

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

THE STORIES OF MARRIAGE

Katharine K. Baker *

Opponents of same-sex marriage scored an impressive victory on Election Day, 2008. Challenging the mayor of San Francisco’s assertion that same sex marriage was here to say “whether you like it or not,”¹ opponents of same-sex marriage convinced 52.3% of the California electorate to vote for a constitutional amendment defining marriage as between a man and a woman.² What happened? This essay provides a partial answer to that question by taking seriously the stories that opponents of same sex marriage tell about what marriage is. The stories that get told about marriage determine the efficacy of any legal argument made in favor of same sex marriage.

In the course of the last 15 years, proponents of same sex marriage (“SSM”) have proffered several different constitutional arguments in favor of their cause. Most of these arguments have been rooted in either fundamental rights or equality jurisprudence. Both of these theories have won in some places. The Supreme Court of Hawaii originally ruled that restricting marriage to opposite couples was gender discrimination, in violation of the state’s Equal Rights Amendment.³ The Supreme Courts of Vermont and New Jersey found that gays and lesbians had a right, grounded in equality doctrine, to the same

* Professor and Associate Dean, Chicago-Kent College of Law

¹ See Jonathan Darman, Hoping that Left is Right, <http://www.newsweek.com/id/180047> (discussing Gavin Newsom’s stance on same-sex marriage).

² See Secretary of State Debra Bowen, California General Election, Proposition 8 – Eliminates the Right of Same-sex Couples to Marry, 52.3% to 47.7%, <http://vote.sos.ca.gov/>.

³ Baehr v. Lewin, 852 P. 2d 44 (Haw 1993)

BAKER DRAFT

2/6/09 – *Please do not quote without permission*

legal treatment as married people, though they did not have a right to the name “marriage.”⁴ New Jersey explicitly found that gays and lesbians did *not* have a fundamental right to marry (The Vermont court did not address that question.)

The Supreme Judicial Court of Massachusetts found that the fundamental rights and equality arguments were inextricably intertwined and that gays and lesbians were entitled to get married, but not because they had a fundamental or equality right to do so.⁵ Instead, the Massachusetts court found that there was no rational basis for restricting marriage to opposite sex couples.⁶ Recently, the California and Connecticut Supreme Courts have found that gays and lesbians have an equality right to marry because restricting marriage to opposite couples discriminates on the basis of sexual orientation.⁷ California also found that gays and lesbians had a fundamental right to marry each other. Connecticut did not reach that argument.

There has been a good deal of ink spilled over how best to conceptualize the claim to same sex marriage. Because most unenumerated fundamental rights arguments are controversial, courts and commentators often prefer equality arguments. Moreover, to some, the fundamental rights argument seems tautological because it assumes a contested definition of marriage.⁸ Presumably, before one says that there is a

⁴ See *Baker v. Vermont*, 744 A2d 864 (Vt 1999) and *Lewis v. Harris*, 908 A2d 196 (NJ (2006)

⁵ *Goodridge v. Dpt of Pub Health*, 798 NE2d 941 (Mass. 2003)

⁶ *Goodridge*, 798 NE2d at 961

⁷ See *In Re Marriage Cases*, 193 P.2d 384 (2008); *Kerrigan v. Commissioner*, 951 A.2d 407 (2008). The holding in the California case was overturned by Proposition 8. See *supra* note 2 .

⁸ See Andrew Koppelman, *Grading the California same-sex marriage opinion*, Balkinization. <http://balkin.blogspot.com/2008/05/grading-california-same-sex-marriage.html>. (“It won’t do to just define marriage as ‘the substantive right of two adults who share a loving relationship to join together to establish an officially recognized family of their own.’ That’s just a bald conclusion masquerading as an argument.”)

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

fundamental right to marriage, one has to define what marriage is. Pro SSM advocates would define marriage in a way that can include same sex couples. Anti SSM marriage advocates would define marriage as between a man and a woman. Thus, saying that there is a fundamental right to marriage does not say anything unless there is a common definition of marriage. Equality arguments, it was thought, avoided that tautological conundrum.

This essay will argue that equality arguments do no such thing. Instead, the story that gets told about what marriage is determines which kind of argument, fundamental rights or equality, is likely to be persuasive. Ultimately, every argument requires a story about why marriage is important, with a definition of what marriage is. And there is a deep cultural divide in this country over what marriage is. Equality arguments can no more bridge that divide than can fundamental rights arguments.

The political reaction to the California Supreme Court's gay marriage decision, and the political reaction to the Hawaii Supreme Court's decision some 15 years earlier, may make this last point seem obvious. In both cases, voters endorsed measures that defined marriage as between a man and a woman, thus rendering irrelevant the equality arguments that the respective supreme courts used to confer the right to same sex marriage.⁹ Clearly, voters can define away equality rights to marriage, just as easily as they can define away fundamental rights to marry. The flurry of activity that California's

⁹ Voters in Hawaii amended their constitution in order to allow state legislators to reserve marriage to opposite sex couples. See David Orgon Coolidge, *The Hawaii Marriage Amendment: Its Origins, Meaning and Fater*, 22 *Univ. of Hawaii L. Rev.* 19 (2000).

BAKER DRAFT

2/6/09 – *Please do not
quote without permission*

Proposition 8 has generated makes the work of this essay all the more timely, however.¹⁰ Definitions, and the stories in which they are embedded, matter. They matter politically and they matter to legal theory.

This essay will explore six different stories of marriage. These are not the only stories told about marriage, but they are the predominant ones. Part I will tell the stories of marriage told by advocates of SSM and explain how those stories fare under both fundamental rights and equal protection analysis. Part II will tell the stories told by critics of SSM. Those stories suggest that contrary to what the Massachusetts Supreme Judicial Court found in *Goodridge*, restricting marriage to opposite sex couples almost certainly passes rational basis review, and, contrary to what the California and Connecticut courts held, equality arguments for SSM are not that strong.

The critical problem with the equality argument for SSM is that marriage, as it currently operates in our culture, is deeply gendered. It is gendered not only in the sense that opposite sex couples have the exclusive right to enter it, it is gendered because of the way in which it facilitates, produces and legitimates gender roles. For many people, the gender roles that marriage reifies are constitutive of what marriage is and how it operates. Empirical data verifies what critics of same sex marriage celebrate, which is that marriage is a gender factory.¹¹ The ability of marriage to produce responsible, stable

¹⁰ The validity of Proposition 8 is currently being challenged. Technically, the challenge is about whether Proposition 8 is a revision or an amendment to the California constitution (as interpreted by the Supreme Court), but that question turns in part on whether marriage is a fundamental right. See Edmund G. Brown, Attorney General, Answer Brief in Response to Petition for Extraordinary Relief, *Tyler v. California*, S168066, 84-87 (Filed Dec 19, 2008).

¹¹ This term was coined by Sarah Fenstermaker Berk in *SARAH FENSTERMAKER BERK, THE GENDER FACTORY: THE APPORTIONMENT OF WORK IN AMERICAN HOUSEHOLDS* (1985).

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

gender roles explains why the state supports marriage, why marriage is so important at an emotional level to its participants, and why the laws of parenthood and marital dissolution look as they do. Part III explores the social science data showing how marriage makes gender.

Strong proponents of gender equality no doubt reject this gendered view of marriage as normative matter. They wish it were not so. But as a descriptive matter, the story appears to be true. Indeed, data suggests that people who are the most likely to profess allegiance to gender equality are the ones most likely to live very gendered lives *if they marry*.

Part IV will flesh out how inapposite equality doctrine is to the narrative that views marriage as essentially gendered. Contrary to what many courts seem to have assumed, maxims from race discrimination simply do not apply in the gender context. The Constitution may be color-blind, but it is not gender-blind and neither equality doctrine nor family law has ever taken the task of eliminating gender roles seriously. Indeed, in both the employment and marital context, the more pronounced the gender roles and traits, the more the law feels compelled to accommodate them. If marriage's purpose is to facilitate gender roles and traits, equality doctrine may not need to care.

In order to make equality doctrine relevant, proponents of SSM have to start telling new stories of marriage. They have to convince the public, as well as courts, that SSM is not an oxymoron. They need a story of marriage that explains why marriage is and can be beneficial without being gendered. Given how pronounced and important gender roles are in most marriages, proponents of SSM must explain how marriage can

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

serve its beneficial functions without reifying gender. To be persuasive, however, that argument may well require conceding that SSM will be institution-changing.

Part V of this essay will offer one such story. It is an understanding of marriage as an institution in which dependencies develop, roles are assumed and, for a variety of reasons stemming from the emotional and sexual connections involved, the general rules of property and contract do not work well. A narrative like this de genders marriage, but it also celebrates the lack of autonomy, substantial interdependence and role assumption that mark most marriages. When forced to confront this alternative marriage narrative, many people may not feel like celebrating. In which case, we need to ask why we have state-sponsored marriage at all. Given the evidence of how strongly gendered marriage is, opponents of SSM are undoubtedly right when they suggest SSM will disrupt the way in which marriage currently functions. Proponents of SSM may well have to concede this if they are to make coherent arguments for SSM under either a fundamental right or equality theory.

PART I: One Set of Stories

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

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

disability and accident insurance plans, the right to assert evidentiary privileges, the right to presumptions of joint property ownership, hospital visitation and other incidents relevant to medical treatment of a family member, and the entitlements and responsibilities pertaining to spousal maintenance and marital property at separation.¹²

These rights and obligations can often result in significant financial savings and security for couples. The state provides these incidents of marriage to couples because these incidents afford couples the freedom to divide labor and develop interdependencies that promote stability and protect against dependency on the state. States value stability for a whole host of reasons¹³ and states almost always prefer that dependents' needs get met in private, thereby relieving any responsibility that might fall to the state.

This narrative of marriage suggests that the state creates and sanctions marriage because the state benefits from marriage. It is a narrative that is particularly susceptible to equality arguments for SSM because anti-SSM advocates have a hard time explaining why gay and lesbian couples need to be denied the concrete benefits of marriage or how the state could possibly be hurt by providing these stabilizing benefits to gay and lesbian couples.¹⁴

¹² For a more complete list see Anita Bernstein, *The Case For and Against Marriage*, 102 Mich. L. Rev. 129, 149-152 (2005). Getting married also provides one access (through one's spouse) to a host of other semi-private social welfare benefits, like health insurance, disability insurance and certain pension rights. Grace Blumberg has described the distribution of these benefits as our "shadow welfare state." Grace Blumberg, *The Regularization of Non-marital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 Notre Dame L. Rev 1265 (2001).

¹³ A stable social system is likely to be better poised to accumulate wealth, less prone to violence, and better able to organize in times of peril than an unstable social system.

¹⁴ The Supreme Courts of Vermont and New Jersey relied on just this kind of equality reasoning in ruling that the respective states must provide Civil Union status to gay and lesbian couples. See *Baker v. Vermont*, 744 A.2d 864 (1999), *Lewis v. Harris*, 908 A.2d 196 (2006).

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

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

The second story of marriage is the one that has been told most prominently by the U.S. Supreme Court and it focuses much less on the concrete benefits of marriage and much more on the symbolic benefits of marriage, most particularly marriage's emotional and expressive benefits. Although not precisely clear about why or when this right exists, the Court has ruled that states cannot deny the right to marry to poor people¹⁵ or to prisoners.¹⁶ The Court has suggested that the right to enter into marriage is grounded in privacy doctrine because of the critical role that families play in our private lives,¹⁷ but it has also emphasized the public aspect of marriage. Thus, it can be both “the most

¹⁵ Zablocki v. Rehal, 434 US 374 (1978) (striking down Wisconsin law that denied marriage licenses to people who could not show that they would not be in arrears on their child support payments).

¹⁶ Turner v. Safely, 482 US 78 (1987) (striking down prison regulation that prevented male prisoners from marrying).

¹⁷ See Zablocki, 434 US at 386. In explaining why the right to marry is fundamental, the Court cited almost every constitutional case having anything to do with parenting, procreation, marriage or other family relationships.

BAKER DRAFT

2/6/09 – *Please do not quote without permission*

important relation in life” and “and “the foundation of society.”¹⁸ It “affects personal rights of the deepest significance . . . [but] . . . [i]t also touches basic interests of society.”¹⁹

In *Turner*, the Court wrote that marriage is “an expression of emotional support and public commitment . . . [and] an expression of personal dedication.”²⁰ This story of marriage corresponds with what Peggy Copper Davis has described as the 19th century human rights ideology that supported the recently enslaved’s right to marry. She describes this ideology as grounded in the “conviction that . . . [there is a] . . . human capacity to make life-defining choices, and [a] human drive to do so, such that every person has an inalienable entitlement to construct a life on chosen terms.”²¹ The decision to marry is a decision about who one wants to be. This understanding of marriage suggests that the decision to enter into marriage is a personal one because it involves critical issues of self-determination, but it is also a public one because marriage serves as a form of expression.²²

As the Supreme Judicial Court of Massachusetts wrote in *Goodridge*, “marriage is a vital social institution . . . [that is] . . . one of our community’s most rewarding and

¹⁸ *Maynard v. Hill*, 125 US 190, 205 (1888).

¹⁹ *Williams v. North Carolina*, 325 US 226, 230 (1945)

²⁰ *Turner*, 482 US at 95.

²¹ Peggy Cooper Davis and Carol Gilligan, *Reconstructing Law and Marriage*, in 11 *The Good Society* 57, 58 (2002). Given how strongly gendered most marital lives are, it may seem odd to think of the decision to marry as a decision to construct life on terms of one’s choosing. If marriage gives one little opportunity to avoid gender roles, then choosing to marry hardly seems like a decision to construct one’s own terms, unless one marriage offers a unique opportunity to live life in a particularly gendered way. This is what I take story #6, see *infra* , to suggest.

²² Cass Sunstein has suggested that the right to marry counts as fundamental “because of the expressive benefits that come from official state-licensed marriage.” Cass Sunstein, *The Right to Marry*, 26 *Card. L. Rev* 2081, 2096 (2005).

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

cherished institutions.”²³ Plaintiffs in New Jersey picked up on this public element of marriage when they wrote about the key expressive benefits of marriage. It is the “ultimate expression of love, commitment and honor that you can give another human being.”²⁴ “[O]thers know immediately that you have taken steps to create something special.”²⁵

Not surprisingly, this story of marriage as expression and self-determination fits quite squarely into fundamental rights analysis. It is a right to express who one is by making a public commitment to another. The right to make this simultaneously personal and public declaration is critical to human development and happiness and, therefore, the state must be very careful not to interfere with it. It is worth noting though, how distinct this theory of entitlement is from the first one. The first story sees marriage as a legal construct, a state-created bundle of rights and obligations. The second story sees marriage as an institution – like religion, perhaps - that serves human interests and values and with which the state should not interfere.²⁶

The problem with this second story of marriage is that what gives marriage its expressive potential and symbolic meaning is its social and historical context. Getting

²³ Id. At 954

²⁴ Lewis v. Harris, 908 A.2d 196, 225-26 (Poritz C.J., concurring and dissenting) (quoting plaintiffs’ briefs)

²⁵ Id.

