

ARTICLE

MARRIAGE RIGHTS AND PARENTAL RIGHTS: PARENTS, THE STATE, AND PROPOSITION 8

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I. INTRODUCTION

On November 4, 2008, 52.47% of Californians voted to amend the state constitution to “eliminate the right of same-sex couples to marry” and to provide that “only marriage between a man and a woman is valid or recognized in California.”¹ In the weeks and months since the enactment of Proposition 8, there has been much postmortem analysis of the election and the campaign that preceded it.² In some circles, the blame for Proposition 8 fell squarely on the shoulders of African-Americans and Latinos, many of whom came out in strong numbers to support Barack Obama’s presidential bid.³ Others looked to the Mormon Church, which was identified as a critical source of funding and support for the Yes on 8 campaign.⁴ In short, in most of the initial media coverage of Proposition 8, the campaign’s success has been attributed to a combination of Mormon money and minority homophobia.⁵

1. See California Secretary of State, Election Night Results, <http://vote.sos.ca.gov>Returns/props/map19000000008.html>; Text of Proposition 8, *available at* <http://www.smartvoter.org/2008/11/04/ca/state/prop/8/>.

2. See, e.g., Tim Dickinson, *Same-Sex Setback*, ROLLING STONE, Dec. 11, 2008, *available at* http://www.rollingstone.com/politics/story/24603325/samesex_setback (analyzing the Proposition 8 election); Ben Ehrenreich, *Anatomy of a Failed Campaign*, THE ADVOCATE, Dec. 16, 2008, *available at* http://www.advocate.com/issue_story_ektid66063.asp (analyzing the No on 8 campaign); Michael Joseph Gross, *Gay Is the New Black*, THE ADVOCATE, Nov. 16, 2008, *available at* http://www.advocate.com/exclusive_detail_ektid65744.asp (discussing Proposition 8 and the struggle for civil rights for sexual minorities).

3. Steve Lopez, *Needed: A Black Elton John*, L.A. TIMES, Nov. 12, 2008, at B1 (“[T]he overwhelming African American turnout for Barack Obama also helped Proposition 8, which was supported by a large majority of black voters, as well as Latinos.”); Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1 (quoting an opponent of same-sex marriage who concluded that “[w]ithout the Latino vote . . . Proposition 8 would never have succeeded.”) (internal quotations omitted). It should be noted that the exit polling data suggesting that the minority vote was determinative in Proposition 8’s success has since been refuted. See John Wildermuth, *Black Support for Prop 8 Called an Exaggeration*, S.F. CHRON., June 2, 2009, at B1 (citing studies that show that “[p]arty identification, age, religiosity and political views had much bigger effects than race, gender or having gay and lesbian family and friends”); see also PATRICK J. EGAN & KENNETH SHERRILL, CALIFORNIA’S PROPOSITION 8: WHAT HAPPENED AND WHAT DOES THE FUTURE HOLD? 9-12 (2009), http://www.thetaskforce.org/downloads/issues/egan_sherrill_prop8_1_6_09.pdf (concluding that National Election Pool exit poll data “overestimated African American support for Proposition 8 by ten percentage points or more,” and finding that minority support for the measure could be explained by higher levels of religiosity among racial and ethnic minority groups).

4. See, e.g., Hendrik Hertzberg, *Eight is Enough*, THE NEW YORKER, Dec. 1, 2008, at 27 (“Of the forty million dollars spent on behalf of Prop. 8, some twenty million came from members or organs of the Church of Jesus Christ of Latter-day Saints.”); Jesse McKinley & Kirk Johnson, *Mormons Tipped Scale in Ban on Gay Marriage*, N.Y. TIMES, Nov. 15, 2008, at A1 (documenting Mormon efforts on behalf of Proposition 8); Dan Savage, *Anti-Family, Anti-Gay*, N.Y. TIMES, Nov. 11, 2008, at A31 (“[T]he Mormon Church largely bankrolled Proposition 8.”).

5. More recently, some have criticized the campaign against Proposition 8 as poorly

By focusing on these explanations for Proposition 8's success, we have neglected other important aspects of the campaign. In addition to identifying the fragile coalitions that were cobbled together in support of Proposition 8, it also is important to understand how the Yes on 8 campaign transformed the discourse about same-sex marriage. As this Article argues, the campaign reframed the same-sex marriage debate in California from a question of equal rights for same-sex couples to one of state infringement on the individual rights of the rest of the polity. In short, the Yes on 8 campaign co-opted its opponent's rights rhetoric. It did not dispute that same-sex marriage implicated rights, but it made clear that the rights at stake were not the civil rights of gays and lesbians. Instead, the campaign argued that state recognition of same-sex marriage implicated the rights of the rest of the state's populace. Accordingly, the campaign emphasized that state recognition of same-sex marriage would imperil the exercise of religious and personal beliefs, and importantly, would allow the state to introduce children to the concept of gay marriage in school, thereby challenging parental authority over children in the home.

Recognizing and understanding this rhetorical shift provides a more nuanced explanation for Proposition 8's victory in California. Specifically, it demonstrates that the Yes on 8 campaign sought to valorize "traditional marriage" not only through the expected route—championing opposite-sex marriage over same-sex marriage—but also by appealing to the family as a bulwark of protection for individuals, especially parents, against an intrusive and threatening state.⁶ In so doing, the campaign not only makes clear the shifting terms of the debate over same-sex marriage, it also manifests the way in which family law constructs parenthood, the family, and the relationship between parents and the state. This Article proceeds in three Parts. Part II briefly describes the trajectory of same-sex marriage rights in California. This history provides important context for understanding the way in which the Yes on 8 campaign transformed the same-sex marriage debate in the 2008 election.

Part III turns to the Yes on 8 campaign. By analyzing a selection of television commercials aired in support of Proposition 8, this Part illustrates how the Yes on 8 campaign transformed the debate over Proposition 8 from a question of equal rights and anti-discrimination principles to a discussion that emphasized the threat of state intrusion upon core individual rights, including parental rights over children in the home. Additionally, this Part builds upon this analysis by explaining that the campaign's anti-state rhetoric was not solely

run and flat-footed in its responses to the Yes on 8 campaign. See Ehrenreich, *supra* note 2; John Wildermuth, *Proposition 8 Opponents Unhappy with Campaign Leaders*, S.F. CHRON., Jan. 25, 2009, at B1.

6. I should say at the outset that I do not intend this discussion of the Yes on 8 campaign's use of individual rights rhetoric to be either a critique or an endorsement of the strategy. Instead, this Article seeks only to explain the way in which Yes on 8 campaign packaged its opposition to same-sex marriage and to locate the campaign in the broader struggle to secure gay civil rights.

about the threat of state interference with individual rights and parental autonomy. Instead, the anti-state rhetoric also was intended to suggest that state recognition of same-sex marriage would challenge parental authority to communicate and inculcate traditional gender roles and values to children within the private family.

Understanding these aspects of Proposition 8's success is crucial to the ongoing fight for marriage equality. The Yes on 8 campaign's success underscores the importance of framing the same-sex marriage debate in terms that appeal to a broad range of constituents and coalitions. These aspects of the campaign may be particularly useful as the same-sex marriage debate migrates from courtrooms and legislatures to the ballot box.⁷ Further, as Part IV argues, because the Yes on 8 campaign tapped into law's construction of the family, it also tells us much about the way in which family law both defines the family—and the legal relationship between parents and the state—and supports family caregiving.

Finally, the Article concludes by briefly discussing the Yes on 8 campaign in context of the broader struggle to secure civil rights for the LGBT community.

7. This is not to say that courts and legislatures are no longer participating in this debate. Indeed, recently, the Iowa Supreme Court and the Vermont, New Hampshire and District of Columbia legislatures expanded civil marriage to include same-sex couples. See *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); Ian Urbina, *D.C. Council Approves Gay Marriage*, N.Y. TIMES, Dec. 15, 2009, at A28; Abby Goodnough, *New Hampshire Legalizes Same-Sex Marriage*, N.Y. TIMES, June 3, 2009, at A19; Monica Davey, *Iowa Court Voids Gay Marriage Ban*, N.Y. TIMES, Apr. 4, 2009, at A1; Abby Goodnough, *Gay Rights Groups Celebrate Victories in Marriage Push*, N.Y. TIMES, Apr. 8, 2009, at A1. Instead, I wish only to emphasize the degree to which the debate has expanded to include the electoral process. Indeed, on November 4, 2008, Proposition 8 was one of four ballot initiatives aimed at limiting the rights of gays and lesbians. In Arizona, Proposition 102, which further amended the state constitution to define marriage expressly as “a union between one man and one woman,” passed with 56% of the vote. Ballot Proposition Guide, Proposition 102, available at http://www.azsos.gov/election/2008/Info/PubPamphlet/Sun_Sounds/english/Prop102.htm (last visited Feb. 19, 2009). See also Tiffany Sharples, *Ballot Initiatives: No to Gay Marriage, Anti-Abortion Measures*, TIME MAG., Nov. 5, 2008, available at <http://www.time.com/time/politics/article/0,8599,1856820,00.html> (last visited Feb. 19, 2009). In Florida, 62% of voters cast their ballots in favor of Amendment 2, which defined marriage as the union between “one man and one woman as husband and wife” and declared that “no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized.” Sharples, *supra*. And in Arkansas, over 57% of voters supported Proposed Initiative Act 1, which prohibited any individual “who is cohabiting outside of a valid marriage” from adopting children or serving as a foster parent. See Proposed Initiative Act No. 1, available at <http://arkansasmatters.com/content/fulltext/?cid=131431> (last visited June 4, 2009). Although the measure applied to any unmarried, cohabiting persons, it was specifically intended to thwart the “gay agenda.” Sharples, *supra*. Importantly, a year after Proposition 8's passage, same-sex marriage suffered another ballot box loss in Maine. See Abby Goodnough, *Gay Rights Rebuke May Change Approach*, N.Y. TIMES, Nov. 5, 2009, at A25.

II. THE ROAD TO PROPOSITION 8

By most accounts, the event that animated Proposition 8 was the California Supreme Court's May 2008 decision in *In re Marriage Cases*.⁸ There, the court concluded that denominating same-sex unions differently from opposite-sex unions violated the California Constitution.⁹

While the Court's decision in *In re Marriage Cases* was the proverbial straw that broke the camel's back in the fight to retain the traditional definition of marriage, the initial steps toward Proposition 8 were taken earlier. As this Part describes, several decades of interaction between state actors and the voting public in defining and redefining marriage and alternatives to marriage laid the foundation for the tenor of the Yes on 8 campaign.

Until 1977, California law defined marriage only as "a personal relation arising out of a civil contract, to which the consent of the parties making that contract is necessary."¹⁰ In 1977, in the wake of the Stonewall riots,¹¹ legal challenges to marriage laws in other jurisdictions,¹² and the perceived threat that the Equal Rights Amendment (ERA) would permit same-sex marriage,¹³ the legislature revised the state's marriage laws to include gender-specific language and provisions limiting civil marriage to opposite-sex couples.¹⁴ As the legislative history makes clear, the legislature, fearing that the statutory language was unclear, enacted the provisions specifically "to prohibit persons of the same sex from entering lawful marriage."¹⁵

8. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); Laurie Goodstein, *California, A Line in the Sand for Same-Sex Marriage Foes*, N.Y. TIMES, Oct. 27, 2008, at A12.

9. *In re Marriage Cases*, 183 P.3d at 433-35, 452; see also Melissa Murray, *Equal Rites and Equal Rights*, 96 CAL. L. REV. 1395, 1396-99 (2008) [hereinafter Murray, *Equal Rites*] (discussing *In re Marriage Cases*).

10. CAL. CIV. CODE § 4100 (1993) (current version at CAL. FAM. CODE §300 (2008)). See also *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 691 (Ct. App. 2006) (providing text of statute).

11. See generally BARRY ADAM, *THE RISE OF A GAY AND LESBIAN MOVEMENT* (1987) (discussing the Stonewall riots and the emergence of the gay rights movement); DAVID CARTER, *STONEWALL: THE RIOTS THAT SPARKED THE GAY REVOLUTION* (2004) (discussing the Stonewall Riots).

12. See *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), appeal dismissed for want of a substantial federal question, 409 U.S. 810 (1972); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971).

13. Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461, 466-67 (2007) (discussing widely-held fears that the passage of the ERA would lead inexorably to same-sex marriage).

14. See CAL. FAM. CODE § 300 ("Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary."); see also CAL. FAM. CODE § 301 ("An unmarried male of the age of 18 years or older, and an unmarried female of the age of 18 years or older, and not otherwise disqualified, are capable of consenting to and consummating marriage.").

15. Sen. Com. on Judiciary, Analysis of Assem. Bill No. 607 (1977-1978 Reg. Sess.) as amended May 23, 1977, p. 1.

By 2000, the legal landscape had changed considerably. In California and other states, legal challenges to marriage laws led to the emergence of alternative state-recognized statuses for same-sex couples.¹⁶ Indeed, in 1999, the California legislature created the status of domestic partnership, which offered same-sex couples and opposite-sex couples over the age of sixty-two some of the privileges and benefits of civil marriage.¹⁷

Less auspicious for same-sex couples than these state law developments was a change in federal law. In 1996, Congress enacted the federal Defense of Marriage Act (DOMA), defining marriage as a union between a man and a woman for purposes of federal law, and authorizing states to decline legal recognition to same-sex unions effected in other jurisdictions.¹⁸ In DOMA's wake, a rash of states passed "mini-DOMAs"—state laws or state constitutional amendments that specifically restricted civil marriage and legal recognition of foreign marriages to opposite-sex unions.¹⁹ California was no exception.

In 2000, State Senator William "Pete" Knight proposed for inclusion on the March 2000 ballot an initiative that would amend the California Family Code to provide that "[o]nly a marriage between a man and a woman is valid or recognized in California."²⁰ The initiative, known alternately as the Knight Initiative, the California Defense of Marriage Act, and Proposition 22, was passed by 61.4% of California voters.²¹

Of course, Proposition 22's enactment did not end the matter of marriage rights for same-sex couples in California. In 2003, the legislature passed the California Domestic Partner Rights and Responsibilities Act of 2003, also known as Assembly Bill 205 of 2003, which marked a major shift in the legal rights and privileges offered domestic partners.²² Prior to AB 205, the state's domestic partnership scheme offered same-sex couples only limited rights and

16. See CAL. FAM. CODE § 297-297.5 (2007) (creating domestic partnerships for same-sex couples); CONN. GEN. STAT. §§ 46b-38aa-38pp (Supp. 2007) (creating the civil union status for same-sex couples); N.H. REV. STAT. ANN. §§457-A:1 (same); N.J. STAT. ANN. § 37:1-29 (Supp. 2007) (same); VT. STAT. ANN. tit. 15, §§ 1201-1207 (2002) (same); see also Murray, *Equal Rites*, *supra* note 9, at 1396-97 (discussing the creation of civil unions); Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 440-41 (2008) [hereinafter Murray, *The Networked Family*] (discussing the creation of alternative statuses for same-sex couples).

17. CAL. FAM. CODE § 297-297.5 (2005) (creating domestic partnerships, which afford same-sex couples most of "the same rights, protections, and benefits" and make them "subject to the same responsibilities, obligations, and duties under law" as married spouses).

18. Defense of Marriage Act, Pub. L. 104-99, 110 Stat. 2419 (1996).

19. See, e.g., Andrew Koppelman, *The Difference Mini-DOMAs Make*, 38 LOY. U. CHI. L.J. 265, 265-66 (2007) (describing the enactment of mini-DOMAs in over forty U.S. jurisdictions).

20. CAL. FAM. CODE § 308.5 (2000).

21. Office of Cal. Sec'y of State, Primary Returns, <http://primary2000.sos.ca.gov/returns/prop/00.htm>.

22. California Domestic Partner Rights and Responsibilities Act, CAL. FAM. CODE § 297.5 (2007).

privileges, such as public registry and hospital visitation privileges.²³ AB 205 was intended to expand domestic partnership privileges so that domestic partners could enjoy almost all of the privileges and rights of spouses.²⁴ Additionally, the law recognized similar statuses, such as civil unions, created in other states.²⁵

These significant changes to the domestic partnership scheme were denounced almost immediately by opponents of same-sex marriage. The expanded domestic partnership scheme, opponents argued, was indistinguishable from marriage, and thus manifested the state's intent to redefine marriage over the objections of a majority of California voters.²⁶ They filed lawsuits challenging the validity of AB 205 on the ground that it impermissibly amended Proposition 22.²⁷

The consolidated lawsuits failed at both the trial court and intermediate appellate court.²⁸ In the latter forum, the court concluded that although domestic partnerships offered some of the same rights and privileges of marriage, significant differences continued to distinguish the two statuses from one another.²⁹ Accordingly, the court concluded that AB 205 did not effectively repeal Proposition 22.³⁰

Debate over same-sex marriage, and the conflict between state actors and same-sex marriage opponents, continued to build. On February 11, 2004, San Francisco mayor Gavin Newsom, citing the California Constitution's Equal Protection Clause as authority, defied Proposition 22 by instructing the county clerk to issue marriage licenses to same-sex couples.³¹ Over 4,000 same-sex

23. See T.A. Gilmartin, *Jackie Goldberg Doesn't Care What You Call It: AB 205 Is (Almost) Marriage*, LESBIAN NEWS, Dec. 2004, at 27 (noting that although earlier iterations of the domestic partnership law gave same-sex couples key rights, there were still well over 1,000 rights afforded under marriage not available to registered domestic partners).

