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Linda C. McClain*

I. INTRODUCTION

The Declaration of Independence states that all men are created equal and endowed by their Creator with certain unalienable rights, including life, liberty, and the pursuit of happiness. The very foundational document of our nation assumes that our rights exist within the context of God’s created order. The self-evident differences and complementary design of men and women are part of that created order. We were created as male and female, and for this reason a man will leave his father and mother and be joined with his wife, and the two shall become one in the mystical spiritual and physical union we call “marriage.”

The self-evident biological fact that men and women are designed to complement one another is the reason that for the entire history of mankind, in all societies, at all times, and in all places marriage has been a relationship between persons of the opposite sex.

-Marilyn Musgrave¹

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1. *Federal Marriage Amendment (The Musgrave Amendment): Hearing on H.R.J. Res. 56 Before the Subcomm. on the Constitution, H. Comm. on the Judiciary*, 108th Cong. 7 (2004) (prepared statement of Rep. Marilyn Musgrave, Member, H. Comm. On the Judiciary speaking in support of the proposed Federal Marriage Amendment) [hereinafter *FMA Hearing*] available at http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.52&filename=93656.pdf&directory=/disk2/wais/data/108_house_hearings (last visited Feb. 6, 2006); see also *Preserving Marriage: A View from the States, Hearing before the S. Judiciary Comm.*, 108th Cong. (2004), *U.S. Senate Judiciary Committee holds a Hearing on Same-Sex Marriage*, Federal Document Clearing House, June 22, 2004 (statement of Rep. Marilyn Musgrave) [hereinafter *Preserving Marriage Hearing*] reprinted in 2004 WL 1413039.

Why does marriage, in the United States, need the protection of an amendment to the federal constitution? To answer that question for her colleagues in the House of Representatives and the Senate, Representative Marilyn Musgrave, a primary sponsor of the Federal Marriage Amendment (FMA), made the above appeal to “God’s created order,” and to the Declaration of Independence’s assumption of that divine order.² Musgrave further testified, before the Senate, that the FMA was necessary to ward off activist judges who care neither about the “millennia-old tradition” that marriage is between a man and a woman—followed, up to now, by “every state in the union”—nor for the “text and structure of the Constitution.”³

During the 108th Congress, the House of Representatives approved a version of the FMA (sometimes called “The Musgrave Amendment”) providing:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.⁴

A similar version of the FMA did not reach a vote in the Senate before the 2004 election.⁵ Nonetheless, as the 109th Congress commenced in 2005, legislators in the House and Senate reintroduced proposals for a federal marriage protection amendment, and the FMA remains under consideration.⁶

2. *FMA Hearing*, *supra* note 1, at 5, 7.

3. *Preserving Marriage Hearing*, *supra* note 1.

4. H.R.J. Res. 56, 108th Cong. (2003).

5. Carl Hulse, *Senators Block Initiative to Ban Same-Sex Unions*, N.Y. TIMES, July 15, 2004 at A1.

6. *See, e.g.*, S.J. Res. 1, 109th Cong. (2005) (introduced on January 24, 2005):

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.

Id. There is not just one form of the FMA, which only complicates the interpretive and federalism issues raised by it. For example, by contrast to S.J. Res. 1, H.J. Res. 39, introduced in the House on March 17, 2005, reads:

Section 1. Marriage in the United States shall consist only of a legal union of one man and one woman.

Section 2. No court of the United States or of any State shall have jurisdiction to determine whether this Constitution or the constitution of any State requires that the legal incidents of marriage be conferred upon any union other than a legal union between one man and one woman.

Section 3. No State shall be required to give effect to any public act, record, judicial

Not all proponents of a federal marriage amendment make such an explicit appeal as did Representative Musgrave to divine creation as a ground for preserving “traditional marriage” as the union of one man and one woman. Nonetheless, whether they appeal to divine design, religious and cultural traditions, biology, procreation, differences in mothers’ and fathers’ parenting styles, social science, or “common sense,” FMA proponents do share a view that same-sex marriage threatens gender complementarity. On this view, gender complementarity—the union of the two opposite, and different, sexes—is fundamental to marriage, to children’s healthy development, to a healthy society, and to the family carrying out its critical function of transmitting values and sustaining democracy.

In this article, I will examine and critically evaluate gender complementarity as a justification for the FMA. My primary focus will be upon how the argument has featured in Congressional hearings about the FMA, both in supporting statements made by legislators and by witnesses. Although claims about why marriage needs the protection of a federal constitutional amendment to meet the supposed threat represented by same-sex marriage often link together a variety of arguments premised on complementarity, I will attempt to separate several strands of the argument. They are: (1) opposite-sex marriage is part of the created order; (2) procreation is the purpose of marriage and has a tight nexus with optimal mother/father parenting; (3) marriage bridges the “gender divide” by properly ordering heterosexual sexual desire and procreation (a variation on the second argument); (4) marriage is “about children,” not adult love; and (5) traditional marriage transmits values crucial for democracy.

A puzzle about such appeals to traditional marriage motivated this article. Can FMA supporters reconcile their stance about the imperative of protecting the gender complementarity of traditional marriage with the transformation of marriage brought about by family law reforms and contemporary Equal Protection jurisprudence? Such jurisprudence bars government from legislating about the roles of husbands and wives based on archaic stereotypes and fixed notions about their capacities. Corresponding family law reforms have repudiated the common law’s model of marriage as one of gender hierarchy (in which husband and wife have reciprocal, and complementary, rights and duties) in favor of a model of marriage as an equal partnership (in which spouses have mutual

proceeding or any other State concerning a union between persons of the same sex that is treated as a marriage, or as having the legal incidents of marriage, under the laws of such other State.

H.R.J. Res. 39, 109th Cong. (1st Sess.) (March 17, 2005).

rights and duties, defined in gender-neutral terms). To what extent do contemporary appeals to men's and women's different (created) natures, their distinct genders, and how these translate into distinct styles in interacting with children—both of which are claimed to be vital to optimal childrearing—simply reject the last thirty years or so of legal developments, which stress the need to avoid gender role stereotypes about men's and women's proper roles and destinies? It appears that this may be a case in which one person's "archaic stereotypes" and "fixed notions" of gender (for example, woman as having "special responsibility" as the center of home and family life; man as the proper provider for, and head of, the family) might well be another's vision of core elements of "man/woman" marriage based on "real" or "inherent" differences between the sexes.⁷

Of the many dramatic changes in family law over the last three decades, the "elimination of official gender roles" may be, as family law scholar Susan Frelich Appleton contends, "perhaps the most significant and pervasive transformation" of family law.⁸ Nonetheless, FMA supporters continually and uncritically appeal to gender complementarity as a justification for preserving "traditional marriage" without addressing marriage's evolution and whether marriage's definition should also evolve in light of legal and societal reforms concerning the status of being a husband or a wife.⁹

In Part II, I offer a representative sampling, rather than a complete inventory, of how these arguments feature in Congressional hearings. To flesh out the argument that marriage "bridges the gender divide," I give some attention to its elaboration in other venues by "pro-marriage" conservatives to prevent the recognition of same-sex marriage and its appearance in judicial opinions upholding state marriage laws against challenges by same-sex couples.

In Part III, I offer a critical evaluation of these appeals to gender complementarity. Given this symposium format, as well as the voluminous literature on the same-sex marriage issue, I will not reiterate the arguments I advance elsewhere in support of same-sex marriage.¹⁰

7. I take the formulation "man/woman marriage" from Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 CAN J. FAM. L. 11 (2004). See also <http://www.manwomanmarriage.org> (Stewart's website); see also *infra* Part III (for discussion of the relevant constitutional jurisprudence about the distinction between sex-role stereotyping and "real" or "inherent" differences between the sexes).

8. Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL'Y REV. 97, 110 (2005).

9. Frelich reaches a similar conclusion. See *id.* at 116, 133-34.

10. For this argument, see LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 155-190 (2006).

Rather, I try to engage the specific arguments made by FMA supporters, focusing in particular on their notion of marriage as “bridging the gender divide” and their appeal to preserving traditional marriage as the Framers knew it so that it can continue to undergird democracy. I situate the notion of “bridging the gender divide” within the broader context of arguments about marriage’s role in ordering otherwise unruly heterosexuality and, in particular, taming men.

I further contend that appeals to a millennia-old, unchanging “tradition” about marriage as the union of the two sexes fail to attend to legal reform and societal changes leading to marriage’s evolution away from gender hierarchy and prescribed, complementary roles of husband and wife within marriage to a model of equal rights and responsibilities. For example, in his testimony before the Senate Judiciary Committee, Mitt Romney, Governor of Massachusetts, asked: “Should we abandon marriage *as we know it, and as it’s been known by the framers of our Constitution?* Has America been wrong about marriage for 200-plus years?”¹¹ Whatever else the FMA may do, it will *not*, I will argue, preserve marriage as the Framers knew it.

I will now turn to an examination and critical evaluation of appeals to gender complementarity made in hearings about the FMA.

II. GENDER COMPLEMENTARITY AS THE BASIS FOR A FEDERAL MARRIAGE AMENDMENT

A. *Opposite-Sex Marriage Is Part of the Created Order*

Some supporters of the FMA ground their argument in divine creation. As noted above, Congresswoman Marilyn Musgrave, a primary sponsor of the FMA in the House of Representatives, told her colleagues in the House that: “The self-evident differences and complementary design of men and women are part of th[e] created order.”¹² She went on to invoke the Book of Genesis as a key text on how “two shall become one in the mystical, spiritual, physical union we call marriage.”¹³ She then turned to biology, namely, “The self-evident biological fact that men and women are designed to complement one another is the reason that for the entire history of mankind, in all societies, at all times and in all places marriage has been a relationship between persons of the

11. *Preserving Marriage Hearing*, *supra* note 1 (statement of Mitt Romney, Gov. of Mass.) (emphasis added).