²⁶ The relationship between state-sponsored marriage and religion is a long and still extant one. In the Anglo-American tradition, secular authorities began to wrest control over marriage from ecclesiastical authorities starting somewhere around the 16th century. The state was never too eager to unmoor marriage from its ecclesiastical roots. Hence, the basic understanding of what marriage was (a lifelong union of a man and a woman, for which consent was necessary and one of the primary purposes of which was the rearing of children) did not change significantly when the state began to assert control. Indeed, even today, the degree to which state cedes control over marriage to religious authorities is striking given the Constitutional commandment to separate church and state. See Katharine K. Baker and Katharine B. Silbaugh, *Essentials of Family Law* (forthcoming, 2008).

BAKER DRAFT

2/6/09 – *Please do not
quote without permission*

married makes a statement because of what people understand marriage to mean. Marriage has been a critical part of our social and political structure for a very long time. Marriage and the family that it instantly creates is still an organizing principle for our society. But same sex marriage may not be. What “others know immediately” about the statement one makes when one gets married depends on what others understand marriage to mean. I do not have, and no one would realistically maintain that I have, a fundamental right to marry my dog. It would be ludicrous for me to maintain such a right because no one would know what it means (sharing a home with my dog? Sharing material goods? A sexual relationship?). Because the expressive value of marriage is dependent on marriage’s social meaning and because that social meaning is contested, the right to marry demands, as critics of the theory have maintained, on a common definition of marriage.²⁷ That we may not have.

A third story of marriage was told by the California Supreme Court in the *In re Marriage Cases*.²⁸ This story understands marriage to be a state-conferred title, a blessing of sorts, pursuant to which a couple secures status from the state. With that state-conferred status comes the respect and dignity of others. In this version of marriage, the state-conferred benefits of marriage are inextricably intertwined with the emotional benefits of marriage because one helps determine the other. The personal well-being that comes from marriage comes in part from the respect and dignity that is afforded marital status. The California Court wrote that the “core substantive rights [of

²⁷ See Koppelman, *supra* note (“The fact that you really, really, want to get married can’t be the basis for a constitutional right. Otherwise the incest and polygamy laws would be in trouble too.”)

²⁸ 193 P.2d 384 (2008).

BAKER DRAFT

2/6/09 – *Please do not
quote without permission*

marriage] include the opportunity of an individual to establish . . . an officially recognized and protected family . . . [that is] . . . entitled to the same respect and dignity as marriage.”²⁹ The California Court found this narrative of marriage to be susceptible to both fundamental rights and equality arguments, but the court’s reasoning is a little odd.

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

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

²⁹ In Re Marriage Cases, 43 Cal. 4th at 781, 183 P2d at 399.

BAKER DRAFT

2/6/09 – *Please do not
quote without permission*

marriage, yet it was the respect and dignity from others that the Court said was a key part of the fundamental right to marry.

The California Court’s marriage narrative seems much less odd in the context of equality theory. The state cannot have domestic partnerships for gay people and marriage for straight people even if they are identical legal statuses because, as virtually everyone who has ever had a Civics class in this country knows, *separate is not equal*. The cite here is to *Brown v. Board of Education*,³⁰ in which the Supreme Court famously held that African-American children had an equality right to the same education as white children. The Supreme Court did not hold that African-American children had a fundamental right to a decent education. *Brown* was only an equality case. The maintenance of white and non-white regimes, wrote the Court, “generates a feeling of inferiority . . . and may affect [African-American children’s] hearts and minds,” because “the policy of separating the races is usually interpreted as demonstrating the inferiority of the negro group.”³¹ According to the California Supreme Court, the maintenance of two marital regimes runs a comparable risk of creating the same kind of risk of “second class citizenship”³² for Domestic Partnerships.

The Supreme Court of Connecticut, in *Kerrigan v. Commissioner*, augmented this equality analysis somewhat by pointing out that “private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”³³ Just because

³⁰ 347 US 483 (1954)

³¹ 347 US 483, 494 (quoting district court in Kansas).

³² *Marriage Cases* at 183 P.2d at 452.

³³ *Kerrigan*, 957 A.2d at 479 (citing *Palmore v. Sidoti*, 466 US 429 (1984)). The Connecticut legislature, like the California legislature, had already instituted full Civil Union status when *Kerrigan* was decided.

BAKER DRAFT

2/6/09 – *Please do not
quote without permission*

some people may not afford SSM respect and dignity does not mean that the law can formally acknowledge that lack of respect. The cite here was to *Palmore v. Sidoti*,³⁴ a case in which the U.S. Supreme Court ruled that a court could not take into account the fact that a white child raised in a mixed race household might suffer hardship in a way that she would not if she was raised in an all white household because to do so would legitimate racist biases.

Together, say the courts of California and Connecticut, *Brown* and *Palmore* demonstrate how parallel marital regimes for same sex couples violate basic principles of equality and therefore gays and lesbians must be entitled to marriage itself. As Part II will demonstrate, however, neither *Brown* nor *Palmore* have proven influential in the context of gender. We have separate but equal facilities for men and women and courts have been willing to accommodate private gender biases on many occasions. Before turning to that argument in more detail though, let us first turn to the stories of marriage that are told by critics of SSM.

PART II: The Other Set of Stories

Critics of SSM have their own stories of marriage. The first of these stories has to do with marriage as a procreative institution. This story of marriage has probably gotten

³⁴ 466 US 429 (1984)

BAKER DRAFT

2/6/09 – *Please do not
quote without permission*

the most attention,³⁵ but it is also, I will suggest, the weakest. The critics' second story has to do with marriage as an institution for child-rearing, and the critics' third story has to do with marriage as an institution for gender reification. The second and third of these stories have considerable significance for SSM arguments. For consistency sake, I will refer to the critics' of SSM narratives as stories 4, 5 and 6 and the proponents' of SSM narratives as stories 1, 2, and 3.

Story #4 suggests that marriage is an institution designed for procreation. For years, the only legal way to engage in the conduct that led to procreation was to do so within the institution of marriage. Recently, a group of Catholic theologians, known to some as the New Natural Law Theorists,³⁶ have gone so far as to suggest that marriage can be restricted to opposite couples because married heterosexual sex is an inherent good in a way that no other form of sexual expression is.³⁷ Others have done much to refute this latter point about the inherent superiority of married heterosexual sex.³⁸ It is, as the authors of the view concede, a viewpoint that one either implicitly understands or one does not.³⁹ As one who does not, it makes little sense for me to comment on it here.

Regardless of one's view on the superiority of married heterosexual intercourse, any student of literature or history is well aware that marriage has never been particularly good at policing sexuality. One of the purposes of marriage may have been to channel

³⁵ See *infra* notes

³⁶ See Andrew Koppelman, *The Gay Rights Question in Contemporary American Law* 73 (1996).

³⁷ See Robert P George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 *Geo L J* 301 (1995); John M Finis, *Law Morality and "Sexual Orientation,"* 69 *Notre Dame L Rev* 1049 (1994)

³⁸ See Mary Becker, *Women Morality and Sexual Orientation*, 8 *UCLA W L J* 165 (1998); Andrew Koppelman, *Is Marriage Inherently Heterosexual*, *The American J of Jurisprudence* 51 (1997)

³⁹ George and Bradley, *supra* note at 307 ("In the end , we think, one either understands that spousal genital intercourse has a special significance as instantiating a basic, noninstrumental value, or something blocks that understanding and one does not perceive correctly.")

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

sexuality into marital relationships, but sex has happened outside of marriage forever.⁴⁰ If marriage's primary purpose had been to restrict sexual activity to marriage it is highly likely marriage would have broken down as an institution. It simply is not up to the defined task. Policing extra-marital sexual activity is and always has been extraordinarily difficult. The activity takes place in private. There are no non-culpable witnesses and unless the participants are willing to implicate themselves, the activity is virtually impossible to prove. Until very recently, the only way to know whether sex happened was if a pregnancy resulted, but as long as the woman who got pregnant was married to someone, there was no way of proving that the sex was extra-marital.⁴¹

What marriage has been much better at is providing an institution for child-rearing. Marriage is not about making babies (Story #4), but about taking care of them. This is the fifth story of marriage – marriage as an institution designed to ensure optimal child-rearing. A child born to a marriage (regardless of the actual origins of his or her genetic material) has a mother and a father whose responsibility it is to provide materially, emotionally, physically and spiritually. William Blackstone understood and endorsed this view. He wrote “the main end and design of marriage [is] to ascertain and fix upon some certain person to whom the care, the protection, the maintenance and the education of the children should belong. . . .”⁴² The marital presumption of paternity,

⁴⁰ See generally, Lawrence Stone, *The Family, Sex and Marriage in England 1500-1800* (1977) (documenting extra marital sexual activity). Harold T Christensen and Christina F Gregg, *Changing Sex Norms in American and Scandinavia*, 32 *J. Marr & the Fam* 616-627 (1970) (summarizing studies of premarital sex).

⁴¹ Genetic testing now allows us to test whether there has been an exchange of bodily fluids and who the source of those fluids is.

⁴² 1 William Blackstone, *Commentaries* 443

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

which until quite recently was practically irrebutable,⁴³ is the strongest indicator of the law's allegiance to the story of marriage as an institution for child-rearing.

The problem with this narrative of marriage, for opponents of SSM, is that gays and lesbians can rear children within marriage too. Indeed, the reason that many gays and lesbians want to get married is because they want to raise children. To foreclose that option, opponents of SSM have to add an addendum to story #5 indicating that the best way to rear children is to provide them with both a male and female role model. Thus, the full version of story #5 is that marriage is for child-rearing and because child-rearing is done best by a man and a woman, marriage is for a man and a woman.

The addendum about male and female role models may be true. But it also may not be true. Reliable evaluations about what matters most for optimal child-rearing are very difficult to produce. The studies that scholars do have access to are varied, rarely longitudinal, and wildly disparate in result.⁴⁴ To be reliable, studies of child welfare must have a sufficient number of subjects, sufficient heterogeneity yet control for class, culture and a host of other differences.⁴⁵ Based on the studies that have been done, many scholars of the family now believe that, all else being equal, children raised by their own happily-married, stable, biological parents have an easier time than most children

⁴³ See generally, Katharine K. Baker, *Bargaining or Biology: The History and Future of Paternity Law and Parental Status*, 14 *Cornell J. of L. and Pub Policy* 1, 22-25 (2004) (explaining how, without genetic testing, proving paternity was so difficult that litigants could not overcome the marital presumption).

⁴⁴ See William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting and America's Children*, 15 *Future of Children* 97, 100-106 (2003) (Explaining the problems with existing studies of children of same-sex couples).

⁴⁵ *Id.*

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

raised in circumstances other than that.⁴⁶ But the majority of children in this country are probably raised in circumstances other than that.⁴⁷

The worlds in which children are raised are simply too varied for legislators or other policy makers to make reliable categorical rules about optimal child-raising.⁴⁸ That is probably why we allow adoption even though there is strong evidence that adoption is often taxing on children.⁴⁹ It is why many states allow single parents to adopt even though most people agree that two parents are better than one.⁵⁰ It is why we countenance step-families even though many children seem to fare worse in step-families than in single-family families.⁵¹ Most of the studies of gay families with children suggest that the children are not harmed by the same gender of their parents,⁵² but

⁴⁶ Lisa Gennetian, *One or Two Parent? Half or Step Siblings? The Effect of Family Structure on Young Children's Achievement*, 18 *J. of Population Economics* 415-36 (2005) (for educational outcomes, children reared in traditional nuclear families do much better than those reared in other family structures); Donna Ginther and Robert Pollak, *Family Structure and Children's Educational Outcomes: Blended Families, Stylized Facts and Descriptive Regressions*, 41 *Demography* (2004) (2004) (same); Sara McLanahan and Gary Sandefur *Growing Up with a Single Parent: What Hurts, What Helps* (1994) (children raised by both biological parents do substantially better along several metrics than children raised by single parent or biological parent and step-parent)

⁴⁷ See McLanahan and Sandefur, *supra* note at 2-3 ("Well over half of the children born in 1992 will spend all or some of their childhood apart from one of their parents.")

⁴⁸ Shelly Lundberg and Robert A Pollak, *The American Family and Family Economics*, 21 *J. of Eco. Perspectives* 19 (2007) ("Because family structure is intertwined with other parental characteristics that affect children, a causal relationship between family structure and child outcomes is difficult to establish.")

⁴⁹ See generally, David M Brodzinsky, *Being Adopted: The Lifelong Search for Self* (1992)

⁵⁰ June Carbone, *From Partners to Parents: The Second Revolution in Family Law* 118 (2000) (most researchers in the area concede that, all else being equal two parents are better than one, though the question of why is hotly debated)

⁵¹ See *supra* note for outcomes of step-families.

⁵² Judith Stacey and Timothy J Biblörze, (How) Does the Sexual Orientation of Parents Matter? 66 *American Sociological Review* 183 (2001) (most current research indicates that there is no difference in development between children that live with heterosexual parents and children who live with same-sex parents); Katrien Vanfraussen, Ingrid Ponthjaert-Kristoffersen, Anne Brewaeys, 73 *Am J. of Orthopsychiatry* (2003) (no differences in how parents and children in gay and straight families perceived the quality of their relationships); Raymond Chan, Barbara Raboy and Charlotte Patterson, 69 *Child Development*, 443-457 (sexual orientation of parents had no significant impact on psychological well-being of their children.)

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

children of gay families are, by definition, not raised in a married biological family.

Because they are likely to have been either adopted or born through artificial insemination of some kind with one parent being akin to a step-parent, they are likely to experience some of the hardships associated with these family structures.

The Supreme Courts of Vermont, Massachusetts and New Jersey made much of the fact that their state legislatures had already enacted various different protections for gay parents and that therefore it did not make sense for the legislatures to preference straight over gay parenting.⁵³ But adoptive parents are always treated differently than parents of children born as a result of heterosexual intercourse. A single person is allowed to adopt a child and parent that child on his or her own, even though we do not give a single person the right to parent a child born as a result of heterosexual intercourse on his or her own. Both the child and the other genetic contributor have the right to establish parentage in that genetic contributor.