24. CAL. FAM. CODE § 297.5 (2005) ("Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under the law . . . as are granted to and imposed upon spouses."). Courts have noted distinctions between domestic partnerships and marriages, however. See *Knight v. Superior Court*, 26 Cal. Rptr. 3d 687, 699 (Cal. Ct. App. 2005) (enumerating the distinctions between marriages and domestic partnerships).

25. CAL. FAM. CODE § 299.2 (2005).

26. *Knight*, 26 Cal. Rptr. 3d at 689-90.

27. *Id.*

28. *Id.* at 700; *Knight v. Schwarzenegger*, 2004 WL 2011407, at *9 (Cal. Super. Ct. Sept. 8, 2004).

29. *Knight*, 26 Cal. Rptr. 3d at 698-99. (concluding that Petitioners' suggestion that domestic partnership was "'marriage' by another name" was unfounded as "domestic partners do not receive a number of marital rights and benefits").

30. *Id.* at 700.

31. *Lockyer v. City & County of San Francisco*, 95 P.3d 459, 465 (Cal. 2004) (quoting Newsom's letter to the City Clerk); Carolyn Marshall, *Dozens of Gay Couples Marry in San Francisco Ceremonies*, N.Y. TIMES, Feb. 13, 2004, at A24; David Stout, *San Francisco City Officials Perform Gay Marriages*, N.Y. TIMES, Feb. 12, 2004. Newsom's unorthodox actions were animated by President George W. Bush's 2004 State of the Union address, in which the

couples were married in San Francisco before the California Supreme Court ended the policy on March 11, 2004.³² Although the court voided all of the marriages on October 12, 2004, Newsom's unorthodox move escalated the debate and drew national attention to the issue.³³

The penultimate word on the distinction between civil marriage and domestic partnerships came in May 2008, when the California Supreme Court announced its much-anticipated decision in *In re Marriage Cases*, which challenged, *inter alia*, the constitutionality of Proposition 22.³⁴ Because California's domestic partnership status offered same-sex couples many of the benefits and rights of marriage, the issue presented to the court was narrower than that addressed by courts in other jurisdictions.³⁵ Essentially, the California Supreme Court did not have to decide whether the state was required to provide same-sex couples with the privileges and benefits of marriage—the domestic partnership scheme did just that.³⁶ Instead, the court was charged with determining whether California was required to offer same-sex couples both the substance and form of marriage.³⁷ That is, the court had to determine whether same-sex couples were entitled to not just the obligations and privileges of marriage, but the marriage label itself.³⁸

In its lengthy decision, the court concluded that although the substance of marriage was afforded to both opposite-sex and same-sex couples, using different nomenclature for same-sex relationships violated the California Constitution's Equal Protection and Substantive Due Process Clauses.³⁹ The "separate but equal" domestic partnership scheme, the court concluded, risked characterizing same-sex couples and their relationships as inferior to opposite-

president promised to preserve the sanctity of traditional marriage, ostensibly by supporting a federal marriage amendment. See Sylvia A. Law, *Who Gets to Interpret the Constitution? The Case of Mayors and Marriage Equality*, 3 STAN. J. C.R. & C.L. 1, 5 (2007).

32. Dean E. Murphy, *San Francisco Forced to Halt Gay Marriages*, N.Y. TIMES, Mar. 13, 2004, at A1.

33. Jesse McKinley, *California Ruling on Same-Sex Marriage Fuels a Battle, Rather Than Ending It*, N.Y. TIMES, May 18, 2008, at A18 [hereinafter McKinley, *California Ruling*] (observing that Newsom "added to the national debate about same-sex marriage in 2004 when he ordered the county clerk to issue marriage licenses to gay couples").

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

35. *Id.* at 398 (noting that the question presented to the Court was "whether . . . the failure to designate the official relationship of same-sex couples as marriage violat[e]d the California Constitution").

36. See Murray, *Equal Rites*, *supra* note 9, at 1397 ("[T]he state had given same-sex couples the substance of marriage, but in a form different from that offered to opposite-sex couples.").

37. *In re Marriage Cases*, 183 P.3d at 398.

38. *Id.* For a thoughtful discussion of the nomenclature issue, see Courtney Megan Cahill, *(Still) Not Fit to Be Named: Moving Beyond Race to Explain Why 'Separate' Nomenclature for Gay and Straight Relationships Will Never Be Equal*, 97 GEO. L.J. 1155 (2009).

39. *In re Marriage Cases*, 183 P.3d at 434-36, 451.

sex relationships.⁴⁰ As such, California became the second state in the nation to expand civil marriage to include same-sex couples.⁴¹

Even before the court issued its decision in *In re Marriage Cases*, groups opposed to same-sex marriage began circulating initiative petitions to forestall any attempt by the court to redefine marriage in more expansive terms.⁴² One such petition, titled the “California Marriage Protection Act,” gathered an estimated 764,063 valid signatures, qualifying for the November 4, 2008 ballot as Proposition 8.⁴³ The measure went further than Proposition 22, in that it proposed to amend the state constitution to explicitly define marriage as a union between a man and a woman, and to restrict legal recognition of same-sex marriages in California.⁴⁴ As such, it was explicitly intended as a bulwark against an overreaching judiciary and other state actors who would thwart the will of the voters. After legal challenges to the initiative were dismissed, the measure was included on the November 4 ballot.⁴⁵ It was passed by 52% of California voters,⁴⁶ and it was upheld as a valid constitutional amendment by the California Supreme Court.⁴⁷

In highlighting the back-and-forth exchanges between various state actors and the proponents and opponents of same-sex marriage, this Part is not intended to be an exhaustive account of the debate over same-sex marriage in

40. Cahill, *supra* note 38, at 1170 (noting that the distinction between marriage and domestic partnership risked denying “the official family relationship of same-sex couples the equal dignity and respect that is a core element of the constitutional right to marry”).

41. Massachusetts had been the first state to do so in 2003. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). However, it did so only after the Massachusetts Supreme Judicial Court, in an advisory opinion to the Legislature, made clear that creating civil unions would not remedy the constitutional violation posed by restricting marriage to opposite-sex couples. *See* Opinions of the Justices to the Senate, 802 N.E.2d 565, 566-72 (Mass. 2004). In October 2008, the Connecticut Supreme Court struck down that state’s civil union law, ruling that same-sex couples had a constitutional right to marry. *Kerrigan v. Conn. Dep’t of Pub. Health*, 957 A.2d 407, 481 (Conn. 2008). In 2009, the Iowa Supreme Court held state laws limiting marriage to opposite-sex couples unconstitutional, while the legislatures in Vermont, New Hampshire, and the District of Columbia voted to expand civil marriage to include same-sex couples. *See supra* note 7.

42. McKinley, *California Ruling, supra* note 33, at A18; Cheryl Wetzstein, *Signatures Pledged for California Marriage Vote*, WASH. TIMES, Apr. 25, 2008, at A6.

43. John Wildermuth, *State Measures Get Official Ballot Numbers*, S.F. CHRON., June 28, 2008, at B2.

44. The proposed amendment provided that “only marriage between a man and a woman is valid or recognized in California.” *See* Protect Marriage, About Prop 8, <http://www.protectmarriage.com/about> (last visited June 2, 2009).

45. *See* Maura Dolan, *Gay Rights Groups Lose a Round; State Supreme Court Rejects Bid to Keep a Ban on Same-Sex Marriage off the November Ballot*, L.A. TIMES, July 17, 2008, at 3; Bob Egelko, *Gay Marriage Backers Want Ban Issue Off Ballot*, S.F. CHRON., June 21, 2008, at B3 (describing legal challenges to including Proposition 8 in the November ballot).

46. *See* California Secretary of State, Election Night Results, <http://vote.sos.ca.gov/Returns/props/map19000000008.html>.

47. *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

California. As the subsequent Part demonstrates, understanding these dynamics is important for understanding the tenor of the Yes on 8 campaign.

III. REFRAMING THE DEBATE: THE YES ON 8 CAMPAIGN'S RIGHTS RHETORIC

Although Proposition 8 prevailed at the ballot box in November, in June 2008, when the measure first qualified for the ballot, the prospect of victory seemed much more remote.⁴⁸ The electoral winds favored presidential candidate Barack Obama, whose broad appeal was expected to generate massive Democratic voter turnout.⁴⁹

In addition to the dynamics of the national election, the California Supreme Court's decision in *In re Marriage Cases* squarely framed same-sex marriage as a civil rights issue.⁵⁰ As the court held in its decision, redefining marriage to include same-sex couples was necessary to fulfill the state constitution's equality mandate, and to ensure that gays and lesbians were not second-class citizens.⁵¹ Indeed, the decision took the unprecedented step of denominating gays and lesbians a suspect class entitled, in the manner of racial and ethnic minorities, to the most rigorous constitutional scrutiny.⁵²

Relying heavily on out-of-state funding, the Yes on 8 campaign launched an impressive media campaign focused primarily on television and radio ads that reframed the rhetoric of the debate in terms more amenable to their cause.⁵³ The strategy was relatively simple: the campaign had to make

48. See Jessica Garrison, *Bid to Ban Gay Marriage Trailing: Poll Finds 54% of Likely Voters Oppose Prop. 8, While 40% Support the Ballot Measure*, L.A. TIMES, Aug. 28, 2008, at 1; John Koopman, *Ban on Gay Marriages Trailing in State Poll*, S.F. CHRON., Aug. 28, 2008, at A1.

49. See Patrick Healy, *Hopefuls Differ As They Reject Gay Marriage*, N.Y. TIMES, Nov. 1, 2008, at A1 (“[O]pponents of [Proposition 8] hope that a huge Democratic turnout in California on Nov. 4—and, possibly, depressed turnout among conservatives—will help defeat it.”).

50. Throughout its decision, the Court referenced precedents like *Perez v. Sharp* and *Loving v. Virginia*, both of which struck as unconstitutional state bans on interracial marriage. See, e.g., *In re Marriage Cases*, 183 P.3d 384, 436, 467 (Cal. 2008). Additionally, in concluding that restricting the marriage label to opposite-sex couples, while providing same-sex couples access to domestic partnership “constitut[ed] significantly unequal treatment,” the Court referred to *Sweatt v. Painter* and *United States v. Virginia*. In those cases, the United States Supreme Court concluded that the creation of new institutions for an excluded class violated the Equal Protection Clause of the federal constitution. See *United States v. Virginia*, 518 U.S. 515, 555-56 (1996) (holding that Virginia’s decision to establish a separate military program for women, in lieu of admitting them to the Virginia Military Institute, violated the Equal Protection Clause); *Sweatt v. Painter*, 339 U.S. 629, 634 (1950) (finding insufficient Texas’s creation of a separate law school for African American students in lieu of admitting them to University of Texas Law School).

51. *In re Marriage Cases*, 183 P.3d at 434.

52. *Id.* at 444 (“The strict scrutiny standard therefore is applicable to statutes that impose differential treatment on the basis of sexual orientation.”).

53. According to campaign filings, the Yes on 8 campaign spent over \$20 million on

opposition to same-sex marriage appear less like homophobia and discrimination and more like reasonable dissent.⁵⁴ As an initial matter, the campaign sought to convince undecided and uncommitted voters that gays and lesbians did not *need* marriage because they had virtually all of the rights and privileges of marriage under the domestic partnership status. Further, even if same-sex marriage afforded gays and lesbians new civil rights, it foreclosed the exercise of other rights by the rest of the polity. In short, the campaign reframed the debate in decisive terms: Same-sex marriage was unnecessary, and indeed, superfluous. Gay couples already *had* the civil rights attendant to marriage. Allowing the state to redefine marriage would not make gays and lesbians more equal, it would simply require everyone else to accept the state's new definition of marriage—a move that would, they argued, infringe upon personal and religious beliefs.⁵⁵

According to its architects, the Yes on 8 campaign was the first attempt to focus on the *consequences* for opposite-sex families of expanding marriage to include same-sex couples.⁵⁶ Though it may have been the first anti-same-sex marriage campaign to deploy the strategy, the Yes on 8 campaign was not the first conservative movement to reframe rights rhetoric to its advantage. Indeed, conservative movements long have regarded individual rights as a bulwark against threats to perceived assaults on the traditional family and traditional family values. As Kristin Luker recounts, when feminists characterized abortion as a woman's private choice to reject or embrace motherhood, the pro-life movement responded by reframing their opposition to abortion in terms that emphasized the fetus's right to live.⁵⁷ In his dissent in *Romer v. Evans*,

media expenditures. The bulk of this spending was for television advertising. See California Secretary of State, Cal-Access Campaign Finance Database, <http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1302592&session=2007&view=expenditures> (last visited Feb. 22, 2009). See also Seth Hemmelgarn, *New Reports Detail Prop 8 Expenditures*, BAY AREA REP., Feb. 5, 2009, <http://www.ebar.com/news/article.php?sec=news&article=3708> (reporting that the Yes on 8 campaign “spent at least \$25.4 million for TV airtime and production costs”). The campaign also made liberal use of the Internet and emerging media like Facebook and Twitter to disseminate its message. See www.protectmarriage.org (last visited June 2, 2009).

54. See Surina Khan, *Tying the Not: How the Right Succeeded in Passing Proposition 8*, available at http://www.publiceye.org/magazine/v23n4/proposition_8.html (last visited June 2, 2009) (discussing the Yes on 8 campaign's strategy).

55. For a thoughtful discussion of the way in which social conservatives have adopted the individual rights framework as a method for combating gay-inclusive school programming, see Douglas NeJaime, *Inclusion, Accommodation, and Recognition: Accounting for Differences Based on Religion and Sexual Orientation*, 32 HARV. J.L. & GENDER (forthcoming 2009).

56. Frank Schubert & Jeff Flint, Case Study, *Passing Prop 8*, in CAMPAIGNS & ELECTIONS, 2009, at 44.

57. See KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 92-157 (1984). Critically, upon realizing that the emphasis on fetal rights was off-putting to swing voters, the pro-life movement altered their rhetoric to downplay the tension between women's rights and fetal rights and instead “incorporate[d] claims for women's rights into its case against

which struck down a popularly-enacted constitutional amendment repealing civil rights protections for gays and lesbians, Justice Scalia described the challenged amendment as “a modest attempt by seemingly tolerant [citizens] to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.”⁵⁸ Similarly, in the 2000 case *Boy Scouts of America v. Dale*,⁵⁹ the Boy Scouts of America countered charges that the dismissal of an openly gay troop leader constituted unconstitutional discrimination by claiming that the New Jersey anti-discrimination statute prohibiting such dismissals violated its First Amendment rights.⁶⁰ More recently, online dating service eHarmony’s policy limiting matches to opposite-sex couples was defended on the ground that it was consistent with its founder’s religious beliefs.⁶¹ In all of these circumstances, the shift towards individual rights rhetoric allowed these groups to counter claims of discrimination by calling on well-worn accounts of individual choice and liberty. By invoking the individual rights rhetoric in the same-sex marriage debate, the Yes on 8 campaign hoped to counter the view that same-sex marriage was a civil rights issue.

By reframing the debate in these terms, the Yes on 8 campaign not only transformed the substance of the discussion, it offered voters a new image of state authority. To counter images of the state as a benign entity committed to facilitating tolerance and protecting minority groups, the campaign positioned the state as an antagonistic, counter-majoritarian force running roughshod over the will of the voters and intruding into the private lives of families.

However, even as it explicitly co-opted the debate’s rights rhetoric, the campaign also communicated, often in very subtle terms, the perceived consequences of state-recognized gay marriage. Not only would individual liberties be subject to state interference and parental rights challenged, marriage itself would be divested of its gendered content. Accordingly, the Yes on 8 campaign routinely joined the anxiety over state interference with individual and parental rights with the anxiety over “genderless” marriage, suggesting the importance of the family—and particularly, the traditional marital family—as a site for imparting gender norms and values.

The Subparts that follow provide analyses of a selection of Yes on 8

abortion.” Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Women-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 1018 (2007).

58. 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

59. 530 U.S. 640 (2000).

60. *Id.* at 643.

61. See Bob Egelko, *eHarmony Accused of Discrimination*, S.F. CHRON., June 2, 2007, at B2 (describing the claims against eHarmony and the company’s defenses, including the argument that prohibiting same-sex matching was consistent with its founder’s religious views); see also James G. Lakely, *eHarmony Settlement Erodes Everyone’s Freedom*, S.F. CHRON. Dec. 8, 2008, at B5 (arguing that eHarmony’s settlement in the face of discrimination claims should “trouble anyone who values liberty”).

commercials,⁶² all of which illuminate the way in which the campaign refocused the debate away from equal rights for same-sex couples, and toward the prospect of state interference with individual rights and personal beliefs. Moreover, many of the ads suggest that among the individual rights imperiled by state recognition of same-sex marriage was parental authority to impart particular values—including gender norms and values—to children in the home.

A. Whether You Like It or Not

The first Yes on 8 ad to air in California was entitled *Whether You Like It or Not*.⁶³ The ad opens on San Francisco mayor Gavin Newsom standing at a lectern.⁶⁴ Gesticulating wildly, Newsom announces to an applauding crowd, “This door’s wide open now! It’s gonna happen, whether you like it or not!”⁶⁵ The imminent “it” to which Newsom refers is, of course, same-sex marriage. The frame then shifts to four justices of the California Supreme Court.⁶⁶ As the screen shows close-ups of the justices conducting courtroom business, an unseen narrator reminds the viewer that “[f]our judges ignored four million voters and imposed same-sex marriage on California. It’s no longer about tolerance. Acceptance of gay marriage is now mandatory!”⁶⁷ A black-robed hand bangs a gavel to punctuate the end of the sentence.⁶⁸

Even in its first thirty seconds, *Whether You Like It Or Not* is not subtle in reframing the rights discourse. This is not about “tolerance” of gay citizens, but accepting the state’s unilateral decision (via the Supreme Court) to redefine marriage. Nor is the ad subtle in its anti-state stance. Gavin Newsom, the “boy mayor”⁶⁹ of a famously liberal city⁷⁰ enthusiastically embraces the California

62. The commercials selected do not represent the entire universe of ads aired in support of Proposition 8. Instead, I selected four ads that were widely aired on California television stations, as well as three additional ads that were “viral videos” that were widely disseminated via the Internet.