12. *FMA Hearing*, *supra* note 1, at 5.

13. *Id.*

opposite sex.”¹⁴ Musgrave offered this same complementarity argument in her testimony before the Senate Judiciary Committee in a hearing on the FMA.¹⁵

Marriage’s place in the created order also features in statements by other lawmakers about the need for the FMA. For example, declaring that he would not “stand idly by while the courts in Massachusetts redefine marriage in Indiana,” Representative Pence (of Indiana) quoted the Biblical verse, “If the foundations are destroyed, what can the righteous do?” and urged his colleagues: “marriage is such a foundation of our society. Marriage was ordained by God, established in the law. . . . We must preserve and defend this foundation in our society.”¹⁶ In a subsequent hearing, representative Kingston invoked the words of one of his constituents, a civil rights leader, on the foundational role of marriage as a “sacred building block of our society”:

Our country was formed by a group of people who were persecuted for believing certain fundamental things. They looked at their [C]reator in terms of the defining foundation for our families . . . and this foundation included the marriage of a man and a woman. The installation of marriage was wholly designed for the production, reproduction, and propagation of the family.¹⁷

Kingston continued that marriage laws—defining marriage as between one man and one woman—were “designed to be a blessing for children and society,” noting also the biological complementarity between men and women. Marriage, in contrast to systems of slavery and segregation, fits in “perfect harmony with the laws of nature” due to its “design” to help children by “keeping their mothers and fathers together.”¹⁸

The creation stories of Genesis featured in other appeals by lawmakers and witnesses to explain the need for the FMA. Representative Steve King (of Iowa) asserted: “[I]t is imperative that this nation act . . . quickly because marriage itself is the building block for this society, this civilization, and, in fact, for every civilization since the beginning of time. The first marriage was Adam and Eve in the Garden of Eden, ordained by God.”¹⁹

14. *Id.*

15. *Preserving Marriage Hearing*, *supra* note 1 (statement of Rep. Musgrave).

16. 150 CONG. REC. H6580, H6587 (2004) (statement of Rep. Pence).

17. 150 CONG. REC. H7898, H7921 (2004) (statement of Rep. Kingston).

18. *Id.* at H7922.

19. *Defense of Marriage Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. of the Judiciary*, 108th Cong. 5 (2004) (statement of Rep. Steve King), available at <http://frwebgate.access.gpo.gov/cgi-bin/usedtp.cgi?IPaddress=162.140.64.52&filename=92830.pdf&>

In that same hearing, witness Vincent McCarthy, of the American Center for Law and Justice, invoked Genesis 1:26-27, that God created “man in his own image, in the image of God created he him; male and female created he them,” as affirming:

[t]he observable fact that we humans are of two kinds: male and female. Moreover, it is plain that these opposite sexes while unlike are, nonetheless, meet for each other. The consortium of a man and a woman, the proto-society, represents the creation of a bond unlike other bonds. Within the society of marriage, a man and a woman commune, conceive offspring, rear that offspring, and provide the stable blocks from which larger societies may be created.²⁰

An explicitly religious and Biblical vision of marriage's place in the created order also featured in testimony offered in Senate hearings about the FMA. For example, witness Tony Perkins, president of the influential conservative religious organization, the Family Research Council, described marriage as “created and sanctioned by God Himself,” who officiated at the first marriage between Adam and Eve in the Garden of Eden.²¹ It is the intent of the Creator, he stated, that men and women are meant for each other, to procreate, and live together. But Perkins also appealed to social science and common sense. The former confirms “that the married state is consonant with our nature and good for the individual spouse,” as evidenced by studies consistently showing the greater happiness, health, longevity, and prosperity of married persons. And “common sense” supports maintaining (man-woman) marriage as a “social norm.”²²

B. Procreation (Producing Future Generations) Is the Purpose of Marriage

A recurring argument in hearings over the FMA is that only a man and a woman can procreate. This form of complementarity is the basic

directory=/disk2/wais/data/108_house_hearings (last visited Feb. 6, 2006).

20. *Id.* at 23 (statement of Vincent P. McCarthy, President, American Center for Law and Justice, Inc.).

21. *Judicial Activism vs. Democracy: What Are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws? Hearing Before the Subcomm. On the Constitution, Civil Rights, and Property Rights of the S. Judiciary Comm.*, 108th Cong. 205 (2004) (statement of Tony Perkins, President, Family Research Council), [hereinafter *Judicial Activism vs. Democracy Hearing*], available at http://frwebgateaccess.gpo.gov/cgibin/useftp.cgi?IPaddress=162.140.64.128&filename=96924.pdf&directory=/disk3/wais/data/108_senate_hearings (last visited Feb. 6, 2006).

22. *Id.*

one of biological—and sexual/reproductive—difference. Senator Hatch explained, in a Senate hearing:

[T]here is a very simple reason that the institution of male-female marriage has been the norm in every society for over 5,000 years. . . . Society does have an interest in future generations and the conjugal act between men and women creates them. This . . . underlies laws that promote and protect traditional marriage. Decoupling procreation from marriage ignores the very purpose of marriage.²³

In the House, Representative Musgrave similarly appealed to the long history of marriage as a relationship “between persons of the opposite sex,” and asserted that “the primary function of marriage has always been to provide a legal context for procreation and child rearing by fathers and mothers.”²⁴

Often, the appeal to biology carries with it the argument that the male-female parenting combination is the optimal one for children. For example, in a hearing about whether DOMA would likely be struck down, making a federal marriage amendment all the more necessary, Senator Cornyn asserted that marriage is society’s “bedrock institution” for a reason: “after all, as a matter of biology, only the union of a man and a woman can produce children. And as a matter of common sense, confirmed by social science, the union of mother and father is the optimal, most stable foundation for the family and for raising children.”²⁵

An assumption that optimal childrearing requires the complementary capacities and skills of fathers and mothers also animates FMA supporters. Mitt Romney, Governor of Massachusetts, warned against a society “indifferent about having mothers and fathers,” and urged that because children need a mother and a father—with the “contrasting features of both genders”—the FMA would declare a proper “national standard” for raising children.²⁶ During the House’s consideration of the FMA, Representative DeLay linked the unique reproductive capacity of the union of a man and a woman to the complementarity capacities of opposite sex parents. DeLay admitted, to a point, the parental capacity of gay men and lesbians:

23. *Preserving Marriage Hearing*, *supra* note 1 (statement of Sen. Orrin G. Hatch); *FMA Hearing*, *supra* note 1, at 6 (statement of Rep. Musgrave).

24. *FMA Hearing*, *supra* note 1, at 6 (statement of Rep. Musgrave).

25. *Judicial Activism vs. Democracy Hearing*, *supra* note 21 (statement of Sen. John Cornyn).

26. *Preserving Marriage Hearing*, *supra* note 1 (statement of Gov. Mitt Romney).

Mary and Jane can be great mothers and there are many of them that are great mothers. Peter and Paul can be great fathers. But Peter and Paul cannot be a mother. And Mary and Jane cannot be a father. The reason that one man and one woman is necessary to rear children is so that they can receive the benefits that a man can give them and a woman can give them. They can see the commitment between a man and a woman, the trust that is committed between the two, the love.²⁷

In the same proceeding, other legislators appealed to the need for the complementary parenting styles of mother and father. Representative Johnson (of Texas) asserted both that children need a father and a mother “for healthy and proper development” and that “[m]en and women were created to complement each other, and that is most obvious in successful parenting.”²⁸ Some legislators appealed to their own experience as to why children need mothers and fathers. For example, after invoking his own fathering experience, Representative Garrett (of New Jersey) concluded: “The ideal situation for a child is to grow up with a mom and dad in a loving, committed marriage. Mothers are better able to provide certain lessons than fathers can, and fathers in turn can provide role models in ways that moms simply cannot.”²⁹

C. Marriage “Bridges the Gender Divide”

The tight and necessary link between procreation and parenting is also, for some FMA supporters, part of the project of managing the sexes and bridging the gender divide. Prominent figures in the marriage movement appeal to this function of marriage. As Professor Katherine Shaw Spaht, an author of Louisiana’s covenant marriage legislation, testified: a “core common understanding of marriage” is that it “bridges the differences in the sexes, a bridge that is essential to procreation.” Marriage, thus, is a “societal method for managing heterosexual bonding [and] the need a child has for his mother and his father.”³⁰ Maggie Gallagher, President of the Institute for Marriage and Public Policy, similarly testified that marriage fosters child well-being—and protects

27. 150 CONG. REC. H7898, H7923 (statement of Rep. DeLay).

28. *Id.* at H7916 (statement of Rep. Johnson).

29. *Id.* at H7916 (statement of Rep. Garrett).

