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

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Abstract

On November 4, 2008, 52% of Californians voted for Proposition 8, a ballot initiative amending the state constitution to eliminate same-sex marriage rights. In the weeks and months since the election, there have been many explanations for Proposition 8’s success, including the impact of Mormon money and minority homophobia. What has been neglected in the discussion is some analysis of the way in which the Yes on 8 campaign reframed the debate over same-sex marriage from an anti-discrimination/equal rights discourse to one that emphasized the threat of state imposition on individual rights, including parental rights. Revealing the way in which the campaign focused on the threat of state interference with parental rights offers a more nuanced account of Proposition 8’s success. It also says much about the legal and social construction of the family and our understanding of the relationship between parents and the state in ensuring the well-being of children. By tapping into embedded cultural and legal tropes about the family and about the relationship between parents and the state, the campaign also can be understood as a manifestation of family law’s characterizations of the family and the state.

INTRODUCTION

On November 4, 2008, 52.47% of Californians voted to amend the state

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PROPOSITION 8

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.”

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. 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. Others looked to the Mormon Church, which was identified as a critical source of funding and other support for the Yes on 8 campaign. In short, in most of the initial media coverage of Proposition 8, its success has been attributed to a combination of Mormon money and minority

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3 Steve Lopez, Needed: A Black Elton John, L.A. Times, Nov. 12, 2008, at 1 (“[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., Jan. 7, 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? (2009) at 9-12, http://www.thetaskforce.org/downloads/issues/egan_sherrill_prop8_1_6_09.pdf (last visited March 8, 2009) (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 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 (asserting that “the Mormon Church largely bankrolled Proposition 8”); Hendrik Hertzberg, Eight is Enough, 84 THE NEW YORKER, 1, 27 (2008) (noting that “[o]f 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”).
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 essay argues, the campaign reframed the same-sex marriage debate from a question of equal rights for same-sex couples to one of state infringement of 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, the rights that required protection, were not the civil rights of gays and lesbians. Instead, the campaign argued that state recognition of same-sex marriage implicated another set of rights—the individual rights of the rest of the 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. 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 Essay proceeds in three parts. Part I 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 II turns to the Yes on 8 campaign. By analyzing a selection of

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5 More recently, some have criticized the campaign against Proposition 8 as poorly run and flat-footed in its responses to the Yes on 8 campaign. See Ehrenreich, supra note X; John Wildermuth, Proposition 8 Opponents Unhappy With Campaign Leaders, S.F. CHRON., Jan. 25, 2009, at B1.
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 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 courthouses and legislatures to the ballot box. Further, as Part III 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.

6 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 legislature expanded civil marriage to include same-sex couples. See Varnum v. Brien, 07-1499 (Iowa Apr. 3, 2009) (available at http://www.judicial.state.ia.us/wfData/files/Varnum/07-1499.pdf); 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.COM, Nov. 5, 2008, 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 1, which prohibits unmarried, cohabiting couples from adopting children or serving as foster parents. Although the measure applies to all unmarried couples, it was specifically intended to thwart the “gay agenda.” Id.
I. 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.\(^7\) There, the court concluded that restricting civil marriage to opposite-sex couples violated the California Constitution.\(^8\)

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 towards 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.”\(^9\) In 1977, in the wake of the Stonewall riots,\(^10\) legal challenges to marriage laws in other jurisdictions,\(^11\) and the perceived threat that the Equal Rights Amendment (ERA) would permit same-sex marriage,\(^12\) the legislature revised the state’s marriage laws to include gender-specific language and provisions limiting civil marriage to opposite-sex couples.\(^13\) As the legislative history makes clear, the legislature, fearing

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\(^7\) In re Marriage Cases, 43 Cal. 4th 757 (2008); Laurie Goodstein, California, A Line in the Sand For Same-Sex Marriage Foes, N.Y. TIMES, Oct. 27, 2008 at A12.

\(^8\) In re Marriage Cases, 43 Cal. 4th at 830-31, 855-56; see also Melissa Murray, Equal Rites and Equal Rights, 96 CAL. L. REV. 1395, 1396-99 (2008) (discussing In re Marriage Cases).


\(^12\) 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).

\(^13\) 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
that the statutory language was unclear, enacted the provisions specifically “to prohibit persons of the same sex from entering lawful marriage.”  

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. 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 62 some of the privileges and benefits of civil marriage.

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. 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. 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.” The initiative, known alternately as the Knight Initiative, the California Defense of Marriage Act, and Proposition

making that contract is necessary.”); see also CA 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.”).


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


19 CAL. FAM. CODE § 308.5 (2000).
22, was passed by 61.4% of California voters.\textsuperscript{20}

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.\textsuperscript{21} Prior to AB 205, the state’s domestic partnership scheme offered same-sex couples only limited rights and privileges, such as public registry and hospital visitation privileges.\textsuperscript{22} AB 205 was intended to expand domestic partnership privileges so that domestic partners enjoyed almost all of the privileges and rights of spouses.\textsuperscript{23} Additionally, the law recognized similar statuses, such as civil unions, created in other states.\textsuperscript{24}

These significant changes to the domestic partnership scheme were denounced almost immediately by opponents of same-sex marriage. The expanded domestic partnership scheme, they argued, was indistinguishable from marriage, and thus manifested the state’s intent to redefine marriage over the objections of a majority of California voters.\textsuperscript{25} They filed lawsuits challenging the validity of AB 205 on the ground that it impermissibly amended Proposition 22.\textsuperscript{26}

The consolidated lawsuits failed at both the trial court and intermediate appellate court.\textsuperscript{27} In the latter forum, the court concluded that although domestic partnerships offered some of the same rights and privileges of

\begin{itemize}
\item \textsuperscript{21} California Domestic Partner Rights and Responsibilities Act, A.B. 205. Legislative Counsel of California. 2003–2004 Session.
\item \textsuperscript{22} 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).
\item \textsuperscript{23} 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, 128 Cal. App. 4th 14, 30 (2005) (enumerating the distinctions between marriages and domestic partnerships).
\item \textsuperscript{24} CAL. FAM. CODE § 299.2 (2005).
\item \textsuperscript{25} Knight v. Superior Court, 128 Cal. App. 4th 14, 17-18 (2005).
\item \textsuperscript{26} Id. at 17-18.
\item \textsuperscript{27} Id. at 31; Knight v. Schwarzenegger, 2004 WL 2011407 (Cal. Superior Sept 8, 2004), at *9.
\end{itemize}
marriage, significant differences continued to distinguish the two statuses from one another.\textsuperscript{28} Accordingly, the court concluded that AB 205 did not effectively repeal Proposition 22.\textsuperscript{29}

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.\textsuperscript{30} Over 4,000 same-sex couples were married in San Francisco before the California Supreme Court ended the policy on March 11, 2004.\textsuperscript{31} 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.\textsuperscript{32}

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 \textit{In re Marriage Cases}, which challenged, \textit{inter alia}, the constitutionality of Proposition 22.\textsuperscript{33} 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.\textsuperscript{34}

\textsuperscript{28} \textit{Knight v. Superior Court}, 128 Cal. App. 4th 14, 30 (2005) (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”).