63. *Whether You Like It or Not*, <http://www.youtube.com/watch?v=4kKn5LNhNto&NR=1> (last visited June 2, 2009).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. Debra J. Saunders, *Gavin Newsom, Boy Mayor*, S.F. CHRON., Feb. 2, 2007, at B9. Newsom also is seen as an antagonist to the traditional view of marriage because of his personal life. He has been divorced and has admitted to an affair with his campaign manager’s wife. See Jonathan Darman, *Hoping That Left Is Right*, NEWSWEEK, Jan. 26, 2009, at 44.

70. San Francisco routinely is associated with liberal political values. See, e.g., Chris Christoff, *Obama: I’d Guarantee \$4 Billion to Retool Auto Industry: A Safety Net for Automakers Picks up Steam*, DETROIT FREE PRESS, Aug. 5, 2008 (detailing the way in which Senator Obama’s pitch for heightened fuel mileage standards was derided by Michigan

Supreme Court's decision to expand civil marriage, even over the objections of the four million voters who earlier supported Proposition 22. The decision to feature Newsom so prominently—he also appears at the end of the ad, again reiterating that same-sex marriage is imminent “whether you like it or not”—is a telling choice. As mentioned earlier, Newsom defied Proposition 22 by directing the county clerk to issue marriage licenses to same-sex couples.⁷¹ Accordingly, he is not only a poster boy for same-sex marriage in California; he is portrayed as the embodiment of the counter-majoritarian state imposing its will upon a majority of Californians.⁷²

The juxtaposition of Newsom with the images of the four California Supreme Court justices furthers this idea of the counter-majoritarian state. Now the rogue mayor has been joined by four rogue justices who willfully dismissed the wishes of four million California voters and imposed same-sex marriage on an unwilling polity.⁷³ The heavy-handed image of a banging gavel—literally the arm of the state—brings it all together in a striking visual tableau. The will of the people, the ad suggests, has been crushed by the state.

Having established this image of antagonistic, activist state actors, the ad then turns to the consequences of redefining marriage to include same-sex couples for the rest of the polity. The scene changes, and Professor Richard

Republicans as “pandering to San Francisco liberals”); Carla Marinucci, *Iran Controversy Intensifies GOP Outrage at Pelosi*, S.F. CHRON., Apr. 12, 2007, at A1 (noting that in the 2006 midterm elections, Republicans “raised the specter of what ‘San Francisco liberal’ Nancy Pelosi would do as speaker should the Democrats win control of the House”); Brent D. Wistrom, *Tiahrt Easily Wins Another Term: Donald Betts Can’t Deny the Republican a Seventh Term in the House*, WICHITA EAGLE, Nov. 5, 2008, at A11 (noting that a local politician won an election after characterizing his opponent “a San Francisco liberal”).

71. See *supra* note 31 and accompanying text.

72. It should be noted that Newsom's actions commanded wide support among his constituents in San Francisco. As such, his actions were not necessarily counter-majoritarian in that they were consistent with local attitudes and inclinations. Indeed, San Francisco voters “opposed Proposition 8 in droves,” exhibiting strong support for same-sex marriage. Dan Morain & Jessica Garrison, *Focused Beyond Marriage*, L.A. TIMES, Nov. 6, 2008, at A1.

73. *Whether You Like It or Not*, *supra* note 63. It is worth noting that concept of a counter-majoritarian judiciary was popularized by Alexander Bickel's *The Least Dangerous Branch*. There, in a critique of the Warren Court, Bickel expressed skepticism of judicial review because it allowed unelected judges to overrule the lawmaking of elected representatives, thereby undermining the will of the majority. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-17 (1962). Interestingly, Bickel's critique of judicial review was confined to the federal judiciary, which is unelected and enjoys life tenure. By contrast, members of the California Supreme Court are appointed by the governor to twelve-year terms but must be reconfirmed by the voters in retention elections. The electorate has occasionally exercised the power to not retain justices. For example, Chief Justice Rose Bird and Associate Justices Cruz Reynoso and Joseph Grodin, who routinely voted to overturn death penalty convictions and sentences, were voted out of office in the 1986 general election. See Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 38 (2007).

Peterson of Pepperdine University School of Law enters the frame.⁷⁴ Peterson cautions that the decision to expand civil marriage to include same-sex couples “changes a lot of things.”⁷⁵ Included among these potential changes are: “[p]eople [being] sued over personal beliefs,”⁷⁶ “[c]hurches . . . los[ing] their tax exemption,”⁷⁷ and “[g]ay marriage [being] taught in public schools.”⁷⁸ The narrator reminds voters: “We don’t have to accept this.”⁷⁹

Peterson’s litany of the possible consequences of same-sex marriage in California reinforces the central themes of the commercial and the Yes on 8 campaign more broadly. The commercial advises viewers that they should be worried about redefining marriage. But they also should be worried about the consequences of this move. If the state sanctions same-sex marriages, the commercial warns, then those who do not endorse such marriages may run afoul of anti-discrimination laws, exposing themselves to lawsuits, and in the case of religious institutions, jeopardizing their tax status. More importantly, the Yes on 8 campaign argues, state recognition of same-sex marriage would mean that any discussions of marriage within school curricula, which are subject to state oversight and authority, also will include discussions of gay marriage. In this way, the state would not only redefine marriage to permit same-sex marriage, it would teach children that marriage includes same-sex unions, perhaps challenging personal and religious beliefs instilled by parents in the home.

In sum, *Whether You Like It or Not*’s message is clear. Important rights are at stake. But the rights at stake are not necessarily those of the gays and lesbians excluded from civil marriage. Instead, the rights at stake are those of individual citizens who wish to practice their personal and religious beliefs and

74. Peterson’s biography on the Pepperdine University School of Law’s website notes his expertise in mediation and alternative dispute resolution and his “passionate advoca[cy]” on behalf of people with disabilities. See Richard Peterson, Biography, <http://law.pepperdine.edu/academics/faculty/peterson.html> (last visited June 13, 2009).

75. *Whether You Like It or Not*, *supra* note 63.

76. *Id.* This statement refers to *North Coast Women’s Care Medical Group, Inc. v. San Diego Superior Court*, 189 P.3d 959 (Cal. 2008). There, a lesbian patient sued a medical group and two of its employee physicians, alleging that their refusal to perform intrauterine insemination on her, based on their religious and personal beliefs, violated California’s Unruh Civil Rights Act. The Court agreed. It is worth noting that the Court’s disposition hinged on its interpretation of the Unruh Civil Rights Act, and not on its decision to expand civil marriage to include same-sex couples.

77. This statement referred to a column in the *Gay and Lesbian Times* that cautioned that clergy who are “aggressively involved in political campaigning” risk losing their tax-exempt status. The column did not warn that the decision to permit same-sex marriage required stripping churches of their tax-exempt status. See Robert Devoken, *Beyond the Briefs*, GAY & LESBIAN TIMES, Oct. 9, 2008.

78. This statement refers to *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008), in which the First Circuit affirmed a federal district court decision holding that a public school’s curriculum, which promoted tolerance of a wide range of family arrangements, did not violate parents’ rights.

79. *Whether You Like It or Not*, *supra* note 63.

instill them in their children, without the threat of state interference. By imposing same-sex marriage on California, over the objections of a majority of voters, the state has overstepped its bounds and now threatens the exercise of individual rights.

But *Whether You Like It or Not* did more than simply shift the terms of the debate by reframing the rights rhetoric. By all accounts, *Whether You Like It or Not* was crucial in swaying voters and turning the tide of the campaign.⁸⁰ According to Frank Schubert and Jeff Flint, the architects of the campaign, after “more than a week” of “blanketing the state” with the ad, the campaign “went from being significantly behind, to taking the lead in two published polls.”⁸¹

B. Proposition 8 Made Simple

In another ad, *Proposition 8 Made Simple*, same-sex marriage opponents reiterate the anti-state rhetoric while attempting to distance opposition to same-sex marriage from bigotry and homophobia.⁸² It is worth noting that *Proposition 8 Made Simple* did not air on television, but instead was available on Yes on 8 Internet sites, and was disseminated as an Internet viral video. Because it was intended for Internet distribution and consumption, the ad is considerably longer than ads intended for more conventional media outlets—its running time is over four minutes.⁸³ As a consequence, the ad offers a very detailed discussion of the events preceding Proposition 8, and the perceived consequences of state recognition of same-sex marriage. Additionally, the lengthy running time allows the ad to invoke, in more subtle tones, a gendered subtext that warrants attention. The ad, which is animated and features voiceover narration, begins by explaining the events that preceded Proposition 8.⁸⁴

The audience is reminded that in 2000, “Californians voted yes” on Proposition 22, which defined marriage as a union “between a man and a woman.”⁸⁵ Viewers then learn that “four San Francisco judges overturned this legislation, ruling it unconstitutional” and making same-sex marriage “legal in California.”⁸⁶ At this point, a drawing of a man and woman appears, labeled

80. Jonathan Darman, *Hoping That Left Is Right*, NEWSWEEK, Jan. 26, 1009, at 44; Mike Swift, *A Huge Setback for Gay Rights*, SAN JOSE MERCURY NEWS, Nov. 5, 2008 (noting that “the race began to tighten” after *Whether You Like It or Not* aired).

81. Schubert & Flint, *supra* note 56.

82. *Proposition 8 Made Simple*, available at <http://www.youtube.com/watch?v=vI-GjWY-WIA> (last visited June 2, 2009).

83. By way of comparison, *Whether You Like It or Not*'s running time was roughly thirty seconds.

84. *Proposition 8 Made Simple*, *supra* note 82.

85. *Id.*

86. *Id.*

with the terms “man + woman.”⁸⁷ In an instant, a male icon replaces the female icon and the two remaining figures are labeled with the terms “man + man.”⁸⁸ The screen then shifts again to reiterate the anti-state message. A drawing of the scales of justice appears.⁸⁹ One side is labeled “judicial” and the other “legislative.”⁹⁰ But the scales are not calibrated because the “judicial” side weighs more heavily, tipping the balance.⁹¹ The audience is then left to wonder “have the courts gone too far?”⁹² The answer, of course, is a resounding “yes.” Again, the four justices who comprised the majority in *In re Marriage Cases* are portrayed as counter-majoritarian, activist judges who have, by judicial fiat, imposed same-sex marriage on an unwilling majority. The ad then appeals to undecided and uncommitted voters by “[making]” Proposition 8 “simple” for the “many people in the middle who aren’t quite sure what to think.”⁹³

At this point, the screen flashes to a drawing of a couple, “Jan and Tom.”⁹⁴ Jan and Tom, viewers are told, are a typical family with two children and a dog.⁹⁵ The couple and their son and daughter live next door to “Dan and Michael, a same-sex couple.”⁹⁶ As the ad explains, the neighbors have been “good friends . . . for years.”⁹⁷ In fact, “[w]hen Jan and Tom were on vacation, Dan and Michael watched their dog” and “[w]hen Dan was sick, Jan brought him soup.”⁹⁸ Throughout the recitation of these facts, the stick figures of the four adults interact easily, with wide smiles on their penciled faces.⁹⁹

Proposition 8, however, wipes the smiles from Jan and Tom’s faces, leaving them “torn” and confused.¹⁰⁰ Although “they believed in and wanted to teach their children traditional values,” they also felt that “Dan and Michael should be treated fairly and equally regardless of their lifestyle choice.”¹⁰¹ With this move, the Yes on 8 campaign sets the stage for its appeal to median voters who wonder how “same-sex marriage will affect [them] and [their] children.”¹⁰²

The ad then features Tom at his computer reading the text of Section 297

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

of the California Family Code.¹⁰³ There, he learns something “interesting . . . Same-sex couples like Dan and Michael who are in a domestic partnership already have the same legal rights and privileges as married couples.”¹⁰⁴ Armed with this new information, Tom is left to wonder, “[i]f this isn’t about rights and equality, then what is it about,” and why does it require redefining marriage?¹⁰⁵ If marriage is not necessary to afford same-sex couples the rights and privileges enjoyed by straight couples, then it can only be about something more fundamental—redefining and altering the institution itself.

Jan, we discover, also has been investigating the matter. After speaking with her sister, Nancy, who lives in Massachusetts, Jan learns that after that state legalized same-sex marriage, public schools began teaching children about same-sex marriage.¹⁰⁶ And “[w]hen parents objected, courts ruled that they had no right to receive advance notice that their children will be taught about gay marriage, nor could they pull their children from class.”¹⁰⁷ Suddenly, the consequences of Proposition 8 for people like Jan and Tom are apparent. “[State] anti-discrimination law [could] force citizens to compromise their values and beliefs in the name of tolerance.”¹⁰⁸ Moreover, state recognition of same-sex marriage could mean that children would be taught about same-sex marriage in school, regardless of whether their parents agree or not.

The narrator then informs the audience that Jan and Tom are “voting yes . . . on Proposition 8.”¹⁰⁹ But their decision to do so, the ad makes clear, results from concern about the impact of same-sex marriage on individual rights (and parental rights, in particular), not from bigotry or intolerance.¹¹⁰ Indeed, the couple are “still good friends with Dan and Michael . . . In fact, they are having a barbeque together *right now*.”¹¹¹ But Jan and Tom have learned that “[t]hey can respect Dan and Michael’s lifestyle choice without affirming and embracing their lifestyle.”¹¹²

103. *Id.*

104. *Id.* It is worth noting that domestic partnership is not identical to marriage. California’s procedures for registering as domestic partners differ from marriage licensing requirements. Compare CAL. FAM. CODE § 297, with CAL. FAM. CODE §§ 350, 420. Further, domestic partnerships are only available to same-sex couples and opposite-sex couples above the age of 62. See *id.* § 297(b)(5)(A)-(B). Similarly, to be eligible for a domestic partnership, prospective partners must cohabit, a requirement not imposed on those seeking civil marriages. See *id.* § 297(b)(1), 297(c). Finally, domestic partnership has different tax consequences than does civil marriage. See *Knight v. Superior Court*, 26 Cal. Rptr. 3d 687, 691 (Cal. Ct. App. 2005).

105. *Proposition 8 Made Simple*, *supra* note 82.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* (emphasis added).

112. *Id.* Critically, the ad characterizes Dan and Michael’s relationship as a “lifestyle” or “lifestyle choice,” emphasizing that the relationship (and perhaps, gay identity) is a *choice*

With this, the Yes on 8 campaign not only calls attention to the court's role in overturning a popularly-enacted ballot initiative, it co-opts rights rhetoric to present opposition to same-sex marriage as reasonable dissent. As the ad insists, Jan and Tom are not homophobes or bigots. They *like* their gay neighbors and want them to be treated "fairly and equally,"¹¹³ but they have genuine concerns about what redefining marriage will mean for their family.¹¹⁴ For Jan and Tom, voting yes on 8 is not about discriminating against gays and lesbians, but about preserving and protecting the individual rights of other citizens, including parents. And who could object to preserving individual rights like religious freedom and parental autonomy? Certainly not Dan and Michael, who, despite Jan and Tom's decision to vote for Proposition 8, remain friendly with their neighbors.¹¹⁵

The rhetorical shift from an equal rights discourse to an individual rights discourse is bolstered by the constituencies represented in the ad. It is not coincidental that Dan and Michael, the gay neighbors, are two white men who have no children.¹¹⁶ As such, they are part of a privileged group—a point that the ad makes plain in critical ways. They are economically advantaged (they live in the same, seemingly-upscale enclave as Jan and Tom) and as registered domestic partners, they have the many of the same legal advantages as Jan and

for both men. In so doing, the ad further distances the claim for marriage equality from civil rights claims, which have been rooted in the immutability of such characteristics as race, sex, and national origin. *See* *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) ("[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility.") (internal citations and quotations omitted); Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 294 (1994) ("The core claim made in defense of anti-gay discrimination is that homosexuality is different from other protected aspects of identity because it is both *chosen* and *behavioral* and is therefore categorically beyond the pale of civil rights protection.").

113. *Proposition 8 Made Simple*, *supra* note 82.

114. In this way, the depiction of Jan and Tom as reasonable dissenters to the state-mandated recognition of same-sex marriage conjures up comparisons to John Rawls' discussion of reasonable pluralism. JOHN RAWLS, *POLITICAL LIBERALISM* 36 (1996) (conceptualizing liberal pluralism as "a diversity of reasonable comprehensive doctrines").

115. *Proposition 8 Made Simple*, *supra* note 82.

116. The ad does not explicitly specify the race of any of the parties depicted. It is an animated ad and all of the parties are the same hue as the background on which they are drawn—white. Nevertheless, it is likely that the parties are intended to be Caucasian. Jan, Tom, and their children are part of a marital nuclear family, which has been associated with middle-class Anglo culture. *See* Marc Stein, *Boutilier and the U.S. Supreme Court's Sexual Revolution*, 23 LAW & HIST. REV. 491, 501 n.25 (2005) (noting that the nuclear family "was a model that middle-class whites had used historically to differentiate themselves from their perceived class and race inferiors"). Similarly, as Russell Robinson has observed, gay culture has been identified almost exclusively with white men. Russell K. Robinson, *Racing the Closet*, 61 STAN. L. REV. 1463, 1508 (2009) (arguing that white men "typify the gay aesthetic ideal"). As such, it seems likely that Dan and Michael, two male partners, also are intended to be Caucasian.