30. *A Proposed Constitutional Amendment to Preserve Traditional Marriage: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 133 (2004) [hereinafter *A Proposed Constitutional Amendment Hearing*] (statement of Katherine Shaw Spaht, Professor of Law, LSU Law Center) available at http://frwebgate.access.gpo.gov/cgi-bin/sueftp.cgi?IPaddress=162.140.64.120&filename=98156.pdf&directory=/diskb/wais/data/108_senate_hearings (last visited Feb. 6, 2006).

women—by bridging the gender divide: “Marriage is about bringing two different genders together so that children have mothers and fathers and so that one gender, so that women, are not burdened by the social disadvantages and the inequalities, the enormous social inequalities created when widespread fatherlessness becomes the social norm.”³¹

That marriage bridges the gender divide is a central claim in the recent report, *The Future of Family Law: Law and the Marriage Crisis in North America*, (hereinafter referred to in the text as “the Report”), co-sponsored by Gallagher’s Institute, the Institute for American Values, and the Institute for the Study of Marriage, Law, and Culture.³² A striking feature in the Report is the vision of marriage as agonistic: marriage is “unique,” and not like other close personal relationships between adults, because its main feature is “the attempt to bridge sex difference and the struggle with the generative power of opposite-sex unions.”³³

The Report argues that contemporary conflicts over family law rest on a deeper conflict between two competing visions of marriage: the older model of conjugal marriage and the newer (and to the Report’s authors, deeply troubling) model of marriage as merely a “close personal relationship.” The committed, intimate relationships of same-sex couples and opposite-sex couples, for example, may share certain “core relational values,” like “intimacy, commitment, interdependence, mutual support and communication.”³⁴ But marriage involves “core dimensions of conjugal life” that “a culture of pure relationships” fails to “bring into focus”—namely:

fundamental facets of human life: the fact of sexual difference; the enormous tide of heterosexual desire in human life; the massive significance of male/female bonding and procreativity; the unique social ecology of parenting, which offers children bonds with their biological parents; and the rich genealogical nature of family ties and the web of intergenerational supports for family members that they provide.³⁵

31. *Judicial Activism vs. Democracy Hearing*, *supra* note 21, at 27-28 (statement of Maggie Gallagher).

32. THE COUNCIL ON FAMILY LAW, *THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA* (2005), available at http://www.marriedebate.com/pdf/future_of_family_law.pdf (last visited Feb. 6, 2006).

33. *Id.* at 15.

34. *Id.* at 20.

35. *Id.* at 33.

A very similar passage about the facets of conjugal life is quoted in the concurring opinion by Judge Parrillo, in *Lewis v. Harris*, a 2-1 decision by the New Jersey Appellate Division, which affirmed a ruling by the Superior Court that neither the due process nor the equal protection provisions of New Jersey's constitution compelled the State of New Jersey to allow same-sex couples in the State to marry.³⁶ Rejecting the characterization (by Massachusetts's Supreme Judicial Court in *Goodridge v. Department of Public Health*) of commitment as the "sine qua non" of marriage,³⁷ Judge Parrillo warned—drawing on Daniel Cere (principal investigator of the Report and author of the quoted passage) and on Monte Stewart—that this "distillation of marriage down to its pure 'close personal relationship' essence strips the social institution 'of any goal or end beyond the intrinsic emotional, psychological, or sexual satisfaction which the relationship brings to the individuals involved'"³⁸ Marriage, Parrillo concluded, manages the fact that "there are two sexes."³⁹ Its purpose is "not to mandate procreation but to control or ameliorate its consequences."⁴⁰ Thus, the "deep logic" of gender should remain as a "necessary component of marriage."⁴¹

Why do the sexes need to be managed? Marriage, the Report contends, is a way of regulating otherwise unruly heterosexual desire—a desire that otherwise causes "immense personal and social damage."⁴² The Report asserts: "If law and culture choose to 'do nothing' about sexual attraction between men and women, the passive, unregulated heterosexual reality is multiple failed relationships and millions of fatherless children," because "the default position for men and women attracted to the opposite sex, absent strong social norms, is too many children born without fathers, too many men abandoning the mothers of their children, and too many women left alone to care for their

36. 875 A.2d 259 (N.J. App. Div. 2005) (Parrillo, J., concurring). My colleague Joanna Grossman and I wrote a column for FindLaw Writ critiquing *Lewis v. Harris* (available at http://writ.findlaw.com/commentary/20050628_mcclain.html) (last visited Feb. 6, 2006).

37. 798 N.E.2d 941, 961 (2003).

38. *Lewis*, 875 A.2d at 276 (citing to Stewart, *supra* note 7, at 81 (quoting from Daniel Cere, "The Conjugal Tradition in Post Modernity: The Closure of Public Discourse?" at 6 (2003) (unpublished))).

39. *Id.* at 277.

40. *Id.* at 276. This argument about marriage ameliorating the consequences of procreation appears in Stewart, *supra* note 7, at 47.

41. *Lewis*, 875 A.2d at 278. This language about the "deep logic" of gender and ameliorating procreation's consequences favorably quotes Cere's account of how the traditional model of marriage embraces the "fundamental facets" of "conjugal life." Stewart, *supra* note 7, at 81-82 (citing to David Cere, *The Conjugal Tradition in Postmodernity: The Closure of Public Discourse?*, Presentation at the Revisioning Marriage in Postmodern Culture Conference (Dec. 2003) (unpublished))).

42. THE COUNCIL ON FAMILY LAW, *supra* note 32, at 12.

offspring.”⁴³ Marriage serves (to use a familiar idea) a channeling function: “its very purpose lies in channeling the erotic and interpersonal impulses between men and women in a particular erotic direction: one in which men and women commit to each other and to the children that their sexual unions commonly (and even at times unexpectedly) produce.”⁴⁴ On this view, “conjugal marriage is fundamentally child-centered”⁴⁵ because it manages the consequences of sex. One of the more memorable lines of the Report, set off in a special captioned box, asserts: “the bedrooms of the nation still produce children.”⁴⁶

How is marriage’s channeling function, then, threatened by expanding marriage’s definition to include same-sex marriage? A premise among FMA supporters is that this would fundamentally change what marriage is “for” or “about.”⁴⁷ Society cannot sustain “incompatible conceptions” of marriage, with most states—and the federal government—adhering to “the natural link of marriage to procreation and mother-father parenting” and a few states defining marriage “as a form of friendship.”⁴⁸ This relates to another argument made by FMA supporters: marriage is not about adult love, but about children.

D. Marriage Is About Children, Not Adult Love

A striking claim made more than once in Congressional hearings about the FMA is that children, not adult love, are the purpose of marriage. For example, in a Senate hearing, Professor Teresa Stanton Collett urged that the FMA must “define marriage as the union of a man and a woman because marriage is about the needs of children, not about adult desires.”⁴⁹ In another Senate hearing, Reverend Richardson

43. *Id.*

44. *Id.* On the channeling function, see Carl Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992).

45. THE COUNCIL ON FAMILY LAW, *supra* note 32, at 7, 13.

46. *Id.* at 33.

47. For example, Governor Mitt Romney testified that the redefinition of marriage by the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), is “no minor change, or slight adjustment. It is a fundamental break with all of our laws, experiences, and traditions.” Written Testimony of Governor Mitt Romney to the Senate Judiciary Committee, *Preserving Traditional Marriage, A View from the States*, (June 22, 2004), available at http://judiciary.senate.gov/print_testimony.cfm?id=1234&wit_id=3608 (last visited May 5, 2006).

48. *Legal Threats to Traditional Marriage: Implications for Public Policy: Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary, House of Representatives*, 108th Cong. 6 (2004) [hereinafter *Legal Threats to Traditional Marriages*] (statement of Dwight Duncan, Professor of Law, Southern New England School of Law), available at http://frwebgate.access.gpo.gov/cgi-bin/usedft.cgi?IPaddress=162.140.64.52&filename=93225.pdf&directory=/disk2/wais/data/108_house_hearings (last visited Feb. 6, 2006).

49. *A Proposed Constitutional Amendment Hearing*, *supra* note 30, at 34 (statement of

testified: "Marriage is about children, not about love. . . . This discussion about marriage is not about love. It is about the best arrangement for raising children."⁵⁰ He acknowledged that, as a pastor in an African American community, he was familiar with the fact that people are raising children in non-traditional families in his community, but continued: "That doesn't change the fact that there is an ideal. There is a dream that we have and should have for all children—and that is a mom and dad for every child, black or white."⁵¹ In the same hearing, Reverend Daniel de Leon asserted: "The institution of marriage is designed for children, not for adult love."⁵² He elaborated by appealing to gender complementarity in parenting: children need a mother and a father because they are like "two poles," very different and at times even opposites, but both necessary for a balanced form of living.⁵³ In a subsequent hearing, Governor Mitt Romney similarly testified that marriage is "principally for the nurturing and development of children," not "solely about adults"; children's healthy development is best furthered by exposure to "the contrasting features of both genders."⁵⁴

The premise of gender complementarity at the base of this argument is apparent in the remarks made by Representative DeLay when he opened up debate in the House over the FMA:

[M]arriage is . . . not a contract of mutual affection between consenting adults. It is, instead, the architecture of family, the basic unit of civilization, the natural means by which the human species creates, protects and instills its values in its children

Individual men and women, with the innate qualities of their gender, come together in shared sacrifice to raise children. They each make their own unique contributions to the raising of boys and girls as male and female models for their male and female children.⁵⁵

How does same-sex marriage threaten the premise that marriage is about children and shared sacrifice, not love? Obviously, parenting by same-sex couples would threaten the complementarity of parenting anchored by heterosexual marriage. But FMA supporters also worry that

Teresa Stanton Collett, Professor of Law, St. Thomas School of Law).