\textsuperscript{29} \textit{Id.} at 31.


\textsuperscript{32} Jesse McKinley, \textit{California Ruling on Same-Sex Marriage Fuels a Battle, Rather Than Ending It}, \textit{N.Y. Times}, May 18, 2008, at A18 (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”).

\textsuperscript{33} \textit{In re Marriage Cases}, 43 Cal. 4th 757 (2008).

\textsuperscript{34} \textit{Id.} at 780 (noting that the question presented to the Court was “whether . . . the failure to designate the official relationship of same-sex couples as marriage violate[d] the California Constitution”).
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.\(^{35}\) Instead, the court was charged with determining whether California was required to offer same-sex couples both the substance and form of marriage.\(^{36}\) 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.\(^{37}\)

In its lengthy decision, the court concluded that the California Constitution required, as a matter of equal protection and substantive due process, that same-sex unions be denominated as marriages.\(^{38}\) The “separate but equal” domestic partnership scheme risked characterizing same-sex couples and their relationships as inferior to opposite-sex relationships.\(^{39}\) As such, California became the second state in the nation to expand civil marriage to include same-sex couples.\(^{40}\)

Even before the court issued its decision in *In re Marriage Cases*, conservative groups opposed to same-sex marriage began circulating initiative petitions to forestall any attempt by the court to redefine marriage in more expansive terms.\(^{41}\) One such petition, titled the “California Marriage Protection Act,” gathered an estimated 764,063 valid signatures.

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\(^{35}\) See Murray, *Equal Rites*, supra note X, 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.”).

\(^{36}\) *In re Marriage Cases*, 43 Cal. 4th at 780.

\(^{37}\) *Id*.

\(^{38}\) *Id*. at 830-31, 854.

\(^{39}\) *Id*. at 831 (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”).

\(^{40}\) Massachusetts had been the first state to do so in 2003. *Goodridge v. Dept' 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 the state’s civil union law, ruling that same-sex couples had a constitutional right to marry. *Kerrigan and Mock v. Connecticut Dep’t of Pub. Health*, 957 A.2d 407, 481 (Conn. 2008). In April 2009, the Iowa Supreme Court held state laws limiting marriage to opposite-sex couples unconstitutional, while the Vermont legislature voted to expand civil marriage to include same-sex couples. *See supra note X.*

qualifying for the November 4, 2008 ballot as Proposition 8.\footnote{John Wildermuth, \textit{State Measures Get Official Ballot Numbers}, S.F. CHRON., June 28, 2008, at B2.} 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.\footnote{The proposed amendment provided that “only marriage between a man and a woman is valid or recognized in California.” Protect Marriage, About Prop 8 http://www.protectmarriage.com/about (last visited Jan. 7, 2009).} 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.\footnote{See Maura Dolan, \textit{Gay Rights 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, \textit{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).} It was passed by 52% of California voters.\footnote{See California Secretary of State, Election Night Results (available at http://vote.sos.ca.gov/Returns/props/map19000000008.html). The validity of Proposition 8 continues to be debated. On November 19, 2008, the Court accepted three lawsuits challenging Proposition 8 but denied requests to stay its enforcement. \textit{See} Judicial Council of California, \textit{California Supreme Court Takes Action on Proposition 8}, available at http://www.courtinfo.ca.gov/presscenter/newsreleases/NR66-08.PDF (last visited February 27, 2009). Oral arguments were heard on March 5, 2009, and a decision is expected within ninety days of oral argument.}

This section is intended to highlight the back-and-forth exchanges between the courts, the legislature, and local officials, and between the proponents and opponents of same-sex marriage. It is not intended to be an exhaustive account of the debate over same-sex marriage in California. As the subsequent Part demonstrates, understanding these dynamics is important for understanding the tenor of the Yes on 8 campaign.

\section*{II. 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.\footnote{See Jessica Garrison, \textit{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, \textit{Ban on Gay Marriages Trailing in State Poll}, S.F. CHRON.,} The electoral winds favored presidential
candidate Barack Obama, whose broad appeal was expected to generate massive voter turnout.\textsuperscript{47}

In addition to the dynamics of the national election, the Supreme Court’s decision in \textit{In re Marriage Cases} squarely framed same-sex marriage as a civil rights issue.\textsuperscript{48} 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.\textsuperscript{49} Indeed, the decision took the unprecedented step of denominating gays and lesbians a suspect class, who, in the manner of racial and ethnic minorities, were entitled to the most rigorous constitutional scrutiny.\textsuperscript{50} Consequently, being in favor of same-sex marriage meant that you were in favor of civil rights and equality. Opposing same-sex marriage meant that you were a bigot.

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.\textsuperscript{51} The strategy was relatively simple: the campaign

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\item[48] Throughout its decision, the Court referenced precedents like \textit{Perez v. Sharp} and \textit{Loving v. Virginia}, both of which struck as unconstitutional state bans on interracial marriage. See, e.g., \textit{In re Marriage Cases}, 43 Cal. 4th at 781, 833. In addition, 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 \textit{Sweatt v. Painter} and \textit{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 \textit{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); \textit{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).

\item[49] \textit{In re Marriage Cases}, 43 Cal. 4th at 830.

\item[50] \textit{Id.} at 844 (“The strict scrutiny standard therefore is applicable to statutes that impose differential treatment on the basis of sexual orientation.”).