Allowing gay men and women to enter into second parent adoptions⁵⁴ also says little more than that the legislature thinks that a child is better off with two parents than with one. It does not necessarily mean that the legislature thinks there is no difference between two parents of the same sex and two parents of the opposite sex. Possibly most important, all potential adopters have to be screened. No one is allowed to adopt domestically unless they have passed the licensing requirements for parenthood. Non-adoptive parents do not have to get licensed. They get parental status by virtue of

⁵³ Baker, 744 A.2d at 881-82; Goodridge, 798 NE2d at 963-964; Lewis, 908 A.2d at 213.

⁵⁴ “Second parent adoptions” refers to the practice of allowing a second same-sex parent to adopt a child who only has one legal parent. See Leslie Harris, Lee Teitelbaum and June Carbone, *Family Law* 927 (2004).

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

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

The ambiguity of the evidence regarding how important bi-gendered role models are for children-rearing explains why the constitutionality of the SSM issue is so important.⁵⁵ Given the ambiguity, a legislature that thinks that marriage is an institution designed primarily for the rearing of children may rationally reject gay marriage. States cannot prove that having a male and female role model is best, but neither can proponents of SSM prove that it makes no difference. So the burden of proof becomes critical.

If marriage is a fundamental right or if gays and lesbian have a constitutionally protected equality right to get married, the burden is on the state to prove that having both a mother and a father is important. This the state cannot do. But if there is neither a fundamental right nor an equality right to marry, the burden is on SSM advocates to show that a policy favoring one parent of each gender is irrational. This proponents of SSM

⁵⁵ The Supreme Judicial Court of Massachusetts disagreed with this conclusion, finding that there was no rational reason to prevent gays and lesbians from marrying because if they were prevented from marrying, gays and lesbians would just have children outside of marriage, and then the children would not be able to enjoy the benefits of marriage. See Goodridge, 798 A.2d at 963 (“The department has offered no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriage in order to have and raise children.”) With all due respect to the Massachusetts SJC, it ignored the extensive literature on the channeling function of family law. See Carl E. Schieder, *The Channeling Function in Family Law*, 20 Hofstra L Rev 495 (1992). States may reject SSM because they think it more likely that if there is no SSM, people who might enter into a SSM, will choose instead to enter into an opposite sex marriage to raise children. The Court said there was no evidence that this would happen, but history would seem to be all the evidence we need. I know of no one who disputes a strong history of people who may have been inclined to enter into relationships with people of their own sex, nevertheless getting married and having children.

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

probably cannot do. As a matter of policy, it might be extraordinarily wrong-headed to preclude two committed people of the same sex who very much want to parent with each other from doing so, but, given the evidence of what situations are better and worse for children, a reasonable legislator might conclude otherwise.

This leads us then to the sixth marriage narrative, marriage as a promoter and producer of gender roles. This story of marriage will probably be jarring to some. Perhaps because it can be so jarring, courts have not engaged it significantly, except to dismiss it categorically and without discussion.⁵⁶ One finds this discourse of inherently gendered marriage mostly in the academic writings by opponents of SSM. The story goes something like this:

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

The above synopsis is mine, but it is gleaned from the following descriptions of marriage. Marriage is “the central cultural site of male-female relations.”⁵⁷ It is “an institution that interacts with a unique social-sexual ecology in human life. It bridges the

⁵⁶ Both the California and Massachusetts simply stated that SSM would not fundamentally change the institution of marriage, see Goodridge, 798 A.2d at 965 n. 28 (dismissing dissent’s claim that the majority was changing the institution of marriage itself because the dissent’s argument hews too close to the idea that men and women are different), In Re Marriage Cases, 183 P2d at 421 (stating that SSM would not “change, modify or . . . deinstitutionalize the existing institution of marriage.”) But if one believes that one of the primary purposes of marriage is to reify gender roles, it is quite likely that SSM will change the institution of marriage.

⁵⁷ Dan Cere, War of the Ring, in *Divorcing Marriage* 9,14 (2004).

BAKER DRAFT

2/6/09 – *Please do not
quote without permission*

male-female divide.”⁵⁸ Its “*universal* features . . . include” being “supported by authority and incentives” and recognizing “interdependence of men and women.”⁵⁹ Bringing men and women together has been “the massive cultural effort of every human society at all times and in all places.”⁶⁰ Marriage does this by creating husbands and wives. “The status bestowed by marriage is that of “wife” and “husband” and the relation between husband and wife is the form of life that marriage alone creates”⁶¹

Marriage creates the “social identities” of husband and wife and those social identities (which are formed by social norms and expectations) are very different than the social identity of “partner.”⁶² “[B]oth spouses gain from . . . the benefits that come from faithfully fulfilling one’s chosen duties as . . . husband or wife.”⁶³ Marriage “sustains a complex form of social interdependency between men and women.”⁶⁴ “Norms of trust, fidelity, sacrifice and providership . . . give [married] men clear directions about how they should act . . . [and] . . . [m]ost men seek to maintain their social status by abiding by society’s norms.”⁶⁵ “Norms of adult maturity associated with marriage encourage adults to spend and save in a more responsible fashion [F]or many men, marriage is

⁵⁸ Dan Cere, War of the Ring, in *Divorcing Marriage* 9,11(2004) (citing the work of evolutionary psychologists Margo Wilson and Martin Daly).

⁵⁹ Katharine Young & Paul Nathanson, *The Future of an Experiment*, in *DIVORCING MARRIAGE* 41, 45. UNVEILING THE DANGERS IN CANADA’S NEW SOCIAL EXPERIMENT (Cere and Farrow, eds) (2004)

⁶⁰ *Id.* At 43

⁶¹ F.C. DeCoste, The Halpern Transformation: Same-Sex Marriage, Civil Society and the Limits of Liberal Law, 41 Alberta L. Rev. 619, 625

⁶² Monte Stewart, Genderless Marriage, Institutional Realities and Judicial Elision, 1 Duke J. of Con L. & Pub Policy 1, 19

⁶³ The Witherspoon Institute, *Marriage and the Public Good: Ten Principles* [hereinafter “Witherspoon”] 14 (2006).

⁶⁴ *The Future of Family Law: Law and the Marriage Crisis in North America* 20 (2005)

⁶⁵ Witherspoon, *supra* note at 32

BAKER DRAFT

2/6/09 – *Please do not
quote without permission*

a right of passage that introduces them fully into an adult world of responsibility and self-control.”⁶⁶

With an extensive set of cultural norms and expectations about what it means to be married, i.e. to be a husband and wife, marriage channels men and women into gender roles that allow each to identify with and achieve the cultural ideals of masculine and feminine.⁶⁷ If we allow people of the same sex to marry, we alter the essentially gendered nature of marriage and we put at risk the separate but equal masculine and feminine roles that marriage has traditionally reified. Having people live into and fulfill those roles has proven to be immensely beneficial for both society as a whole and individuals in particular.⁶⁸

One response to this story may be that SSM will not destroy gendered marriage; it will just allow for an alternative. If heterosexual people still want to live gendered lives, SSM will not prevent them from doing so. The rejoinder to this argument is subtle, but

⁶⁶ Witherspoon at 32.

⁶⁷ Most of the evidence suggests that marriage is relatively more advantageous for men than women. Married men measure significantly higher for psychological and physical health than do single men. Married women measure higher than single women, but not as much higher. See *infra* note Indeed, much of the argument against SSM suggests that it is the benefits that married men receive individually and provide to the social whole that makes marriage so valuable. Non-married adult men are less happy, more violent, less responsible and less integrated into their communities. See STEVEN NOCK, *MARRIAGE IN MEN’S LIVES* 6-8 (1998).

⁶⁸ There is fairly consistent evidence that marriage makes both men and women happier, healthier and wealthier. Steven Nock writes “The many beneficial effects of marriage are well-known. Married people are generally healthier; they live longer, earn more, have better health and better sex lives, and are happier than their unmarried counterparts. . . . Some disagreement may exist about the magnitude of such effects, but they are almost certainly the result of marriage, rather than self-selection.” See *id.* at 3 (citing numerous studies). For a more recent study, see Alois Sututizer and Bruno Frey, *Does marriage make people happy or do happy people get married*, 35 J. OF SOCIO-ECONOMICS 326, 3--- (2006) (finding that marriage continues to be highly correlated with happiness for both men and women and that “[i]t is unlikely that . . . selection effects can explain the entire difference in well-being between singles and married people.”) See also, Goive Marriage, M. Hughes and C. Style, *The Family Life Cycle – Internal Dynamics and Social Research Consequences*, 58 *Sociology and Social Res.* 56-68 (1983) (marriage improves women’s lives substantially).

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

not necessarily weak. By unmooring marriage from its gendering effects, SSM puts in jeopardy the way in which most married people have learned to express themselves as spouses, the way in which they have learned to live in a loving sexual relationship, and the way in which they have come to understand who they are as participating, responsible members of society. What allows marriage to do this is the rich set of norms, many of them gendered, that define how married people are to behave. The strong social pressure to conform to these norms restricts people's freedoms but allows them to live into responsible masculinity and femininity.⁶⁹ Adhering to the social norms of marriage and accepting the responsibilities of marital roles allows for a kind of self-expression and self-development that is both restricting and ennobling.⁷⁰ Those social norms will change if, for instance, husband will not necessarily mean provider and wife will not necessarily mean caretaker.

Admittedly, some couples already alter aspects of these roles. But few couples abandon them completely.⁷¹ The more marriage's gendered conventions are challenged,

⁶⁹ Bruce Hafen writes about the restrictions of family life this way, "the same relationships that seem to tie us down are, paradoxically, the sources of strength most likely to lift us up." Burce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 *BYU L Rev* 1, 41. See also idea of responsibility providing fulfillment.

⁷⁰ For more on how accepting the roles in marriage is both an expressive and constitutive act, see Milton Regan, *Spousal Privilege and the Meanings of Marriage*, 81 *Va L. Rev* 2045, 2088-89 (1995). Regan's work builds on Meir Dan-Cahan, *Responsibility and the Boundaries of the Self*, 105 *Harv. L. Rev.* 959 (1992) (articulating and analyzing the constitutive responsibility paradigm) and it is similar to how Katharine Bartlett has described parenthood. See Katharine Bartlett, *Re-Expressing Parenthood*, 98 *Yale L. J.* 293, 301 (1988) (citing the work of NEL NODDINGS, *CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION* 5 (1984), and suggesting that accepting the responsibilities of parenthood is a means of adults striving to realize their "ennobled selves.")

⁷¹ One study famously found that though the percentage of unpaid work that a wife does in the home decreases as she earns more money relative to her husband, but in those couples where the wife actually earns more than her husband, the wives begin to do a greater share of the housework. The authors attribute this phenomenon to the greater importance of conforming to gendered roles with regard to unpaid work if the couple is not conforming to those roles with regard to paid work. See Theodore N Greenstein,

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

the less stable they become and the less likely they are to be re-enforced by broad social consensus. Without that broad social understanding of marriage as gendered, the gendered norms that go with it will die and so will the roles through which many people have found meaning in their lives.

For those who find this understanding of marriage somewhat alienating or just alien, it is important to recognize two distinct but important points. First, the gendered narrative fits very easily into much of the pre-existing constitutional discourse on marriage. One can see how marriage could be “the foundation of society,” “the most important relation in life,”⁷² and “fundamental to the very existence and survival of the race”⁷³ *because* of the way in which it reifies gender, serving both the states interest in stability and protection against dependence (story #1) and individuals’ interests in expression and self-determination (story #2). The more mundane stories of marriage as just being a close connection between two people, one that does not necessarily have a rich set of norms associated with it, seems inconsistent with the lofty rhetoric. Second, a great deal of social science data confirms what this narrative of marriage celebrates. The next Part explores more fully what the social science data suggests about marriage’s tendency to reinforce gender.

Economic Dependence, Gender and the Division of Labor in the Home: A Replication and Extension, 62 J. Marriage & Fam 322, 333 (2000).

⁷² See *Maynard v. Hill* and *Williams v. North Carolina*, *supra* notes 14-15.

⁷³ *Skinner v. Oklahoma* 316 US 535, 539 (1942).

BAKER DRAFT

2/6/09 – *Please do not
quote without permission*

PART III: The Gender Factory⁷⁴

As Story #1 suggested, one of the advantages of marriage is that it allows for a division of labor and an allocation of roles within households. This role division provides stability for the household, for the individuals within it and for society as a whole. In the vast majority of households, this role division is also gendered. As Sarah Berk showed in her classic book, *THE GENDER FACTORY*, standard economic explanations for and how and why unpaid work *might* be divided in a household cannot explain the social reality of how work *is* divided in households.⁷⁵ Gender can. Gender predicts who does what, how much each married partner does and why husbands and wives do not negotiate more over who does what or how much.⁷⁶ Couples do not fight over what jobs they will do precisely because the allocation is so patterned into who they are as gendered selves. And the more those gendered work patterns are replicated, the more entrenched gender roles become. Thus, the home and the marriages that define it not only reflect gender, they create it. “[G]ender both affects and is perhaps effected through the division of household labor. It is around the household that gender relations are produced and reproduced on a daily basis.”⁷⁷

⁷⁴ See Berk *supra* note .

⁷⁵ 162-165

⁷⁶ *Id.* at 165, 191 (“[H]ow people interact about who does what is as stable a phenomenon as the division of work itself.”)

⁷⁷ *Id.* At 165

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

Marriage increases the amount of domestic work that women do and decreases the amount that men do.⁷⁸ Married women, regardless of whether they also work outside the home, do much more household work than their husbands.⁷⁹ Studies find that even in the most egalitarian households, women perform 59% of the domestic work.⁸⁰

Marriage, particularly marriages with children, decrease women's commitment to paid work and increase their commitment to unpaid work. A strong majority of married mothers work outside the home,⁸¹ but in the most recent, exhaustive study of time allocation in households with children, Suzanne Bianchi and her colleagues found that mothers average 67% of the unpaid work in a household, while fathers average 64% of the paid hours for a household.⁸² Mothers do twice as much child care as do fathers.⁸³

Mothers may be able to do more child care because they do less paid work than do fathers. Married women often leave the labor force for a short or long period. Between 1983 and 1998, fifty percent of women, but only sixteen percent of men, reported being out of the labor force for one full year.⁸⁴ Thirty percent of women, but

⁷⁸ Beth Ann Shelton & John Daphne, Does Marital Status Make a difference? 14 J. Fam Issues 401 (1993) (women's domestic labor goes up with marriage); Sanjiv Gupta, The Effects of Transitions in Marital Status on Men's Performance of Household, 61 J. Marriage & Fam 700, 700-701 (1999) (men's domestic labor goes down with marriage).