50. *Judicial Activism vs. Democracy Hearing*, *supra* note 21, at 11 (statement of Reverend Richard W. Richardson).

51. *Id.* (statement of Reverend Richard W. Richardson).

52. *Id.* at 13-14 (statement of Reverend Daniel DeLeon).

53. *Id.* (statement of Reverend Daniel DeLeon).

54. *Preserving Marriage Hearing*, *supra* note 1 (statement of Governor Mitt Romney).

55. 150 CONG. REC. H6581 (statement of Rep. DeLay).

recognizing same-sex marriage would affect *all* marriages by sending a message that marriage has no link at all to parenthood. For example, Stanley Kurtz, of the Hoover Institution, invoked Scandinavia as a cautionary tale of how recognizing same-sex marriage supposedly contributes to separating marriage from parenthood, so that marriage has “nothing to do with children.” In contrast to the idea that “marriage is the cement that keeps parents together for the sake of the children,”⁵⁶ marriage, in Scandinavia, has instead become a “pure celebration of the love of two adults,” so that men and women become parents together—but not spouses—a pattern he claims has become more pronounced due, in part, to recognizing same-sex marriage.⁵⁷ In Kurtz’s view, because same-sex marriage separates “the idea of marriage from the idea of parenthood,” it seems to be a “cause as well as a symptom of the decline of Scandinavian marriage.” Far from sending a message that “marriage is for everyone,” he contends, it encourages nonmarital births because it “seems to be spreading the idea that no kind of family is preferable to any other.”⁵⁸

E. Traditional Marriage Plays a Mediating role in Transmitting Values

A recurring argument in support of the FMA is that government must act to protect marriage because it is “the foundation of every civilization in human history.”⁵⁹ But FMA supporters also appeal more locally to the role of traditional marriage in the United States in undergirding democracy and transmitting values and virtues fundamental to being good persons and good citizens. They warn that tampering with the institution of marriage could upset this foundational role of the family.

In his testimony, Governor Romney spoke of the family unit as underpinning “all successful societies,” the “single most powerful force that preserves society across generations, through centuries.” As noted above, he asked: “Should we abandon marriage *as we know it, and as it’s been known by the framers of our constitution?* Has America been wrong

56. *Legal Threats to Traditional Marriage*, *supra* note 48, at 15 (statement of Stanley Kurtz, Hoover Institute, Harvard University).

57. *Id.*

58. *Id.* For an empirical refutation of Kurtz’s arguments about Scandinavia, see WILLIAM N. ESKRIDGE AND DARREN R. SPEDALL, *GAY MARRIAGE: WHAT WE’VE LEARNED FROM THE EVIDENCE*, Chapter 5 (forthcoming 2006) (arguing that Kurtz treats gay marriage as the cause of phenomena that were longstanding trends in Scandinavian society and also countering that, rather than same-sex marriages and partnerships signaling “the triumph of a purely individualistic hedonism,” partners “are giving up choices by promising mutual commitment, and an increasing number of them are sacrificing their liberties to commit to families with children.”)

59. See, e.g., *A Proposed Constitutional Amendment Hearing*, *supra* note 30, at 10 (statement of Sen. Wayne Allard).

about marriage for 200-plus years?”⁶⁰

After the 2004 election, with the convening of the 109th Congress, Congress considered newly introduced versions of the FMA. Testifying before the Senate Judiciary Committee in support of a constitutional amendment, Professor Lynn Wardle described marriage as “the primary mediating structure through which values are transmitted to society in general and to the rising generations, in particular.”⁶¹ He urged protection of marriage because courts are “dumping loads of ad hominem pejorative rhetoric on the unique and millennia-old social institution of conjugal marriage” and holding laws “irrational” that restrict marriage to a man and a woman. As he has in other venues, Wardle also warned that changing the “domestic habits” of Americans—by altering the structure of marriage—could have a dramatic impact on the “superstructure” of America’s constitution.⁶² In a surprising use of the history of anti-miscegenation laws (given the more typical invocation of such laws to argue *for* same-sex marriage), Wardle also linked the movement for same-sex marriage to dangerous political movements that sought to “capture marriage,” such as white supremacy and eugenics. Wardle referred approvingly to *Loving v. Virginia*, which struck down Virginia’s bar on interracial marriage, as repudiating “stains on marriage laws” caused by “extraneous ideologies.”⁶³

III. EVALUATION OF GENDER COMPLEMENTARITY ARGUMENTS MADE IN SUPPORT OF THE FMA

A. *The Appeal to the Created Order*

Appealing to divine creation and, particularly, to the Bible as a rationale for enshrining a definition of marriage in the U.S. constitution blurs the line between church and state. A significant feature of the litigation in Vermont and Massachusetts challenging the exclusion of same-sex couples from the benefits, obligations, and protections of

60. *Preserving Marriage Hearing*, *supra* note 1 (statement of Gov. Mitt Romney) (emphasis added).

61. *Less Faith in Judicial Credit: Are Federal and State Defense of Marriage Initiatives Vulnerable to Judicial Activism?: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Lynn D. Wardle, Professor of Law, Brigham Young University), available at http://judiciary.senate.gov/testimony.cfm?id=1454&wit_id=4136 (last visited Feb. 6, 2006).

62. *Id.*; see, e.g., Lynn D. Wardle, *The Bonds of Matrimony and the Bonds of Constitutional Democracy*, 32 HOFSTRA L. REV. 349, 355-63, 375-77 (2003) (arguing that U.S. Constitution rests on foundation of marriage-based families and changing Americans’ “domestic habits” would have extreme consequences for constitutional government).

63. Wardle, *supra* note 61 (discussing *Loving v. Virginia*, 388 U.S. 1 (1967)).

marriage has been the courts' focus on marriage as a *civil*,⁶⁴ that is, state-created, secular institution and on what government's interest in civil marriage is. Arguments like those of Rep. Musgrave and Tony Perkins simply reject this distinction. Indeed, some marriage defenders have been outraged by the language in *Goodridge* about marriage as a state-created—rather than divinely-created—institution.

As Senator Durbin observed in his remarks opposing the FMA, at issue is not the religious “sanctity” of marriage, but the “legality” of marriage.⁶⁵ Otherwise, “if we are going to adopt the premise that the religious values that, in [our] own faith, support the institution of marriage should be enshrined in the constitution, then I think we are moving into perilous territory.”⁶⁶ Durbin pointed out, for example, that, generally speaking, religious leaders, following the “dictates of the Founding Fathers,” do not want Congress to legislate in ways that put the government’s “imprimatur, . . . permission, and . . . approval” on their religious belief. By contrast, when religious leaders want their beliefs and values about marriage—for example, a religion’s prohibition of divorce—enshrined in the Constitution, this blurs sanctity and legality and the line between church and state.⁶⁷ This blurring of the religious and civil dimensions of marriage also permeated Congressional debates leading to the passage of the Defense of Marriage Act.⁶⁸ Undeniably, religious convictions and ideals, like human dignity and equality, have inspired citizens to seek political and constitutional reform. But in a pluralistic constitutional democracy, citizens owe each other certain duties of civility and mutual respect concerning the forms of argument

64. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003) (“Simply put, the government creates civil marriage. In Massachusetts, civil marriage is, and since pre-Colonial times has been, precisely what its name implies; a wholly secular institution.”).

65. *Judicial Activism vs. Democracy Hearing*, *supra* note 21, at 46 (statement of Sen. Durbin).

66. *Id.*

67. *Id.*

68. For example, in the legislative debate over DOMA, Senator Robert Byrd stated:

[T]housands of years of Judea-Christian teachings leave absolutely no doubt as to the sanctity, purpose, and reason for the union of man and woman. One has only to turn to the Old Testament and read the word of God to understand how eternal is the true definition of marriage. . . . Woe betide that society . . . that fails to honor that heritage and begins to blur that tradition which was laid down by the Creator in the beginning.

142 CONG. REC. S10109-10 (Sept. 10, 1996) (statement of Sen. Byrd).

Elsewhere, I argue that this and similar appeals to religious traditions about marriage illustrate how legislators enacting DOMA failed to satisfy the duty of civility and public reason in political justification (as explained in the political liberalism of John Rawls) by supporting their appeal to theological beliefs by reference to *public reasons* and *public values*. See Linda C. McClain, *Deliberative Democracy, Overlapping Consensus, and Same-Sex Marriage*, 66 FORDHAM L. REV. 1241, 1244-52 (1998). On the idea of public reason, see generally John Rawls, *The Idea of Public Reason Revisited*, 64 CHI. L. REV. 756 (1997).

they make. Thus, government's interest in defining, regulating, and supporting the institution of *civil* marriage must be explained in terms of public reasons and political (or public) values that are accessible to other citizens regardless of whether they share each other's religious convictions.⁶⁹ The same concerns and limits should apply when amending the constitution.