Tom, a married couple.¹¹⁷

Further, because they are two white men—as opposed to an interracial couple or two lesbians—it is perhaps easier to make the point that their exclusion from civil marriage does not constitute impermissible discrimination, or if it does, this discrimination pales in comparison to the other benefits their status as white men confers.¹¹⁸ If Dan and Michael were an interracial couple, or a lesbian couple, the undecided voter could well imagine that voting for Proposition 8 would exacerbate the discrimination that women and minorities already experience.¹¹⁹

Finally, because Dan and Michael are domestic partners who are *not* raising children together, their need for marriage may appear less urgent. Responding to same-sex marriage opponents' claims that marriage is the optimal venue for childrearing and should be limited to those capable of procreating, gays and lesbians have argued that civil marriage should be available to same-sex couples, many of whom are having and raising children together.¹²⁰ Indeed, in recent legal challenges, arguments in favor of same-sex marriage focused on the importance of marriage for providing family security and dignity to same-sex couples with children.¹²¹ In this way, depicting Dan and Michael as two childless, white men subtly untethers the claim for marriage equality from the rhetoric of civil rights and concerns about creating an optimal setting for childrearing. In so doing, it allows the Yes on 8 campaign to focus instead on the threat of state interference with individual rights.

117. Gay men often have been depicted as economically advantaged. See Darren Lenard Hutchinson, "*Gay Rights*" for "*Gay Whites*"?: *Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358, 1368-82 (2000) (discussing the social construction of sexual minorities as white and wealthy); Schacter, *supra* note 112, at 291-92 ("[O]pponents of gay civil rights claim that gay men and lesbians are economically well-off and therefore do not need legal protection.").

118. White men are widely viewed as enjoying significant advantages over racial minorities and women in society. See D. Aaron Lacy, *The Most Endangered Title VII Plaintiff? Exponential Discrimination Against Black Males*, 86 NEB. L. REV. 552, 574-76 (2008) (describing the various benefits enjoyed by white men).

119. See generally, Hutchinson, *supra* note 117 (considering the discrimination faced by sexual minorities who are also women and/or people of color).

120. See Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 YALE J.L. & HUMAN. 1, 20-21 (2009) ("Same-sex couples *could* have children, and in fact *were* having children, . . . and these families sought recognition as such, in part through marriage.").

121. *Hernandez v. Robles*, 855 N.E.2d 1, 32 (N.Y. 2005) (Kaye, C.J., dissenting) ("Civil marriage provides tangible legal protections and economic benefits to married couples and their children, and tens of thousands of children are currently being raised by same-sex couples in New York."); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 963 (Mass. 2003) ("[T]he task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws."); *Baker v. State*, 744 A.2d 864, 882 (Vt. 1999) ("If anything, the exclusion of same-sex couples from the legal protections incident to marriage exposes *their* children to the precise risks that the State argues the marriage laws are designed to secure against.").

Less explicit than the anti-state message and the shift in rights rhetoric is the ad's underlying gender subtext. In subtle ways, the ad invokes gendered imagery to suggest that at least some of the "traditional values" that Jan and Tom want to instill in their children include the traditional gender roles and norms attendant to opposite-sex marriage. This appeal to traditional gender norms is not altogether surprising. The same-sex marriage debate has long been framed in gendered terms,¹²² and the Yes on 8 campaign is no exception to this rhetorical tradition.

Arguments against same-sex marriage that focus on marriage as the locus for procreation are obviously undergirded by an account of biologically determined gender roles.¹²³ Others, however, have offered a gloss on the procreation theme. Not only is opposite-sex marriage the place to *have* children, it is the ideal institution in which to *raise* them because it values the complementary characteristics that men and women bring to childrearing.¹²⁴ As such, marriage is both an environment for the successful deployment of gender roles, and the medium for the cultivation of these roles in future generations.¹²⁵

Inextricably intertwined with these childrearing arguments is a rationale that focuses on the role of marriage in constructing and consolidating gender norms and roles in society. Marriage, opponents of same-sex marriage argue, is not just a regulatory institution for adult relationships. It is the "complex cultural site for opposite-sex bonding,"¹²⁶ and "society's primary means of

122. Widiss, Rosenblatt & NeJaime, *supra* note 13, at 487-98 (documenting the use of gender stereotypes in the same-sex marriage debate); see also Richard Thompson Ford, *Hate and Marriage*, SLATE, July 12, 2006, <http://www.slate.com/id/2145620/> ("A lot of the resistance [to same-sex marriage] is less about sexual orientation than about sex difference. In other words, it's not about the difference between gay and straight; it's about the difference between male and female. By this logic, conventional marriage doesn't exclude gay couples from a special status reserved for straights; it excludes women from a special status reserved for men—that of husband—and excludes men from a status reserved for women—that of wife.").

123. Monte Stewart, *Marriage Facts*, 31 HARV. J.L. & PUB. POL'Y 313, 326 (2008) (arguing that one of the functions of "man-woman marriage" is to situate passion and provide a site for responsible procreation).

124. Inherent in these arguments is an understanding of the childrearing roles that men and women perform, and the division of labor between men and women within the family unit. See Lynn D. Wardle, "*Multiply and Replenish*": *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771, 798 (2001). Not only do "men and women contribute different (gender-connected) strengths and attributes to their children's development," in the context of opposite-sex marriage, they serve as "living models [to children] of what both a man and a woman are like." Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 857 (1997). See Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006).

125. See Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1914-16 (2000) (discussing the intersecting influences of gender, marital, and parental roles).

126. DANIEL CERE, *THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA* 40 (2005).

bridging the male-female divide.”¹²⁷ More importantly, however, marriage creates the “social identities”¹²⁸ of husband and wife—it is the institution in which gender is constructed and replicated.¹²⁹ Accordingly, redefining marriage to include same-sex couples is not just about redefining the institution in broader terms, but it is also about divesting marriage of its gendered substance¹³⁰ and rendering gender roles unintelligible in society at large.¹³¹ Thus, it is not just the traditional definition of marriage that requires defense and protection. The traditional family (and its underlying gender roles) that marriage produces is crucial for maintaining traditional gender norms in the face of social change.¹³²

From the first frame, *Proposition 8 Made Simple* appeals to gender traditionalists with subtle visual cues. Recall that the ad initially deploys the male and female icons typically used to denote male and female restrooms in describing the decision permitting same-sex marriage in California.¹³³ The use of this iconography recalls Jacques Lacan’s critique of “urinary segregation.”¹³⁴ According to Lacan, our understanding of gender is socially constructed through everyday interactions and visual cues like the gender-specific iconography that adorn restroom doors. As such, the system of urinary segregation—labeling public restrooms for men and for women—creates rather than reflects the categories of “men” and “women,” thereby giving substantive

127. Katharine Young & Paul Nathanson, *The Future of an Experiment*, in DIVORCING MARRIAGE 41 (Daniel Cere & Douglas Farrow eds., 2004).

128. Monte Stewart, *Genderless Marriage, Institutional Realities and Judicial Elision*, 1 DUKE J. OF CON. L. & PUB. POL’Y 1, 19 (2006).

129. R.A. Lenhardt, *Beyond Analogy: Perez v. Sharp, Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 CAL. L. REV. 839, 878 (2008) (“The sex-specific roles of bride and groom send clear messages about what it means to be a man and what it means to be a woman.”) (internal citations omitted).

130. Indeed, some opponents of same-sex marriage refer to it as “genderless” marriage for this reason. See, e.g., Monte Neil Stewart, *Eliding in Washington and California*, 42 GONZ. L. REV. 501, 512 (2007) (discussing “genderless marriage”).

131. See *Lewis v. Harris*, 875 A.2d 259, 277 (N.J. Super. Ct. App. Div. 2005) (Parrillo, J., concurring) (arguing that permitting same-sex marriage could strip marriage of its gender content, rendering it “non-recognizable and unable to perform its vital function” in society).

132. As some scholars have documented, anxiety over homosexuality often has accompanied anxiety over women’s deviation from traditional gender roles within the marital family. See William N. Eskridge, *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1334 (2000) (noting that, historically, public anxiety over homosexuality has been linked to “the larger revulsion of society against women who violated gender norms”). In the same vein, anxiety over the perceived obsolescence of traditional gender norms has also undergirded opposition to reproductive rights. Luker, *supra* note 57, at 193 (noting that the abortion debate has been transformed from a debate over the medical profession’s right to make life-or-death decisions to “a referendum on the place and meaning of motherhood” in society).

133. *Proposition 8 Made Simple*, *supra* note 82.

134. Jacques Lacan, *The Agency of the Letter in the Unconscious*, in ECRITS: A SELECTION 161, 167 (Alan Sheridan trans., Norton 1977).

content to the concept of gender.¹³⁵ Accordingly, the use of these gendered icons, and the subtle shift from a male and female icon to two male icons, suggests the fears of gender disruption that attend same-sex marriage.¹³⁶ That is, if marriage is redefined to include same-sex couples, it will be rendered “genderless” and stripped of its gendered meaning and content.¹³⁷

In other ways, however, the ad’s discussion of gender and marriage is less abstract and deals concretely with gender roles within marriage. For example, in first describing Jan, Tom, and their family to the audience, the ad also reveals the gendered division of labor in their home. Jan appears in the kitchen with a big smile on her face.¹³⁸ Not only does Jan cook for the family, she “likes” it!¹³⁹ And once a week on Saturday, Tom mows the lawn.¹⁴⁰ The enormous smile on his face makes it clear that he too enjoys his role in the family. Their commitment to these gendered roles is also inferred by their contact with their gay neighbors. When Dan was ill, Jan brought him soup, subtly reinforcing for the audience her domestic prowess and her nurturing, womanly nature.¹⁴¹ Similarly, when the couples unite for their post-election barbecue, Tom mans the grill.¹⁴²

Furthermore, it is likely not coincidental that Jan and Tom are parents to a boy and a girl. As opponents of same-sex marriage argue, dual-gender

135. *Id.*

136. See Stewart, *supra* note 130, at 505 (describing opposite-sex marriage as “[s]ociety’s primary and most effective means of bridging the male-female divide” and its “only means of conferring and transforming the identity and status of a male into husband/father, and a female into wife/mother—statuses and identities particularly beneficial to society.”). Interestingly, the decision to replace the male and female icons with two male icons, as opposed to two female icons, may reflect a conscious effort to invoke the image of male-male intimacy, which has been considered more taboo than female-female intimacy. See Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 236 (1994) (discussing the taboo of male-male sodomy and its gendered underpinnings).

137. Koppelman, *supra* note 136, at 203.

138. *Proposition 8 Made Simple*, *supra* note 82.

139. *Id.*

140. *Id.*

141. Lisa Phillips, *Helping Out in the Family Firm: The Legal Treatment of Unpaid Market Labor*, 23 WIS. J.L. GENDER & SOC’Y 65, 95 (2008) (characterizing “women’s work” as “cooking, physical care” and nurturing).

142. See Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1211 (1990) (identifying the “prototypically male realm of car repairs, sports, and barbecues”); Nancy D. Polikoff, *Lesbian and Gay Parenting: The Last Thirty Years*, 66 MONT. L. REV. 51, 60 (2005) (noting that barbecuing has been “traditionally associated with the male role”); Florence Fabricant, *Cooking in the Great Outdoors: The American Barbecue*, N.Y. TIMES, July 2, 1980, at C1 (observing that barbecuing has “long been considered a masculine pursuit”); William E. Geist, *Barbecuing: A Manly Art*, N.Y. TIMES, May 17, 1987 (“I’m a man. Men cook outside.”); Jennifer 8. Lee, *The Man Date; What Do You Call Two Straight Men Having Dinner?*, N.Y. TIMES, Apr. 10, 2005, at A1 (observing that “there is a masculine overtone to the [barbecue] grill”).

parenting plays a “vital role . . . in shaping sexual and gender identity and in providing heterosexual role modeling” to children.¹⁴³ Here, Jan and Tom’s children, each of whom has a parental role model of the same sex, will reap the benefits of dual-gender parenting.¹⁴⁴ Their daughter will learn to be a nurturing, soup-cooking woman merely by observing Jan’s example. Their son will learn the manly arts of barbequing and lawn care by Tom’s side. In short, by voting for Proposition 8, Jan and Tom have preserved their authority and autonomy as parents to cultivate and impart these gender values to their children.

Thus, *Proposition 8 Made Simple* does simplify the debate. Although “being a good neighbor” to same-sex couples like Dan and Michael “is important,” the ad makes clear that doing so does not require “embracing” same-sex marriage—especially when same-sex couples already have the same rights as married couples (albeit under a different name).¹⁴⁵ Instead of focusing on what same-sex couples stand to lose if Proposition 8 is enacted, the ad wants median voters to focus on what *they* will lose if it is not. And as the ad explains, “embracing” same-sex marriage has important consequences beyond state recognition of same-sex couples.¹⁴⁶ It will challenge parental authority over children and may even dismantle the meaning of gender in the family and in society more broadly.

C. Everything To Do With Schools, It’s Already Happened, and Truth

In a trifecta of television ads, *Everything To Do With Schools*,¹⁴⁷ *It’s Already Happened*,¹⁴⁸ and *Truth*,¹⁴⁹ the Yes on 8 campaign elaborated on the consequences of same-sex marriage for opposite-sex couples by focusing specifically on the prospect of state interference with parental autonomy.¹⁵⁰ However, because the ads focus on the parent-child relationship, one can also

143. *Lofton v. Sec’y of Dept. of Children and Family Services*, 358 F.3d 804, 818 (11th Cir. 2004).

144. Again, it is likely no coincidence that the gay neighbors, Dan and Michael, are childless. Because they do not have children, the commercial implies, the substantive content of marriage, and the gender roles attendant to this content, are meaningless for Dan and Michael. Put another way, because they do not have children, they do not really *need* marriage. But marriage’s content, the ad subtly suggests, is incredibly meaningful for families like Jan and Tom’s—families with children.

145. *Proposition 8 Made Simple*, *supra* note 82.

146. *Id.*

147. *Everything To Do with Schools*, available at <http://www.youtube.com/watch?v=7352ZVMKBQM> (last visited June 2, 2009).

148. *It’s Already Happened*, available at <http://www.youtube.com/watch?v=0PgjcgqFYP4> (last visited June 2, 2009).

149. *Truth*, available at http://www.youtube.com/watch?v=I61Pd5_jHQw (last visited June 2, 2009).

150. Interestingly, the campaign purposely chose to build upon the momentum generated by *Whether You Like It or Not* by focusing their message on children and education. Schubert & Flint, *supra* note 56.

glean subtle cues about the inculcation of gender values within the traditional family.

In the first ad, *Everything To Do With Schools*, the campaign enlists the aid of Robb and Robin Wirthlin.¹⁵¹ In 2004, the Wirthlins, a Mormon couple from Lexington, Massachusetts, sued their local school system alleging that the system's "effort to educate its students to understand and respect gays, lesbians, and the families they sometimes form in Massachusetts" violated the Wirthlins' "[constitutional] rights . . . to raise their children" with their chosen values.¹⁵² More specifically, the Wirthlins contended that the state-approved curriculum was an attempt to "indoctrinate their children with the belief that homosexuality and same-sex marriage are moral and to denigrate the contrary view that they wish[ed] to instill in their children."¹⁵³

In the ad, a voiceover narrator leaves it to the Wirthlins to dispel the view that "gay marriage doesn't have anything to do with schools."¹⁵⁴ Facing the camera, Robin Wirthlin explains that "[a]fter Massachusetts legalized gay marriage, our son came home and told us that the school taught him that boys can marry other boys. He's in the second grade."¹⁵⁵ Despite their objections, a federal "court said that [the Wirthlins] had no right to object or pull [their] son out of class."¹⁵⁶ The Wirthlins recede from view and the camera refocuses on a California school teacher who reframes the issue for the viewing public: "It's already happened in Massachusetts. Gay marriage will be taught in our schools unless we vote yes on Proposition 8."¹⁵⁷

Everything To Do With Schools dovetails nicely with another Yes on 8 ad, *It's Already Happened*,¹⁵⁸ which began airing at roughly the same time. In *It's Already Happened*, viewers are not only reminded of the potential threat to parental authority, they also are offered subtextual gender cues that signal the perceived threat of same-sex marriage to traditional gender values. In the ad, a mother is standing at the kitchen counter when her pigtailed daughter rushes in breathlessly.¹⁵⁹ "Guess what I learned in school today?" the daughter asks her mother before thrusting into her mother's hands a copy of the children's book *King and King*.¹⁶⁰ The girl then explains excitedly that she "learned how a

151. *Everything To Do with Schools*, *supra* note 147.

152. *Parker v. Hurley*, 474 F. Supp. 2d 261, 263 (D. Mass. 2007).

153. *Id.*

154. *Everything To Do with Schools*, *supra* note 147.

155. *Id.*

156. *Id.*

157. *Id.*

158. *It's Already Happened*, *supra* note 148.