\item[51] According to campaign filings, the Yes on 8 campaign spent over $20 million on media expenditures. The bulk of this spending was for television advertising. See 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, \textit{New Reports Detail Prop 8 Expenditures}, BAY AREA REPORTER ONLINE, Feb. 5, 2009, available at
\end{footnotes}
had to make opposition to same-sex marriage appear less like homophobia and bigotry and more like reasonable dissent.\textsuperscript{52} 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.\textsuperscript{53}

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.\textsuperscript{54} 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 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.\textsuperscript{55} Similarly, in the 2000 case \textit{Boy Scouts of America v. Dale},\textsuperscript{56} the Boy Scouts


\textsuperscript{53} 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, \textit{Inclusion, Accommodation, and Recognition: Accounting for Differences Based on Religion and Sexual Orientation}, \textit{32} HARV. J. L. & GENDER (forthcoming 2009).

\textsuperscript{54} Frank Schubert & Jeff Flint, Case Study, \textit{Passing Prop 8}, CAMPAIGNS & ELECTIONS, Feb. 2009, at 44.


\textsuperscript{56} 530 U.S. 640 (2000).
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. 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 founders’ religious beliefs. 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 subsections that follow provide analyses of a selection of Yes on 8 commercials, all of which illuminate the way in which the campaign

57 Id. at 643.
58 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”).
59 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.
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.60 The ad opens on San Francisco mayor, Gavin Newsom standing
at a lectern.61 Gesticulating wildly, Newsom announces to an applauding
crowd, “this door’s wide open now! It’s gonna happen, whether you like it
or not!”62 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.63 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!”64 A black-robed hand bangs a gavel to punctuate the end
of the sentence.65

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”66 of a famously liberal city67

60 Whether You Like it or Not, http://www.youtube.com/watch?v=4kKn5LNhNto&NR=1 (last visited Jan. 7, 2009).
61 Id.
62 Id.
63 Id.
64 Id.
65 Id.
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.
67 San Francisco routinely is associated with liberal political values. See, e.g., 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”);
Chris Christoff, Obama: I’d Guarantee $4 Billion to Retool Auto Industry: A Safety Net for
enthusiastically embraces the California 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. 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 the majority of Californians.

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. The heavy-handed image of a banging gavel—literally the arm of the state—brings it all together in a

\[\textit{Automakers Picks up Steam, DETROIT FREE PRESS, Aug. 5, 2008 (detailing the way in which Senator Obama’s pitch for heightened fuel mileage standards was derided by Michigan Republicans as “pandering to San Francisco liberals”); Carla Marinucci, \textit{Iran Controversy Intensifies GOP Outrage at Pelosi}, S.F. CHRON., Apr. 12, 2007, at A1 (noting that in the 2006 midterm elections, Republicans “raised the specter of what ‘San Francisco liberal’ Nancy Pelosi would do as speaker should the Democrats win control of the House”).}\]

\[\textit{See supra note X and accompanying text.}\]

\[\textit{It should be noted that Newsom’s actions commanded wide support among his constituents in San Francisco. As such, it was not necessarily counter-majoritarian in that it was consistent with local attitudes and inclinations. Indeed, San Francisco voters “opposed Proposition 8 in droves,” exhibiting strong support for same-sex marriage. Dan Morain & Jessica Garrison, \textit{Backers Focused Prop 8 Battle Beyond Marriage, L.A. TIMES, Nov. 6, 2008, available at http://www.latimes.com/news/local/la-me-gaymarriage6-2008nov06,0,2331815.story}.}\]

\[\textit{Whether You Like it or Not, supra note X. It is worth noting that concept of a counter-majoritarian judiciary was popularized by Alexander Bickel’s \textit{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. \textit{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 and appear on the ballot unopposed 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 were staunchly opposed to capital punishment, and were subsequently removed from office in the 1986 general election. \textit{See Corinna Barrett Lain, Deciding Death, 57 DUKE L.J. 1, 38 (2007).}\}
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 Peterson of Pepperdine University’s Law School enters the frame. Peterson cautions that the decision to expand civil marriage to include same-sex couples “changes a lot of things.” Included among these potential changes are: “People [being] sued over personal beliefs,” “[c]hurches [losing] their tax exemption,” and “[g]ay marriage [being] taught in public schools.” The narrator reminds voters: “We don’t have to accept this.”

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

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71 Peterson’s biography on the Pepperdine University School of Law’s website notes his expertise in mediation and alternative dispute resolution and his “passionate advocacy” on behalf of people with disabilities. See Richard Peterson, Biography (available at http://law.pepperdine.edu/academics/faculty/peterson.html).

72 Whether You Like it or Not, supra note X.

73 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.

74 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 AND LESBIAN TIMES, Oct. 9, 2008.

75 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.

76 Whether You Like it or Not, supra note X.
of same-sex marriage means 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 instill them to 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. 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.”

B. Proposition 8 Made Simple

In another ad, Proposition 8 Made Simple, the Yes on 8 campaign reiterates the anti-state rhetoric while attempting to distance opposition to same-sex marriage from bigotry and homophobia. 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. As a consequence, the ad offers a very detailed discussion of the events

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77 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).
78 Schubert & Flint, supra note X.
80 By way of comparison, Whether You Like it or Not’s running time was roughly thirty seconds.
preceding Proposition 8, and the perceived consequences of state recognition of same-sex marriage. Additionally, the lengthy running time also 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.\textsuperscript{81}

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.”\textsuperscript{82} Viewers then learn that “four San Francisco judges overturned this legislation, ruling it unconstitutional” and making same-sex marriage “legal in California.”\textsuperscript{83} At this point, a drawing of a man and woman appears, labeled with the terms “man + woman.”\textsuperscript{84} In an instant, a male icon replaces the female icon and the two remaining figures are labeled with the terms “man + man.”\textsuperscript{85} The screen then shifts again to reiterate the anti-state message. A drawing of the scales of justice appears.\textsuperscript{86} One side is labeled “judicial” and the other “legislative.”\textsuperscript{87} But the scales are not calibrated because the “judicial” side weighs more heavily, tipping the balance.\textsuperscript{88} The audience is then left to wonder “have the courts gone too far?”\textsuperscript{89} The answer, of course, is a resounding “yes.” Again, the four justices who comprised the majority in \textit{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.”\textsuperscript{90}

At this point, the screen flashes to a drawing of a couple, “Jan and Tom.”\textsuperscript{91} Jan and Tom, viewers are told, are a typical family with two children and a dog.\textsuperscript{92} The couple and their son and daughter live next door to “Dan and Michael, a same-sex couple.”\textsuperscript{93} As the ad explains, the neighbors have been “good friends … for years.”\textsuperscript{94} In fact, “[w]hen Jan and