B. Linking Procreation to Childrearing Is the Purpose of Marriage

The treatment of the "procreation is the essence of marriage" and "marriage is the optimal setting for child well-being" arguments by Vermont's and Massachusetts's highest courts, in *Baker v. Vermont* and in *Goodridge*, provide effective rebuttals of this line of argument.⁷⁰ That rebuttal runs along the following lines: Procreation is not a requirement for marriage. Not all married couples can or choose to have children. The state regulates their marital relationship and its dissolution despite the absence of any asserted state interest in children; for government also has an interest in the emotional and economic interdependency that arises between adults within a marriage. During marriage, for example, spouses owe each other a mutual duty of support, which includes economic (and some emotional) elements.⁷¹ During divorce proceedings, courts make an equitable distribution of marital property on the theory that marriage is an economic partnership; they may also order spousal support under the same theory.⁷² By the same token, assisted reproductive technology calls into question the idea that it is only in the bedroom that children are produced. Infertile heterosexual couples use this technology. Same-sex couples also use it. And a number of states have taken measures to help persons avail themselves of this technology. So too, adoption and fostering children are avenues to parenting other than procreation, and (although not uniformly, e.g., Florida) states have enabled gay men and lesbians to serve as adoptive and foster parents.⁷³ And both the *Baker* and

69. See McClain, *supra* note 68; AMY GUTMANN AND DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 52-94 (1996) (explaining duty of reciprocity in a deliberative democracy).

70. *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

71. Twila L. Perry, *The "Essentials of Marriage": Reconsidering the Duty of Support and Services*, 15 YALE J. L. & FEMINISM 1 (2003) (reviewing relevant law on duties to provide support and services).

72. See generally, LESLIE JOAN HARRIS, LEE E. TEITELBAUM, AND JUNE CARBONE, *FAMILY LAW* 387-500 (3d ed. 2005) (addressing the economic consequences of divorce).

73. See ABA SECTION OF FAMILY LAW, *A WHITE PAPER: AN ANALYSIS OF THE LAW REGARDING SAME-SEX MARRIAGE, CIVIL UNIONS, AND DOMESTIC PARTNERSHIPS* 13-14 (2004) (reporting that "Florida is the only state that categorically prohibits lesbian and gay individuals from adopting children," and that Mississippi prohibits adoption by "gouples of the same gender," second-

Goodridge courts pointed to measures taken by their state legislatures and judiciaries to facilitate parenting outside of the marital relationship.⁷⁴

Such state courts also considered—and rejected—the claim that same-sex marriage would hasten the disassociation between marriage and parenting.⁷⁵ Among the plaintiffs in each case were parents seeking greater stability for their families.⁷⁶ Similarly, opponents of the FMA have more than once pointed out the reality that gay men and lesbians are rearing children and excluding them from marriage hinders, rather than furthers, government's interest in protecting children.⁷⁷ Of course, this leads to the claim that optimal child rearing requires a mother and a father with their complementary traits and styles.

I cannot, in this symposium article, air the entire debate over what social science suggests on this issue of optimal childrearing.⁷⁸ However, both the Vermont and the Massachusetts courts rejected this optimal

parent adoption (in which the same-sex partner of a biological parent adopts the parent's child) has been allowed by statute or appellate court decision in nine states (plus the District of Columbia), and by trial court judges in at least fifteen other states), available at <http://www.abanet.org/family/reports/WhitePaper.paper.pdf> (last visited May 91, 2006); Jane Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-parent Adoptions*, 75 Chi-Kent L. Rev. 933 (2000) (reporting on states allowing second- parent adoption).

74. *Baker*, 744 A.2d at 881-872, 884-85; *Goodridge*, 798 N.E.2d at 962-64.

75. *Baker*, 744 A.2d at 881-82 (noting under inclusiveness of argument about barring same-sex couples from marriage to further “link between procreation and childrearing,” since “to the extent that the state’s purpose in licensing civil marriage was, and is, to legitimize children and provide for their security, the statutes plainly exclude many same-sex couples who are no different from opposite-sex couples with respect to these objectives”); *Goodridge*, 798 N.E.2d at 962 (“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 marriages in order to have and raise children.”).

76. *Baker*, 744A.2d at 867 (two of the plaintiff couples have children together); *Goodridge*, 798 N.E.2d at 949 (among the plaintiffs are couples rearing children; each plaintiff “attests a desire to marry his or her partner in order to affirm publicly their commitment to each other and to secure the legal protections and benefits afforded to married couples and their children.”)

77. See, e.g., *An Examination of the Constitutional Amendment on Marriage: Hearing Before the Senate Judiciary Committee*, 109th Cong. (Oct. 20, 2005) (testimony of Christopher E. Harris, Assistant Professor of Pediatrics, Vanderbilt University School of Medicine) (testifying as to support by American Academy of Pediatrics for joint and second-parent adoption by gay and lesbian parents and warning that the proposed amendment would threaten family security for the millions of children being reared by gay and lesbian parents); *Defense of Marriage Act*, *supra* note 19 (statement of Rep. Tammy Baldwin) observing that “well over a million children” in U.S. are being raised in “gay and lesbian families”—in “healthy, loving families by parents who could protect them in additional ways could they secure [marital] obligations, . . . rights, . . . responsibilities, [and] benefits.”)

78. Lynn Wardle’s article about the relevant social science on children reared in same-sex families spurred a much-discussed article by Judith Stacey and Steven Biblarz, finding that Wardle was correct that authors often overstate the case for finding “no difference” with children reared by opposite-sex parents, but they found that these differences are salutary, not harmful. Compare Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 ILL. L. REV. 833 with Judith Stacey & Timothy J. Biblarz, (How) Does the Sexual Orientation of Parents Matter?, 66 AM. SOCIOLOGICAL REV. 159 (2001).

setting for childrearing argument as a rationale. Why? For one thing, those states had taken affirmative measures to facilitate parenting by gay men and lesbians. Notably, in 2002, after observing that “a considerable body of professional literature provides evidence that children with parents who are homosexual can have the same advantages and the same expectations for health, adjustment, and development as can children whose parents are heterosexual,” the American Academy of Pediatrics stated its support for legislative and legal efforts to allow co-parent and second parent adoption so children can have the “psychologic and legal security that comes from having two willing, capable, and loving parents.”⁷⁹ One recent study by an adoption institute reached a similar conclusion about the social science evidence, and urged that “laws and policies that preclude adoption by gay and lesbian parents disadvantage the tens of thousands of children mired in the foster care system who need permanent, loving homes.”⁸⁰ Second-parent adoptions “have been granted in a steadily growing number of state and county jurisdictions.”⁸¹

This functional approach to family definition and to parenting suggests that the best interest of children may be served by a broader approach to legal protection of parents. Notably, California’s highest court recently concluded that the state’s interest in child welfare was furthered by recognizing a lesbian who was the former partner of the biological mother of twins born during their relationship as a second, “natural mother” of those children, over her objection, when the alternative was to deprive the children of the support of two parents.⁸² Her gender was no bar to the court concluding that the state’s public welfare purpose of ensuring adequate support for children was best served by recognizing parental rights and responsibilities when a woman had supported her partner’s artificial insemination, “received the resulting twin children into her home and held them out as her own.”⁸³

Supporters of the FMA reject this functional approach. FMA supporters claim that marriage provides children with vital role models of both genders and that children who lack the complementary male and

79. AMERICAN ACADEMY OF PEDIATRICS, *Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 339 (2002), available at <http://aappolicy.aappublications.org/cgi/content/full/pediatrics%3b109/2/339> (visited May 9, 2006); for a conservative critique of this stance, see James C. Dobson, *Pediatricians vs. Children*, WASH TIMES, Feb. 12, 2002, at A15.

80. EVAN B. DONALDSON ADOPTION INSTITUTE, *Expanding Resources for Children: Is Adoption by Gays and Lesbians Part of the Answer for Boys and Girls Who Need Homes?* 2 (March 2006), available at http://www.adoptioninstitute.org/policy/2006_Expanding_Resources_for_children.php (last visited May 3, 2006).

81. ABA SECTION OF FAMILY LAW, A WHITE PAPER, *supra* note 73, at 14.

82. *Elisa B. v. Superior Court*, 117 P.3d 660, 671 (Cal. 2005).

83. *Id.* at 662.

female role models fare poorer than marital children.⁸⁴ The trend in family law, however, is to a more inclusive, functional approach to who may be a parent—a trend relating not just to gay men and lesbians, but also to stepparents, and other persons who act in a parental capacity toward a child.⁸⁵ Movement within family law toward supporting not only gay and lesbian parents but also single-parent adoption rests on the premise that such developments further the best interests of children.⁸⁶

Assertions about gendered styles of parenting are highly contestable. For example, one claim is that mothers simply are more attuned to and intuitive about children and their needs. However, in his study of fathering, *Family Man*, Scott Coltrane found both that parents who equally shared child care responsibilities focused on “the comparability of their parenting skills and similarities in their relationships with their children,” and also that as fathers became more active care givers, they also became more intuitive and attuned to their children.⁸⁷ Moreover, parents who “equally shared most of the child care” commented that their children “frequently addressed the mother ‘daddy’ or the father ‘mommy’ without realizing that they had done so.”⁸⁸ To those who believe gender complementarity is vital to parental modeling, this may sound like a dangerous androgyny. But it also tends to support the gist of other research finding that gender is less important in caring for children than such factors as parental warmth, nurturance, closeness, and investment of time.⁸⁹

Given his call for a “national standard” concerning optimal childrearing, it seems significant that Governor Romney in so doing, also spoke of a possible “middle ground” that would recognize “the inalienable rights of all of our citizens to make their own choices to join

84. One recent book comparing boys raised by single-mother and two-mother families and boys raised in mother-father households challenges that presupposition. PEGGY DREXLER, *RAISING BOYS WITHOUT MEN: HOW MAVERICK MOMS ARE CREATING THE NEXT GENERATION OF EXCEPTIONAL MEN* (2005). Research psychologist Peggy Drexler finds that such boys are emotionally healthy and happy and do not lack for male “role models” in their lives, even if there is no father in the house. *Id.* at 60-94. She also finds that, in some indicators, such boys appear to be better off than some boys raised in two-parent families. *Id.* at 124-127.

