents that their teachers taught them that “princes could marry princes” and parents sitting on the family couch discussing their outrage that gay marriage would be taught in schools.<sup>209</sup>

An ad entitled *Daddy, Where Do Babies Come From?* featured a daughter asking her two gay male parents where babies come from, and why her other friends have one mother and one father.<sup>210</sup> The fathers looked at each other with skepticism and suggested the daughter not go over to her friend’s house anymore.<sup>211</sup> The ad concluded that same-sex marriage confuses children about the “real meaning of marriage”: procreation.<sup>212</sup> Similarly, *The Story of Prop 8* features a montage of family-friendly images, including a couple playing with their young child, a heterosexual wedding reception, and a living room mantle bedecked with opposite-sex wedding photos, which are displayed on the screen while a narrator explains that “Proposition 8 is about restoring the traditional definition of marriage.”<sup>213</sup> The narrator describes marriage’s core function as “bind[ing] men and women for one overriding societal purpose: to create a loving environment for the raising up of children.”<sup>214</sup> Driving home the campaign’s central message, the narrator notes that “protecting the interests of children is the reason the state has for regulating marriage to begin with.”<sup>215</sup>

While these ads, on their face, reiterate the central themes invoked by opponents of same-sex marriage since *Baehr*—namely, that the core of marriage, both to individuals and the State, is found in child rearing—they also present a few noteworthy differences. In addition to confirming that marriage is about procreation, *Daddy, Where Do Babies Come From?* also suggests that same-sex couples are fearful, perhaps even loathsome, of traditional marriage. Fueled by such fear, same-sex parents, as depicted in the ad, actively mislead their children about society’s central values. Such a depiction implies that same-sex parents are not simply inferior to opposite-sex parents, but that they are the enemy to opposite-sex parents, who strive, by living example, to teach their children traditional values. *The Story of Prop 8* also serves to reinforce the concept of marriage as a child-based institution, but stumbles in its reasoning. The ad takes note that marriage is “a complex web of social, legal and spiritual commitments,” but then jumps to the seemingly incongruous conclusion that children are the only reason the State has an interest in marriage.

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209. See generally ProtectMarriage.com, *supra* note 207.

210. ProtectMarriage.com, *Daddy, Where Do Babies Come From?*, available at <http://www.youtube.com/watch?v=75J3TN9Zzck> (last visited Dec. 2, 2009).

211. *Id.*

212. *Id.*

213. ProtectMarriage.com, *The Story of Prop 8*, <http://www.protectmarriage.com/tell> (last visited Mar. 14, 2009).

214. *Id.*

215. *Id.*

Another series of ads warns that children of same-sex couples are not the only ones who are at risk. *Finally the Truth* opens with dramatic, doomsday-inspired music and the story about the San Francisco first graders' field trip to their lesbian teacher's wedding.<sup>216</sup> Over images of children throwing flower petals and blowing bubbles at the newly married couple, a narrator warns that "[a] public school took first-graders to a lesbian wedding, calling it a 'teachable moment.'"<sup>217</sup> Despite same-sex marriage advocates' claims to the contrary, the narrator cautions that "[an] official website confirms teaching marriage is required in ninety-six percent of schools, and a leading Prop 8 opponent has warned parents cannot remove their children from this instruction."<sup>218</sup> Simply put, "[c]hildren will be taught about gay marriage unless [Californians] vote yes on Proposition 8."<sup>219</sup>

In *Robb and Robin Wirthlin's Story*, two parents from Massachusetts talk about their experiences after same-sex marriage was legalized in their state.<sup>220</sup> Robin describes how her son came home from school one afternoon and told her about a book the class read "about a prince who married another prince, not a princess, and they became the king and the king."<sup>221</sup> The Wirthlins were dismayed by their son's story. "This was actually being read aloud by the teacher in class?" Robin exclaimed.<sup>222</sup> The Wirthlins feared that redefining marriage would have devastating results "at every level of society, especially at the youngest levels of our society—our children."<sup>223</sup> Their particular concern was about the effects same-sex marriage would have on their son's public school education:

They will teach about homosexuality and gay marriage in every topic: in math, in social studies, in reading, in spelling; there will be terms and concepts of homosexuality promoted in every subject, at every level, from kindergarten on up. Parents will have no right to object and schools will roll this forth whether they like it or not. . . . We just want to protect our children while they are children, not have them face adult issues while they're children. . . . We just want [our children] to have a carefree and protected childhood.<sup>224</sup>

An abbreviated version of this message appeared in *Everything to Do with Schools*, which also featured the Wirthlins and their concerns about their second-grade son's education.<sup>225</sup> Voicing their feelings of powerlessness and

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216. ProtectMarriage.com, *Finally the Truth*, <http://www.protectmarriage.com/video/> (last visited Dec. 2, 2009).