\textsuperscript{81} Proposition 8 Made Simple, supra note X.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
Tom were on vacation, Dan and Michael watched their dog” and “[w]hen Dan was sick, Jan brought him soup.”95 Throughout the recitation of these facts, the stick figures of the four adults interact easily, with wide smiles on their penciled faces.96

Proposition 8, however, wipes the smiles from Jan and Tom’s faces, leaving them “torn” and confused.97 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.”98 With this argumentative 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.”99

The ad then becomes a drawing of Tom at his computer reading the text of Section 297[.5] of the California Family Code.100 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.”101 Armed with this new information, Tom is left to wonder, “If this isn’t about rights and equality, then what is it about” and why does it require redefining marriage?102 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 learn, 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

95 Id.
96 Id.
97 Id.
98 Id.
99 Id.
100 Id.

101 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. § 297 with CAL. FAM. §§ 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) & (c). Finally, domestic partnership has different tax consequences than does civil marriage. See Knight v. Superior Court, 128 Cal.App.4th 14, 20 (2005).
102 Proposition 8 Made Simple, supra note X.
about same-sex marriage. 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.” 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.” 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.” 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. Indeed, the couple are “still good friends with Dan and Michael …. In fact, they are having a barbeque together right now.” But Jan and Tom have learned that “[t]hey can respect Dan and Michael’s lifestyle choice without affirming and embracing their lifestyle.”

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,” but they have genuine concerns about what redefining marriage will mean for their family. For Jan and Tom, voting yes on 8 is not about limiting the rights of 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

103 Id.
104 Id.
105 Id.
106 Id.
107 Id.
108 Id. (emphasis added).
109 Proposition 8 Made Simple, supra note X.
110 Id.
111 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”).
decision to vote for Proposition 8, remain friendly with their neighbors.\footnote{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 (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. (forthcoming 2009). As such, it seems likely that Dan and Michael, two male partners, also are intended to be Caucasian.}

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.\footnote{White men are widely viewed as enjoying significant advantages over racial minorities and women in society, and indeed, may use their privileged position to subordinate racial minorities and women. 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). Indeed, white men’s position of relative privilege may lead to them perceiving discrimination differently than racial minorities and women. See generally Russell K. Robinson, Perceptual Segregation, 108 COLUM. L. REV. 1093 (2008) (describing the differences in the ways that whites, women, and minorities perceive racial and gender discrimination). Relatedly, the view that white men do not experience discrimination to the same extent as women and racial minorities has undergirded the African American community’s strong reaction to the LGBT community’s analogical use of Loving v. Virginia in structuring the terms of the same-sex marriage debate. See Catherine Smith, Queer as Black Folk, 2007 WIS. L. REV. 379, 386-89 (discussing reactions to the use of Loving and analogies to interracial marriage bans).} 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 same legal advantages as Jan and Tom, a married couple.

Further, because they are two white men—as opposed to an interracial couple or two lesbians—it is 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 class, racial, and gender status confer.\footnote{Proposition 8 Made Simple, supra note X.} 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.
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.\footnote{Chuck Colbert, \textit{Gay Catholics Refuse to Go Away or Be Quiet}, BOSTON GLOBE, Dec. 31, 2000, at 3 (discussing a baby boom among LGBT Catholics).} 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.\footnote{Goodridge \textit{v. Dep’t of Pub. Health}, 440 Mass. 309, 335 (2003) ("[T]he task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws."); Hernandez \textit{v. Robles}, 7 N.Y.3d 338, 393 (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."); Baker \textit{v. State}, 170 Vt. 194, 219 (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.").} In this way, depicting Dan and Michael as two childless, white males weakens the claim for same-sex marriage from the rhetoric of civil rights and traditional concerns about marriage and child-rearing, and allows the Yes on 8 campaign to focus on the threat of state interference with individual rights.

Less explicit than the shift in rights rhetoric and the anti-state message, 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 debate has long been framed in gendered terms,\footnote{Widiss, Rosenblatt & NeJaime, \textit{supra} note X, at 487-98 (documenting the use of gender stereotypes in the same-sex marriage debate); see also Richard Thompson Ford, \textit{Hate and Marriage}, SLATE, July 12, 2006, available at: 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.").} 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.\textsuperscript{118} Others, however, have offered a gloss on the procreation theme. Not only is opposite-sex marriage the place to \textit{have} children, it is the ideal institution in which to \textit{raise} them because it values the complementary characteristics that men and women bring to child-rearing.\textsuperscript{119} 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.\textsuperscript{120}

Inextricably intertwined with these child-rearing arguments, is a rationale that focuses specifically on the role of marriage in constructing and consolidating gender norms and roles in society more generally. Marriage, opponents of same-sex marriage argue, is not just a regulatory institution for adult relationships. It is the “central cultural site of male-female relations,”\textsuperscript{121} and “society’s primary means of bridging the male-female divide.”\textsuperscript{122} More importantly, however, marriage creates the “social identities”\textsuperscript{123} of husband and wife—it is the institution in which gender is constructed and replicated.\textsuperscript{124} Accordingly, redefining marriage to include same-sex couples is not just about redefining the institution in broader terms, but also about divesting marriage of its gendered substance.\textsuperscript{125} and

\textsuperscript{118}Monte Stewart, \textit{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).


\textsuperscript{122} Katharine Young \\& Paul Nathanson, \textit{The Future of an Experiment, in Divorcing Marriage} 41 (Daniel Cere \\& Douglas Farrow, Eds., 2004).


\textsuperscript{125} Indeed, some opponents of same-sex marriage refer to it as “genderless” marriage
rendering gender roles unintelligible in society at large. Thus, it is not just the traditional definition of marriage that requires defense and protection. Because the family serves as a site for the cultivation and replication of the traditional marriage model and its attendant gender roles, it too is crucial for maintaining traditional gender norms in the face of social change.

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. The use of this iconography recalls Jacques Lacan’s critique of “urinary segregation.” 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 content to the concept of gender. 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. That is, if marriage is redefined to include same-sex

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127 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 also has undergirded opposition to reproductive rights. Luker, *supra* note X, 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).

128 *Proposition 8 Made Simple, supra* note X.