85. See HARRIS, TEITELBAUM, AND CARBONE, *supra* note 72, at 911-42 (noting move within family law toward functional definition of parenthood through use of such categories as stepparent and second-parent adoption, psychological parents, de facto parent, and parent by estoppel).

86. For examples of state high courts that have allowed second-parent adoption because it furthers the best interests of children, see *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1003); *Adoption of Evan*, 583 N.Y.S.2d 634 (N.Y. 1995); *Sharon S. v. Superior Ct.*, 73 P.3d 554 (Cal. 2003); *Adoption of B.L.V.B.*, 628 A.2d 1271 (Vt. 1993).

87. SCOTT COLTRANE, *FAMILY MAN: FATHERHOOD, HOUSEWORK, AND GENDER EQUALITY* 80-81, 116-20 (1997).

88. *Id.* at 81.

89. NANCY DOWD, *REDEFINING FATHERHOOD* 44-47 (2000) (surveying research on impact of fathers on child development).

in partnerships or unions of some kind and to have relationships between one another, *perhaps even to raise children*.”⁹⁰ This reference to “perhaps even to raise children” is remarkable, given his firm insistence that marriage is the optimal setting for childrearing. How, on the terms of FMA supporters, is marriage’s core purpose—fostering child well-being—secured if unmarried persons engaged in rearing children are supported in any way by the state? His stance appears to be one of favoring marriage (and restricting access to it by gay men and lesbians) but tolerating—and even giving legal protections to—other family forms. Does this stance stem from pragmatism—after all, the highest court in his state noted that the courts and legislature in Massachusetts, recognizing family diversity, had acted affirmatively to protect the family in its various forms? Or perhaps in grouping same-sex couples with various “nonconjugal” relationships, marriage supporters further the distance between opposite-sex marriage and the intimate commitments of same-sex couples.

In any case, the articulation by some FMA supporters of a legal system of marriage plus some other forms of recognition for a range of nonmarital relationships indicates a glimmering that family law should move “beyond marriage” in the direction of greater equality among families. For example, in her testimony, Teresa Stanton Collett asserted, on the one hand, that “marriage is for children,” and thus the FMA was necessary to ensure that marriage is only the union of a male and a female. On the other hand, she asserted that the FMA should “leave it to states” to “craft compassionate alternative legal arrangements for unmarried people.” Indeed, she argued that other “compassionate legal arrangements” should be deployed to “take care of the diversity of human relationships we find throughout our great nation.” Within her purview is not simply same-sex couples, but also nonconjugal relationships, such as “two elderly widows” seeking to care for each other, or older siblings. The common denominator, in her view, is allowing people “to publicly register their willingness to care for each other and receive various rights and obligations” (akin to the reciprocal beneficiaries law in Hawaii).⁹¹

90. *Preserving Marriage Hearing*, *supra* note 1 (statement of Gov. Mitt Romney).

91. *A Proposed Constitutional Amendment Hearing*, *supra* note 30, at 97098 (statement of Teresa Stanton Collett). I find this particularly striking because it is so similar—even in its specific examples—to the recent report by the Law Commission of Canada, *BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS* (2001). Yet it is this report that is sharply criticized in the report, *THE FUTURE OF FAMILY LAW*, *see* *THE COUNCIL ON FAMILY LAW*, *supra* note 32, as an embodiment of “personal relationship” theory that would treat marriage merely as another personal relationship.

C. Marriage “Bridges the Gender Divide”

The argument that marriage’s purpose is to bridge the gender divide coins an intriguing phrase in service of a familiar theme in defense of traditional marriage: marriage is society’s way of taming men. The marriage movement often asserts that the father-child bond—and the mother-father bond—are more fragile than the mother-child bond and it is marriage that is the social glue that cements fathers to mothers and children. Evolutionary biology is one support invoked for this picture: there is a gap between men’s seemingly infinite reproductive capacity—and relatively low investment of sperm—and their capacity actively to invest in their offspring. This contrasts with women’s far more (no pun intended) labor-intensive investment in a more limited number of offspring. Men, without marriage, wander. They stray. Properly channeled into marriage, masculinity takes socially productive forms. As the marriage movement puts it, marriage “closes this gap between a man’s sexual and fathering capacities.”⁹²

To be sure, the Report, *The Future of Family Law*, appeals to the “enormous tide of heterosexual desire” (not just men’s desire). But in the end, this tide is harmful because of men’s—not women’s—irresponsibility with respect to intimate commitment and to children and women’s vulnerability due to pregnancy and motherhood. Notably, Daniel Cere, principal investigator of the Report, has also written about the decline of courtship. Some contemporary calls to renew courtship stress the role of women as sexual gatekeepers who use their modesty to channel the passions of their manly suitors into the socially productive channel of marriage. Courtship, too, which “charts pathways to marriage,”⁹³ is a way of managing the two sexes: female sexual modesty disciplines male ardor.⁹⁴

92. THE MARRIAGE MOVEMENT: A STATEMENT OF PRINCIPLES, *available at* <http://www.marriagemovement.org>. For an appeal to evolutionary biology on this point, *see* JAMES Q. WILSON, *THE MARRIAGE PROBLEM* (2000). Theologian Don Browning speaks of a “male problematic,” finding recognition of it all the way back in Aristotle and Aquinas, confirmed by evolutionary biology. DON S. BROWNING ET AL., *FROM CULTURE WARS TO COMMON GROUND* 22 and 68-69 (2d ed. 2000).

93. Daniel Cere, *Courtship Today: The View from Academia*, *THE PUBLIC INTEREST*, Mar. 22, 2001, at 53.

94. *See, e.g.*, Amy A. Kass and Leon R. Kass, *Proposing Courtship*, 96 *FIRST THINGS*, Oct. 1999, at 32, *available at* <http://www.firstthings.com>. I discuss both the marriage movement and contemporary calls to renew courtship in MCCLAIN, *THE PLACE OF FAMILIES*, *supra* note 10, at 117-54, 281-89. The Institute for American Values has sponsored key documents on both of these topics. On the marriage movement, *see* *The Marriage Movement: A Statement of Principles* (2000) (sponsored by the Institute for American Values, University of Chicago Religion, Culture, and Family Project, and the Coalition for Marriage, Family, and Couples Education); *HOOKING UP, HANGING OUT, AND HOPING FOR MR. RIGHT: COLLEGE WOMEN ON DATING AND MATING TODAY*

Does “bridging the gender divide” suffice as a rationale for amending the federal constitution to freeze the definition of marriage as between one man and one woman? Surely not. As I have elaborated elsewhere, “viewing marriage as a means of domesticating men has a long history closely intertwined with sex inequality.”⁹⁵ This history should counsel skepticism about appeals to human nature or to sex differences to justify policies about the proper ordering of the sexes. True, the Supreme Court has spoken of “real” or “inherent” differences between the sexes, and their differential reproductive capacities are one such difference. But what follows from those differences? Even if generalizations about paternal irresponsibility have some basis in fact, there is also the risk that these portraits of his and her parenthood rest more on stereotypes and on socialization about gender roles than on real or inherent differences. They also may fail to reflect individual capacity. Portraying men as fundamentally irresponsible unless they are controlled through marriage insults their moral capacity. It also assigns women the familiar role of gatekeepers: morally responsible for themselves and for men in the areas of sexuality and family.

But even accepting, for purposes of argument, the gender divide rationale for marriage, one could argue that same-sex marriage would reinforce and preserve marriage’s institutional role in channeling, or ordering, sexuality. The Report does not include among the “fundamental facets of human life” the sexual desire of those persons who swim outside of “the enormous tide of heterosexual desire in human life.”⁹⁶ However, William Eskridge, a prominent proponent of same-sex marriage, has argued that one benefit of marriage for gay men would be precisely its “civilizing effect” on men’s greater inclination than women’s—whether rooted in biology or culture—toward promiscuity.⁹⁷ In other words, on this view, it is the institution of marriage itself—rather than women—that would exert the civilizing influence upon men toward exclusive commitment. Moreover, one could argue that marriage between two women—less inclined, on the gender ordering argument, toward sexual infidelity and parental irresponsibility—would shore up rather than undermine social stability. And given the reality that gay men and lesbians in intimate relationships are rearing children, marriage, with its symbolic freight of commitment, could reinforce – rather than sever – the link between adult intimacy and shared parenting. FMA proponents might counter that gay men and lesbians who use assisted reproductive

(2001).

95. MCCLAIN, *supra* note 10, at 136.

96. THE COUNCIL ON FAMILY LAW, *supra* note 32, at 8.

97. WILLIAM ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE 9-10 (1996).

technology to have children deviate from the “conjugal” model of marriage because they artificially sever the natural link between sex and procreation. However, unless FMA supporters have a persuasive explanation about why the many heterosexual married couples who enlist such technology should be exempt from this naturalist argument, then it is not clear why same-sex families so formed threaten the social order more than do the families formed by heterosexual married couples using such technology.