⁷⁹ David Demo & Alan Acock, Family Diversity and the division of Domestic Labor: How Much Have Things Really Changed? 42 Fam Res. 323, 323-31 (1993)

⁸⁰ Theodore N. Greenstein, economic Dependence, Gender and the Division of Labor in the Home: A Replication and Extension, 62 J. Marriage & am. 322, 333 (2000).

⁸¹ US Dep't of Lab., Bureau of Lab. Statistics News, Employment Characteristics of Families in 2005, tbl4 (April 27, 2006), <http://www.bls.gov/news/pdf/famee.pdf> (65% of married mothers work outside the home)

⁸² Suzanne M. Bianchi et al., Changing Rhythms of American Family Life 91 (2006).

⁸³ Id.

⁸⁴ Heidi Hartmann et al., How Much Progress in Closing the Long-Term Earnings Gap? In The Declining Significance of Gender?125, 131 (Francine D. Blau et al., eds, 2006).

BAKER DRAFT

2/6/09 – *Please do not
quote without permission*

only .05 percent of men reported more than four years of zero earnings.⁸⁵ Women with the strongest commitment to paid labor, i.e., those who reported earnings for every year of their prime earning years (ages 26-59), still reported working almost 500 fewer hours per year than men.⁸⁶ Some women work less than the standard work week or standard work year; others forego overtime opportunities when men do not.

These differing work patterns are starkly reflected in the gender wage gap. Most wage gap measures usually only account for workers who work full time on an annual basis (thus excluding part-time or part-year workers, most of them women). When one includes those part time and part year workers and looks at just prime earning years, women earn 38 cents for every dollar men earn.⁸⁷

Most women who currently make the choice to do less paid work were raised during what might be described as a time of maximum gender equality, with all the benefits that Title VII, Title IX, and constitutional gender equality doctrine afforded them.⁸⁸ Yet almost half of all mothers with children under age one leave the labor force.⁸⁹ One study found that mothers born after 1965, if they live in households earning more than \$120,000 a year, are more likely than not to be home full-time, no

⁸⁵ Id

⁸⁶ Id.

⁸⁷ Id.

⁸⁸ Title VII refers to the prohibition on sex discrimination in employment found in the Civil Rights Act of 1964, Sec. 701 et seq. Title IX refers to the prohibition on sex discrimination found in the Educational Amendments of 1972, 20 USC. Sec. 1681 et seq. (1994). Constitutional gender discrimination doctrine is discussed *infra* in Part IV.

⁸⁹ Claudia Wallis, *The Case for Staying Home*, *Time*, Mar. 22, 2004 at 52. The number of working married mothers with children under age one fell from 59% in 1997 to 53% in 2000 (and stayed roughly the same in 2002). That drop was most pronounced among older (over 30) well-educated women, and though six percentage points may not seem like a huge drop, economists suggest that it is significant. Id.

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

matter what the age of their children.⁹⁰ Another study found that “[e]ven wives with graduate and professional degrees do not usually work full time if their husband’s income exceed[s] \$75,000.”⁹¹

Marriage affords many women the opportunity to not work or to work less. It does not appear to afford men the same choice. The labor supply curve for married women is very elastic.⁹² The labor supply curve for married men is starkly inelastic.⁹³ If anything, marriage increases men’s commitment to the labor force because if their wives choose not to do paid work or to do less of it, married men do more of it.⁹⁴ Thus, marriage propels men into the paid labor force, even as it offers women a path out of it.⁹⁵

As groups, neither men nor women seem particularly upset by this differential response to marriage. Despite their spending significantly different amounts of time on paid and unpaid work, married mothers and fathers report feeling comparably successful

⁹⁰ Id. Women of the same income level, raised without the benefits of legally recognized gender equality, i.e. those born between 1946 and 1964, are significantly less likely to be home full-time (51% of post-baby-boomer mothers are home full time versus 33% of baby-boomer mothers).

⁹¹ Ira Mark Ellman, Marital Roles and Declining Marriage Rates, 41 Fam. L. Q. 455, 474 (2007) (This finding is based on data from the 1997 Current Population Survey.) Ellman also found that “as economic pressure decline, married American mothers increasingly choose to work part time rather than full time, regardless of their educational level.” Id. At 475

⁹² Edward McCaffery, Taxing Women (1997).

⁹³ Id.

⁹⁴ Men with non-wage-earning spouses work more than men whose wives earn wages, though they also earn considerably more per hour. One study found that men with non-working spouses work 4% more than men with working spouses, but that they earn 20% more. Tamar Lewin, Men Whose Wives Work Earn Less, Studies Show, NYTimes, Oct. 12 1994 at A1. See also Joy A. Schneer & Frieda Teitman, Effects of Alternative Family Structure on Managerial Career Paths, 36 Acad Mgmt J 830, 840 (1993) (what was once thought to be a marital bonus paid to married men is more accurately seen as a traditional family bonus. Men whose wives are home full-time earn more per hour than men whose wives work.)

⁹⁵ Whether the number of hours that men and women work is equal seems to depend on how completely they specialize along gender lines. In households where women perform no paid labor, men, on average, work more hours than women. In households in which women work outside they home (and do the bulk of unpaid labor), it is the women who work more hours. Bianchi et al at 56.

BAKER DRAFT

2/6/09 – *Please do not quote without permission*

in balancing work and family life.⁹⁶ Married fathers are more likely than married mothers to report making sacrifices in family time for the sake of their job, but they are also slightly more likely to report making sacrifices in their job for the sake of the family.⁹⁷ It is *unmarried* mothers who are by far the most likely to report making sacrifices in both job and family for the sake of the other. Married mothers, who work the fewest paid hours, are the most content with their role balance.

The gendered differential in time allocation and married parents satisfaction with it does not jibe particularly well with what parents say they believe about a gendered division of work. 82% of people born between 1965 and 1981 believe that “both parents should be equally involved in caregiving.”⁹⁸ Putting those beliefs together with the data on actual hours devoted to caretaking, it is striking that more parents are not dissatisfied with their role allocation. Interesting also is the correlation between belief in gender egalitarianism and gendered work patterns. Education level is highly correlated with marriage rate, as is income level.⁹⁹ Yet, the more wealth a married couple is, the more

⁹⁶ Bianchi et. al. at 139 (50% of married fathers and 52% of married mothers report feeling very successful in achieving work/family balance). See also Alan J. Hawkins, Chritina M Marshall & Sarah M. allen, *The Orientation Toward Domestic Labor questionnaire: Exploring Dual-Earner Wives’ Sense of Fairness About Family Work*, 1 J. Fam. Psych. 44 (1998) (“although dual-earner wives [in the United States] do two to three times the amount of domestic work their husbands do, less than one third of wives report the division of the daily family work as unfair.”)

⁹⁷ Id. (20% of married men report sacrificing family time for career, versus only 14% of married women. 32% of married men report sacrificing job for family, versus only 30% for married women.)

⁹⁸ Id. At 128. (76% of people born between 1946 and 1964 believe this).

⁹⁹. For the link between commitment to gender equality and education, see Richard J. Harris & Juanita M. Firestone, *Changes in Predictors of GenderRole Ideologies Among Women: A Mutlivariate Analysis*, 38 SEX ROLES 239, 240 (1998). Fro the link between marriage rate and education, see Dept. Health and Human Services, Natl. Center for Health Statistics, *Cohabitation,, Marriage, Divorce and Remarriage in the United States* 4 (2002) (“In addition to race and employment status, other characteristics of individuals that have been found to be related to higher probability of getting married include higher education and earnings.”) See http://www.aamft.org/Press_Room/CDC_series23_7_2002.pdf. Education may teach

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

profound their gender specialization tends to be.¹⁰⁰ What can account for a feeling of success if one's behavior so clearly deviates from one's beliefs about gender equity?

One answer may be capaciousness in the term "equality." It is not precisely clear what people mean when they say that both parents should share equally. Perhaps people mean that the investment in caretaking should be comparable, or equal-on-major-decision-making, or just close. Any of those understandings of equality, though, suggest that separate might be equal in the context of gender.

Another reason people may not be concerned about deviating from their reported beliefs about gender roles is because they underestimate the importance of gender in their own lives. Women may feel like they have successfully negotiated a paid/unpaid balance even though they do twice as much unpaid work as their spouses because norms of motherhood encourage them to do so much unpaid work. Interviews with mothers who have left or significantly diminished their paid work suggest as much. "I have more of a link [to my children] than my husband does." "You can't get away from the fact that women bear children." "The day-to-day stuff is harder for women." "He doesn't have the same guilt that I have. He doesn't worry that its going to hurt them."¹⁰¹

people to believe in gender equality, but it also enables them to make more money and the more money a couple makes, the more likely they are to lead gendered lives.

¹⁰⁰ In addition to the figures cited above regarding women who can afford to being at home full-time, see supra note , consider these figures. Twenty-two percent of women with professional degrees do not work at all so that they can stay home with their children, Claudia Willis, *The Case for Staying Home*, *Time*, Mar 22, 2004 at 53. A survey of the Harvard Business School classes of 1981, 1985 and 1991 found that 62% worked part-time or not at all. It is possible that all of these women with professional degrees are living off of their part-time salaries or accumulated wealth, but it probably much more likely that the primary source of income to their household comes from a husband.

¹⁰¹ All of these quotes are taken from women interviewed by Mary Blair-Loy in her book on women executives. See Mary Blair-Loy, *Competing Devotions: Career and Family Among Women Executives* 83-84, 69 (2003)

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

Men may feel comfortable doing so much less unpaid work in the home because masculinity norms strongly encourage them to participate in the workforce. Participating in the workforce allows men to compete, usually with other men, and competition is a hallmark of masculinity.¹⁰² Earning the bulk of the family's money also allows men to define themselves as breadwinners and providers. As numerous scholars of fatherhood and masculinity have concluded, "the breadwinner role is socially defined as men's primary family role."¹⁰³ "[B]readwinning has remained the great unifying element in fathers' lives. Its obligations . . . shape their sense of self, manhood and gender."¹⁰⁴

In accounts of why and how many well-educated, formerly egalitarian couples divided roles along gender lines, participants report that paid work is simply more psychologically important to fathers than mothers.¹⁰⁵ As Steven Nock writes in his study of how marriage functions in men's lives, "[a husband] in his role as primary provider for the family, has committed himself to instrumental tasks that contribute to his gender identity as a man . . ."¹⁰⁶ "[S]ome amount of differentiation (or inequality) in marriage

¹⁰² Allen Johnson, *The Gender Knot* 34, 44-45 (1997) (men compete with each other for women and for power in society).

¹⁰³ Joseph H. Pleck, *Husband's Paid Work and Family Roles: Current Research Issues in Research in the Interweave of Social Roles, Families, and Jobs* 251, 305 (Lopata & Pleck eds. 1983).

¹⁰⁴ Robert L. Griswold, *Fatherhood in America: A History* 2 (1993).

¹⁰⁵ Mary Blair-Loy, *Competing Devotions: Career and Family Among women Executives* 72, 68 (2003) ("[M]y husband loves his work. Form him to make a change would be change of such magnitude, such importance to him personally . . ." "He'd be very antsy to get back to work. . . . He's just more distracted by work."); Joan William, *Unbending Gender: Why Family and Work Conflict and What To Do about It* 25-31 (2000) (describing how women assume the burden of unpaid work because it is so important for their spouses to keep working long hours in paid work).

¹⁰⁶ Steven Nock, *Marriage in Men's Lives* 62.

BAKER DRAFT

2/6/09 – *Please do not
quote without permission*

contributes to what it means to “be” a husband, and . . . what it means to conform to cultural ideals of masculinity.”¹⁰⁷

The importance of marital roles is evident in the incidence of marriage as well. Indeed, data collected on those who do not marry, suggests that marital roles are more robust than marriage itself. Women who are likely to earn equal to or more than their husbands are much less likely to marry.¹⁰⁸ This phenomenon is seen most profoundly at either end of the income scale. Studies of unmarried poor women indicate that though many of these women want to marry and have turned down marriage proposals from men, they remained single because they could not find a suitable spouse.¹⁰⁹ A suitable spouse, for them, would be one who would remain faithful, stay employed and provide for the family.¹¹⁰ An unemployed spouse or a spouse who could not be relied upon, was not worthy of the title spouse. These women continue to believe in marriage, but marriage for them is an institution that requires men to assume certain roles.

High earning women have a related problem. The more women earn, the less likely they are to marry. One study found that for women between the ages for 40 and 44, the percentage who have never married increases with education for every year beyond one year of college.¹¹¹ This may be because, like poor women, high-earning women seek men who can perform the traditional provider role and the more women

¹⁰⁷ Id. At 132.

¹⁰⁸ Elloman, *supra* note at 455-56.

¹⁰⁹ Kathryn Edin & Maria Kefalas, *Promises I can Keep: Why Poor Women Put Motherhood Before Marriage* (2005).

¹¹⁰ Id at 126, 130.

¹¹¹ Elaia Rose, *Education and Hypergamy, and the Success Gap*, Working Paper #353330, Univ. Wash. Econ. Dept (2005).

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

provide for themselves, the higher the standard they will set for prospective spouses.

Alternatively, it may be that men do not want to relinquish the traditional marital role and therefore prefer not to marry women who might earn as much as them. It may be both. Regardless, the patterns suggest that marital roles continue to play a prominent role in people's understanding of what marriage is.

The prevalence of gendered marital roles is often thought to be beyond the law's reach. The law – and many people – view the marital relationship as a private one, entitled to a norm of non-interference.¹¹² An individual couple's decision to specialize along gender lines probably feels to them personal and a function of their unique attributes as a couple, even though if an employer or the government specialized in that same way it would raise serious equality concerns. Legal attempts to interfere with a couple's allocation of marital roles would probably strike many as impermissibly invasive.

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

¹¹² This norm of non-interference has pedigree in both the common law, *McGuire v. McGuire*, 59 NW2d 336 (Neb. 1953) (court will not assume jurisdiction over parties' distribution of resources within an on-going marriage) and the Constitution, *Griswold v. Connecticut*, 381 US 479 (1965) (state cannot interfere with sanctity of marital decision-making about contraception).

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

which gender roles are perpetuated. This perpetuation of gender roles in private has not disappeared with the variety of public measures aimed to ensure gender equality.

Given that background of what marriage is and how it operates, it is appropriate to ask what same sex couples are asking for when they ask for SSM. Are they asking for a right to enter into an institution that will allow each to assume a gendered role, albeit a gender role that, for at least one half of each couple, will not map onto his or her biological sex? Or, is the claim for SSM a claim that marriage must not be gendered – that the law must interfere to prevent the reproduction of traditional gender. As the next Part will show, equality doctrine has been quite ambivalent about allowing people to be alternatively gendered (i.e., to assume a role that does not map onto his or her biological sex), and it has been reticent to eradicate gender roles altogether, particularly when they manifest themselves in private settings.