159. *Id.*

160. *Id. King and King* is a Dutch children's book that has been translated into English. The book details a young prince's search for an ideal mate. Although he explains to his mother that he "never cared much for princesses," she insists on parading countless princesses before him for his approval. One candidate is escorted by her brother, Prince Lee. Predictably, the princes fall in love and begin preparing for marriage. The book ends with a

prince married a prince, and I . . . can marry a princess!”¹⁶¹

Although the ad focuses on the impact of same-sex marriage on the school curriculum, the screen is heavy with gendered imagery. The girl enters her family’s *kitchen*, the household space most closely associated with feminine domesticity,¹⁶² to find her mother tending to her domestic work.¹⁶³ Moreover, the fact that the two characters in this vignette are female tacitly invokes the perceived importance of gender role-modeling within the traditional family. Not only is the mother charged with cultivating particular values in her child, she is an example to her daughter of how women *should* behave.¹⁶⁴ If the state permits same-sex marriage, it will unduly complicate the message that this mother wants to transmit to her daughter. If a princess can marry a princess, how will gender roles within the family be maintained? As the ad subtly suggests, although this mother models a traditional feminine role for her daughter, she is not her daughter’s sole influence. At school, where *King and King* is taught, the girl learns that these gender roles are not preordained or inevitable. In this scenario, the state uses the school curriculum to challenge, and perhaps thwart, this mother’s efforts to transmit and replicate gender norms and values to her daughter in her home.¹⁶⁵

The ad’s conclusion reiterates the threat of same-sex marriage to parental authority in the home. As the horrified mother scans the book’s pages, a now-

shared kiss. See LINDA DE HAAN & STERN NIJLAND, *KING AND KING* (2002). The sequel, *King and King and Family*, depicts the two kings returning from their honeymoon to adopt an orphan girl, whom they raise as a princess. See LINDA DE HAAN & STERN NIJLAND, *KING AND KING AND FAMILY* (2004).

161. *It’s Already Happened*, *supra* note 148. It is worth noting that the girl depicted is Latina. In many of its ads, the Yes on 8 campaign went to great pains to depict minorities and members of religious communities. See Schubert & Flint, *supra* note 56.

162. Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 HARV. J.L. & GENDER 237, 251 (2008) (identifying the kitchen as a “traditionally feminine domain, the part of the house in which women exert control”).

163. It is likely that the girl’s father is absent from the kitchen because he is at work, earning a living in order to provide financially for the family. See Catherine R. Albiston, *Bargaining in the Shadow of Social Institutions, Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 LAW & SOC’Y REV. 11, 18 (2005) (discussing normative assumptions about wage-earning that figure the ideal worker as “a male breadwinner with a stay-at-home wife”).

164. One of the key arguments proffered in defense of legal bars to same-sex marriage is that heterosexual marriage and parenthood are optimal for childrearing because, *inter alia*, they allow for children to observe gender roles in practice and model their own behavior on that of their same-gender parent. See *Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1382-83 (S.D. Fla. 2001) (arguing that opposite-sex marriage is the optimal environment for rearing children because it “provides . . . proper gender role modeling and minimiz[es] social stigmatization”) (internal citations and quotation marks omitted).

165. Certainly, this more subtle gendered reading of *It’s Already Happened* is not available from the text of the ad. On its face, the ad squarely addresses the fear that state-recognized gay marriage will be taught to children in schools, compromising parental authority within the home.

familiar figure to the same-sex marriage debate walks into the frame.¹⁶⁶ Professor Peterson of Pepperdine University School of Law weighs in: “Think it can’t happen? It’s already happened.”¹⁶⁷ Peterson reminds the viewers that in the wake of the legalization of same-sex marriage in Massachusetts, “schools began teaching second graders that boys can marry boys,” and the “courts ruled parents had no right to object.”¹⁶⁸ The voiceover narrator then intones, “Teaching children about gay marriage *will* happen here unless we pass Proposition 8.”¹⁶⁹

Although *Everything To Do With Schools* and *It’s Already Happened* argue that public school curricula will be impacted by same-sex marriage, the potential impact might appear remote to the average viewer unless it is spelled out. After all, the Wirthlins’ legal battle took place across the country in Massachusetts. Accordingly, a companion ad, *Truth*,¹⁷⁰ which began airing in October 2008, makes the prospect of state indoctrination of young children via the public school curriculum a concrete reality. The opening shot of the commercial features a group of school children standing on the steps of San Francisco’s City Hall.¹⁷¹ They are watching and clapping as a newly married lesbian couple descends the steps arm in arm.¹⁷² The narrator intones that “a public school took first graders to a lesbian wedding, calling it a teachable moment.”¹⁷³ The frame then shifts to show a group of newspaper headlines trumpeting the visit—including one featuring Mayor Gavin Newsom, who conducted the marriage ceremony.¹⁷⁴ The ad ends with what is surely intended to be a warning to the undecided: “Children *will* be taught about gay marriage unless we vote yes on Prop 8.”¹⁷⁵

In this trio of ads, the Yes on 8 campaign refines its anti-state/individual rights discourse. Instead of focusing abstractly on the potential threat to individual rights, as it did in *Whether You Like It or Not* and *Proposition 8 Made Simple*, here the campaign focuses on concretizing the threat that state recognition of same-sex marriage poses to parental rights and autonomy in childrearing. The ads allege—incorrectly—that in the months immediately after the California Supreme Court permitted same-sex marriage, the educational environment changed dramatically.¹⁷⁶ The ads suggest that public schools, in

166. *It’s Already Happened*, *supra* note 148.

167. *Id.*

168. *Id.*

169. *Id.* (emphasis in original).

170. *Truth*, *supra* note 149.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. In fact, *In re Marriage Cases* had no such effect. Under California law, parents enjoy an absolute right to review all materials provided as part of a school’s comprehensive sexual health education program and to have their children excused from participation. CAL.

their capacity to provide students with basic information about life skills, health, and sexuality, may now teach students about same-sex marriage, even going so far as to have students observe a same-sex marriage ceremony.¹⁷⁷ Though not explicitly stated, the point of all three ads is obvious: due to its authority over children in school, the state may expose *your* children to same-sex marriage, regardless of whether doing so challenges that which you instill in your children in the privacy of your home.

In this way, the ads insist that the state's view of marriage will no longer be confined to the public sphere. Children will learn about marriage and family in the classroom, and these images will challenge those offered by dissenting parents in the private confines of the home. As the three ads further suggest, because parents have no opportunity to object to what is taught in the schools, their authority over children in the home will be constantly challenged and contradicted by the state's authority over children in the area of education.¹⁷⁸ Time and again, parental authority will be co-opted and usurped by the state.

Put together, the three ads do more than simply state the potential impact of state-recognized gay marriage on public school instruction, parental rights, and the inculcation of gender roles in the home. They also bolster the campaign's account of the antagonistic, overreaching state. In *Proposition 8 Made Simple* and *Whether You Like It or Not*, the campaign emphasized the counter-majoritarian impulses of state actors, highlighting Mayor Newsom's unilateral decision authorizing same-sex marriages in San Francisco and the California Supreme Court's decision invalidating Proposition 22 and authorizing same-sex marriage. But in those ads, the state's actions, and their consequences, were confined largely to the public sphere.¹⁷⁹ By contrast, *Everything To Do With Schools, It's Already Happened*, and *Truth*, characterize the state as an entity that, through the administration of schools, also can override parental authority and desires in the home by offering children a view of marriage to which their parents object.

Read together, the combined impact of the ads is obvious—and is intended to be frightening. Not only can the state override the will of the majority in the public sphere, its tentacles also may reach into the private sphere, limiting

EDUC. CODE § 51240; see also *Citizens for Parental Rights v. San Mateo County Bd. of Educ.*, 124 Cal. Rptr. 68, 80-82 (Cal. Ct. App. 1975) (discussing the prior version of this longstanding policy).

177. Again, this was a gross distortion of the existing legal landscape. See *supra* note 176.

178. As the No on Prop 8 campaign tried to impress upon voters, California education law differs substantially from that in Massachusetts, where the Wirthlins' legal challenge took place. See *supra* note 176 and *infra* note 208 and accompanying text.

179. According to Professor Peterson in *Whether You Like It or Not*, state recognition of same-sex marriages has consequences for the tax status of religious institutions and physicians' choices about whom they will treat. *Whether You Like It or Not*, *supra* note 163. Importantly, these consequences are framed as *public* consequences that implicate public concerns, like tax revenue and health care.

parental authority and autonomy there. As such, the Yes on 8 campaign offers a chilling account of the consequences of state recognition of same-sex marriage. In both public and private life, the will of the state trumps that of dissenting voices. More troublingly, the home and the family—entities that are imagined as bulwarks against the totalitarian impulses of the state¹⁸⁰—will be breached by the state. In all, the Yes on 8 campaign offers a view of society in which there are no spaces that remain safe from the tyranny of state control.

D. Where Do Babies Come From?

In *Where Do Babies Come From?*, the anti-state discourse and shifting rights rhetoric seen in most of the other Yes on 8 campaign ads is more subdued.¹⁸¹ And whereas the previous ads can be read to offer only implicit or subtextual warnings about the threat to traditional gender roles, *Where Do Babies Come From?*, which was produced by a group affiliated with the Yes on 8 campaign and intended for Internet distribution, focuses squarely on the gender anxieties prompted by the prospect of state-recognized same-sex marriage and same-sex marital families.

Unlike *It's Already Happened*, which presumably takes place in an opposite-sex marital home,¹⁸² *Where Do Babies Come From?* is set in a same-sex household occupied by two gay men¹⁸³ and their daughter.¹⁸⁴ As music plays softly in the background, the daughter, who plays on the floor with a doll, asks, “Daddy?,” to which *both* men look up in acknowledgement.¹⁸⁵ The daughter then asks, “Where do babies come from?”¹⁸⁶ The fathers share a meaningful look, as if to say, we knew *this* was coming.¹⁸⁷ Then Father A responds, “Mommies have babies, dear. That’s where they come from.”¹⁸⁸

180. The notion of the family as a defense against the state’s totalitarian impulses is well-represented among opponents of same-sex marriage. See, e.g., William C. Duncan, *DOMA and Marriage*, 17 REGENT U. L. REV. 203, 203 (2005) (“Totalitarian societies . . . have been long characterized by attempts to deconstruct (and reconstruct) the family.”); Maggie Gallagher, *If Marriage Is Natural, Why Is Defending It So Hard? Taking Up the Challenge to Marriage in the Pews and the Public Square*, 4 AVE MARIA L. REV. 409, 410 (2006) (“The family, as the generator of human and religious values, stands in the way of the totalitarian state’s project to create a new man.”).

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

182. *It's Already Happened*, *supra* note 148.

183. Again, the gay couple portrayed consists of two white men. As I argued earlier, this casting choice perhaps is intended to further distance the same-sex marriage questions from issues of civil rights and equality and to focus instead on the question of individual rights. See *supra* notes 116-19 and accompanying text.

184. *Where Do Babies Come From?*, *supra* note 181.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

Unsatisfied with this answer, the daughter presses on: “Can boys ever have babies?”¹⁸⁹ The two fathers again share a concerned look and Father B raises his eyebrows.¹⁹⁰ Father A patiently explains to the girl that “only mommies” have babies.¹⁹¹ Undeterred, the daughter takes a different approach: “Megan says you have to have a mommy *and* a daddy to have a baby.”¹⁹² Again, her fathers share meaningful looks.¹⁹³ Father A rushes to clarify Megan’s instruction. “What Megan means,” he explains, “is that it takes a man and a woman to make a baby. That’s all.”¹⁹⁴ The daughter shakes her head and invokes Megan once again. “[Megan] said that mommies and daddies have to get married first.”¹⁹⁵ Father A dismisses this assertion. “No, sweetheart, you don’t have to be married to have a baby.”¹⁹⁶ At this, the daughter is visibly perplexed. Shaking her head in confusion she addresses both of her fathers, “Then . . . what’s marriage for?”¹⁹⁷ With this, there is a crescendo of dramatic music and the voiceover narrator implores the viewer, “Let’s not confuse our kids. Protect marriage by protecting the *real* meaning of marriage. Only between a man and woman. Vote yes on Proposition 8.”¹⁹⁸

Where Do Babies Come From? raises a loaded question—what *is* marriage for? If marriage produces and communicates sex-specific family roles for men and women, then, as the ad implies, this function is upended by redefining marriage to include same-sex couples. *Where Do Babies Come From?* portrays same-sex households as sites where family roles are undifferentiated and confusion abounds.¹⁹⁹ This sense of gender confusion is apparent from the first frame of the commercial. Two men are raising a daughter, who plays at their feet with a doll, a toy that traditionally has been used as a vehicle for recreating and instilling particular gender norms and values.²⁰⁰ Although the girl plays with a doll, the commercial makes clear that her family situation does not offer her clear gender roles to guide her play.²⁰¹ Raised by two fathers, she lacks the benefits of dual-parent role modeling, as she lacks a female role model in the home.

The absence of a female mother figure is further underscored when the girl

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

asks an important question of her fathers, “Where do babies come from?”²⁰² The question’s import does not hinge solely on the biological explanation it demands; instead, the question prompts the realization that this girl, raised by two men, lacks the female figure to whom these questions usually are directed.²⁰³ After all, a standard event in the parent-child relationship is “the birds and the bees” discussion where sexuality and reproduction are explained, usually by the parent who is of the same gender as the child. In this vignette, however, the absence of the mother figure means that there is no parent who is the obvious choice with whom the daughter can broach these topics. Moreover, the absence of a mother figure is highlighted by the fact that the ad portrays the girl’s fathers as bumbling and inept, further confusing her about the origin of babies and marriage’s purposes.

The importance of dual-gender parenting—and, implicitly, opposite-sex marriage—as a means of imparting traditional gender norms and values to children, whether explicitly or by example, is communicated elsewhere in the ad. When the girl begins her question by asking, “Daddy?,” *both* men acknowledge her. In terms of the division of labor in parenthood, neither is the obvious choice to tackle this important subject—there are no clear gender roles in this home and, as a consequence, same-sex parenting is portrayed as haphazard, confusing, and *bad*. Indeed, the ad suggests that the two men are such ineffectual parents that their daughter is left to rely on the wisdom of her peers for information about marriage and the origin of babies. According to Megan, the daughter’s friend, “you need a mommy and a daddy to have a baby.”²⁰⁴

Although she never appears in the ad, Megan is a critical figure in the dialogue between the Yes on 8 campaign and the voting public. Not only is Megan aware of gender roles within the family, she is able to communicate these norms and values to her friend, whose life in a same-sex household leaves her confused about these norms. In this way, Megan’s clear understanding of gender roles within the family is juxtaposed against the confusion of the daughter raised by two gay men. The contrast implies the superiority of opposite-sex marriage and casts same-sex marriage as suboptimal for children’s

202. *Id.*

203. The trope of men’s inability, and women’s unique ability, to address issues of sex and sexuality, particularly with their daughters, is well-developed in society and popular culture. The television drama *Friday Night Lights* has confronted both stereotypes with considerable grace. In an episode entitled *It’s Different for Girls*, a father learns of an Internet website chronicling his daughter’s sexual escapades. He never confronts her about it, and instead, they have an awkward conversation where the subject of sex is never even broached. *Friday Night Lights: It’s Different for Girls* (NBC television broadcast Jan. 24, 2007). By contrast, in a more recent episode, a father happens upon his teenage daughter and her boyfriend *in flagrante delicto*. They never discuss what transpired. Instead, the girl and her mother have an earnest and heartfelt conversation about sex and contraception. See *Friday Night Lights: The Giving Tree* (NBC television broadcast Mar. 20, 2009).

204. *Where Do Babies Come From?*, *supra* note 181.

development.

However, the ad's invocation of Megan also suggests that while marriage is for bearing and raising children, it also serves other functions. Within the privacy of the family, parents may impart to their children whatever personal beliefs and values they choose, including personal beliefs and values about marriage and gender roles, free from the interference of the state and external parties. Moreover, *Where Do Babies Come From* subtly suggests that, in the wrong hands, this kind of privacy and autonomy can be dangerous and disruptive.

Recall Father B's response to his daughter's assertion about Megan and her thoughts on where babies come from and the importance of marriage in creating a space for procreation.²⁰⁵ Upon hearing this information, Father B, no doubt exasperated with Megan and her family, says *sotto voce*, "[M]aybe you should spend a little less time at Megan's house."²⁰⁶ With this exchange, the ad offers a new riff on the theme of interference with parental autonomy.

When Father B hears Megan's views on the origin of babies, his response is to consider limiting the amount of time his daughter spends "at Megan's house."²⁰⁷ In short, he may exercise his autonomy and authority as a parent to prevent his child from having too much contact with external parties whose influence he finds undesirable.²⁰⁸ But the ad also intimates that this particular exercise of parental authority is problematic.

The ad suggests that if the state permits same-sex marriage, same-sex couples will be entitled to the privacy protections that traditionally have attended marriage.²⁰⁹ Insulated by these privacy protections, same-sex couples, like their opposite-sex counterparts, will have the authority and autonomy to conduct their family lives—and, critically, to raise children—free from state intrusion. But, importantly, marital privacy does more than shield the family from state intervention; it also permits families to exclude outside influences. Here, the ad implies that the privacy that state recognition confers will allow same-sex couples to raise their children in the manner of their choosing—and that their choices necessarily will depart from the traditional model of marriage and the gender roles that undergird it.

205. *Id.*

206. *Id.*

207. *Id.*

208. Parents have broad license to exclude undesirable influences from their children's lives. And, indeed, their capacity to do so has been bolstered by state policies. Laura A. Rosenbury, *Children as Subjects 14-17* (Jan. 26, 2009) [hereinafter Rosenbury, *Children as Subjects*] (unpublished manuscript on file with author) (discussing public policies such as anti-gang legislation, anti-bullying measures, and curfew ordinances that are aimed at limiting negative peer influences).

209. Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1294 (2009) [hereinafter Murray, *Strange Bedfellows*] (discussing, in the context of *Griswold v. Connecticut*, the degree to which the legal understanding of privacy is tethered to marriage).

The same-sex couple in the ad makes the point plainly. Insulated by family privacy, they have chosen to raise their daughter without a female role model and with little guidance as to traditional gender roles. But, not only have they used their family privacy to impart a “genderless” family model to their daughter, by exercising their parental autonomy to exclude Megan from their daughter’s orbit, the ad suggests, they foreclose a crucial conduit through which more traditional gender norms and roles may be imparted.

In this way, the ad evinces a tension between same-sex marriage and parental autonomy that is absent in the other Yes on 8 campaign ads. By choosing to recognize same-sex marriages, the state challenges the parental autonomy of opposite-sex couples and impedes the cultivation of traditional gender norms. But this is not the full extent of same-sex marriage’s consequences. As *Where Do Babies Come From?* implies, state-recognized marriage, and its privacy protections, provide same-sex couples with broad license to raise their children in the absence of these gendered roles, as well as the discretion to exclude from their children’s lives those who could impart more traditional gender norms and values. As such, *Where Do Babies Come From?* suggests that same-sex marriage problematizes parental autonomy along multiple valences.

Of course, *Where Do Babies Come From?* does not explore the fact that these fathers do not *need* marriage to exercise their parental autonomy to exclude Megan from their daughter’s life. Generally, parents, whether married or not, are free to make these sorts of decisions.²¹⁰ Instead, its subtle reminder about the consequences of state recognition may be intended to call attention to the way in which state recognition of same-sex marriage permits the uneven exercise of parental authority. In this newly-legitimized same-sex household, the couple may exercise their parental rights to exclude from the home viewpoints like Megan’s—viewpoints with which they disagree. However, as *Truth, It’s Already Happened*, and *Everything to Do With Schools* allege, parents in opposite-sex marriages are hobbled in their efforts to seclude *their* children from unwanted influences.²¹¹ According to the Yes on 8 campaign, because of state-recognized same-sex marriage, these influences are present in the schoolhouse and from there, may seep into the bosom of the family, challenging gender norms and parental authority.

Overall, *Where Do Babies Come From?* strikes a different tone than the previously discussed Yes on 8 ads. However, even as it expands its focus beyond state intrusion on individual rights, it reminds viewers that state recognition of same-sex marriage has alarming consequences for opposite-sex

210. Barbara Bennett Woodhouse, “*Who Owns the Child?: Meyer and Pierce and the Child as Property*,” 33 WM. & MARY L. REV. 995, 1113-18 (1992) (describing the prevailing property-based model of parenthood, which includes a right to exclude outsiders from a child’s sphere of influence).

211. See *Everything to Do With Schools*, *supra* note 147; *It’s Already Happened*, *supra* note 148; *Truth*, *supra* note 149.

couples. On its face, *Where Do Babies Come From?* brings to the fore a theme that is primarily subtextual in most of the Yes on 8 campaign ads. By focusing on a same-sex household where gender roles are undifferentiated and confusion abounds, the ad reminds the viewer that the norms and values inculcated in opposite-sex marital households will be challenged by the “genderless” model espoused in newly legitimized same-sex marriages. As such, *Where Do Babies Come From?* suggests that same-sex marriage will redefine not only *who* can marry, but also gender roles within marriage, the role of the family in imparting and replicating these norms and values, and marriage’s place in the social order.

IV. LESSONS FROM THE YES ON 8 CAMPAIGN

The previous Subparts documented the way in which the Yes on 8 campaign transformed the rights rhetoric of the same-sex marriage debate from one about the civil rights of sexual minorities to focus instead on the individual rights of other citizens. In so doing, the campaign framed the state as an antagonistic entity willfully overriding the will of the voters, impermissibly infringing upon parental rights and authority, and destabilizing gender norms within the family and society. Recognizing the Yes on 8 campaign’s anti-state individual rights discourse and its latent gender subtext provides a more complete account of the campaign and offers insights for future efforts to secure marriage equality.²¹²

First, the Yes on 8 campaign’s strategy suggests the power and authority that rights rhetoric conveys. In short, the Yes on 8 campaign recognized how powerful the equal rights/civil rights frame was for the LGBT community.²¹³ If

212. For example, understanding the campaign’s preoccupation with state interference in the private sphere perhaps provides a more nuanced explanation for African American, Latino, and Mormon support for the measure. An anti-state message may have been uniquely resonant with these groups, all of which have long (and bitter) histories of state intervention into the family. See SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA* (2002) (documenting the history of conflict between the Mormon Church and local, state, and federal government over the question of plural marriage); Katherine Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 *YALE J.L. & HUMAN.* 251, 256 (1999) (explaining that African Americans adopted non-nuclear family forms in response to the pressures exerted on the family by state-sanctioned slavery); Dorothy E. Roberts, *The Community Dimension of State Child Protection*, 34 *HOFSTRA L. REV.* 23, 29-35 (2005) (lamenting the effects on poor and minority race communities of concentrated child protection intervention in those communities); Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 *AM. U. J. GENDER & L.* 1, 14 (1993) (reporting that state agencies are more likely to intervene in black homes in part because those homes depart from accepted family norms); Annette R. Appell, *Disposable Mothers, Deployable Children*, 9 *MICH. J. RACE & L.* 421, 442 (2004) (book review) (“[E]mpirical evidence indicates that child welfare professionals view Black families as less viable, less resourceful, and, consequently, in need of coercive state intervention.”).

213. Schubert & Flint, *supra* note 56.

viewed through the lens of civil rights and equality, Proposition 8 appeared unduly retrograde, bigoted, and hateful. By focusing instead on the “consequences” of legalizing same-sex marriage for the rest of the polity, the Yes on 8 campaign redefined the terms of the debate by offering a new rights lens—individual rights—through which to view the same-sex marriage debate. In so doing, it crafted a message that appealed to “a much broader audience than the 40 percent . . . of voters” who made up its base.²¹⁴

But the Yes on 8 campaign’s use of individual rights rhetoric suggests something more than the broad appeal of rights. It also reveals the plasticity of rights rhetoric and the inconsistencies it may produce. In turning away from the civil rights frame, the Yes on 8 campaign appealed to individual rights—and specifically, the *natural* rights of parents to raise their children free from state interference and coercion. The campaign consciously invoked a set of rights that have been understood to be distinct from the rights that the state creates and confers—rights that accrue naturally to parents due to their biological connection with their offspring.²¹⁵ But interestingly, even as campaign invoked the authority of natural, parental rights, it required—indeed, demanded—the protection of the state to effectuate those rights. The campaign sought to amend the California Constitution in order to prevent the state from trumping parental authority over children in the home. These two competing impulses—freedom from state interference with parental rights *and* the need for state intervention in order to effectuate those rights—produces a message that is incoherent and circular: we do not want the state to say that marriage includes gay couples because doing so would interfere with our rights as parents to teach our children a traditional view of marriage, but we need the state to say that marriage is limited to opposite-sex couples in order to exercise our rights as parents and promote a traditional view of marriage to our children.

Rather than responding to the challenge of the new individual rights frame by debunking its claims and revealing the inconsistencies of its rights logic, the No on Prop 8 campaign focused initially on resurrecting the civil rights and equality frame—a strategy that yielded mixed results.²¹⁶ In an ad entitled *Conversation*, the No on Prop 8 campaign depicts a conversation between two women seated at a kitchen table.²¹⁷ As they pore over photographs, one confides to the other that she “do[esn’t] know how [she] feels about this same-sex marriage thing.” Her friend assures her that it is “okay” to have reservations

214. *Id.*

215. Murray, *The Networked Family*, *supra* note 16, at 395 (“Because of the ‘natural bonds of affection’ they share with their children, parents are presumed to act in their children’s best interests, and thus are the ‘natural’ persons with whom to vest the responsibility for providing care.”) (citations omitted).

216. Jasmyne A. Cannick, *The Gay/Black Divide*, L.A. TIMES, Nov. 8, 2008, at B23 (“Opponents of Proposition 8 relied on an outdated civil-rights model.”).

217. *Conversation*, available at <http://www.youtube.com/watch?v=vB0lZ8XbmJM> (last visited June 4, 2009).

about gay marriage but asks her if she is “willing to take away rights and have our laws treat people differently,” which is what Proposition 8 would require.²¹⁸ Her sense of justice and fairness reinvigorated, the once-conflicted woman affirms her commitment to equality and anti-discrimination.²¹⁹ A second ad, narrated by African American actor Samuel L. Jackson, explains to viewers that Proposition 8 would return California to a time when state-facilitated discrimination was permitted.²²⁰ To illustrate the point, the ad, entitled *Discrimination*, depicts scenes from the Japanese internment and references race-based housing restrictions and prohibitions on interracial marriage.²²¹

By all accounts, these response ads did little to disrupt the momentum of the Yes on 8 campaign.²²² The response ads failed to address the emphasis on individual rights that the Yes on 8 campaign’s shift in rights rhetoric produced.²²³ In short, the playing field had changed dramatically, and the No on 8 campaign had yet to update their message to respond to the Yes on 8 campaign’s focus on same-sex marriage’s perceived implications for individual rights.²²⁴

Critically, once the No on Prop 8 campaign responded to same-sex marriage’s alleged consequences, it narrowed the Yes on 8 campaign’s gains. The No on 8 campaign’s “most effective” ad confronted head-on same-sex marriage’s implications for schools and education, and, indirectly, parental rights.²²⁵ In the ad, California’s Superintendent of Public Instruction, Jack O’Connell, explained that Proposition 8 “has nothing to do with schools or kids,” and that California schools “aren’t required to teach *anything* about marriage.”²²⁶

Unfortunately, within twenty-four hours of this ad’s airing, the Yes on 8 campaign responded with *Truth*, which depicted a first grade field trip to San Francisco’s City Hall to celebrate a lesbian wedding.²²⁷ Although *Truth* was quite controversial—the parents of the children featured in the ad vehemently

218. *Id.*

219. *Id.*

220. See *Discrimination*, available at <http://www.youtube.com/watch?v=Oj-0xMrsyxE> (last visited June 4, 2009).

221. *Id.*

222. See Schubert & Flint, *supra* note 56.

223. *Id.*

224. *Id.*

225. *Prop 8 Has Nothing To Do with Schools*, available at <http://www.youtube.com/watch?v=CIL7PUI24hE> (last visited June 4, 2009).

226. *Id.* (emphasis in original). As discussed earlier, under California law, parents retain the right to review all materials provided as part of a school’s comprehensive sexual health education program and to have their children excused from participation. See *supra* note 176.

227. *Truth*, *supra* note 149.

objected to the use of the film footage without their consent²²⁸—it successfully blunted the No on Prop 8 campaign’s effort to counter the individual rights rhetoric.²²⁹

In all, the ebbs and flows of both campaigns underscore the importance of both rights rhetoric and coalition-building in the debate over same-sex marriage. Crafting a rights message that is expansive enough to include multiple constituencies is essential in these debates. And, as the No on Prop 8 campaign learned too late, responding to new rights rhetoric—and revealing the inconsistency of its logic—quickly and nimbly is essential for defining the debate in terms amenable to one’s cause.

However, it is also important to recognize that the rights rhetoric that was deployed so successfully by the Yes on 8 campaign was not constructed out of whole cloth for this particular fight. Indeed, the rhetoric of individual rights, and parental rights particularly, has long been part of our social discourse because these principles serve as cornerstones of the legal regulation of the family. To be sure, the Yes on 8 campaign did more than simply reframe the rights rhetoric to focus on individual rights and parental rights. It tapped into broader social intuitions that are undergirded by family law’s construction of the family and the relationship between parents and the state. As such, the lessons of the Yes on 8 campaign go beyond Proposition 8 and same-sex marriage to implicate family law writ large.

The following Subparts discuss the way in which the Yes on 8 campaign tapped into, and reinforced, themes that pervade family law and shape public policy efforts aimed at families. Specifically, it argues that the Yes on 8 campaign privileged the marital nuclear family as a normative model above other caregiving relationships, further entrenched family law’s allocation of authority over children between parents and the state, and posited the relationship between parents and the state as either one of detachment or intrusion. Moreover, in so doing, the Yes on 8 campaign reinforced our socio-legal preoccupation with marriage as both a model for family life and a rubric for addressing the challenges that families face.

A. Reifying the Nuclear Family

In terms of their visual presentation and latent gender subtext, the Yes on 8 campaign ads connected strongly with family law’s preoccupation with the

228. See Pia Lopez, *Parents to Prop 8’s Frank Schubert: Don’t Use Our Kids*, SACRAMENTO BEE.COM, THE SWARM, Oct. 30, 2008, http://www.sacbee.com/static/weblogs/the_swarm/2008/10/016585.html (describing the parents’ efforts to stop the Yes on 8 campaign from airing film footage featuring their children); Transcript, *Politicizing Copyright, On the Media*, available at <http://www.onthemedial.org/transcripts/2008/10/31/04> (last visited June 4, 2009).

229. See Schubert & Flint, *supra* note 56.

marital nuclear family. Although family law recognizes the extended family²³⁰ and “non-traditional” family arrangements,²³¹ the nuclear family unit predominates as a normative ideal. For example, in some circumstances, courts have granted benefits usually limited to spouses and family members to those who are neither married nor related by blood or affinity, but whose relationships comport with normative intuitions about family life. Not surprisingly, these intuitions are guided by the models of marriage and the nuclear family.²³² In *Braschi v. Stahl Associates*, for instance, the New York Court of Appeals concluded that two gay men were “family members” for purposes of New York City’s rent control statute because they lived as though they were a married couple.²³³ In *Hann v. Housing Authority of the City of Easton*, a federal district court concluded that an unmarried heterosexual couple raising children together was eligible for public housing because, although they lacked a marriage license, they *functioned* in the manner of the marital nuclear family.²³⁴

Importantly, it was not only the Yes on 8 campaign that endorsed the marital nuclear family as the model for family life. In responding to the Yes on 8 campaign’s ads, the No on Prop 8 campaign also invoked nuclear family tropes, although without much of the gendered subtext. In a response ad titled, *The Thorons*, the No on Prop 8 campaign introduced viewers to the Thorons, a married older couple. The Thorons explained that they had been married “forty-

230. *Moore v. City of East Cleveland*, 431 U.S. 494, 504 (1977) (“Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family.”).

231. See *Troxel v. Granville*, 530 U.S. 57, 63 (2000) (“The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household.”); *Roberts v. Ward*, 493 A.2d 478, 481 (N.H. 1985) (“The realities of modern living, however, demonstrate that the validity of according almost absolute judicial deference to parental rights has become less compelling as the foundation upon which they are premised, the traditional nuclear family, has eroded.”); Murray, *The Networked Family*, *supra* note 16, at 396-403 (describing attempts to move beyond the traditional model of the nuclear family).

232. See Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 1015-21 (2000) (noting that legal recognition as a family often hinges on the degree to which a group comports with the indicia of the marital family life); cf. Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL’Y & L. 307, 321 (2004) (“Arguably the most significant drawback to using a functional theory to gain legal recognition of nontraditional families is that doing so implicitly concedes the marital nuclear family as the paradigmatic family form.”).

233. 543 N.E.2d 49, 53-54 (N.Y. 1989) (“In the context of [New York City’s rent control statute], a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence. This view comports both with our society’s traditional concept of ‘family’ and with the expectations of individuals who live in such nuclear units.”).

234. 709 F. Supp. 605, 610 (E.D. Pa. 1989) (“With respect to the plaintiffs in this action, it is clear that they are entitled to family status. The plaintiffs are unmarried but have three natural children. . . . The only thing missing is a marriage certificate.”).

six years” and “together ha[d] raised three children, who are now adults.”²³⁵ If Proposition 8 passed, the Thorons cautioned, their “gay daughter . . . w[ould] lose the right to marry.”²³⁶ The couple then implored the audience not to deny the right to marry to “anyone’s family.”²³⁷

Although *The Thorons* tackled the question of equal rights directly, it did little to counter the Yes on 8 campaign’s implicit endorsement of the nuclear family model. The ad depicted two married parents and referenced their children in multiple ways.²³⁸ The couple’s fear was that Proposition 8 would compromise their family by requiring the law to treat their gay daughter differently than their other children.²³⁹ The Thorons’ immediate focus is on Proposition 8’s effect on their family unit, and (presumably) other nuclear family units like theirs.

Indeed, most of the ads opposing Proposition 8 reflected the nuclear norm by depicting nuclear family vignettes in which extended family members are unseen and rarely discussed.²⁴⁰ Only one ad, *Conversation*, explicitly referenced extended family at all.²⁴¹ In the ad, two women are seated at a kitchen table where they peruse family photographs. The host explains to her guest that one photograph depicts “[her] niece Maria and [Maria’s same-sex] partner, Julie, at their wedding.”²⁴² The niece and her partner are never shown, nor is the audience offered any other depiction of extended family members.²⁴³ Instead, the reference to the extended family serves solely as a conduit to the ad’s discussion of marriage equality more generally.²⁴⁴ In this way, even the No on Prop 8 campaign implicitly validated, and did not challenge, the Yes on 8 campaign’s depiction of nuclear families as the norm, and indeed, as superior to all other family arrangements. The only apparent disagreement between the two camps is whether same-sex couples should be entitled to form marital nuclear families of their own.