217. *Id.*

218. *Id.*

219. *Id.*

220. *Robb and Robin Wirthlin's Story*, *supra* note 208.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. ProtectMarriage.com, *Everything to Do with Schools*, <http://www.protectmarriage.com>.

loss of parental authority, the Wirthlins explained that “we tried to stop public schools from teaching children about gay marriage, but the court said we had no right to object or pull him out of class.”<sup>226</sup> The ad then cuts to a classroom scene, where a teacher sat at her desk and warned viewers: “It’s already happened in Massachusetts. Gay marriage will be taught in our schools unless we vote yes on Proposition 8.”<sup>227</sup>

These three ads sent a powerful and fearful message to voters: Same-sex marriage, if legalized, will steamroll the rights of all Californians, and particularly the rights of opposite-sex parents to educate their children. According to the Yes on 8 Campaign, the issue went beyond the welfare of children raised in same-sex households; the social and emotional welfare of *all* children throughout California was at stake. These ads portrayed marriage not only as an instrument in the education and socialization of children—the alteration of which would have drastic effects on child socialization—but also as a source of parental rights and authority. Thus, from the Yes on 8 Campaign’s point of view, in redefining marriage to include same-sex couples, opposite-sex parents necessarily lose authority over their children’s education and, ultimately, their social and moral wellbeing.<sup>228</sup> This doomsday approach catapulted marriage into a new realm of social importance, which excluded same-sex parents by definition.<sup>229</sup>

## II

### PROPOSITION 8 AND ITS PREDECESSORS: REFLECTIONS ON THE DEFINITION OF MARRIAGE AND ITS ROLE IN THE SAME-SEX MARRIAGE DEBATE

Opponents of same-sex marriage launched an aggressive Proposition 8 campaign that made clear their understanding of the role and meaning of marriage in society—that marriage is a civil institution designed to encourage and reward child rearing by opposite-sex couples. Because children are at the core of marriage, they argued, any law that would alter the institution of marriage in any way must be evaluated for its effects on marriage’s essential child-centered purpose. This bold yet single-faceted approach taken by the Yes on 8 Campaign afforded advocates of same-sex marriage a prime opportunity to revitalize the discourse on marriage, emphasize the oft-forgotten individual benefits of marriage, and propose a more robust concept of marriage that reflects and honors the myriad benefits which make marriage the enduring institution that it is. Unfortunately, the No on 8 Campaign lacked a cohesive message, failing altogether to present a much-needed definition of modern

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com/video/ (last visited Dec. 2, 2009).

226. *Id.*

227. *Id.*

228. See discussion of the “Yes on 8” campaign ads, *supra* text accompanying notes 206–229.

229. Murray, *supra* note 104, at 3.

marriage, let alone one that speaks to the rights and benefits same-sex couples so ardently seek. This Section provides a brief discussion of marriage as it stands today, the implications of Prop 8's success on contemporary attitudes towards marriage, and the role the courts have and will continue to play in the ongoing debate over same-sex marriage.

*A. Modern Marriage and Its Implications in the Same-Sex Marriage Debate*<sup>230</sup>

Having endured throughout the centuries as one of the most fundamental familial and societal institutions in the United States,<sup>231</sup> marriage is at once absolute and fluid. As to its fixed qualities, marriage has typically involved a mutual, monogamous and personal commitment between consenting adults.<sup>232</sup> It was traditionally a state-regulated institution that served to structure and govern American families.<sup>233</sup> Historically, marriage has also provided the primary channel for begetting and raising children.<sup>234</sup> The Yes on 8 Campaign was, thus, correct in asserting that there is a link between marriage and children.

However, even though the link between marriage and child rearing is rooted in history, raising children was never *the* fundamental purpose of marriage.<sup>235</sup> Even early Americans tended to view marriage more as a mutual, loved-based commitment between two people and less as a public relationship tied to the religious or civic duty of child rearing.<sup>236</sup> Studies today show that people still perceive marriage as an institution that couples enter primarily because of their mutual love for each other and out of a desire for companionship.<sup>237</sup> The Yes on 8 Campaign's narrowing of marriage to its child-rearing function thus flies in the face of both the historical and contemporary understandings of marriage.