Part IV: Equality Doctrine

This Part reviews the law of gender equality in three different contexts, employment cases involving dress codes, employment cases involving privacy and sexual preferences, and constitutional cases involving gender discrimination. Recall that the courts that have used equality theory to mandate SSM relied heavily on race discrimination doctrine, in particular the notions that separate cannot be equal and that private biases must not influence governmental behavior.¹¹³

¹¹³ See surpa note and accompanying text.

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

All three of the areas reviewed in this Part suggest that gender equality is a far more slippery concept than racial equality appears to be. In short, the racial analogy often fails in the context of gender discrimination. There are still many areas in which the law condones separate but equal gendered standards and validates private gender biases. At the end of this Part, I also note the irony of applying equality concepts to the law of marriage.

A. The Grooming Cases

The law of gender equality is most routinely tested and created under Title VII of the 1964 Civil Rights Act, the federal statute that prohibits discrimination in employment on the basis of sex. Within this field, in a set of cases known as the “dress” or “grooming” cases, employers are allowed to establish separate but equal rules on the basis of gender and they are allowed to take into account private biases, i.e. community norms, when hiring and retaining workers. Admittedly, the permitted accommodation of gender roles is bounded. Employers are not allowed to segregate job categories (employers cannot make women be secretaries and men be mechanics);¹¹⁴ nor are they allowed to exaggerate gender roles in ways that may be detrimental to one sex.¹¹⁵ But they are allowed to impose separate hair length requirements on men and women.¹¹⁶

¹¹⁴ Though employers are not required to adjust pay across categories if employees personal preferences are such that women choose to work in some of the less lucrative fields (home furnishings) and men choose to work in the more lucrative fields (mechanics). *EEOC v. Sears, Roebuck*, 839 F.2d 302 (7th Cir. 1988).

¹¹⁵ *Magnuson v. Peak Technical Servs. Inc.* 808 F Supp 500 (ED Va, 1992) (denying summary judgment to employer who told employee to wear high heels because her legs were sexy); *Carroll v. Talman Fed. Sav. & Loan Ass*, 604 F.2d 1028, 1032-33 (7th Cir 1979) (striking down employer policy that required women to wear sexually revealing uniform when men could wear street clothes).

¹¹⁶ *Dodge v. Giant Food*, 488 F.2d 1333, 1337 (DC Cir 1973).

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

They can require women, but not men to wear skirts,¹¹⁷ and men, but not women, to wear neckties.¹¹⁸ Men are not necessarily entitled to wear effeminate clothing,¹¹⁹ and men can be prohibited from wearing jewelry.¹²⁰

One of the most recent “grooming” cases involved a bartender who complained about a company policy that made her wear make-up and cut her hair in a certain style. Her male co-workers were not required to wear make-up or wear their hair in that style. Sitting en banc, the Ninth Circuit wrote, “[t]he material issue under our settled law is not whether the policies are different, but whether the policy imposed on the plaintiff creates an unequal burden for [her] gender.”¹²¹ In other words, difference itself does not constitute inequality. Separate can be equal as long as it is not unduly burdensome.

In one of the most well-known grooming cases, involving a TV broadcast journalist who was fired because of declining audience approval numbers attributable to her appearance, the court wrote that different specific appearance criteria for women and men “do not implicate the primary thrust of Title VII, which is to prompt employers to discard outmoded sex stereotypes posing distinct employment advantages for one sex.”¹²² The District Court had made clear that there was nothing wrong with tailoring grooming

¹¹⁷ 466 F. Supp 1388 (WD Mo 1979)

¹¹⁸ Devine v. Lonschein, 621 F Supp894, 897 (SDNY 1985).

¹¹⁹ Doe v. Boeing Co., 846 P2d 531 (Wash 1993) (denying claim of a man fired for wearing “excessively feminine attire, including a string of pearls)

¹²⁰ Lockhart v. Louisiana-Pacific Corp. 795 P.2d 602 (Or Ct. App. 1999).

¹²¹ Jaspersen v. Harrah, 444 F 3d 1104 (9th Cir 2006)

¹²² Craft v. Metromedia, 766 F2d 1205, 1215 (8th Cir. 1985)

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

requirements to conform with “community standards.”¹²³ In other words, private biases can matter and it is only outmoded stereotypes that must go.

The grooming cases’ blatant rejection of equality principles that seem core in the racial context has, not surprisingly, generated a fair amount of commentary. Some writers feel strongly that the accommodation of gender roles, no matter how understandable, is pernicious and ultimately undermines what should be the thrust of equality doctrine. To this group, the manifestation of gender is the problem; gender distinction and sex discrimination are one in the same thing.¹²⁴ Thus, the role of equality doctrine should be to rid society of all gender stereotypes, not just “outmoded” ones.¹²⁵ Mary Ann Case argues that we must make the world safe for both men and women in “frilly pink dresses.”¹²⁶ Taylor Flynn suggests that employer bans on male employees wearing earrings are nothing more than penalties on men for failing to conform “to the masculine gender role expectation that men do not accessorize.”¹²⁷ Katherine Franke suggests that “Title VII should recognize the primacy of gender norms as the root of . . . sex discrimination, and . . . the law should prohibit all forms of normative gender stereotyping”¹²⁸

¹²³ *Craft v. Metromedia*, 572 F Supp 868, 877 (DC Mo 1983), citing *Willingham v. Macon Telegraph Publishing Co.*, 507 F2d 1084 (5th Cir 1975).

¹²⁴ See Mary Ann Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 *Yale L J* 1, 3 (1995) (“We are in danger of substituting for prohibited sex discrimination a still acceptable gender discrimination.”)

¹²⁵ “Outmoded” is the term used by the Eighth Circuit in *Craft*, see *supra* note . . .

¹²⁶ Case, *supra* note at 7-8.

¹²⁷ Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 *Colum L. Rev* 392, 394 (2002).

¹²⁸ Katherine Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 *U Pa L. Rev* 1, 96 (1995).

BAKER DRAFT

2/6/09 – *Please do not
quote without permission*

Others have taken a more accommodationist approach. Katharine Bartlett uses the grooming cases to point out the indeterminacy of the term equality. She writes “[t]here can be no abstract all-purpose definition of equality that fits all times and places.”¹²⁹ Instead she said the focus of equality doctrine should be on whether gender classifications further gender-based disadvantages and this she argues requires more, not less, attention to community norms (i.e., private biases).¹³⁰ Robert Post writes that “[i]t is implausible to read Title VII as mandating that gender conventions be obliterated [We should not be required] to imagine a world of sexless individuals, but . . . [we should] . . . explore the ways in which Title VII *should* alter the norms by which sex is given social meaning.”¹³¹ Kimberly Yuracko suggests that courts use a “power-access approach” and prohibit “only those types of sex-specific trait discrimination that arise out of gender norms and gender scripts that reinforce sex hierarchy in the workplace.”¹³² She goes on to argue that if courts were to prohibit all forms of gender role distinction and force a convergence “toward an androgynous mean,” women would likely be disadvantaged because they would be forced into a male norm that would inhibit their freedom without materially increasing anyone else’s.¹³³

¹²⁹ Katharine Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms and Workplace Discrimination*, 92 Mich L Rev 2541, 2579 (1994).

¹³⁰ *Id.* at 2545 “(Because what constitutes disadvantage, as well as what it takes to reduce that disadvantage and even what reducing that disadvantage means, can only be determined in context . . . I conclude that the evaluation of equality claims under Title VII requires more, not less, attention to community norms.”)

¹³¹ Robert Post, *Prejudicial Appearances, The Logic of American Antidiscrimination Law*, 88 NYU L Rev 1, 20 (2000) (emphasis added)

¹³² Kimberly A. Yuracko *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 Tex L Rev 167, 172 (2004).

¹³³ *Id.* at 202-03 “The employer who does not want to employ men in bob haircuts will simply not make this an option under its dress code, even if it does not mind women wearing them. The result is not more options for men to gender bend but fewer traditionally gender-conforming options for women.” Consider

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

The grooming cases and the commentary they have generated raise doubt about the state supreme court decisions that have latched onto race discrimination principles as the equality principles that should govern in the SSM context. If prohibitions on SSM is gender discrimination then one would presume that courts should have looked to gender discrimination doctrine. If prohibitions on SSM is sexual orientation discrimination, the question becomes which line of doctrine, race or gender, is more applicable. Given that many scholars have argued that sexual orientation is gender discrimination¹³⁴ and given the interplay of gender and sexual orientation in the SSM context, it is hard to see why the analogy should be to race. At a minimum, one would expect courts to explain why the more accommodationist approach to gender discrimination should not be adopted in the SSM cases.

Dress codes serve no other purpose than to accommodate private biases and thereby reify and reproduce gender. An acceptance of gender difference can be reconciled with gender equality principles only if one accepts the legitimacy, at least in some contexts, of separate but equal. If there can be gendered dress codes and if private biases can shape the legal standard for gender accommodation, what is wrong with a regime that sanctions both marriage – which reifies and reproduces gender - and civil unions – which does everything that marriage does except reify and reproduce gender?

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

¹³⁴ See *supra* notes .

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

Such a regime could provide for gays and lesbians everything that marriage provides except for the gendering function. Gays and lesbians are not entitled to that gendering function because the grooming cases suggest that individuals do not have protected rights to demand that the public accommodate them in their desire to gender themselves in a manner inconsistent with their biological sex.

Moreover, opponents of SSM might argue, to allow gays and lesbians to marry and try to conform to marriage's gender roles will undermine what we understand those roles to be. Fulfilling those roles serves a stabilizing social function and facilitates home organization and male/female communication. If we allow women to be husbands or fathers and men to be wives or mothers, we may disrupt the social meaning of those roles in a way that is disquieting to many and makes it harder for straight couples to migrate into those roles. Allegiance to those roles is very strong.

Consider title of the much discussed book "Heather has 2 Mommies."¹³⁵ Why doesn't Heather have a Mommy and a Daddy - one who happens to be female. Why is it that we assign the names Mommy and Daddy to biological sex, rather than gender role? Although gay couples tend to distribute unpaid work in a more egalitarian fashion,¹³⁶ it is likely that Heather has one parent that does more paid work and one who does more

¹³⁵ Leslea Newman, *Heather Has Two Mommies* (1988).

¹³⁶ See Sandra Solomon et al., *Money, Housework, Sex and Conflict: Same-sex Couples In Civil Unions, Those not in Civil Unions, and Heterosexual Married Siblings*, 52 *Sex Roles* 561, 572 (2005) (same sex couples much more likely than heterosexual couples to distribute household labor equally, even if one member of the couple earns more than the other).

BAKER DRAFT

2/6/09 – *Please do not
quote without permission*

unpaid work.¹³⁷ Our almost universal acceptance of the terms “mother” and “father” to refer to male and female parents, regardless of the gender of the other parent, suggests strong resistance to allowing women to be fathers and men to be mothers. That strong cultural resistance is relevant to legal discussions of equality because community norms define legally permissible demands for gender conformity.

B. Privacy and Sex

The other contexts in which Title VII seems to explicitly condone gender distinctions have to do with customer preferences that are explicitly linked to customer privacy concerns or sexual preferences. Thus, nursing homes, hospital delivery room nursing staff, and agencies that hire nursing aides or others who are likely to have physical contact with clients (or see them nude), can discriminate on the basis of sex.¹³⁸ In explaining these cases, Robert Post suggests that courts accept discrimination because “gender is highly salient in matters of privacy. The sex of the person by whom we are

¹³⁷ In the book, one of Heather’s mother’s is a doctor, the other a carpenter. Perhaps the couple divides the unpaid work of the household evenly, but it is likely that the carpenter would shoulder more of the unpaid work because the opportunity costs of doing so would be less for her.

¹³⁸ See, e.g., Healey v. Southwood Psychiatric Hosp., 78 F.3d 128, 133 (3d Cir. 1996) (permitting sex to be a BFOQ for psychiatric hospital staff treating emotionally disturbed and sexually abused children and adolescents because “[c]hild patients often [had to be] accompanied to the bathroom, and sometimes...bathed”); Jones v. Hinds Gen. Hosp., 666 F. Supp. 933, 935 (S.D. Miss. 1987) (“The job duties of male and female nurse assistants and male orderlies often require that such employee view or touch the private parts of their patients.”); Fesel v. Masonic Home of Del., Inc., 447 F. Supp. 1346, 1352 (D. Del. 1978) (“The Home has the responsibility of providing twenty-four hour supervision and care of its elderly guests. Fulfillment of that responsibility necessitates intimate personal care including dressing, bathing, toilet assistance, geriatric pad changes and catheter care. Each of these functions involves a personal touching....”). But see Olsen v. Marriott Int’l, Inc., 75 F. Supp. 2d 1052 (D. Ariz. 1999) (holding impermissible the consideration of sex in hiring of massage therapists).

BAKER DRAFT

2/6/09 – *Please do not
quote without permission*

seen or touched normally matters very much to us.”¹³⁹ Whatever our commitments to gender equality, they do not necessarily trump the values we place on protecting personal privacy preferences.¹⁴⁰ This would suggest that to the extent SSM claims are claims to disrupt the private bargaining that results in gendering, they are not that strong.

Commentators and courts have also suggested that jobs in which sexual titillation goes to the essence of the service provided, be it prostitution, lap dancing or Playboy Bunny service, can be segregated on the basis of sex.¹⁴¹ Courts are less willing to suspend equality principles in the sexual titillation context than in the privacy context, but the more explicitly sexual the business, the more acceptable the sex discrimination. Most commentators concede that being a woman is a bona fide occupational qualification (BFOQ) for working in a strip club, at least one that caters to men.¹⁴²

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

¹³⁹ Robert Post, *Prejudicial Appearances, The Logic of American Antidiscrimination Law*, 88 NYU L Rev 1, 26 (2000)

¹⁴⁰ Though, as Kimberly Yuracko points out, allowing privacy concerns to trump equality principles in the privacy cases is not likely to have a disparate impact on one particular sex. “[W]hile women may be denied certain jobs to protect men’s privacy, men will be denied the same range of jobs to protect women’s privacy.” Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 Cal L Rev 147, 212 (2004)

¹⁴¹ See Arthur Larson & Lex K. Larson, *Employment Discrimination* § 15.10, at 4-27 (1992) (if prostitution is legal, people should be able to discriminate on the basis of sex in hiring.); Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes and Proxies*, 141 U Pa L Rev 149, 205 (1992) (discussing strip clubs). Although changing norms in the last 30 years have made Playboy Clubs all but obsolete, when Title VII first passed, New York administrative commissions found it permissible for the Clubs to discriminate in hiring Bunnies. *St. Cross v. Playboy Club*, Case No. CSF 22618-70, Appeal No. 773 (N.Y. State Div. of Human Rights Dec. 17, 1971); *Weber v. Playboy Club*, Case No. CSF 22619-70, Appeal No. 774 (N.Y. State Div. of Human Rights Dec. 17, 1971).