130 *Id.*

131 See Monte Neil Stewart, *Eliding in Washington and California*, 42 GONZ. L. REV. 501, 505 (2007) (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.”).
couples, it will be rendered “genderless,” and stripped of its gendered meaning and content.\textsuperscript{132}

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.\textsuperscript{133} Not only does Jan cook for the family, she “likes” it!\textsuperscript{134} And once a week on Saturday, Tom mows the lawn.\textsuperscript{135} The enormous smile on his face makes it clear that he, too, enjoys his role in the family. The 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.\textsuperscript{136} Similarly, when the couples unite for their post-election barbeque, Tom mans the grill.\textsuperscript{137}

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 parenting plays a “vital role … in shaping sexual and gender identity and in providing heterosexual role modeling” to children.\textsuperscript{138} 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.\textsuperscript{139} Their daughter will learn to be a

\textsuperscript{132} \textit{Id.} at 508.

\textsuperscript{133} \textit{Proposition 8 Made Simple}, supra note X.

\textsuperscript{134} \textit{Id.}

\textsuperscript{135} \textit{Id.}


\textsuperscript{139} Again, it likely is not a 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. But this content, the ad subtly suggests, is incredibly meaningful for families.
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, with *Proposition 8 Made Simple*, the Yes on 8 campaign truly does simplify the debate. Although “being a good neighbor” to same-sex couples like Dan and Michael “is important,” the campaign 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). 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. 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*, *It’s Already Happened*, and *Truth*, 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. However, because the ads focus on the parent-child relationship, one can also 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

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\[145\] 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 X.
aid of Robb and Robin Wirthlin. 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 the values they choose. 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.”

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.” 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.” Despite their objections, a federal “court said that [the Wirthlins] had no right to object or pull [their] son out of class.” The Wirthlins recede from view and the camera refocuses on a 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.”

Everything To Do With Schools dovetails nicely with another Yes on 8 ad, It’s Already Happened. 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. “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. The girl then explains excitedly that she “learned how a prince

\[\text{Draft – do not cite or circulate without author’s permission}\]
married a prince, and I … can marry a princess!”

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, to find her mother tending to her domestic work. 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. 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, who brings home the bacon and who fries it up in the pan? As the ad subtly suggests, although this mother occupies a traditional feminine role, 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.

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 shared kiss. See Linda de Haan and 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 and Stern Nijland, King and King and Family (2004).

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

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”).

No doubt 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.

One of the key arguments proffered in defense of legal bars to same-sex marriage is that heterosexual marriage and parenthood are optimal for child-rearing 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 quotations omitted).

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.
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-familiar figure to the same-sex marriage debate walks into the frame.\footnote{161} Professor Peterson of Pepperdine University School of Law weighs in: “Think it can’t happen? It’s already happened.”\footnote{162} 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.”\footnote{163} The voiceover narrator then intones, “teaching children about gay marriage will happen here unless we pass Proposition 8.”\footnote{164}

Although Everything To Do With Schools and It’s Already Happened argue that public school curricula will be impacted/affected by same-sex marriage, the potential impact might appear remote to the average viewer unless it is teased out/spelled out. After all, the Wirthlins’ legal battle took place across the country in Massachusetts. Accordingly, a companion ad, Truth,\footnote{165} 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 City Hall.\footnote{166} They are watching and clapping as a newly-married lesbian couple descends the steps arm in arm.\footnote{167} The narrator intones that “a public school took first graders to a lesbian wedding, calling it a teachable moment.”\footnote{168} 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.\footnote{169} 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.”\footnote{170}

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

\footnote{161}{It’s Already Happened, supra note X.}
\footnote{162}{Id.}
\footnote{163}{Id.}
\footnote{164}{Id. (emphasis in original).}
\footnote{165}{Truth, supra note X.}
\footnote{166}{Id.}
\footnote{167}{Id.}
\footnote{168}{Id.}
\footnote{169}{Id.}
\footnote{170}{Id.}
recognition of same-sex marriage poses to parental rights and autonomy in child-rearing. As the ads make clear, in the months immediately after the California Supreme Court permitted same-sex marriage, the educational environment changed dramatically. Public schools, in their capacity to provide students with basic information about life skills, marriage, health, and sexuality, may now teach students about same-sex marriage, even going so far as to have student observe a same-sex marriage ceremony. Though not explicitly stated, the ad’s point seems obvious: due to its authority over children in school, the state may expose your children to same-sex marriage, regardless of whether it challenges that which you impart and instill in your children in the privacy of your home.

In this way, Truth intimates 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 some 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.171 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.172 By contrast, Everything To Do With Schools, It’s Already Happened and Truth, characterize the state as an entity that, through the administration of the public schools, also can override parental authority

171 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 infra notes X.

172 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 who they will treat. Whether You Like It or Not, supra note X. Importantly, these consequences are framed as public consequences that implicate public concerns, like tax revenue and health care.
and desires in the home by offering children a view of marriage to which their parents object.

Read together, the combined impact of the three 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 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 state \(^{173}\) – 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. \(^{174}\) 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, \(^{175}\) *Where Do Babies Come From?* is set in a same-sex household occupied by two gay men \(^{176}\) and their daughter. \(^{177}\)

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\(^{173}\) 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., 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.”); 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.”).

\(^{174}\) *Where Do Babies Come From?*, available at http://www.youtube.com/watch?v=75J3TN9Zzck (last visited Feb. 28, 2009).

\(^{175}\) *It’s Already Happened*, supra note X.

\(^{176}\) Again, the gay couple portrayed are 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 instead, focus on the question of individual rights. See supra notes X and accompanying text.
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.178 The daughter then asks, “Where do babies come from?”179 The fathers share a meaningful look, as if to say, we knew this was coming.180 Then Father A responds, “Mommies have babies, dear. That’s where they come from.”181

Unsatisfied with this answer, the daughter presses on: “Can boys ever have babies?”182 The two fathers again share a concerned look and Father B raises his eyebrows.183 Father A patiently explains to the girl that “only mommies” have babies.184 Undeterred, the daughter takes a different tack: “Megan says you have to have a mommy and a daddy to have a baby.”185 Again, her fathers share meaningful looks.186 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.”187 The daughter shakes her head and invokes Megan once again. “[Megan] said that mommies and daddies have to get married first.”188 Father A dismisses this assertion. “No, sweetheart, you don’t have to be married to have a baby.”189 At this, the daughter is visibly perplexed. Shaking her head in confusion she addresses both of her fathers, “Then . . . what’s marriage for?”190 With this, there is a crescendo of dramatic music and the voiceover narrator implores the viewer, “Let’s not confuse our kids. Protecting marriage by protecting the real meaning of marriage. Only between a man and woman. Vote yes on Proposition 8.”191

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

178 Id.
179 Id.
180 Where Do Babies Come From?, supra note X.
181 Id.
182 Id.
183 Id.
184 Id.
185 Id.
186 Id.
187 Id.
188 Id.
189 Id.
190 Id.
191 Id.
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. 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. 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. 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 asks an important question of her fathers, “Where do babies come from?” 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. 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

192 Id.
193 Where Do Babies Come From?, supra note X.
194 Id.
195 Id.
196 The trope of men’s inability, and women’s unique ability, to address issues of sex and sexuality – particularly with their daughters – is well-worn 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, NBC, It’s Different For Girls, aired Jan. 24, 2007. By contrast, in a more recent episode, a father happens upon his teenaged daughter and her boyfriend en 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, NBC, The Giving Tree, aired Mar. 20, 2009.
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.”