In these ways, both sides of the Proposition 8 campaign manifested the resonance of the nuclear family unit in family law and public policy. However, in invoking the gender roles attendant to the nuclear family model,²⁴⁵ it would

235. *The Thorons*, available at <http://www.youtube.com/watch?v=l6dBUCi32c8&eurl> (last visited June 4, 2009).

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Conversation*, *supra* note 217.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. The gendered division of household labor that historically characterized the nuclear family model was, as I have suggested, subtly woven into the fabric of ads such as *Proposition 8 Made Simple*, *It’s Already Happened* and *Where Do Babies Come From?* More directly, many of the Yes on 8 campaign ads invoked tropes of cozy, nuclear family

seem that the Yes on 8 campaign departed from modern family law principles. After all, in recent years, family law purportedly has disavowed the traditional gender roles that have attended marriage in favor of a vision of family life grounded in principles of gender egalitarianism.²⁴⁶ Viewed through this lens, the Yes on 8 campaign's subtle appeal to traditional gender roles might be seen as a retrograde throwback that departs from family law's more progressive influences.

Upon closer examination, however, one could argue that the Yes on 8 campaign's gender subtext is completely consistent with family law's principles. Although family law purports to have abandoned the gender distinctions that historically attended marriage,²⁴⁷ in fact, remnants of these distinctions persist in family law. For example, in recent years, family law has espoused the partnership theory of marriage, which posits spouses as co-equal economic contributors to the household, each entitled to share in the marital property upon divorce.²⁴⁸ However, in practice, the theory often rewards those women "who forego market work and are married to wealthy men."²⁴⁹ In other words, despite its attempt to reconfigure marriage along more egalitarian lines, aspects of family law provide strong incentives for maintaining marriage's traditional gendered division of labor. In this way, the Yes on 8 campaign not only tapped into family law's preoccupation with the nuclear family. The campaign's gender subtext also may be consistent with a gendered subtext that, despite reform efforts, continues to pervade family law.

What is notable about this preoccupation with the nuclear family model (and its attendant gender norms) is the degree to which it is radically out of step with the empirical reality of family life. According to the most recent census, most American families depart from the nuclear family ideal.²⁵⁰ In California,

domesticity, all while suggesting that same-sex marriage would imperil the nuclear unit by challenging parental authority over children.

246. A prominent example of this impulse in family law has been the shift towards a partnership theory of marriage embodied in the rules governing the equitable distribution of marital property upon divorce. See Am. Law Inst., *Principles of the Law of Family Dissolution: Analysis and Recommendations* §4.04 ("[U]se of the term ['partnership'] is metaphorical and the analogy imperfect. It has become a common way, however, by which to describe the central principle that marriage involves the commitment of both spouses' labors, during their marriage, to the family."). On the partnership theory of marriage generally, see Helene S. Shapo, "A Tale of Two Systems": *Anglo-American Problems in the Modernization of Inheritance Legislation*, 60 TENN. L. REV. 707, 722 (1993); Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 44 (1994).

247. See *Orr v. Orr*, 440 U.S. 268, 280 (1979) (striking down an Alabama statute that made alimony available only to wives on the ground that the Constitution could not support a law that assumed that women were consigned to "the home and the rearing of the family," and men to "the marketplace and the world of ideas").

248. Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1225, 1238-40 (describing the rise of the partnership theory of marriage).

249. *Id.* at 1284.

250. Editorial, *The Changing American Family*, N.Y. TIMES, May 18, 2001, at A18. (noting that as of the 2000 Census "fewer than a quarter of the households in this country are

married couples living with children comprise only twenty-seven percent of total households.²⁵¹ Similarly, the nuclear family's starkly gendered division of household labor no longer attends in most families, as many women now maintain paid employment.²⁵² Nevertheless, family law, public policy, and depictions of the family—like those produced in the battle over Proposition 8—all seem to reinforce the notion that the only families worth recognizing and supporting are those who comport with the increasingly elusive nuclear model and its implicit gender roles.²⁵³

B. Echoing Family Law's Construction of the Relationship Between Parents and the State

In addition to tapping into and further entrenching the dominance of the nuclear family as a normative ideal, the Yes on 8 campaign ads also echoed family law's construction of the relationship between parents and the state in ensuring the well-being of children. As any student of family law will tell you, the relationship between children, parents, and the state traditionally has been figured as a triangle.²⁵⁴ At the top point of the triangle is the state. At the bottom two points are parents and children. Implicit in the triangle configuration is the allocation of authority over children between parents and the state.²⁵⁵ Typically, this power is bifurcated along public and private lines.²⁵⁶

made up of nuclear families—23.5 percent to be exact, down from 25.6 percent in 1990 and 45 percent in 1960”).

251. See Demographic Research Unit, *California Current Population Survey Report, Data as of March 2007* tbl.13 (2009), available at http://www.dof.ca.gov/HTML/DEM_OGRAP/ReportsPapers/documents/CPS07_final.pdf.

252. See U.S. Dep't of Labor, Women's Bureau, *Quick Stats on Women Workers, 2008*, available at <http://www.dol.gov/wb/stats/main.htm> (last visited June 2, 2009) (providing statistics on women's employment in the paid labor force).

253. Even George Murdock, who coined the term “nuclear family” in 1949, acknowledged its normative weight, noting that the nuclear family was “the type of family recognized to the exclusion of all others.” *The Changing American Family*, *supra* note 250.

254. See, e.g., ROBERT H. MNOOKIN & D. KELLY WEISBERG, *CHILD, FAMILY, AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW* 795 (5th ed. 2005) (referencing “the triangular relationship between the child, the family, and the state”); Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 833 (2007) [hereinafter Rosenbury, *Between Home and School*] (“Family law in the United States has long embraced the image of a triangle to describe the allocation of legal authority over childrearing.”); Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 435 (2000) (discussing “perpetual stresses along three sides of a triangle with endpoints labeled PCS: Parent, Child, and State”); Barbara Bennett Woodhouse, *Ecogenerism: An Environmentalist Approach to Protecting Endangered Children*, 12 VA. J. SOC. POL'Y & L. 409, 422 (2005) (“As a teacher of constitutional and family law for over fifteen years, I have illustrated the tensions between parents, children and the state with a triangular diagram.”).

255. Woodhouse, *supra* note 254, at 409, 422.

256. Rosenbury, *Between Home and School*, *supra* note 254, at 840 (“[P]arents exercise private power over children, whereas the states exercise public power.”).

Parents exercise almost unfettered authority over children in the home, making such decisions as what the child will eat, with whom she will associate, what she will wear, and when she will go to sleep.²⁵⁷ Unless and until there is a threat of harm to the child, the state has little power to interfere with parental decision-making.²⁵⁸ By contrast, the state exercises authority over children in schools.²⁵⁹ In that venue, the state's authority is almost absolute, and parents have only limited opportunities to object to how the state exercises its authority.²⁶⁰ According to the triangle configuration, the only actors in children's lives are parents and the state, both of whom exert authority over children in their respective zones of home and school. Implicit in this construction are gendered family roles. Until they reach school age, children remain in the home under the primary care of a parent, usually the mother.

The Yes on 8 campaign ads assume, and do not challenge, the accuracy of this construction and the assumptions that undergird it. In reframing the rights rhetoric to focus on individual rights, and parental rights in particular, the campaign accepted unquestioningly the view that parents and the state *are* the only actors in children's lives and that the home and school *are* the only places where childhood is experienced. Indeed, the campaign reduced much of the debate over same-sex marriage to a contest pitting the state's authority to shape school curricula against parental authority to instill particular values within the home.²⁶¹ Additionally, many of the ads, including *It's Already Happened* and *Proposition 8 Made Simple*, implicitly reflect the gendered assumption that women provide care for children within the home.²⁶²

257. Murray, *The Networked Family*, *supra* note 16, at 395 (acknowledging "broad discretion for parental decisionmaking"); see also Elaine M. Chiu, *The Culture Differential in Parental Autonomy*, 41 U.C. DAVIS L. REV. 1773, 1783 (2008) (noting that "parents make countless decisions for their children," including "when and what a child eats, when and how much a child sleeps, where and with whom a child sleeps, how a child dresses, and how a child grooms his hair").

258. Murray, *The Networked Family*, *supra* note 16, at 395-96 ("The state may intervene into the family to usurp parental decisionmaking authority only in limited circumstances, such as abuse, neglect, and abandonment.").

259. Rosenbury, *Between Home and School*, *supra* note 254, at 840 ("[T]he state generally can reach children only when they are at school and thus subject to state educational policies.").

260. See, e.g., *Leebaert v. Harrington*, 332 F.3d 134, 141 (2d Cir. 2003) (declining to recognize "the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be taught"); *Brown v. Hot, Sexy, and Safer Prods.*, 68 F.3d 525, 534 (1st Cir. 1995) (holding that parental rights "do not encompass a broad-based right to restrict the flow of information in the public schools").

261. Interestingly, in responding to the Yes on 8 campaign ads, Equality California, which opposed Proposition 8, did little to disrupt the view that the battle over same-sex marriage was a contest between the state and parents. Equality California responded to claims that state recognition of same-sex marriage would allow the state to challenge parental authority by explaining the legal limits of the state's authority to teach same-sex marriage in schools. See *Prop 8 Has Nothing To Do with Schools*, *supra* note 225.

262. See *It's Already Happened*, *supra* note 148; *Proposition 8 Made Simple*, *supra*

Of course, the reality of family life differs considerably from the law's version of events. Increasing numbers of women work outside the home, requiring alternative childcare arrangements for their children. In fact, empirical evidence unequivocally establishes that parents and the state are not the only actors in children's lives, and that children's lives are not confined to home and school.²⁶³ For example, although the law posits caregiving as a parental enterprise, parents do not provide care to children as "isolated islands."²⁶⁴ Instead, whether parents work outside of the home or not, they routinely rely on a variety of nonparental caregivers for assistance.²⁶⁵

Moreover, adults, whether parents or nonparental caregivers, are not the only actors in children's lives. Other children frequently exert considerable influence and authority in the lives of their peers.²⁶⁶ Similarly, while the law insists that the geography of childhood is limited to home and school, in fact, children routinely spend significant time in spaces between home and school.²⁶⁷ These spaces include extracurricular activities, childcare, and sports, and involve actors, other than parents and teachers, who participate in shaping children's development.²⁶⁸

This account of the reality of children's lives is largely absent in the law and the Yes on 8 campaign's ads. From a legal perspective, nonparental caregivers often are unrecognized. Because parents enjoy almost unfettered authority and privacy to provide care for their children, the law does not take account of *how* parents actually perform this work.²⁶⁹ Parents are free to raise

note 82.

263. See Murray, *The Networked Family*, *supra* note 16, at 390 ("The reality of caregiving, however, is quite different from its legal construction. In actuality, parents routinely rely on those outside of the nuclear family to help them discharge their caregiving responsibilities."); Rosenbury, *Between Home and School*, *supra* note 254, at 841 (citing social science evidence asserting that childhood is experienced in sites other than home and school).

264. Murray, *The Networked Family*, *supra* note 16, at 387.

265. *Id.* at 390-91 (documenting the diversity of caregiving arrangements).

266. See Rosenbury, *Children as Subjects*, *supra* note 208, at 21 ("Most saliently, children's relationships with other children can at times be more influential in shaping children's daily realities than their relationships with parents, teachers or other adults."); Emily Buss, *The Adolescent's Stake in the Allocation of Educational Control Between Parents and State*, 67 U. CHI. L. REV. 1233, 1233 (2000) ("What matters to adolescent development is relationships with peers, because it is largely through these relationships that they pursue the difficult and important task of identity formation—the sorting and selecting of values, beliefs, and tastes that will define their adult selves").

267. Rosenbury, *Between Home and School*, *supra* note 254, at 841 ("[S]ocialization also takes place in many other spaces [beyond home and school]").

268. *Id.* (identifying "public spaces such as municipal playgrounds, sports fields, and parks, as well as private spaces like churches, clubs, day care centers, and other locations of various after-school instruction" as sites of child socialization).

269. Murray, *The Networked Family*, *supra* note 16, at 396 ("[P]arental rights—and the deference owed their exercise—create a 'black box' in which caregiving duties are accomplished. Within the black box of family privacy, the family's quotidian functions and

their children on their own, with help from family, or by employing paid caregivers.²⁷⁰ In any case, the law does not register *how* the caregiving is performed, unless and until the circumstances threaten the health and safety of the child involved.²⁷¹ By virtue of the privacy that parental rights create, nonparental caregivers are rendered invisible to the law.²⁷² It is as if their legal identities are “covered” by the legal identity of parents and by the rights, privacy, and authority to which parents are entitled.²⁷³

Similarly, the law infrequently acknowledges the degree to which other children exercise influence in the lives of their peers.²⁷⁴ When it does acknowledge this truth, it often is to blunt this peer influence by empowering parents or the state to exercise greater influence over children’s lives.²⁷⁵ This dynamic was subtly depicted, albeit inadvertently, in *Where Do Babies Come From?* Recall that upon learning that Megan had offered an account of marriage and the origin of children, Father B considers limiting his daughter’s contact with Megan and her family, effectively curbing their influence.²⁷⁶ In the ad, this episode plays out with little fanfare or debate because the ad assumes parental capacity to limit undue peer influences. The autonomy that privacy provides vests parents with authority to keep third parties out, including their children’s peers.²⁷⁷

Of course, family law’s understanding of the family is not limited to the demography of family life. It also extends to the geography of the family and its members. Just as it fails to acknowledge these other realities of family life and childhood, law also does not account for the sites of child socialization that exist between home and school.²⁷⁸ Instead, authority over children in these

caregiving decisions are rendered invisible.”).

270. *Id.* at 396 (“Parents may elect to perform their caregiving duties alone, or alternatively, they may rely on assistance from other caregivers. In either case, the law is oblivious to the precise nature of these caregiving decisions.”).

271. *Id.* (“Caregiving is presumed to be a parental enterprise, and the law registers only whether the parent utterly has failed to discharge this responsibility—it is unconcerned with how the responsibilities actually are performed.”).

272. *Id.* at 398 (“The reality of how families actually perform their caregiving—and the nonparental caregivers that participate in this endeavor—remains a private matter.”).

273. *Id.* at 397-98 (arguing that nonparental caregivers “are covered by the legal identity of parents, who have the rights and responsibilities of caregiving and thus are the only caregivers whom the law recognizes”).

274. Rosenbury, *Children as Subjects*, *supra* note 208, at 13-17 (noting the limited ways in which the state acknowledges children’s relationships with other children).

275. *Id.* at 14-17 (discussing efforts to limit peer influences among youth, including anti-gang legislation and laws isolating pregnant teens).

276. *Where Do Babies Come From?*, *supra* note 181.

277. Rosenbury, *Children as Subjects*, *supra* note 208, at 17-18 (discussing law’s conferral to parents of exclusive decision-making authority for their children).

278. Rosenbury, *Between Home and School*, *supra* note 254, at 841 (noting “the failure of most family law scholars to consider any spaces of child socialization other than home and school”).

spaces is characterized as either an extension of parental authority or as an extension of state authority over children in school.²⁷⁹ This configuration makes clear that on multiple levels, the law allocates authority over children in a strict binary fashion. It is *either* vested in parents *or* the state—each of which exercises almost unfettered autonomy in its respective domain, home *or* school.

By emphasizing the threat of state interference with parental authority via school curricula, the Yes on 8 campaign taps into law's construction of parenthood and the bifurcation of authority over children between parents and the state. As such, the campaign does more than simply redefine the terms of the same-sex marriage debate. It further entrenches law's reductive view of children's lives, leaving little space to contemplate the multiple ways in which families' quotidian lives frequently depart from this crabbed legal vision.

Positing the State as an Antagonist or as a Non-entity

The Yes on 8 campaign's unquestioning acceptance of the division of authority between parents and the state accords with another pervasive family law theme: framing the relationship between parents and the state either as one of antagonistic intrusion and intervention or as one of detachment and disinterest. Put differently, by narrowly reading children's lives as bifurcated between parental authority in the home and state authority in schools, law constructs another binary in which to frame the parent-state relationship: the state is either detached from the home and parental authority, or it has usurped parental authority in the home, passing judgment on parental fitness and the safety of children. It is either an antagonist in the lives of families, or it is a non-entity.

The antagonistic account of the state and its relationship to parents is prevalent in family law.²⁸⁰ Consider the example of child welfare and foster care. When parents default on their parental responsibilities, the state, under the auspices of the child welfare system, exercises its *parens patriae* authority to

279. *Id.* at 834-35 (“Either the childrearing that takes place in [these interstitial spaces] is ignored altogether, or it is seen as an extension of the childrearing that takes place in either home or school, obscuring the distinct childrearing that can be performed between home and school by individuals other than parents, state actors, or children themselves.”).