¹⁴² See *id.*

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

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

C. Constitutional Gender Equality

Despite being the primary area in which gender discrimination claims are made, employment law is not the only context in which gender discrimination claims are made. There is a solid constitutional jurisprudence of gender equality that has nothing to do with employment discrimination. This jurisprudence does not necessarily require the eradication of marriage as a heterosexual institution either.

First, the initial question that the Supreme Court asks when it is addressing questions of whether a certain statute or policy violates the Constitution's prohibition on gender discrimination is whether men and women are similarly situated. The Equal Protection Clause requires that men and women be treated comparably only if they are similarly situated.¹⁴³ Sometimes they are not. Rules that assign citizenship differently based on whether it is a foreign-born child's mother or father who is a United States citizen do not violate the Equal Protection clause because mothers and fathers are not similarly situated with regard to parenthood at birth.¹⁴⁴ Comparably, states are allowed

¹⁴³ See *Schlesinger v. Ballard*, 419 US 498, 508 (1975) (longer periods for promotion acceptable for women because "men and women were not similarly situated with respect to opportunities for professional services.")

¹⁴⁴ *Nguyen v. INS*, 533 US 53 (2001) (son of Vietnamese mother and American father not a citizen even though son of Vietnamese father and American mother would be).

BAKER DRAFT

2/6/09 – *Please do not
quote without permission*

to have gendered rules with regard to relinquishing one's parental rights (usually in the context of adoption) because, unless fathers have developed a relationship with the children, they are not similarly situated to mothers, who have a relationship by virtue of pregnancy.¹⁴⁵ Thus, the constitutional question for SSM may be whether same-sex couples are similarly situated to opposite sex couples. If one of the primary purposes of marriage is to help produce and reify gender identity, then same sex couples are not similarly situated to same sex couples with regard to marriage. Indeed, the existence of SSM may undermine the purpose of marriage by making gender role construction more a matter of personal choice than socially accepted norms.

In other contexts the Supreme Court has suggested (as did some of the courts in the grooming cases) that gender discrimination is constitutional as long as it is not the result of rank, non-contemplative stereotyping. Thus, in *Rostker v. Golberg*,¹⁴⁶ the Court upheld a compulsory draft registration system for men only because “Congress did not act “unthinkingly” or “reflexively and not for any considered reason.”¹⁴⁷ “The decision to exempt women from registration was not the accidental byproduct of a traditional way of thinking about females.”¹⁴⁸ “The question of registering women for the draft . . . received considerable national attention and was the subject of wide-ranging

¹⁴⁵ Compare *Caban v. Mohammed*; 441 US 380 (1979) (biological father could block adoption of child by mother's husband because biological father and mother had shared parenting duties once the children are born) with *Lehr v. Robertson*, 463 US 248 (1983) (biological father of child could not block the adoption by mother's husband because biological father had not developed a relationship with child).

¹⁴⁶ 453 US 57 (1981)

¹⁴⁷ *Id.* At 74

¹⁴⁸ *Id.* at 73, quoting *Califano v. Webster*, 430 US 313, 320 (1977). See also *Craft v. Metromedia*, *supra* note (suggesting Title VII's purpose was only to “discard *outmoded* sex stereotypes”) (emphasis supplied)

BAKER DRAFT

2/6/09 – *Please do not
quote without permission*

public debate. . . .¹⁴⁹ Comparably, whatever the origins of prohibitions on SSM (which may well have been reflexive and unthinking), gay marriage has now been the subject of wide-ranging political debate. Few states that continue to ban SSM are doing so as an “accidental byproduct of traditional ways” of thinking about marriage. They are doing so in the midst of a vigorous debate about what marriage means.¹⁵⁰ Most of the states that prohibit SSM have had recent referenda on the issue.¹⁵¹ If the social meaning of marriage is contested in an open and deliberative way then a discrimination doctrine aimed at prohibiting reflexive stereotypes may not require that marriage be defined in one way or another.

The strongest and most helpful gender discrimination case for SSM advocates is probably *United States v. Virginia* (“*VMI*”).¹⁵² In it, the Supreme Court ruled that the Virginia Military Institute’s interest in keeping an environment in which “physical rigor, mental stress, absence of privacy and absolute equality are stressed,” -- an environment that was much easier to maintain with an all-male population – could not justify excluding women. The Court ruled that the state must proffer an “exceedingly persuasive justification” for excluding women from this bastion of masculinity. Virginia could not meet this burden.

Under one reading of *VMI*, the Supreme Court held that the Equal Protection Clause ensured women access to state-sponsored environments that promote and reify

¹⁴⁹ *Id.*

¹⁵⁰ See list of states that recently voted to prohibit SSM
http://www.hrc.org/documents/marriage_prohibitions.pdf

¹⁵¹ *Id.*

¹⁵² 518 US 515 (1996).

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

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

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

Justice Ginsburg's opinion detailed how VWIL did not offer anywhere near as rigorous military training as VMI did. The women students did not live together or eat all meals together or experience the "spartan living arrangements" thought to promote an "egalitarian ethic."¹⁵³ Moreover, Mary Baldwin College had vastly inferior sports facilities, a faculty that held "significantly fewer Ph.Ds and received substantially lower salaries," and no courses in engineering or advanced math and physics.¹⁵⁴ In short, the

¹⁵³ Id at 548.

¹⁵⁴ Id at 552-53

BAKER DRAFT

2/6/09 – *Please do not
quote without permission*

Court readily found that separate was not equal because the separate schools were funded and supported at completely different levels.

The Court’s discussion in *VMI* is distinctly different than the Court’s discussion in *Brown*. In *Brown* the Court wrote “ there are findings below that the Negro and white schools involved have been equalized, or are being equalized with respect to . . . tangible factors. Our decision therefore cannot turn on merely a comparison of those tangible factors.”¹⁵⁵ Instead, the court focused on the “hearts and minds” of the African-American children and on the psychological harm they were likely to suffer because “separating the races is usually interpreted as demonstrating inferiority.”¹⁵⁶

Separating genders is not usually so interpreted. Unisex bathrooms are far more rare than gendered ones. Neither women nor men walk through a department store feeling inferior because women’s clothes are in one place and the men’s clothes in another.¹⁵⁷ In *VMI*, the Supreme Court gave no indication that the VWIL option was inherently unequal because it was separate. If a fully funded, adequately staffed Mary Baldwin College facility would have passed constitutional muster, then *VMI* cannot be

¹⁵⁵ *Brown*, supra 347 US at 690.

¹⁵⁶ See supra notes and accompanying text.

¹⁵⁷ The degree of outrage stemming from gender distinction seems to be based on context. Many people are horrified when children’s toy stores segregate toys on the basis of gender. Perhaps this is because people recognize that adult women and adult men have “real” physical differences that necessitate different clothing styles, while boy and girl children are thought to have fewer “real” differences. But undoubtedly, the difference in style between men and women’s clothing vastly exceeds any “real” difference in body type and many, many parents watch in amazement as boy and girl children seem to demonstrate “real” differences.

BAKER DRAFT

2/6/09 – *Please do not
quote without permission*

read to hold that women are necessarily entitled to be alternatively gendered.¹⁵⁸ Thus, Civil Unions and Domestic Partnerships may not be inherently unequal either.

There are further indications of slippery notions of equality in *VMI*. When explaining that VMI was obligated to open its programs to women who wanted the “adversative model” and were “capable of all the adversative activities requires by VMI cadets,” the Court dropped a curious footnote: “Admitting women to VMI would *undoubtedly* require alterations necessary to afford members of each sex *privacy* from the other in living arrangements, and to adjust aspects of physical training programs.”¹⁵⁹ Why would equality doctrine undoubtedly require this? Shouldn’t equality doctrine prevent such an accommodation? No doubt, the Court was concerned about women’s safety,¹⁶⁰ but that concern leads one to conclude that equality requires protecting women from violent masculinity even as equality entitles women to it.¹⁶¹

¹⁵⁸ Justice Rehnquist concurred separately to show his support for single-sex education and to emphasize his belief that all Virginia had to do was provide a fully comparable facility for women. Apparently, Rehnquist was unsure whether the majority would ever accept a separate but equal facility. But the majority spends most of its analysis demonstrating how the separate facility is inferior, not explaining why a separate facility must be inferior. *VMI* is completely different than *Brown v. Board of Education* in this way. In *Brown*, the Court explicitly said it would not spend any time comparing the facilities. See *supra* note

¹⁵⁹ 518 US at 550, n 19 (emphasis supplied).

¹⁶⁰ The level of sexual assault and harassment at all military academies has proven to be astounding. See Vojdik, *supra* note at 101-102.

¹⁶¹ It is worth noting that the masculinity usually reified at military academies is very different than the masculinity that marriage produces. Indeed, believers in the inherently gendered nature of marriage might argue that marriage is necessary precisely because it provides for men a much more caring, cooperative and responsible masculine template. Military academies are (in)famous for their misogynistic norms. See Vojdik *supra* note . Pursuant to those norms, women are seen as weak and other; if men are to interact with them at all it is to abuse or rape them. The various ditties, insults and names that prove this point are far too numerous to mention, but a simple example found in the men’s room at the Citadel when Shannon Faulkner was fighting for admission may suffice. “Let her in – then fuck her to death.” Vojdik.

Modern marriage suggests something very different about male and female interactions. According to the gender norms of marriage, men and women are different but that difference is to be respected. One’s job is to love the other, not denigrate it. One’s responsibility is to care for and nurture the other and to let the other care for and nurture you. In historical context, and in the context of a broad

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

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

This richer conception of equality is not necessarily applicable in the SSM context because it is so unclear what equality doctrine is supposed to protect for same sex couples. Is it the right to be alternatively gendered or the right to degender marriage? Moreover, the benefits that opposite sex couples gain in marriage have not necessarily come at same sex couples' expense. For sure, as the California Supreme Court recognized, there is a respect and dignity that accompanies most opposite sex marriages and same sex couples have been denied that respect and dignity, but so has everyone who does not get married. Many marriage critics have argued that the respect and dignity that accompanies married people has come mostly at the expense of single people.¹⁶²

understanding of how gender reflects power, gendered marriage may just be misogyny more pleasingly dressed up as a separate-but-equal regime, but the vast majority of married people would probably reject that characterization of marriage, even if they would accept that the masculinity of the military academies is misogynistic. Those social understandings of gender roles and how they operate matter in political and legal discussion of who is entitled to marriage and why. For many, gendered marriage offers a non-misogynistic alternative for masculine identity and therefore gendered marriage has tremendous social value.

¹⁶² See Rachel F. Moran, *How Second-Wave Feminist Feminism Forgot the Single Woman*, 33 Hofstra L. Rev. 223 (2004) (exploring the advantages of non-married life and questioning why the law should support marriage); Laura Rosenbury, *Freinds with Benefits*, 106 Mich. L. Rev. 189 (2007) (exploring how access to social welfare benefits come through marriage in a way that discriminates against the kind of strong friendships that single people enjoy); Katherine M. Franke, *The Politics of Same-Sex Marriage*, 15

BAKER DRAFT

2/6/09 – *Please do not
quote without permission*

The accolades that accompany marriage may also be a function of the social praise that accompanies living into one's socially programmed gender identity. The purpose of opposite sex marriage is to make good men and women, with responsible masculine and feminine characteristics. This is only possible (according to story #6) if the individuals are *not* free to choose their own gender identity. Entering marriage is seen as a right of passage because it involves accepting the more restrictive world of gender roles. Living within those roles is celebrated as a sign of maturity.¹⁶³

Marriage is much more about the absence of choice than the exercise of it. The social norms surrounding marriage require men and women to behave in certain different ways. Opposite sex couples do not exclude same sex couples in order to assert control or superiority over them as same-sex couples; same-sex couples are excluded simply because they cannot live into their socially programmed gender identity.

To be sure, there is constitutional doctrine suggesting that court must look critically at government action that assumes men fill one role and women fill another. The armed services cannot assume that wives of service men are dependent if they do not make the same assumption about husbands of service women.¹⁶⁴ The Social Security Administration cannot differentiate between widows and widowers when awarding survivor benefits.¹⁶⁵ All statutes authorizing courts to order alimony or spousal

Colum. J. Gender & L. 236 (2006) (criticizing the lesbigay movements adoption of marriage norms at the expense of celebrating sexuality unbound by marriage).

¹⁶³ See the work of Milton Regan, Meir Dan-Cahan and Katharein Bartlett, *supra* note (all discussing the ways in which accepting the responsibility of certain roles can be a sign of growth and ennoblement.)

¹⁶⁴ *Frontiero v. Richardson*, 411 US 677 (1973).

¹⁶⁵ *Weinberger v. Wiesenfeld*, 420 US 636 (1975); *Califano v. Goldfarb*, 430 US 199 (1977).

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

maintenance payments must be gender neutral.¹⁶⁶ And states cannot assume, even if there is some supporting evidence, that young male drivers are less cautious than young female drivers.¹⁶⁷ It is not that gender discrimination is permissible under the constitution. It is that what we consider gender discrimination is complicated in ways that raise doubt about the applicability of racial discrimination doctrine in the sexual orientation context. At a minimum, a review of the constitutional jurisprudence of gender equality suggests that the constitution is no where near as gender blind as it is color blind.

D. The Law of Marriage

Finally, a note on the irony of using equality doctrine to secure rights to marriage. Much of the law of marriage, and particularly the law of marriage dissolution exists because gender roles exist. Arguably, the reason marital property regimes assume that all income and property earned during the marriage should be split equally, and the reason spousal maintenance regimes require one spouse to support the other after the marriage is over, is because of the strong likelihood that spouses will be dissimilarly situated. The law of marital dissolution is designed to treat unalikes, alike.¹⁶⁸ The more similarly situated the spouses are, the less we need a law of marital dissolution.

¹⁶⁶ *Orr v. Orr*, 440 US 268 (1979).

¹⁶⁷ 429 US 190 (1976) (Oklahoma statute that allowed women but not men under age 21 to buy 3.2 beer struck down because state could not prove that the goal of enhancing traffic safety.)