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 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. Upon hearing this information, Father B, no doubt exasperated with Megan and her family, says sotto voce, “maybe you should spend a little less time at Megan’s house.” With this exchange, the ad offers a new riff on the theme of interference with parental autonomy.

As discussed earlier, in other Yes on 8 campaign ads, the campaign made clear that state recognition of same-sex marriage would allow the

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197 Where Do Babies Come From?, supra note X.
198 Id.
199 Id.
state, via the school curriculum, to intrude impermissibly upon parental autonomy in the home. *Where Do Babies Come From?* revisits the theme of parental autonomy, but suggests that this autonomy can be a double-edged sword. 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.” 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. 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. 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.

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

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200 *Id.*

201 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 (unpublished draft 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).

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. 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. 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 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

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204 See supra at X.
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.

III. LESSONS FROM THE YES ON 8 CAMPAIGN

The previous sections 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 and anti-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.

First, the Yes on 8 campaign’s strategy makes clear how malleable and manipulable rights rhetoric can be. Moreover, in demonstrating the elasticity of this rhetoric, the campaign’s success also suggests the power and authority rights rhetoric conveys. In short, the Yes on 8 campaign recognized how powerful the equal rights/civil rights frame was for the

\[205\] 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); Annette R. Appell, Book Review: Disposable Mothers, Deployable Children, 9 Mich. J. Race & L. 421, 442 (2004) (noting that “empirical evidence indicates that child welfare professionals view Black families as less viable, less resourceful, and, consequently, in need of coercive state intervention”); 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 they depart from accepted family norms).
LGBT community.206 By analogizing the struggle for marriage equality to the civil rights movement, the LGBT community attempted to forge coalitions with minority groups and a broader constituency for whom the propriety of equality and justice for all were well-settled principles.207 If 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.208

Accordingly, the Yes on 8 campaign forged a new coalition composed of “people of faith,” a reliable sector of its base, as well as those who did not necessarily oppose gay marriage, but were nonetheless fearful of state interference with personal beliefs, parental rights, and religious freedom.209 And importantly, by focusing particularly on the consequences of same-sex marriage for education, the campaign was able to draw support from parents who balked at the prospect of having their children learn about same-sex marriage in school.210

In responding to this rhetorical reframing, the No on Prop 8 campaign focused initially on resurrecting the civil rights and equality frame – a strategy that yielded mixed results.211 In an ad entitled Conversation, the No on Prop 8 campaign depicts a conversation between two women at a

206 Schubert & Flint, supra note X.
207 See, e.g., Evelyn Larrubia, $1 Million from Teachers Union to Oppose Prop. 8: Group Says Defeating Gay marriage Initiative is a “Civil Rights Issue”, L.A. TIMES, Oct. 17, 2008, at B3, (noting that the California Teachers Association’s supported the No on Prop 8 campaign on the ground that marriage equality was a “civil rights issue”); Jesse McKinley, Same Sex Marriage Ban is Tied to Obama Factor, N.Y. TIMES, Sept. 21, 2008, at A20 (noting that public education efforts targeted at African American voters attempted to frame same-sex marriage as a civil rights issue); Mike Swift, Proposition 8: Historic Turning Point or Just Another Battle in the Culture Wars?, SAN JOSE MERCURY NEWS, Nov. 8, 2008 (describing support for the No on Prop 8 campaign as support for “civil rights movements”).
208 Schubert & Flint, supra note X.
209 Id.
210 According to a CNN exit poll, parents of minor children were overrepresented among those voting for Proposition 8, suggesting that the Yes on 8 campaign was successful in identifying the consequences of same-sex marriage for this group. See http://edition.cnn.com/ELECTION/2008/results/polls/#val=CAI01p2 (last visited Mar. 9, 2009).
kitchen table. 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 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. Her sense of justice and fairness reinvigorated, the once-conflicted woman affirms her commitment to equality and anti-discrimination. 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. To illustrate the point, the ad, entitled Discrimination, features scenes from the Japanese internment and references housing restrictions and prohibitions on interracial marriage.

By all accounts, these response ads did little to disrupt the momentum of the Yes on 8 campaign. The response ads failed to address the emphasis on individual rights that the shift in rights rhetoric had produced. 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 consequences.

Critically, once the No on Prop 8 campaign began responding to the alleged consequences of state-recognized same-sex marriage, it narrowed the Yes on 8 campaign’s gains. The No on 8 campaign’s “most effective” ad confronted head-on the question of education and children. 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.”

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213 Id.
214 Id.
216 Id.
217 See Schubert & Flint, supra note X. [add cites]
218 Id.
219 Id.
221 Id. (emphasis in original).
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. Although the ad was quite controversial—the parents of the children featured in the ad vehemently objected to the use of the film footage without their consent—it successfully blunted the No on Prop 8 campaign’s effort to counter the individual rights rhetoric.

In all, the ebbs and flows of both campaigns underscore the importance of both rights rhetoric and coalition-building in the effort to secure (or thwart) 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 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. 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. By endorsing family law’s view of the family and the relationship between parents and the state, the Yes on 8 campaign is participating in the social construction of the family—a process largely driven by law itself.