D. Marriage Is “About Children”; Not Adult Love

As a rationale for the federal marriage protection amendment, the argument that marriage is not about adult love, but about children, sets up an either/or view of the purposes of marriage that is simply wrong with respect to historical and contemporary understandings of marriage. By contrast to Rep. Delay’s contention that “marriage is . . . not a contract of mutual affection between consenting adults,” historians of marriage would counter that such an ideal of marriage dates back at least to the eighteenth century Enlightenment and carries forward from there. Nancy Cott concludes that precisely because “Americans were very much committed to marriage founded on love,” some were critical of the practice of arranged marriages among immigrants, which seemed to fall short of this ideal of “the love match.”⁹⁸ Among the different models of marriage in the Western tradition, John Witte finds that the “Enlightenment contractarian model” of marriage—that marriage’s “essence” was not its religious significance nor its service to the community and the commonwealth, but “the voluntary bargain struck between two parties who wanted to come together into an intimate association”—was “adumbrated in the eighteenth century, elaborated theoretically in the nineteenth century, and implemented legally in the twentieth century.”⁹⁹ Even earlier models of marriage, rooted in Catholicism and the various Protestant traditions, included a contractual view of marriage as a consensual, voluntary association; by contrast to the Enlightenment model, however, they anchored this in a thicker view of the theological, social, and political significance of marriage.¹⁰⁰

In her recent book, *Marriage, A History*, Stephanie Coontz similarly traces the root of the ideal of the love-based marriage to the

98. See NANCY COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 150-51 (2000).

99. JOHN WITTE, FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION 10 (1997).

100. *Id.* at 2-12.

Enlightenment era, and, like Witte, finds that the full implications of this model took hold only later. Her thesis is that today's marriage system—with its tensions and crises—has its roots in the Enlightenment's radical idea that “love should be the central reason for marriage,” but that this very ideal has “an inherent tendency to undermine the stability of marriage as an institution.”¹⁰¹ For if marriage should be freely chosen, and based on love, then how can society preserve the institution of marriage if people are free to leave marriages that do not fulfill their expectations of love?¹⁰² Most pertinent to the issue of how concerns over gender complementarity shape support for the FMA, Coontz also contends that one reason that the ideal of the love-based marriage proved to harbor the potential to destabilize marriage is that the ideal seemed at odds with gender hierarchy, inequality, and the constraints of fixed gender roles within marriage.¹⁰³

The paring down of marriage to being “about children,” not “about love,” seems to fly in the face of “common sense” understandings of marriage. If you ask a random sampling of people why they think people marry, chances are many will say, “love,” companionship, or—as one survey found—to be with one's “soulmate.”¹⁰⁴ To be sure, many might add, “to raise a family.” Again, defining marriage solely as about children lops off the aspect of marriage that concerns intimate association and commitment between adults. Constitutional jurisprudence about marriage recognizes goods of marriage distinct from procreation and parenting. Constitutional liberty includes the right to engage in sexual intimacy that does not aim at procreation and parenthood.¹⁰⁵

If marriage in the United States was truly “about children,” not love, why would marriage laws permit people who did not plan to have children to marry? Why would state and federal governments grant them the public recognition—and the benefits, protections, and obligations—of marriage? To be sure, from time to time, persons concerned to shore up the family have proposed a two-tier system of marriage, within which the state has far less interest in—and regulates far more loosely—

101. STEPHANIE COONTZ, *MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY, OR HOW LOVE CONQUERED MARRIAGE* 4-5 (2005).

102. *Id.*

103. *Id.* at 175-95.

104. The National Marriage Project reported this finding in one of its annual reports. See THE NATIONAL MARRIAGE PROJECT, *THE STATE OF OUR UNIONS 2003 ANNUAL REPORT*, available at <http://marriage.rutgers.edu/Publications/SOOU/SOOU2003.pdf> (last visited Feb. 6, 2003).

105. On the non-procreative goods of marriage, see *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Turner v. Safley*, 482 U.S. 78 (1987). On non-procreative sexual intimacy, see *Einstadt v. Baird*, 405 U.S. 438 (1972); *Lawrence v. Texas*, 539 U.S. 558 (2003).

childless marriages than child-centered marriages.¹⁰⁶ But at present the law still treats marriage (whether there are children or not) as having significant public and private dimensions. Whatever else it may become, at the outset, marriage is a unique public affirmation of commitment *between adults*.

To enact the FMA to establish this “it’s about children, not adult love” vision of marriage would reflect a sadly truncated view of the goods of marriage. After all, even the story of Adam and Eve, invoked by FMA supporters, traces the origin of this first pairing of a man and a woman to God’s declaration that it was not good for the man to be alone. To be sure, the Book of Genesis also contains another creation story, in which God creates man in his own image (“male and female he created them”), blesses them, and tells them, “Be fruitful and multiply, and fill the earth and subdue it.”¹⁰⁷ However, while procreation has been an important purpose (or good) of marriage in the various religious models of marriage in Western tradition, mutual love and friendship have also been central goods.¹⁰⁸ Thus, the stark either/or of the not about love/about children claim runs counter to these religious understandings of marriage.

Finally, the argument that marriage is not about love, but about children, implies a critique of current marriage practices that seems ill served by the FMA. Consider, for example, the argument that in marriage, as Rep. DeLay puts it, men and women, “with the innate qualities of their gender,” should join together in “shared sacrifice to raise children.” Measured against this sacrificial model of marriage, marriage is threatened by any view of it that would allow persons to exit marriage simply because it fails to live up to the ideal of marriage based on mutual love and personal happiness. It is far from obvious that the problem is solved by barring marriage by persons of the same sex. DeLay touches on a shift in cultural understandings about the proper model of marriage. As theologian Don Browning concludes, based on a survey of American attitudes of marriage, the minority view is that “love

106. See generally MARY ANN MASON, *THE EQUALITY TRAP* (1988) (proposing a distinction between marriages with children, which should be more binding, and childless marriages, which should be relationships governed by contract). Mary Ann Glendon has observed that “[O]ur individual rights-laden public language makes it surprisingly difficult to take account of the obvious fact that the public has a much greater interest in the conditions under which children are being raised than in the ways that adults generally choose to arrange their lives.” By contrast, European laws and policies draw a “useful distinction” between households engaged in child rearing and “other types of living arrangements.” MARY ANN GLENDON, *RIGHTS TALK* 125 (1991).

107. The story of Adam and Eve is in Genesis 2:20-23; the other creation story, with the directive to be fruitful and multiply, is in Genesis 1:27-28 (THE NEW OXFORD ANNOTATED BIBLE (1973)).

108. See generally WITTE, *supra* note 99.

as self-sacrifice is key” to marriage, and the emerging majority view is that marital love is a matter of “equal regard and mutuality.”¹⁰⁹ If this is so, then the FMA seems an ill-fitting remedy, for how will barring same-sex couples from marrying restore this sacrificial understanding of marriage? And is a constitutional amendment an appropriate vehicle by which to enshrine one conception of appropriate marital attitudes over another? Here, same-sex marriage serves as an emblem for a broader set of social changes that seem to threaten marriage. On this view, it would seem that better protection of marriage might come from an amendment to require premarital education to encourage taking marriage seriously and to abolish “no fault” divorce, or at least to put stringent restrictions on divorce, if there are children of the marriage.

E. Traditional Marriage Mediates Values

To insist that marriage requires constitutional protection against definitional change because it cannot otherwise play its historical role in mediating values seems to overlook the significant transformation of marriage as the Framers knew it to marriage today. To return to Governor Romney’s invocation of preserving marriage as the Framers knew it: how did the Framers know marriage? They knew it as a metaphor for democratic self-government, in which the husband’s role as sovereign within the domain of the home not only contributed to his capacity for citizenship but also modeled democratic self-government premised on consent.¹¹⁰ As I have written elsewhere, and as historians of marriage amply document, marriage was a hierarchical relationship in which women lacked capacity because their legal personhood, under the doctrine of coverture, was suspended.¹¹¹ Consider this puzzle about the civic role of families: even as married women were denied personal self-government within marriage and equal citizenship within the polity, they were thought to meet their civic obligations—and to foster civic virtue—by serving their husbands and children.¹¹²

Today’s model of marriage as an equal partnership reflects the repudiation of gender hierarchy as a core feature of marriage. Has society

109. Don S. Browning, *What Kind of Love? The Equal Regard Marriage and Children*, 4 AMERICAN EXPERIMENT QUARTERLY 47, 49-51 (Summer 2001) available at <http://www.americanexperiment.org/publications/AEQ.php> (last visited May 9, 2006).

110. See COTT, *supra* note 98, at 9-23; HENDRIK HARTOG, MAN AND WIFE IN AMERICA 101 (2000).

111. MCCLAIN, *supra* note 10, at 56-60; COTT, *supra* note 98, at 9-23; LINDA KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES 8-15 (1998).

112. On this idea of “republican motherhood,” see LINDA KERBER, WOMEN OF THE REPUBLIC (1980).

retained marriage as the Framers knew it? To be sure, in all states but one, civil marriage is still reserved to the union of a man and a woman, as was marriage at the time of the Founding. But the Founders, one suspects, might well conclude that contemporary family law—and society—have abandoned marriage “as it’s been known by the framers of our constitution.” The 18th century political and legal regime in which the husband was sovereign in the home and the political representative of the family scarcely resembles the 21st century model of marriage as an equal partnership between husband and wife, whose reciprocal marital rights and duties are framed in gender neutral terms. Since 1920, when (upon passage of the Nineteenth Amendment) women gained the right to vote, husbands are no longer the political representatives of the household. Unfamiliar to the Framers also would be contemporary understandings of the constitutional liberty of spouses to engage in nonprocreative sexual intimacy and of a wife’s right to make decisions about pregnancy without notice to or the consent of her husband. Novel also would be family law’s repudiation of the common law exemption for marital rape and of other doctrines giving husbands dominion over their wives’ persons.