¹⁶⁸ Aristotle famously described equality as treating likes alike and unalikes, unlike. See ARISTOTLE, *ETHICA NICOMACHEA* v. 3 1121a-1131b, 113 (J.L. Ackrill & J.O. Urmsen eds & W. Ross trans., 1980) (“this is the origin of quarrels and complaints – when either equals have and are awarded unequal shares, or unequals equal shares.”) For more discussion of Aristotle’s influence on the law of gender equality, see CATHARINE MACKINNON, *SEX EQUALITY* 4-10 (2001)

BAKER DRAFT

2/6/09 – *Please do not
quote without permission*

Few people advocate dispensing with marital property or maintenance rules. Treating unalikes alike at the end of a marriage strikes most people as justified, necessary and fair, but it has very little to do with traditional equality doctrine.¹⁶⁹ This does not preclude plaintiffs from making equality claims to enter the institution,¹⁷⁰ but it does shed light on how and why equality arguments may seem inapt.

What is it that SSM couples are being deprived of if marriage's purpose is to make sure that women get compensated for the unpaid work that they do, and that men retain responsibilities for the dependencies they have enabled? Won't most same sex couples look much more similarly situated than most husbands and wives and might that realization undermine the family law rules that have protected women because they are not similarly situated? The modern trend – even in non-community property states - to distribute property equally at divorce and the modern defense of spousal maintenance almost always make explicit reference to the need to protect women.¹⁷¹ Will the arguments for joint property and spousal maintenance seem as compelling if the dependent role is chosen in defiance of social norms instead of in compliance with them? Will we need more proof from gay couples than we do from straight ones that their marital roles were explicitly negotiated, or will we assume that it is marriage, not gender,

¹⁶⁹ June Carbone, *The Futility of Coherence: The ALI's Principles of the Law of Family Dissolution, Compensatory Spousal Payments*, 4 J. L. and Fam. Stud. 43 (2002); Ann Laquer Estin, *Alimony and the Rehabilitation of Family Care*, 71 NC L Rev 721 (1993); Joan Williams, *Is Coverture Dead, Beyond a New Theory of Alimony*, 82 Geo L J 2227 (1994); Jana Singer, *Divorce Reform and Gender Justice*, 67 NC L Rev 1103 (1989).

¹⁷⁰ *Loving v. Virginia*, 388 US1 (1967), the case in which the Supreme Court struck down antiscegenation laws is an example of when such a claim would be appropriate.

¹⁷¹ See cites, supra note .

BAKER DRAFT

2/6/09 – *Please do not
quote without permission*

that leads to role specialization? Why, after all, should the law condone marital roles given their tendency to leave so many people so vulnerable?

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

Part V: Another Story

In this last Part, I offer a final story of marriage, one that incorporates aspects of many of the previous marriage narratives, one that can be reconciled with judicial doctrine and one that makes SSM necessary. I do not offer it as the only true story of marriage, but as an alternative discourse, one that proponents of SSM may need to embrace in order to make effective constitutional arguments. But it is a discourse that challenges many modern understandings of what marriage should be.

A. Story #7

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

BAKER DRAFT

2/6/09 – *Please do not
quote without permission*

from the sense of connection that leads the parties to want to marry. One of the main purposes of marriage is to raise children.

1. Marriage as a Fundamental Right and an Equality Right

If this is what marriage is, gays and lesbians should have a right to it both because marriage is a fundamental right and because gays and lesbians are similarly situated with regard to marriage. Just as Story #1 suggested, the state has an interest in defining and maintaining the legal institution described in Story #7 because of the way in which legal marriage promotes stability and efficiency. The state facilitates marital interdependence by providing the rights and obligations that bind the parties to each other and enable marital role development. As various courts and legislatures have found, there is no good reason to deny same sex couples access to these rights and obligations.¹⁷²

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

¹⁷² See *Baker v. Vermont*, 744 A.2d 864 (1999) and *Lewis v. Harris*, 908 A.2d 196 (2006), requiring the states to provide Civil Union status to gay and lesbian couples. The state legislatures of New Hampshire, Connecticut and California have also granted Civil Union status based on this reasoning. For a summary of state legislation giving same sex couples relationship status, see <http://lambdalegal.org/nationwide-status-same-sex-relationships.html>.

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

As with the traditional masculine and feminine roles, the role of spouse requires a relinquishment of self, a doing for others and a conformity with external norms that require subjugating autonomy and self-interest. But also as with the traditional masculine and feminine roles, fulfilling the role of spouse allows for transcendence of self and a realization of a new identity.¹⁷³ Thus, marriage involves a kind of self-realization that stems from connection not gender.¹⁷⁴ Through this connection, which is re-enforced by both social and legal norms, married people become something new. If the state is to deny people the ability to tap into this rich set of norms in order to express and constitute themselves through marriage, it must have a very good reason. .

The legal rights and obligations that accompany marriage facilitate interdependence and commitment but they do not define the social meaning of spouse. That social meaning comes from the social norms that accompany state-sponsored marriage. Civil Unions or Domestic Partnership may not trigger the same set of norms and thus they may not demand of their participants the same kinds of commitments.¹⁷⁵ Without those commitments, Civil Unions and Domestic Partnerships will not command the same kind of respect and dignity. The problem is not that separate cannot be equal,

¹⁷³ As Milton Regan writes “spouses . . . don’t simply help each other construct separate individual identities . . . [T]hey participate in the creation of a shared identity.” Milton Regan, *Family Law and the Pursuit of Intimacy* 94 (1993). See also Kenneth Karst, *The Freedom of Intimate Association*, 89 *Yale L J* 624, 636 (1980) (“our intimate associations are powerful influences over the development of our personalities.”) See also, George Fletcher, *Loyalty* 81 (discussing loyalty to one’s spouse as an instance where distinguishing between subject and object is pointless).

¹⁷⁴ Objections relations theory has long taught us that human beings have very strong desires for strong emotional attachments. “People are constructed in such a fashion that they are inevitably and powerfully drawn together . . . wired for intense and persistent involvements with one another.” Stephen Mitchell, *Relational Concepts in Psychoanalysis: An Integration* 22 (1988).

¹⁷⁵ Elizabeth Scott, *A World Without Marriage*, 41 *Fam L Q.* 537 (2007) (questioning whether the social norms and expectations for marriage - commitment, fidelity, full emotional intimacy - will be retained for Civil Unions and Domestic Partnerships).

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

but that alternative marriage forms are likely to be different precisely because of the different social norms that will accompany them. It is those social norms that make marriage a fundamental right because it is those social norms that give marriage its expressive and constitutive qualities.

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

2. Marriage and Children

Marriage also often produces children. It can produce them by having one of the spouse's get pregnant; it can produce them by adopting them; it can produce them by entering into some form of reproductive technology contract. My use of the impersonal pronoun here is deliberate. The law used to think of marriage itself as producing children. Custody jurisdiction at divorce extended to "children of the marriage."¹⁷⁶

Courts in intestacy proceedings routinely referred to "children of the marriage."¹⁷⁷

Today, we tend to think of parents and spouses separately. Individuals produce children;

¹⁷⁶ For a list of states that define custody jurisdiction as pertaining to "children of the marriage," see Note, *Divorce and the Modern Family: Providing In Loco Parentis Stepparents Standing to Sue for Custody of Their Stepchildren in a Dissolution Proceeding*, 25 Hofstra L Rev 315, 336, n. 149. (1996).

¹⁷⁷ See *Cary v. Buxton*, 1793 Va LEXIS 3; *Wyth* 183 ("[f]ather's intention to provide for all the children of the marriage."); *Peyton v. Hallett*, 1803 NY 221, 1 Cai.R 363 (interests of "children of the marriage" not affected.).

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

marriages do not. But marriage retains more importance as an institution when the law gives it credit for producing children and same sex parents have much to gain in giving that credit to marriage.

The opponents of SSM are surely right in stories #4 and #5 when they say that children have something to do with marriage. For many people, the desire for children probably motivates the decision to marry. And the link makes sense. It may be for children's sake that we channel adults into marriage.

Critics to the left of the SSM movement have mocked the use of children in the SSM litigation as a transparent attempt to make same sex couples look “normal.”¹⁷⁸ This same criticism of marriage dismisses it as inherently boring, sexually stifling and autonomy-denying.¹⁷⁹ Proponents of SSM may need to concede that marriage is all those things. But so is parenthood. For those who question why straight adults burden themselves with the restrictions of marriage, and why so many gay adults are expending so many resources so that they have the opportunity to burden themselves with the restrictions of marriage, it helps to remember children. The limited reliable data that we have on child-rearing suggests that children benefit from their parents' boredom and lack of autonomy, from the cabined sexuality, and from the stability and interdependence that marks marriage.

¹⁷⁸ See Katherine M. Franke, *The Politics of Same-Sex Marriage*, 15 *Colum. J. Gender & L.* 236, 239 - 240 (2006) (noting “the deployment of children as props that attest to our normalcy” and noting all the children of the plaintiff couples in same-sex marriage cases).

¹⁷⁹ *Id.* (“It’s a tired argument by now that the problem with these staged spectacles [of gay couples looking “normal”] . . . is that they are boring, though of course they are.); See also, Michael Warner, *The Problem With Normal* 87-95 (2000) (discussing how supporting SSM ignores the best principles of Stonewall, which included, “diversity in sexual and intimate relations” and resistance to state sanctioned legitimacy of of consensual sex.”)

BAKER DRAFT

2/6/09 – *Please do not
quote without permission*

Embracing the link between marriage and children is particularly important for many same-sex families. Because same sex couples cannot produce children biologically, the tendency of SSM advocates has been to de-emphasize the importance of children to marriage. This is a mistake. Until very recently, marriage determined parenthood, especially for fathers.¹⁸⁰ The person married to the woman who gave birth was the father. But the marital presumption has waned in importance as genetic science has made it increasingly easy to determine genetic parenthood. This has led to an enormous wave of cases involving non-genetic parenthood.

A divorcing woman can now reliably inform her soon-to-be-ex-husband that he is not the genetic father of “their” child and therefore he should be denied custody.¹⁸¹ Divorcing men find out they are not the genetic fathers and refuse to pay child support.¹⁸² Divorcing men find out they are not genetic fathers but still want parental rights.¹⁸³ These cases have bred new doctrines involving equitable parenthood or de facto parenthood and to a much more expansive system of visitation for non-legal parents.¹⁸⁴

¹⁸⁰ See Katharine K. Baker, *Bargaining or biology, The History and Future of Paternity Law and Parental Status*, 14 *Cornell J. of L and Pub Policy* 1, 22-23 (2004) (“For most of western history, marriage, not blood, determined fatherhood. . . . A child born out of wedlock was *fillius nullius*, or child of nobody.”)

¹⁸¹ *In re Marriage of Sleeper*, 929 P.2d 1028 (Or. Ct. App. 1996) (mother estopped from denying husband’s paternity); *In re Roberts*, 649 N.E.2d 1344, 1346 (Ill. 1995) (Biological mother estopped from denying husband’s paternity of the child when she represented to him that he was the father and, relying on that representation, he developed a relationship with the child.)

¹⁸² *Markov v. Markov*, 758 A.2d 75 (Md. 2000) (husband who found out he was not the biological father still responsible for child support if biological father cannot be found); *MHB v. HTB*, 100 NJ 567 (1985) (husband who found out he was not the father of third child of the marriage still responsible for child support).

¹⁸³ *In re Gallagher*, 539 NW2d 479 (Iowa 1995) (husband can seek custody of child even though he later found out he was not the biological father); *Roberts*, *supra* note .

¹⁸⁴ See Baker, *Bionormativity*, *supra* note at 31-35 (describing the variety of contexts in which courts have used equitable parent doctrines to provide visitation rights); *ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* Sec. 2.03(b)-(c) (2002) (recommending the adoption of the terms equitable parent and de facto parent)

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

Gay parents have benefited from these doctrines to a certain extent, but they would find much more protection in the traditional link between marriage and parenthood. If marriage defined parenthood, courts would not have to look for explicit or implicit intent to share parental rights between gay partners.¹⁸⁵ More important, non-biological gay parents would have access to what non-biological straight parents have been awarded, custody not just visitation.¹⁸⁶ Custodial rights and child support responsibilities would be part of the rights and obligation of marriage.

A strong link between marriage and parenthood could also protect gay parents from the potential dangers involved in the increasingly strong call to make genetic parenthood relevant. The United States is one of the few major industrialized countries that still allows anonymous gamete donation. Canada, the UK, and Sweden all require that children born through artificial insemination be given access to information that allows them to find their donor parents.¹⁸⁷ This means that, in many gay families, there are clearly identifiable alternative parent figures.¹⁸⁸ If a gay couple is divorcing, and perhaps even if they are not, that alternative parent figure may be able to secure some sort of parental rights. Allowing that sperm donor or surrogate mother to secure rights dissipates the rights of the gay parents. A strong link between marriage and parenthood

¹⁸⁵ See *ENO v. LMM* 711 NE2d 886, 891-92 (Mass. 1999); *JAL v. EPH*, 682 A.2d 11314 (Pa. Super 1996).

¹⁸⁶ Compare *ENO* and *JAL*, *supra* note , with the husband's whose wives are estopped from denying biological fatherhood, thus allowing the husbands to petition for custody, not just visitation.

¹⁸⁷ See Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 *Ga L. Rev* 649,688 (2008) (discussing the trend to identify gamete donors as an outgrowth of a belief in the importance of biological connection).

¹⁸⁸ *Id.* (suggesting that the movement to identify genetic parents may lead to a more fluid understanding of parenthood, one in which the traditional two-parent model gives way to a model involving more parents. This new model would necessarily weaken the parental rights of the traditional parents).

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

diminishes the relative importance of genetics to parenthood and strengthen gay parental rights.

3. Summary

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

B. Some Implications

Social conservatives often assume that the SSM movement is the inevitable outgrowth of the loosening marriage and gender norms that started with the divorce reform movement in the 1960s.¹⁸⁹ The story of marriage that I offer here reflects liberalized gender norms – it rejects marriage’s role in producing gender at all – but it does not reflect the ideology of the marriage reform movement in the 1960s and 1970s. Indeed, as the following discussion suggests, the story of marriage offered here rejects much of what is considered the modern ideology of marriage.

¹⁸⁹ See Witherspoon Institute, *supra* note , p.9 (“[I]n the last forty years, marriage and family have come under increasing pressure from the modern state, the modern economy and modern culture.”)

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

1. Spousal Maintenance

First, the divorce revolution's theory of divorce involved both "ending, as far as possible, all personal and economic ties between the spouses" and emphasizing that "both spouses should become equal and independent social and economic actors after divorce and that neither spouse should be especially burdened by the divorce decree."¹⁹⁰

Because, in the 1960s and 70s, women were coming to be viewed as equally able to earn money and because personal growth and individual autonomy came to be valued more highly than they once were,¹⁹¹ the law's willingness to bind two divorced people together dissipated. "Neither [spouse] should be shackled by the unnecessary burdens of an unhappy marriage."¹⁹² The ideal of letting the couple go their separate ways was consistent with the emerging understanding of marriage as a relationship between autonomous equals, either of whom could choose to leave if he or she was unhappy. Virtually every state amended their spousal maintenance statutes to encourage more limited alimony awards as a way of minimizing long-term entanglement between ex-spouses.