The following subsections discuss the way in which the Yes on 8 campaign tapped into, and reinforced, themes that pervade family law and

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222 Truth, supra note X.
224 See Schubert & Flint, supra note X.
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 cementing these family law themes, the Yes on 8 campaign reinforced family law’s preoccupation with marriage as a model for family life and a rubric for discussing 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 marital nuclear family. Although family law gives lip service to the extended family\(^{225}\) and “non-traditional” family arrangements\(^{226}\) the nuclear family unit predominates as a normative ideal. Consider the Family and Medical Leave Act (FMLA).\(^{227}\) Enacted in 1993 for the express purpose of facilitating family caregiving,\(^{228}\) the Act focuses wholly on caregiving that occurs within the nuclear family unit, and specifically on caregiving within the context of the parent-child relationship.\(^{229}\) Under the FMLA, eligible employees are entitled to twelve weeks of unpaid leave in the event of the birth or adoption of a child or to care for a “spouse, or a son, daughter, or parent.”\(^{230}\) Although it interprets the terms “parent,” “son,” “daughter,” and “child” broadly to include even those who function as such,\(^{231}\) the Act focuses squarely on facilitating caregiving that occurs

\(^{225}\) 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.”).

\(^{226}\) 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 X, at 396-403 (describing attempts to move beyond the traditional model of the nuclear family).


\(^{228}\) 29 U.S.C. § 2601(b).

\(^{229}\) See Murray, The Networked Family, supra note X, at 407-09 (critiquing the FMLA).


\(^{231}\) Under the statute, a parent is “the biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a son or daughter.” 29 U.S.C. § 2611(7). Similarly, a “son or daughter” is defined to include “a biological,
within the nuclear family unit.

Even as family law embraces “non-traditional” family arrangements, the nuclear family model continues to be quite appealing. In an effort to recognize the diversity of familial relationships, courts have granted benefits usually limited to spouses and family members to those whose relationships comport with normative intuitions about family life. Not surprisingly, these intuitions are guided by the models of marriage and the nuclear family. For example, in *Braschi v. Stahl Associates*, 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. In *Hann v. Housing Authority of the City of Easton*, a federal district court concluded that an unmarried heterosexual couple raising children together were eligible for public housing because, although they did not have a marriage license, they *functioned* in the manner of the marital nuclear family.

The Yes on 8 campaign ads manifested the resonance of the nuclear family unit in family law and public policy. The gendered division of household labor that has 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, including *Proposition 8 Made Simple, It’s Already Happened* and *Everything to Do With Schools* invoked tropes of cozy, nuclear family domesticity, suggesting that same-sex marriage will imperil the nuclear unit by challenging parental authority over children. Critically, the ads offered few references, whether implicit or explicit, to extended family, friends, or any of the other people that participate in family life. Indeed, if the ads were to be believed,

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232 See Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 1015-21 (2000) (concluding, in the context of *Braschi*, that the court’s conclusion that the couple were family members for purposes of the New York City rent control statute was premised on the fact that they lived their lives in the manner of spouses).


235 This emphasis on the nuclear family was echoed by the ads aired in opposition to Proposition 8. To the extent those ads portrayed families, they were nuclear families (and indeed, those ads that did feature families often took place within the family kitchen). One
autonomous family units composed of mother, father, and children are the only families worth discussing.\footnote{236}

Importantly, it was not only the Yes on 8 campaign that endorsed the 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. 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-six years” and “together ha[d] raised three children, who are now adults.”\footnote{237} If Proposition 8 passed, the Thorons cautioned, their “gay daughter and thousands of [their] fellow Californians w[ould] lose the right to marry.”\footnote{238} The couple then implored the audience not to deny the right to marry to “anyone’s family.”\footnote{239}

Although The Thorons tackled the question of 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.\footnote{240} 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.\footnote{241} Their immediate focus is on Proposition 8’s effect on their family unit, and other nuclear family units like theirs.

Indeed, most of the ads opposing Proposition 8 reflect the nuclear norm by depicting nuclear family vignettes in which extended family members were unseen and rarely discussed.\footnote{242} Only one ad, Conversation, explicitly referenced extended family at all. There, in the gendered space of a household kitchen, two women lingered over a collection of photographs.\footnote{243} As the host explained to her guest, one photograph depicted “[her] niece

\footnote{236} Even Where Do Babies Come From? portrayed a nuclear family unit; however, the ad suggested that this unit is less than desirable because it is not helmed by an opposite-sex couple. Where Do Babies Come From?, supra note X.
\footnote{238} Id.
\footnote{239} Id.
\footnote{240} Id.
\footnote{241} Id.
\footnote{242} See Conversation, supra note X.
\footnote{243} Id.
Maria and [Maria’s same-sex] partner Julie at their wedding.”\textsuperscript{244} The niece and her partner were never shown, nor was the audience offered any other depiction of extended family members.\textsuperscript{245} Instead, the reference to the extended family serves solely as a conduit to the ad’s discussion of marriage rights.\textsuperscript{246} In this way, even the No on Prop 8 campaign 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 disagreement is whether same-sex couples should be entitled to form marital nuclear families of their own.

Of course, as empirical evidence reminds us, the reality of family life is radically out of step with law’s understanding of the family and its depiction in the Proposition 8 ads. According to the most recent census, most American families depart from the nuclear family ideal.\textsuperscript{247} In California, married couples living with children comprise only 27\% of total households.\textsuperscript{248} Nevertheless, family law, public policy, and depictions of the family—like those produced in support of Proposition 8—all seem to reinforce the notion that the only families worth recognizing and supporting are those who comport with the elusive nuclear model.\textsuperscript{249}

\textbf{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.\textsuperscript{250} At the top point of the triangle is the state.

\begin{footnotesize}
\textsuperscript{244} Id.
\textsuperscript{245} Id.
\textsuperscript{246} Id.
\textsuperscript{247} Editorial, \textit{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 made up of nuclear families—23.5 percent to be exact, down from 25.6 percent in 1990 and 45 percent in 1960”).
\textsuperscript{249} 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.” \textit{The Changing American Family, supra} note X.
\textsuperscript{250} See, e.g., Robert H. Mnookin & D. Kelly Weisberg, \textit{Child, Family, and...}
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. Typically, this power is bifurcated along public and private lines. 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 goes to sleep. Unless and until there is a threat of harm to the child, the state has little power to interfere with parental decision-making. By contrast, the state exercises authority over children in schools. 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. According to the triangle configuration, as a legal matter, the only actors in children’s lives are parents and the state, both of whom exert authority over children in their respective zones: home and school. Implicit in this construction are gendered family roles. Until they reach school age, children remain in the


251 Woodhouse, supra note X at 409, 422.
252 Rosenbury, supra note X, at 840 (“[P]arents exercise private power over children, whereas the states exercise public power.”).
254 Murray, The Networked Family, supra note X, 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.”).
255 Rosenbury, supra note X, at 840 (“[T]he state generally can reach children only when they are at school and thus subject to state educational policies.”).
256 See, e.g., Leeber 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”).
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 that pitted the state’s authority to shape school curricula against parental authority to instill particular values within the home.\(^{257}\) 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.\(^{258}\)

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 makes the case unequivocally 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.\(^{259}\) For example, although the law posits caregiving as a parental enterprise, parents do not provide care to children as “isolated islands”.\(^{260}\) Instead, whether parents work outside of the home or not, they routinely rely on nonparental caregivers for assistance.\(^{261}\)

Moreover, adults, whether parents or nonparental caregivers, are not the only actors in children’s lives. Other children frequently exert considerable

\(^{257}\) 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*, http://www.youtube.com/watch?v=CIL7PUl24hE (last visited Feb. 12, 2009).