Since the 1970s, the Supreme Court has taken a more skeptical look at claims that differences between the sexes justify sex-based classifications that assign different legal rights and responsibilities to husbands and wives.¹¹³ What might have been an earlier era’s conventional and even settled understandings of proper gender roles in the family and in other domains of society now seemed, to the Court, to reflect, “old notions” and outdated and “archaic” stereotypes about men’s and women’s capacities, roles, and destinies.¹¹⁴ The Court has noted the role that sex-based classifications have played in denying women equal opportunity, perpetuating inferiority, and reinforcing stereotypes.¹¹⁵ Consider, for example, the late Chief Justice Rehnquist’s observation, in a decision upholding the Family and Medical Leave Act,

113. On the impact of sex-based classifications, see *United States v. Virginia*, 518 U.S. 515 (1996). The Court has struck down sex-based classifications specifically relating to family rights and responsibilities. See, e.g., *Stanton v. Stanton*, 421 U.S. 7 (1975); *Orr v. Orr*, 440 U.S. 268 (1979); *Kirchberg v. Feenstra*, 450 U.S. 455 (1981).

114. See, e.g., *Orr v. Orr*, 440 U.S. 268 (1979) (holding as unconstitutional Alabama’s alimony statute providing that husbands, not wives, may be required to pay alimony upon divorce because the law “carries with it the baggage of sexual stereotypes”). In *Orr*, the court invoked *Stanton v. Stanton*, 421 U.S. 7, 10 (1975), as settling that “‘the old notion’ that ‘generally it is the man’s primary responsibility to provide a home and its essentials,’ can no longer justify a statute that discriminates on the basis of gender.” *Stanton* made the oft-quoted observation that: “No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.” *Id.* at 14-15.

115. *Frontiero v. Richardson*, 411 U.S. 677 (1973); *United States v. Virginia*, 518 U.S. 515 (1996).

that mutually reinforcing stereotypes about men as primarily responsible for paid work and women, caring for the home, have harmed men and women in the workplace trying to balance demands of home and family.¹¹⁶ At the same time, the Court has also insisted that there are “real” or “inherent” differences between the sexes, which are cause for “celebration,” not denigration.¹¹⁷

How might this constitutional framework instantiating sex equality as a relevant limit to state regulation of the family, but also recognizing “real” differences, bear on the issue of government’s interest in protecting marriage? For example, in light of family law’s move to gender neutrality in assigning rights and duties within marriage, is the gendered definition of marriage justifiable as reflecting “real” or “inherent” differences between the sexes? Can the state offer an “exceedingly persuasive justification” for defining marriage by using a sex-based classification?¹¹⁸ Do “real differences” between the sexes justify excluding two men or two women from marriage? Is there an important relationship between this sex-based classification and the ends that government seeks to further in recognizing and regulating civil marriage? Or, as some proponents of same-sex marriage contend, is the different-sex eligibility rule “anachronistic,” a vestige of an earlier family law regime and a view of marriage as a “gendered status” that has “been long rejected by both courts and the legislature”?¹¹⁹

Given that modern family law does not make procreation a requirement of civil marriage and defines marriage in terms of an exclusive commitment and of an emotionally and economically interdependent partnership, there is much to commend the view that the different-sex eligibility rule is an anachronism. To argue that the gendered definition of marriage is not justifiable is not to insist that there are no “real” or “inherent” differences between women and men.¹²⁰ Rather, the constitutional issue is whether those differences bear such a substantial relationship to the purposes of civil marriage as to justify limiting marriage to the union of one man and one woman.

This question of “real differences” has occurred to me as I have

116. Nevada Dep’t of Human Resources v. Hibbs, 538 U.S. 721 (2003).

117. United States v. Virginia, 518 U.S. 515, 533 (1996).

118. *Id.*

119. For this argument, see e.g., Brief of the Professors of the History of Marriage, Families, and the Law as Amici Curiae in Support of Plaintiffs-Appellants, in *Lewis v. Harris*, Docket No. 58389 (on appeal to the Supreme Court of New Jersey) (brief on file with author). I was a signatory to this brief.

120. Cf. Stewart, *supra* note 7, at 91-93 (critiquing the “core legal conclusion of radical social constructionism” that “there are no essential or inherent differences between men and women that can rationally matter in law-making” and contrasting the recognition by the Supreme Court, in *VMI*, 518 U.S. at 533-34, of “real” or “inherent” differences).

listened to arguments made by social conservatives about the risks society will run if it replaces the “old institution” of “man/woman marriage” with the “new institution” of “genderless marriage”—marriage redefined to include same-sex couples.¹²¹ For example, Monte Stewart, President of the Marriage Law Foundation and a participant in this symposium, has articulated the social goods linked to “man/woman” marriage and the high price tag that would accompany genderless marriage.¹²² What stance would he and similarly minded marriage defenders take toward the move within American constitutional law and family law toward, as it were, “genderless marriage”? Indeed, would the marriages of men and women who aim for an egalitarian approach to the division of roles and responsibilities be “genderless,” on such terms, and, as a consequence, be viewed by opponents of same-sex marriage and supporters of the FMA as failing to provide spouses, children, and society with the unique personal and social goods of “man/woman marriage”? To what extent do marriages need to be premised on fundamental differences in male and female capacities and sharp differentiation in roles and responsibilities to (here quoting Daniel Cere, as quoted by Stewart) “bridge the male-female divide” and in so doing, foster social goods?¹²³ And does this offer any sort of persuasive case for barring marriage between two men or two women?

Appeals to preserving “traditional” marriage fail to account for significant change over the course of marriage’s history. Given the many and significant changes in society’s understandings of marriage and in marriage’s legal complexion, critical reflection is in order when one appeals to “tradition” as an argument for the FMA.¹²⁴ My own view,

121. In particular, this question was sparked by listening to a presentation by Monte Neil Stewart on a panel on same-sex marriage at the 12th World Conference of the International Society of Family Law, held in Salt Lake City, Utah, July 19-23, 2005. Monte Neil Stewart, Presentation at the 12th World Conference of the International Society of Family Law (Jul. 19-23, 2005). But the theme of marriage bridging the “gender divide” also features prominently in the recent report, *THE FUTURE OF FAMILY LAW*. See *THE COUNCIL ON FAMILY LAW*, *supra* note 32.

122. Stewart, *supra* note 7, at 75-85, 86-95.

123. Monte Neil Stewart & William C. Duncan, *Marriage and the Betrayal of Perez and Loving*, 2005 BYU L. REV. 555, 564 (2005) (quoting Daniel Cere, *War of the Ring*, *DIVORCING MARRIAGE: UNVEILING THE DANGERS IN CANADA’S NEW SOCIAL EXPERIMENT* 9, 11, 14 (Daniel Cere & Douglas Farrow eds., 2004)).

124. The treatment of interracial marriage bans, by some FMA supporters, as a sort of attempted capture of marriage tradition is most curious in view of the fact that such bans have quite a long history. That history even predates the United States. Maryland adopted such a ban in 1661, Virginia, in 1691. See RACHAEL MORAN, *INTERRACIAL INTIMACY* 19-20 (2001). And, as is well known, defenders of such laws appealed to biblical injunctions against mixing the races. *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (quoting trial court judge’s comment that “Almighty God created the races white, black, yellow, malay, and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.”). No doubt, supporters of such

elaborated elsewhere, is that critical reflection on families, their goods, functions, and the relevant political values at stake, counsels opening up marriage to same-sex couples and developing a registration system to support various forms of committed relationships.¹²⁵

IV. CONCLUSION

In this article, I have set forth several forms of gender complementarity arguments advanced by supporters of a federal marriage amendment during hearings about the amendment. I have contended that none of those arguments, whether rooted in marriage's place in the divinely created order, in marriage's role in tightly linking sexuality to procreation or in bridging the "gender divide," in uniting the sexes not in love but in sacrifice for children, or in transmitting values, offers a persuasive justification for such an amendment. The call to amend the federal constitution to preserve traditional marriage as the Founding Fathers or the Framers of the Constitution knew it seems, at first hearing, a powerful rallying cry. However, a close examination of the institution of marriage reveals that marriage has been, and continues to be, an evolving institution. Whatever else an FMA would do, it would *not* preserve marriage as the Framers and Founders knew it, for the gender complementarity of that era rested on a gender hierarchy long since repudiated in contemporary family law and constitutional jurisprudence. It would preserve one aspect of marriage that is continuous with marriage as the Framers knew it—the different-sex eligibility rule. Does preserving that aspect of marriage, when so much of the gender complementarity of traditional marriage has yielded to a model of gender neutrality and equal partnership, truly warrant the extraordinary step of amending the federal constitution to define marriage? I have argued it does not.

laws believed this ban on mixing went to the very essence of marriage. It is striking that, in this context, Wardle and others seem to salute the Supreme Court for striking down a very longstanding "tradition" about marriage. Stewart and Duncan, *supra* note 123; Wardle, *Federal Constitutional Protection for Marriage: Why and How*, 20 BYU J. PUB. L. 439, 474 (2006) (the "Lessons from Loving" section). To be sure, the appeal to antimiscegenation laws raises the question of what counts as a "tradition" about marriage. Wardle and Stewart deny antimiscegenation laws were part of marriage "tradition" because they focus not on the earliest, pre-Civil War laws, but on the place of antimiscegenation laws in the White Supremacy movement.

125. MCCLAIN, *supra* note 10.