Few people today quarrel with the idea that marriage is a relationship between equals and only a few more argue for a return to fault-based divorce.¹⁹³ But it did not take long for courts or commentators to realize that divorce reform's vision of the parties

¹⁹⁰ Leslie Harris, Lee Teitelbaum and June Carbone, *Family Law* 389 (2005)

¹⁹¹ See Carl Schneider, *Moral Discourse and Family Law* (describing how growing concern for individuals' psychological happiness explains, in part, the greater acceptance of divorce).

¹⁹² *Turner v. Turner*, 385 A.2d 1280 (NJ Super 1978)

¹⁹³ See generally Ira Mark Ellman, *Marriage as Contract, Opportunistic Violence and Other Bad Arguments for Fault Divorce*, 1197 U Ill L Rev 719. Some states have re-introduced fault based divorce with the idea of covenant marriage, but the idea has not spread very far. See generally Steven Nock, Laura Sanchez and James Wright, *Covenant Marriage* (2008).

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

being able to completely separate after divorce simply would not work. In marriages of significant duration and in marriages with differentiated roles, both members of the usually cease being autonomous. The primary wage earner depends on the non-wage earner for unpaid, familial labor – most of which usually directly benefits the parties' children – and the primary caretaker depends on the primary wage earner for financial well-being. Those dependencies cannot be addressed adequately with a simple edict that directs the parties to go their separate ways.

When husbands' marital contributions are primarily monetary and women's marital contributions are primarily nonmonetary, ending all personal and economic ties between the parties leaves ex-wives extraordinarily vulnerable. Even if a wife does make monetary contributions to the marriage, if they are less than her husband's (which, as part III shows, they almost always are), encouraging the two parties to go their separate ways can leave a woman in economic circumstances far less desirable than those she enjoyed while married. Some judges realized this soon after the new rules were adopted. They began rejecting limited term maintenance because they recognized the hardship it imposed on women.¹⁹⁴ More recent reform work acknowledges the failure of the divorce revolution in this regard, making clear that in marriages of sufficient duration or with significant role division, the clean break theory of divorce should not apply.¹⁹⁵

¹⁹⁴ See *Heim v. Heim*, 763 P.2d 678, 683 (1988) (looking to standard of living, not contribution in awarding alimony to wife after a 35 year marriage and awarding long term maintenance); *Marriage of LaRoque*, 406 NW 736 (Wis. 1987) (same for 25 year marriage); *Rosenberg v. Rosenberg*, 595 NE 2d 792, 793 (Mass. App 1992) (same for 29 year marriage).

¹⁹⁵ See generally, American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations*, Chapter 5 (2000) (suggesting that maintenance should be awarded based on the length of marriage and the degree to which the couple adopted marital roles).

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

The movement away from a more individualistic view of marriage, and toward a recognition that marriage creates lasting interdependencies can be seen by some as a step backward. People eager to see women assume equally prominent roles in the public sphere resist this step backwards because awarding maintenance to women who opt out of keen competition in the public sphere may encourage them to opt out. People concerned about this opting out may think that if marriage is to exist, it must be careful not to encourage traditional gender roles in any way.

The story of marriage offered here would reward the spouse who assumes the traditionally female role in marriage. Story #7 understands marital roles as rooted in marriage, not gender. It gives same sex couples the right to marry, but it also celebrates the roles that lead to such a glaring gender wage gap. It accepts marriage as a union of equals, but it suggests that one of the main reasons for marriage is to allow the creation of a separate but equal regime. The material interdependence of marriage requires the law to assume a prominent role in achieving equity at the demise of a marriage because of the strong likelihood that one spouse will be materially dependent on the other.

In the long term, SSM may help reduce the gendered wage gap. If enough same sex couples assume marital roles that are inconsistent with their socially defined gender role the gender roles themselves may be destabilized. This is the fear of opponents of SSM.¹⁹⁶ If enough men become primary caretakers and enough women become primary wage earners, then the likelihood that straight couples will fall into traditional gender roles may dissipate. But this will take time. In the interim, the acceptance of roles is not

¹⁹⁶ See supra note

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

likely to encourage married women to commit more time to the paid labor force and may further encourage them to work less.

2. Pre Marital Agreements

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

Many states still require a finding of procedural fairness before enforcing premarital agreements, but most states have dispensed with any substantive review of the contract terms.¹⁹⁷ As long as there was a full disclosure of assets prior to execution and as long as the parties had a chance to secure independent legal representation, courts will enforce the contracts.¹⁹⁸

If part of what we celebrate in marriage is its ability to alter the individuals who enter the institution, its ability to make two into one, it is not clear that we should honor a contract made between the two. It is not, as the traditional non-enforcement policy explained, that such an agreement is made in contemplation of divorce and therefore

¹⁹⁷ See Harris, Teitelbaum, Carbone, *surpa note* at 728 .

¹⁹⁸ *Id.* There may be reason to doubt how willing courts really are to enforce any procedurally fair prenuptial agreement. Most of the people using these contracts have great wealth, much, though not half of it, ends up being shared. Even parties that are not wealthy usually draft the agreements understanding the background rules of maintenance and property division. Though lawyers may secure for the more advantaged party a better percentage of marital property or a lesser maintenance obligation, they virtually never draft agreements that relieve their clients of any financial obligation at divorce. If lawyers thought that prenuptial agreements were enforced as readily as some commentators and courts have suggested, presumably many more people would push the envelope to explore how little actually had to be shared..

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

against public policy. It is that the self one is acting on behalf of when one signs a prenuptial agreement is supposed to be changed by marriage. If one acts to protect the premarital self, one is undermining the emotional transformation that marriage is supposed to enable and encourage. The purpose of marriage is to change its participants, to make them less autonomous, more duty-bound, and more defined by others. A premarital agreement protecting the premarital self enables one to avoid the emotional and material work of marriage. If one avoids that work, one should not be entitled to the respect and dignity that accompanies marriage.

To some this may be too harsh a response to premarital agreements, many of which are those entered into by older couples seeking to protect their offspring's inheritance. These seemingly sensible and non-problematic estate planning devices protect for the deceased's children the share of her estate that otherwise would go to her spouse at her death.¹⁹⁹ Because the marriages involved in these agreements often do not last that long, perhaps the emotional transformation that marriage is supposed to produce need not bar their enforcement. Or perhaps courts should be allowed to enforce the agreements, but review them carefully for substantive fairness. A strong endorsement of the argument above suggests that marital contracts cannot be enforced at all. A milder endorsement suggests that courts should simply return to a comprehensive substantive review of the agreements, to ensure that the contract reflects marriage's background norms of sharing and sacrifice.

¹⁹⁹ See generally, Katharine B. Silbaugh, Marital Contracts and the Family Economy 93 Nw L Rev 65 72 (1998).

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

Alternatively, we could say that older couples (or younger couples who eschew the material and emotional interdependence that state-sponsored marriage presupposes) simply should not marry. They can cohabit (without social stigma). They can contract with each other for various goods and services (as gay and lesbian couples often do now). If they have children, these couples will need to be careful not to fall into typical marital roles because the law will not step into protect the person who contributed a disproportionate share of unpaid work to the unit.

This system will penalize non-married people because non-married people will not have access to the legal benefits or the respect and dignity that accompanies marriage.²⁰⁰ For non-married people in couples that develop traditional marital roles this will be particularly dangerous. For couple who do not adopt traditional roles, staying unmarried will not be as dangerous, though the people in these couples will still be denied many of the benefits of marriage. But that is the point of state-sponsored marriage. Penalizing single people and rewarding married people are flip sides of the same coin. If the state believes that marriage itself, not just coupling, confers significant social benefits then it is justified in rewarding those who choose it. The state steers people into marriage because the state benefits from many people adopting marital norms. People can opt out of those norms if they wish, but they are not entitled to the state-sanctioned benefits if they do.²⁰¹

iii. Less Autonomy

²⁰⁰ In addition to being denied the state-sponsored benefits of marriage, non-married people may also be denied the benefits that marriage bestows in our shadow welfare state. See supra note .

²⁰¹ People can also reject the premise that the state benefits from people opting into marital norms, but that leads to the conclusion that there should be no state-sponsored marriage.

BAKER DRAFT

2/6/09 – *Please do not
quote without permission*

At a more abstract level, the story of marriage offered here simply rejects an individualistic, more casual approach to marriage. Story #7 sounds more in the language of *Griswald v. Connecticut*, marriage is “intimate to the degree of being sacred . . . an association that promotes a way of life . . . a harmony in living . . . an association for as noble a purpose as any,”²⁰² than *Eisenstadt v. Baird*: “the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.”²⁰³ Case law subsequent to *Eisenstadt* suggests that the right protected in that case, for single people to receive contraceptives, can be found in an individual’s liberty interest in reproductive decision-making.²⁰⁴ Thus, the marriage narrative offered here does not reject the holding of *Eisenstadt*, only its dicta suggesting that marriage is nothing more than an association of two individuals.²⁰⁵

Neither does Story #7 suggest that we should return to the days of fault-based divorce because marriages must be permanent and harder to exit. The ideal of marriage presented here is just that, an ideal. What is celebrated in marriage is the potential to live into that changed life, to experience the difference of two becoming one. For sure, many married people will not experience that. They will divorce too early or they will live a married life marked by much more autonomy and independence than merger. The state

²⁰² 381 US 479, 486 (1965)

²⁰³ 404 US 438 (1972)

²⁰⁴ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 US 833, 836,854 (1992) (“Our law affords constitutional protection to personal decisions relating to . . . choices central to personal dignity and autonomy . . .”) (rejecting spousal notification provision).

²⁰⁵ *Eisenstadt* involved state restrictions on the distribution of contraceptives to non-married people.

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

cannot compel the emotional interdependence that is reified in marriage; it can only endorse and encourage it.

The ideal of two becoming one also goes further than most other stories of marriage in explaining why polyandrous arrangements are not entitled to constitutional protection. The state courts granting same-sex couples the right to marry have been notably weak in their explanation of why states can bar more than two people from marrying. The Massachusetts Court dropped a footnote noting that no party had suggested that the rules barring polygamy would be implicated if the Court legalized SSM.²⁰⁶ Presumably though, if the Court could find no rational reason restricting marriage to man and a woman despite the numerous studies suggesting that children tend to do best in a married household with both of their biological parents,²⁰⁷ it would want some evidence suggesting that the restriction on multi-party marriage was rational.

Also in a footnote and also without evidence, the California Court dismissed any potential arguments about polyandry noting “their potentially detrimental effect on a sound family environment.”²⁰⁸ Why the Court thought more than one spouse had obviously detrimental effects on the family, when spouses of the same-sex did not went completely undiscussed. For a Court that so adamantly declared the constitutionality of the right to marry, the Court’s willingness to expound without evidence is quite remarkable.

²⁰⁶ Goodridge, 798 NE2d at 969 n. 34.

²⁰⁷ See supra note .

²⁰⁸ In Re Marriage Cases, 183 P.2d at 434, n. 52.

BAKER DRAFT

2/6/09 – *Please do not
quote without permission*

The reason why polyandrous relationships should not command the same constitutional scrutiny is simply because it is so very difficult for three or four to become one. Relationships of more than two people are so much less likely to achieve the kind of transcendence and intimacy that is celebrated in marriage that the state need not endorse those relationships. It is the emotionally interdependent connection that creates the separate marital entity. It is that marital entity that is encouraged and celebrated by the state.

There is plenty to criticize in this ideal of marriage. Many people reject it because they reject the idea of state-sponsored marriage.²⁰⁹ We might be much better off if the state chose to treat everyone as an individual and nothing as a unity. Others probably reject story #7 as too hopelessly rooted in a patriarchal past, one in which the “We” really represents nothing other than the “I” of the husband.²¹⁰ Still others can dismiss this ideal as fanciful. If so many marriages end in divorce, the ideal is so rarely realized, that is pointless to reify it.²¹¹

²⁰⁹ See Franke, *supra* at 239 (“the rights-bearing subject of the lesbian/gay right movement has now become ‘the couple’ – a We.”); Rosenbury, *supra* note at 212 (2007) (criticizing the way the law privileges family relationships, particularly marriage, over friendships); Moran, *supra* note (celebrating the advantages of non-married life, particularly for women).

²¹⁰ Emma Goldman, *Marriage and Love*, in *Red Emma Speaks* 158, 164-65 (Alix J Kates Shulman ed. 1972) (“The institution of marriage makes a parasite of woman.”); Nancy Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,”* 79 *Va. L. Rev.* 1535, 1536 (1993) (the role division in marriage is “inherently problematic”). See also Lee Teitelbaum, *Family History and Family Law*, 1985 *Wis. L. Rev.* 1135, 1144-1145 (questioning idea of treating family as a unit, a “we,” because “the practical consequence . . . [is to] confer or ratify the power of over family member over others.”)

²¹¹ The oft-quoted statistic that 50% of all marriages end in divorce is misleading. The most recent demographic data suggests that the divorce rate, as measured by number of marriages that actually end in divorce, has never been higher than 40%. See Dan Henley, *Divorce Rate: It’s Not as High as You Think*, *New York Times*, April 19, 2005. Moreover, many of those are not first time marriages. The number of first time marriages that end in divorce is lower. *Id.*

BAKER DRAFT

*2/6/09 – Please do not
quote without permission*

All of these criticisms may be valid, but all of them also leave one struggling to answer why marriage is a fundamental right or why gays and lesbians may have an equality right to the institution. If marriage is nothing other than whatever the parties make it into, then why aren't states free to deny it to prisoners²¹² and men too poor to pay child support?²¹³ And why can't four people get married? Alternatively, if the problem with Story #7 is that it is a fanciful ideal, not a real description of marriage, then supporters of SSM are left to argue that what they are fighting for is real marriage. But real marriage, as Part IV shows, is a gender factory. It is an institution that promotes stability and interdependence and self-fulfillment by enabling and reproducing gender roles. If that is what marriage is, gay and lesbian couples cannot have an equality right to it, because they are not similarly situated with regard to the ability to reify those gender roles.

²¹² See *Turner v. Safely*, 482 US 78 (1987). For a discussion see *supra* note and text accompanying.

²¹³ *Zablocki v. Redhail*. 434 US 374 (1978). For a discussion see *supra* note and text accompanying.