280. *See* Chiu, *supra* note 257, at 1787 (noting that the state “set[s] the rules” for caregiving and “exacts severe penalties in the child welfare system upon parents who violate the rules”). Some have argued that this model of the parent-state relationship is likely to be experienced by those families who do not embody the normative ideal of the financially independent nuclear family. *See generally* MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 144 (1995) (“[T]he characterization of some family groupings as deviant legitimates state intervention and the regulation of relationships well beyond what would be socially tolerated if directed at more traditional family forms.”); DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002) (linking the high rates of state intervention in African-American families with deeply entrenched patriarchy and racism that devalue black motherhood and define black childrearing patterns as deviant).

intervene and, if necessary, remove the child from a dangerous domestic situation.²⁸¹ Once the child has been removed from the parent's authority, she is under the authority of the state.²⁸² At this point, the state, through agents and institutions like foster parents or group homes, will provide for the child's caregiving needs.²⁸³

Although parental rights are not immediately terminated in the child welfare context, day-to-day parental decision-making and authority are sharply curtailed and these responsibilities are assumed by state agents.²⁸⁴ Parents may eventually resume authority over their children but only after the state is satisfied that the children will not be endangered while in the parents' care.²⁸⁵ In this way, the child welfare system is a context where the relationship between parents and the state is explicitly one of confrontation and opposition.²⁸⁶

But even in situations where the state does not pass judgment on the propriety of parental caregiving and decision-making, the relationship between parents and the state is routinely figured as antagonistic and troublesome. The Yes on 8 campaign's rhetoric of state intrusion into the home via the schools is one example, but others also illustrate this point. Consider the debate over publicly-funded childcare. Although feminists have argued for many years that public support for childcare is necessary for women to achieve economic equality in society,²⁸⁷ efforts to create state-operated childcare facilities for working mothers have been roundly denounced.²⁸⁸ What explains the resistance to the prospect of widely available, publicly-supported childcare? Although many have argued that such measures are cost-prohibitive,²⁸⁹ others worry less

281. See Clare Huntington, *Mutual Dependency in Child Welfare*, 82 NOTRE DAME L. REV. 1485, 1489-90 (2007) (describing the operation of the child welfare system).

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. See Chiu, *supra* note 257, at 1787-89 (describing the conflict between parents and the state in the child welfare system).

287. Heather S. Dixon, *National Daycare: A Necessary Precursor to Gender Equality with Newfound Promise for Success*, 36 COLUM. HUM. RTS. L. REV. 561, 564 (2005) ("[W]omen need affordable and reliable daycare in order to attain true equality to men."); Nancy E. Dowd, *Work and Family: Restructuring the Workplace*, 32 ARIZ. L. REV. 431, 431 (1990) (explaining that, absent public support for childcare, women will continue to lag behind men in the workplace); Deborah Dinner, *Transforming Family and State: Women's Vision for Universal Childcare, 1966-1971* (unpublished manuscript available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=582001) (describing feminist support for universal daycare as essential for women's equality).

288. See Dinner, *supra* note 287 (documenting conservative concerns with the prospect of universal daycare, including the view that such arrangements would usurp an essential maternal function, imperiling the nuclear family); see also Phyllis Schlafly, *How Feminists Want to Change Our Laws*, 5 STAN. L. & POL'Y REV. 65, 71 (1994) (characterizing feminist support for state-supported daycare as "playing the victim").

289. Shikha Dalmia & Lisa Snell, *Universal Preschool Is Inviting Universal Disaster*,

about the burden to the taxpayer and focus instead on the dangers inherent in allowing the state to “raise your children.”²⁹⁰ Publicly supported childcare, it would seem, is merely another avenue for allowing the state to intrude upon family privacy and usurp parental authority.

The alternative to this account of antagonistic state interference is the model of the state and families as detached from families. This model also is prevalent throughout family law, primarily in its understanding of parental rights and its privileging of the autonomous nuclear family.²⁹¹ As noted earlier, because parents exercise almost unlimited authority over children in the home, the state neither registers nor supervises *how* caregiving is discharged.²⁹² Public policy efforts aimed at the family reflect the state’s detachment from the reality of family caregiving. Public policy efforts intended to support family caregiving are geared primarily towards parents, who typically are the only caregivers the law acknowledges.²⁹³ There are few attempts to support caregiving that occurs outside of the parent-child relationship or to assist parents in constructing and maintaining the network of non-parental caregivers on whom they rely.²⁹⁴

Although the Yes on 8 campaign reifies the view that the relationship between parents and the state is either one of detachment (functional families) or antagonism (dysfunctional families), in reality, the interests of parents and the state in securing the well-being of children are not always divergent. In fact, they often are aligned.²⁹⁵ But because the relationship is framed in these binary terms, there are few opportunities to consider more ameliorative interactions and interventions between the two.

Now, more than ever, the increasing pressures of family life require a more

S.F. CHRON., Dec. 4, 2005 (denouncing universal preschool as unduly cost-prohibitive).

290. Karen Holgate, *Preschool for All: Will It Really Help Children, Is It Worth the Cost?*, California Family Council Briefing, Mar. 2006, available at http://www.californiafamily.org/Site/isBrief_Detail.asp?PID=79 (arguing that public support for daycare will “fund someone else’s idea of how to raise your child”). The view that state-supported daycare is tantamount to allowing the state to raise your child stymied women’s progress in the workforce and fueled anti-Communist fervor during the Cold War. During this period, Soviet women, many of whom worked outside of the home and relied on state-funded daycare, were compared unfavorably to American housewives who remained in the home to care for their children. See Melissa E. Murray, *Whatever Happened to G.I. Jane?: Citizenship, Gender, and Social Policy in the Postwar Era*, 9 MICH. J. GENDER & L. 91, 124 (2002) (noting that Cold War-era Soviet women were portrayed as “holding masculine jobs and consigning their children to state-operated childcare facilities”).

291. Chiu, *supra* note 257, at 1792 (noting that for a majority of parents, “there is very little interference by the state in their lives. From the moment of their children’s births, they exercise tremendous authority over their children”).

292. *Id.*

293. Murray, *The Networked Family*, *supra* note 16, 405-09 (discussing parenting and caregiving benefits).

294. *Id.*

295. Huntington, *supra* note 281, at 1511 (arguing that for many families, engagement with the state can be a useful means of preserving family autonomy and self-determination).

facilitative and ameliorative relationship between parents and the state in order to ensure the successful discharge of caregiving responsibilities and the well-being of children.²⁹⁶ Although the traditional family law model has emphasized state detachment from functioning families and antagonistic intervention into dysfunctional families, in fact, *all* families could benefit from increased public support for caregiving. This could mean more state support for childcare—or even universal childcare and healthcare for families. Alternatively, it could mean offering resources, assistance, and intervention to fragile families *before* episodes of parental default threaten harm to children.²⁹⁷

Reframing the relationship between parents and the state as complementary, rather than adversarial or utterly detached, might permit more holistic interventions into fragile families and functioning families alike.²⁹⁸ In this way, state intervention could be more therapeutic and preventative, rather than intrusive, stigmatizing, and punitive. The Yes on 8 campaign accepts unquestioningly law’s vision of the family, and in so doing, further ossifies this account of the relationship between parents and the state, impeding important opportunities to imagine more productive interactions between these two entities.

C. Marriage Myopia

This last point suggests the challenges facing modern families, and in so doing segues neatly into the final family law theme manifested by the Yes on 8 campaign’s discourse. As this Article has discussed, there are issues of importance that concern families and should concern all of us. Yet, these important issues remain on the backburner because our attention and interventions remain narrowly focused on marriage. Even when we engage other family law questions like parental rights and state intervention into the family, as the Yes on 8 campaign did, it often is in the larger context of marriage and preserving a traditional view of that institution.

The Yes on 8 campaign’s focus on marriage is unsurprising. After all, the ads were aired in support of a ballot initiative to amend the state constitution to limit marriage to opposite-sex couples. Even as it discussed these other family law issues, the campaign focused on marriage because marriage was *the* issue. But that is beside the point because, in truth, marriage is always *the* issue—even when it is not.

Consider the 1996 efforts to address the perceived failings of public assistance. Marriage promotion efforts were central to the effort to end “welfare

296. *Id.*

297. *Id.* at 1518-19 (arguing for preventative interventions into the family, rather than more costly “back end” interventions like foster care and removal).

298. *Id.*

as we know it.”²⁹⁹ Although the reform efforts ostensibly were focused on facilitating the transition from welfare to regular employment and economic independence, marriage was offered as an effective way to privatize economic dependency, eliminating the need for public support and intervention.³⁰⁰

The events of November 4, 2008 also illustrate the point. On the Arkansas ballot that day was Proposed Initiative Act No. 1, which prohibited “an individual who is cohabitating outside of a valid marriage” from adopting or serving as a foster parent.³⁰¹ By its terms, the initiative prohibited all unmarried persons from serving as an adoptive or foster parent. However, public discussion of the initiative focused on its intent to thwart a “gay agenda” aimed at furthering gay civil rights, including marriage rights. Accordingly, when the initiative was passed by a majority of Arkansans, few focused on its effect in sharply limiting the state’s pool of prospective adoptive and foster parents.³⁰² Instead, the initiative was discussed in the context of Proposition 8 and other attempts to limit same-sex marriage.³⁰³ Again, marriage was *the* issue, even when other important family issues were at stake.

Historian John D’Emilio reminds us that although marriage dominates our social discourse about the family, in fact, marriage (as it has traditionally been practiced) is on the wane.³⁰⁴ As previously discussed, the gender norms with which marriage historically has been associated have been challenged as more women enter the workforce and build careers outside of the home.³⁰⁵ In this

299. William J. Clinton, Remarks on Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and an Exchange With Reporters, 2 PUB. PAPERS 1325, 1327 (Aug. 22, 1996) (“Today we are ending welfare as we know it.”).

300. See Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform’s Marriage Cure as the Revival of Post-Bellum Control*, 93 CAL. L. REV. 1647, 1650-53 (2005) (describing marriage promotion initiatives).

301. See Proposed Initiative Act No. 1, available at <http://arkansasmatters.com/content/fulltext/?cid=131431> (last visited June 4, 2009).

302. Savage, *supra* note 4 (noting with dismay the effects of the initiative in Arkansas).

303. *Id.* (“While the measure bans both gay and straight members of cohabitating couples as foster or adoptive parents, the Arkansas Family Council wrote it expressly to thwart ‘the gay agenda.’”); see also Bonnie Miller Rubin, *Adoption Ban Targets Gay Couples, Critics Say*, L.A. TIMES, Dec. 4, 2008, at A15 (“Child welfare experts say that the initiative was ostensibly written to prohibit any unmarried couples from adopting or becoming foster parents, but that the measure’s real objective is to bar same-sex couples from raising children—even if it means that youths in need of homes have to wait longer.”).

304. John D’Emilio, *The Marriage Fight Is Setting Us Back*, Gay and Lesbian Review, available at <http://www.glreview.com/issues/13.6/13.6-demilio.php> (last visited Jan. 24, 2009); see also Angela P. Harris, *Loving Before and After the Law*, 76 FORDHAM L. REV. 2821, 2840 (2008) (“[M]arriage is a declining institution”); Rachel F. Moran, *How Second-Wave Feminism Forgot the Single Woman*, 33 HOFSTRA L. REV. 223, 283 (2004) (reporting statistics documenting marriage’s decline).

305. See *supra* note 252 and accompanying text. Of course, this does not mean that marriage no longer has gendered aspects or content. See Herma Hill Kay, “*Making Marriage and Divorce Safe for Women?*” Revisited, 32 HOFSTRA L. REV. 71, 89-91 (2003) (arguing that the law of marriage is “a codification of a society’s attitudes about women”); Laura A.

way, the Yes on 8 campaign's subtle (and not-so-subtle) invocations of gender norms represent a rear-guard effort to protect and defend a model of relationship that is in decline, even among heterosexual couples.

In addition to the renegotiation of gender roles within marriage, marriage itself is being renegotiated. It no longer is a life-long enterprise. Divorce and remarriage are now commonplace, as are the blended families that occur in their wake.³⁰⁶ Some couples choose not to marry, and some married couples choose not to have children within marriage, redefining an institution that was once heralded as the licensed site for procreation.³⁰⁷ In all, family life is changing, but family law and the gay rights movement remain fixed on marriage.

Focusing solely on marriage and access to marriage gives the false impression that these are the only problems that family law needs to resolve.³⁰⁸ In truth, our family lives no longer revolve exclusively around the marital nuclear family—if they ever did.³⁰⁹ Childhood is subject to considerably more influences than those offered within the domains of home and school. And, more and more, families require greater public support for their caregiving work. The focus on marriage belies these truths and stymies efforts to address these issues forthrightly. Moreover, the myopic focus on marriage further entrenches the idea that marriage is the cure for what ails us, that the family *should* be autonomous, independent, and detached from the state and public support for caregiving.

In the months and years ahead, we will no doubt revisit the Yes on 8 campaign as the debate over same-sex marriage continues. But it is important to understand that, as with the Yes on 8 campaign, the issue of same-sex marriage goes well beyond the surface question of whether we ought to allow

Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 219 (2007) (“[T]he practice of marriage, as shaped by the state, plays a vital role in maintaining gender inequality.”).

306. See, e.g., STEPHANIE COONTZ, *THE WAY WE NEVER WERE*, 183 (1992) (describing the changes in family forms in the twentieth century United States); Nancy E. Dowd, *Law, Culture, and the Family: The Transformative Power of Culture and the Limits of Law*, 78 CHI.-KENT L. REV. 785, 789-90 (2003) (“The rates of nonmarital cohabitation and divorce are significant. Marriage is no longer practiced by many as a lifelong partnership, nor is it the only form of committed partnership, and the frequency of more than one marital partner or committed partner over a lifetime is on the rise. Step or blended families are another related part of this picture.”); ARTHUR J. NORTON & LOUISE F. MILLER, U.S. DEPT. OF COMMERCE, *MARRIAGE, DIVORCE, AND REMARRIAGE IN THE 1990’S* 1 (1992) (“Between the late 1960’s and 1980, the divorce rate doubled, reaching a level where at least 1 out of 2 marriages was expected to end in divorce.”).

307. Murray, *Strange Bedfellows*, *supra* note 209, at 1270 (discussing marriage’s procreative purpose).

308. See generally NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008) (urging a shift from an exclusive focus on marriage to family law reform more generally).

309. See generally COONTZ, *supra* note 306 (debunking the myth of the nuclear family as an historical artifact).

all couples the opportunity to wed. Questions about family, parenthood, caregiving, and the interaction between the state and the family are inextricably intertwined in any conversation about the role and meaning of marriage in society. As such, these subjects—as much as the right to marry—should be the focus of our energies and attention.

V. CONCLUSION

Although this account of the Yes on 8 campaign appears replete with lost opportunities to counter the Yes on 8 campaign and advance family law towards a more realistic and pluralistic account of family life, it is important to locate the campaign in the broader effort to secure gay civil rights. Viewed in this context, the story of the Yes on 8 campaign is perhaps more optimistic than the granular analysis of the campaign suggests.

At bottom, the Yes on 8 campaign's successful reframing of the same-sex marriage debate is a story about the privatization of disgust and distaste. To understand what I mean by this, it is important to compare briefly the differences between the Yes on 8 campaign and the campaign in support of Amendment 2, which was enacted by Colorado voters in 1992.³¹⁰ By its terms, Amendment 2 denied local communities the right to pass laws prohibiting discrimination on the basis of sexual orientation.³¹¹ In essence, it was a law that allowed individuals to express their disgust and distaste for homosexuality publicly by removing anti-discrimination protections for gays and lesbians. By contrast, the Yes on 8 campaign is notable in that while it sought to rescind a civil right that had been conferred to same-sex couples, it did not express publicly distaste for gays and lesbians. By this I mean that the campaign's opposition to same-sex marriage was not figured in the language of discrimination or distaste, as was the case in the Amendment 2 campaign.³¹² Instead, the Yes on 8 campaign consciously invoked individual rights, and more importantly, the space to exercise these rights free of state interference. Essentially, the Yes on 8 campaign circled the wagons and attempted to shore up protections for the family and the home—*private* spaces where dissenting views may be freely espoused. In this way, the Yes on 8 campaign is, in part, a campaign about defending opposite-sex marriage and parental authority to inculcate a traditional view of marriage to children. But it should also be understood as a broader effort to protect and defend the home and the family as private spaces where anti-gay (or pro-traditional family) sentiments may be

310. Amendment 2 was found unconstitutional by the United States Supreme Court. *Romer v. Evans*, 517 U.S. 620, 635-36 (1996).

311. *Id.* at 624.

312. In the campaign literature circulated on behalf of Amendment 2, proponents of the measure claimed that gays and lesbians ate feces and drank blood. See MARTHA NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME AND THE LAW* 150 (2004) (describing literature that was circulated in favor of Amendment 2).

voiced without fear of censure or state intervention.

On some level, this reading of the campaign and its broader implications may be alarming to some—the privacy of the home and family may be used to shelter anti-gay sentiment.³¹³ However, it also suggests how much has changed. Even though Proposition 8 prevailed at the ballot box, the terms on which it won make clear that the debate over same-sex marriage (and gay civil rights) is fundamentally different. In campaigning for Proposition 8, the Yes on 8 campaign sounded a retreat from the public common to the privacy of the home and family.³¹⁴ In this way, its invocation of individual rights and parental rights is more than just a new development in the rhetoric of the same-sex marriage debate. It is an implicit acknowledgement that those who are opposed to gay civil rights are, literally and figuratively, losing ground.³¹⁵

313. This concern about the implications of family privacy has been voiced in other contexts. Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1020 (1984) (“The rhetoric of privacy . . . reinforces a public/private dicotomy [sic] that is at the heart of the structures that perpetuate the powerlessness of women.”); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 981-82 (1991) (arguing that the expectation of family privacy has impeded state intervention to curb domestic violence).

314. This is not to say that discrimination against sexual minorities has been completely eliminated. *See, e.g.*, *Pietrangelo v. Gates*, 129 S. Ct. 2763 (2009) (denying a writ of certiorari in a challenge to the federal “Don’t Ask, Don’t Tell” policy).

315. *See* Frank Rich, *The Bigots’ Last Hurrah*, N.Y. TIMES, Apr. 19, 2009, at A10.