\(^{258}\) See *It’s Already Happened*, supra note X; *Proposition 8 Made Simple*, supra note X.

\(^{259}\) See Murray, *The Networked Family*, supra note X, 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, supra note X, at 841(citing social science evidence asserting that childhood is experienced in sites other than home and school).

\(^{260}\) Murray, *The Networked Family*, supra note X, at 387 (“[P]arents do not provide care as isolated islands, but as part of a broader network of caregivers”).

\(^{261}\) *Id.* at 390-91 (documenting the diversity of caregiving arrangements).
influence and authority in the lives of their peers. 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. These spaces include extracurricular activities, childcare, and sports, and involve actors, other than parents and teachers, who participate in shaping children’s development.

This account of the reality of children’s lives is largely absent in the law and the Yes on 8 campaign’s ads. In the law, nonparental caregivers often are invisible. 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. Parents are free to raise their children on their own, with help from family, or by employing paid caregivers. 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. By virtue of the privacy that parental rights create, nonparental caregivers are rendered invisible to the law. 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.

262 See Rosenbury, Children as Subjects, supra note X 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”).

263 Rosenbury, supra note X, at 840 (“[S]ocialization also takes place in many other spaces” beyond home and school).

264 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).

265 Murray, The Networked Family, supra note X, at 396 (“parental 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 caregiving decisions are rendered invisible”).

266 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”).

267 Id. at 396 (“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.”).

268 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”)

269 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
Similarly, the law infrequently acknowledges the degree to which other children exercise influence in the lives of their peers. 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. 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. In the ad, this episode plays out with little fanfare or debate because the ad assumes parental capacity, as understood by family law, to limit undue peer influence. The autonomy that privacy provides vests parents with authority to keep third parties out, including their children’s peers.

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. Instead, authority over children in these spaces is characterized as either an extension of parental authority or as an extension of state authority over children in school. 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 caregivers whom the law recognizes.”

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

271 *Where Do Babies Come From?*, supra note X.

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

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

274 *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.”).
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.

C. 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. 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 intervene and, if necessary, remove the child from a dangerous domestic situation. Once the child has been removed from the parent’s authority, she is under the authority of the state. At this point, the state, through agents and institutions like foster parents or group homes, will

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275 See Chiu, supra note 240, 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 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); MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 144 (1995) (noting that “the 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”).


277 Id.
provide for the child’s caregiving needs.\footnote{278}{Id.}

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.\footnote{279}{Id.} 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.\footnote{280}{Id.} 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.\footnote{281}{See Chiu, supra note X, at 1787-89 (describing the conflict between parents and the state in the child welfare system).}

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, and others also illustrate this point. Consider the debate over publicly-funded childcare. Although feminists have argued for many years that public support for childcare 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, and 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,\footnote{282}{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 draft available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=582001) (describing feminist support for universal daycare as essential for women’s equality).} efforts to create state-operated childcare facilities for working mothers have been roundly denounced.\footnote{283}{See Dinner, supra note X (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-sponsored daycare as “playing the victim”).} What explains the resistance to the prospect of widely available, publicly-supported childcare? Although many have argued that such measures are cost-prohibitive,\footnote{284}{Shikha Dalmia & Lisa Snell, Universal Preschool is Inviting Universal Disaster, S.F. CHRON., Dec. 4, 2005 (denouncing universal preschool as unduly cost-prohibitive).} others worry less about the burden to the taxpayer and focus instead on the dangers inherent in allowing the state
to “raise your children.” 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. As noted earlier, because parents exercise almost unlimited authority over children in the home, the state neither registers nor supervises how caregiving is discharged. 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. 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.

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. But because the relationship is

285 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 was 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 Soviet women were portrayed as “holding masculine jobs and consigning their children to state-operated childcare facilities”).

286 Chiu, supra note X, 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”).

287 Chiu, supra note X, at 1792.

288 Murray, The Networked Family, supra note X.

289 Id.

290 Huntington, supra note X, at 1511 (arguing that for families in distress, engagement with the state can be a useful means of preserving family autonomy and self-determination).
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 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. 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.

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

D. 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 Essay 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 is in the larger context of marriage and preserving a traditional view of that institution.

291 Id.
292 Huntington, supra note X, at 1492-96 (arguing for increased use of preventative measures in the child welfare system).
293 Id.
294 Marriage myopia is not limited to the same-sex marriage debate. During the 1996 welfare reforms, marriage promotion efforts were central to the effort to revamp public
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. And this is the point. Marriage is always the issue—even when it is not.

The events of November 4, 2008 illustrate this 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.295 The initiative was intended to thwart the “gay agenda,” and indeed, when its enactment was discussed, it usually was in the context of Proposition 8 and other attempts to limit same-sex marriage.296 Only a minority of voices chimed in to call attention to the fact that the Act’s effect had little to do with limiting marriage, but rather was about the ability of any unmarried person to serve as an adoptive or foster parent.297

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.298 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.299

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296 Savage, supra note X (“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.”).
297 Savage, supra note X (noting with dismay the effects of the initiative in Arkansas).
299 This does not mean that marriage no longer has gendered aspects or content. See
In this 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 marriage 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. 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. 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. In truth, our family lives no longer revolve exclusively around the nuclear family—if they ever did. 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


See, e.g., 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.”); Stephanie Coontz, *The Way We Never Were*, 183 (1992) (describing the changes in family forms in the twentieth century United States); 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 marriage was expected to end in divorce.”).
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 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 marriage—
should be the focus of our energies and attention.