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230. This Section is, by no means, a comprehensive exposition on the history and meaning of modern marriage. It merely serves to trace broad trends in marriage in the past century and highlight Supreme Court jurisprudence on the role of marriage in the United States. For an in-depth and thoughtful discourse on the evolution of marriage, see NANCY COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* (2002).

231. See generally *id.* ch. 1 (describing how marriage was deeply engrained as a structure of political, religious and familial governance at the time the United States was founded).

232. McClain, *supra* note 185, at 336.

233. See Murray, *supra* note 104, at 46 (describing the triangular relationship among parents, their children and the State, whereby the State, at the top endpoint of the triangle, regulates both parents and their children).

234. See Murray, *supra* note 104, at 56 (noting that marriage was "once heralded as the licensed site for procreation").

235. McClain, *supra* note 185, at 336 ("[T]he argument that marriage is not about adult love, but about children, sets up an either/or view of the purposes of marriage that is simply wrong with respect to historical and contemporary understandings of marriage.").

236. *Id.*

237. *Id.* at 337 n.104 (citing a survey conducted by The National Marriage Project in 2003).

Defining marriage exclusively as a procreative endeavor also incorrectly implies that marriage is a static institution. Significant changes in women's marital property rights, the elimination of coverture, and the emergence of interracial marriage demonstrate that marriage is, in fact, an institution that evolves as society progresses.<sup>238</sup> Marriage is no longer a prerequisite for women's financial security or social status.<sup>239</sup> Moreover, unlike the environment of fifty years ago, marriages need no longer endure in the face of infidelity, abuse, or unhappiness.<sup>240</sup> Rather, marriage is a relationship that people can enter and exit freely.<sup>241</sup> Finally, statistics show that procreation and child rearing—the touchstones of marriage as the Yes on 8 Campaign defined it—no longer reflect the experience of the average married couple in America.<sup>242</sup>

Cabining marriage within its child-rearing function also ignores the myriad personal, public, and legal benefits and obligations that marriage bestows upon each spouse. The court in *Goodridge* noted that there were “hundreds of statutes” in the state code that provided legal marriage benefits, including preferential tax status, automatic inheritance rights, wrongful death benefits, favorable pension options, rights to hospital visitation, strong health insurance coverage, and spousal support rights upon divorce.<sup>243</sup> The court in *In re Marriage Cases* concluded that even in a state providing a parallel domestic partnership regime that affords same-sex couples the same civic and legal benefits as those of married couples, marriage has unique intangible qualities which set it apart from other relationships.<sup>244</sup> In the California court's view, marriage uniquely provides couples the additional right “to have their official family relationship accorded the same dignity, respect, and stature as that accorded to all other officially recognized family relationships.”<sup>245</sup>

The United States Supreme Court has also debunked allegations that marriage is fundamentally, let alone exclusively, devoted to child rearing. In

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238. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 966–67 (Mass. 2003) (discussing the evolution of marriage); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (Kaye, J., dissenting); see also COTT, *supra* note 230 (tracing how changes in the role, function and meaning of marriage have affected public policy over the past three centuries).

239. See June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953, 980 (1991) (asserting that women stopped looking to marriage as a source of economic security in the mid-1980s).

240. See *id.* at 978–79 (1991) (describing evolution of marriage from “a lifetime commitment” to a “contract terminable at will.”).

241. *Id.*

242. Blaine Harden, *Numbers Drop for the Married with Children*, WASH. POST, March 4, 2007, at A3 (reporting that married couples with children now represent less than a quarter of U.S. households—a drastic shift from the 1960s, when more than half of U.S. households were comprised of married couples with children).

243. *Goodridge*, 798 N.E.2d at 955–56.

244. 183 P.3d 384, 435 (Cal. 2008), *superseded by state constitutional amendment*, CAL. CONST. art. I, § 7.5.

245. *Id.* at 434.

*Loving v. Virginia*, the Court described marriage as a “fundamental freedom” and “vital personal right[] essential to the orderly pursuit of happiness,” with no reference to begetting or raising children.<sup>246</sup> Twenty years later, the same Court in *Turner v. Safley* heralded marriage not for its sexual or procreative qualities, but for the emotional and expressive value of the marital commitment—a benefit so crucial to a person’s happiness and sense of self that it could not be denied to prison inmates.<sup>247</sup>

A parallel series of Supreme Court cases defined marriage within the bounds of constitutional privacy and liberty. The Court in *Griswold v. Connecticut*, a seminal case in privacy jurisprudence that upheld a married couple’s right *not* to procreate, held that the sacred intimacy between married spouses merits the utmost privacy and respect under the Constitution.<sup>248</sup>

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.<sup>249</sup>

*Griswold* implies that it is not the actions or endeavors that occur within marriage but rather the nature of the marital relationship itself—the sacred intimacy between two loving adults—that requires such unfettered constitutional protection. Seven years later, in *Eisenstadt v. Baird*, the Court clarified that constitutional privacy as to matters of the family extends beyond married couples. Acknowledging that *Griswold* particularly addressed privacy within marriage, the Court asserted that “[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>250</sup> Similarly, *Lawrence v. Texas*, although not addressing marriage *per se*, further emphasized constitutional notions of liberty and privacy that adhere to the intimacies that occur within the home.<sup>251</sup>

### B. The Success of Proposition 8

The discussion above barely scratches the surface of the legal and historical richness of marriage’s evolution, highlighting but a few of the

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246. 388 U.S. 1, 12 (1967).

247. 482 U.S. 78, 95–96 (1987).

248. 381 U.S. 479, 486 (1965).

249. *Id.*

250. 405 U.S. 438, 453 (1972) (emphasis added).

251. See discussion of *Lawrence*, *supra* text accompanying notes 95–99.

innumerable meanings and roles that marriage holds in contemporary society. Given the abundance of both tangible and intangible benefits that marriage provides, it is not surprising that same-sex couples continue to passionately pursue the right to marry. Moreover, in light of the attitudinal trends on marriage (toward an emphasis on the love and companionship between two individuals) and legal precedent in this area (cases upholding marriage's intimate personal, expressive, and self-defining traits), the future for same-sex marriage looks promising. However, the success of Proposition 8 in California indicates that notions of the modern marriage described above, currently existing in case law and emerging in social pockets across the country, are not in accord with the opinions of a significant cross-section of American society, or even within a historically progressive California.<sup>252</sup>

Proposition 8's success also calls attention to the No on 8 Campaign's failures. Although many factors contributed to the No on 8 Campaign's defeat,<sup>253</sup> an overarching problem that plagued the campaign from its inception was the lack of a central message that directly responded to its opponents' unified proclamation that marriage is fundamentally about children. Instead of revitalizing the debate with a compelling alternate construction of marriage that upholds the liberty and privacy of individuals to freely structure their intimate relationships, the No on 8 Campaign responded with generalized, bland assertions that "Prop 8 Is Unfair" and "Prop 8 Is Wrong," requesting, under no particular rights framework, "Marriage Equality for All."<sup>254</sup> In failing to directly challenge the opposition's claims about the essential connection between marriage and children, the No on 8 Campaign actually served to solidify them, giving its opponents seemingly free reign to elevate the marriage-children connection to new extremes. Specifically, opponents were able to argue that same-sex marriage will infect and irreversibly alter the substance and quality of children's public school education.<sup>255</sup> Ultimately, the No on 8 Campaign's failure was a significant missed opportunity for same-sex marriage advocates to promote a more robust definition of marriage and family that honors the diversity of lifestyles and relationships that comprise the LGBT community.<sup>256</sup>

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252. See *infra* note 256 describing California's tradition in leading civil rights victories.

253. See Wildermuth, *supra* note 206.

254. See generally "No on 8" website sponsored by Equality California, <http://www.eqca.org/site/pp.asp?c=kuLRJ9MRKrH&b=4375153> (last visited Dec. 2, 2009).

255. See discussion of the "Yes on 8" campaign ads, *supra* text accompanying notes 206–29.

256. The No on 8 Campaign's failure also signifies a disappointing assimilationism that disserves California's civil rights tradition. From *Perez v. Lippold*, which legalized interracial marriage nineteen years before the U.S. Supreme Court took up the matter (see discussion of *Perez*, *supra* note 59 and accompanying text), to the state's domestic partnership regime, California has innovated in recognizing and protecting the rights of its minority populations.

However, the very diversity within the LGBT community that urges a more progressive definition of marriage might have been a reason behind the No on 8 Campaign's failure to promote a more modern marriage institution. A diversity of viewpoints within the community of No on 8 organizers likely existed, with some advocating a more traditional marriage institution that simply includes same-sex couples and others promoting a more robust vision of marriage that represents the full panoply of lifestyles embraced within their community. Still other advocates might not have revered marriage at all, but became involved in the No on 8 Campaign to fight for LGBT acceptance and equality.

The No on 8 Campaign might also have feared association with polygamist causes, since its members advocated a progressive marital right that included a broader spectrum of nontraditional relationships. The alleged connection between homosexuality and polygamy is often cited by opponents of same-sex lifestyles as a reason to limit recognition of same-sex behavior and relationships.<sup>257</sup> The LGBT community has worked hard to shed its ties to polygamy, and the No on 8 Campaign might have feared that proposing a more inclusive and tolerant marriage right would compromise the progress which same-sex marriage advocates have fought for years to achieve.

### *C. The Role of the Judiciary in the Fate of Same-Sex Marriage*

It is difficult to predict whether and how same-sex marriage advocates will revise their strategies in future discourses on marriage in light of the No on 8 Campaign's failures. However, it is easier to foresee the critical role that the judiciary will continue to play in resolving the same-sex marriage question. Historically, courts have served both as a trigger and a bridge in civil rights movements.

Examples of the judicial acceleration of civil rights expansion are numerous. The California Supreme Court's decision in *Perez v. Lippold* was the first high court decision to declare that a state's ban on interracial marriage violated the principle of racial equality.<sup>258</sup> In its wake, thirty-three states invalidated their respective bans on interracial marriage before the Supreme Court issued its ruling in *Loving v. Virginia*.<sup>259</sup> The U.S. Supreme Court's decision in *Brown v. Board of Education*, in which the Court declared that "separate" was not "equal" in the context of education and struck down school segregation under equal protection, had an even more galvanizing effect.<sup>260</sup> The *Brown* decision provided immeasurable momentum to the civil rights

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257. See, e.g., Justice Scalia's dissent in *Lawrence v. Texas*, discussed *supra* note 98 and accompanying text.

258. See discussion of *Perez*, *supra* note 59 and accompanying text.

259. 388 U.S. 1, 6 (1967) (noting that only sixteen states retained laws banning interracial marriage at the time the Supreme Court issued its decision in *Loving*).

260. 347 U.S. 483 (1954).

movement, which, in the decade following *Brown*, fueled countless civil protests, demonstrations and, ultimately, a series of national protections for racial minorities, including the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968.<sup>261</sup>

Courts have also served to bridge societal divides on civil rights issues. By the time the Supreme Court decided *Loving v. Virginia*, a majority of states had struck down, *sua sponte*, their laws banning or otherwise punishing interracial marriage. Thus, the effect of *Loving* was to reconnect to the rest of the country those trailing states that had stalled in recognizing the right to interracial marriage. Given that only four states currently allow same-sex marriage,<sup>262</sup> each future state court decision recognizing the right to same-sex marriage will serve both as a crucial trigger for further laws and court decisions that honor marital freedom and as a piece of the bridge toward marriage equality in the grand scheme of civil rights.

#### CONCLUSION

This Comment opened with a discussion of the “teachable moment” a school administrator saw in the same-sex wedding of an elementary school teacher. In truth, the debate over same-sex marriage that has recently occupied courtrooms and ballots throughout the nation has presented a series of teachable moments, with each legal decision and state initiative offering a glimpse into the spectrum of contemporary attitudes toward marriage. What the campaigns surrounding Proposition 8 notably lacked was a willingness, on both sides of the debate, to *learn*. The Yes on 8 Campaign was quick to label the lesbian wedding a threat to the sanctity of marriage and family, exploiting the girl’s confused look as evidence that same-sex marriage is unnatural. The girl’s confusion, however, is exactly what made the moment teachable. Similarly, the No on 8 Campaign neglected to seize upon valuable learning opportunities, failing to use its opponents’ absolutist interpretation of marriage as a springboard to a more progressive dialogue on contemporary marriage.

Thankfully, there will likely be several occasions in the future, both within California and throughout the country, to conduct such societal introspection. Each future legal battle concerning same-sex marriage should be embraced as an opportunity to take a step back and reevaluate the role and purpose of marriage as it stands today. In so doing, we will be able to clarify our goals and vision, both as individual municipalities/states and as a unified country, for the ever-changing American family.

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261. See National Association for the Advancement of Colored People, Legal Department History, <http://www.naacp.org/legal/history/index.htm> (last visited Dec. 2, 2009).

262. New Hampshire, Massachusetts, Connecticut, Iowa, and Vermont currently recognize same-sex marriage.

