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MARRIAGE AND INEVITABILITY: A LESSON FROM MARYLAND

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"'Mr. Kenge,' said Allan, appearing enlightened all in a moment. 'Excuse me, our time presses. Do I understand that the whole estate is found to have been absorbed in costs?' 'Hem! I believe so,' returned Mr. Kenge."[1]

I. INTRODUCTION

As the ongoing litigation over the meaning of marriage drags into its fourth decade, the legal dispute is beginning to rival Charles Dickens' fictional case *Jarndyce and Jarndyce* in longevity.[2] Like that chancery case, it too has raised high expectations of a favorable outcome that will vindicate the hopes of its proposed beneficiaries.

At the present time, the focus of the ongoing debate over the definition of marriage is centered on California, where a major federal case tests the constitutionality of the state's marriage law.[3] Maryland was once the site of a similar courtroom battle, though on a smaller scale.[4] That battle, however, deserves more attention as it, along with similar decisions from other states, will likely prove in the future to be more influential both within and beyond the state than currently imagined.

This article will carefully examine the Maryland case in the context of four decades of litigation over the definition of marriage. It will utilize a close reading of the trial court and Court of Appeals of Maryland decisions to elucidate important questions about marriage and the law.

II. CONTEXT FOR *CONAWAY V. DEANE*[5]

Maryland's seminal same-sex marriage case was decided in 2007, but was only a skirmish in a much larger battle taking place in courts,

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1 CHARLES DICKENS, BLEAK HOUSE 835 (Heritage Press 1942) (1853).

2 *Id.* at 18-19.

3 Perry v. Schwarzenegger, 630 F.3d 898 (9th Cir. 2011).

4 Conaway v. Deane, 401 Md. 219, 932 A.2d 571 (2007).

5 *Id.*

in legislatures, and at the ballot box over a period now stretching forty years.[6]

In the wake of *Loving v. Virginia*,[7] a same-sex couple in Minnesota sought a marriage license from their local clerk hoping that the right to marry discussed in *Loving* would be extended to include a right to an entirely novel definition of marriage.[8] The lawsuit that ensued was appealed to the Minnesota and United States Supreme Courts, with the former rejecting all of the plaintiffs' constitutional claims[9] and the latter dismissing "for want of a substantial federal question,"[10] which is a decision on the merits.[11] For the next two decades, there were only sporadic attempts to establish legal recognition of same-sex marriages through litigation.[12]

Not until the 1990s did a lawsuit alleging that state marriage laws were unconstitutional for failure to allow same-sex couples to get marriage licenses seem likely to succeed. In 1993, the Hawaii Supreme Court narrowly ruled that the state's marriage law was presumptively unconstitutional, though the court also remanded to allow the state to demonstrate a compelling interest justifying the current law.[13] This decision, along with a similar trial court ruling in Alaska,[14] was preempted by an amendment to the state constitution.[15] Ten years later, litigants finally secured a victory in Massachusetts, where the supreme judicial court ruled the state's marriage definition lacked even a rational basis.[16] At around the same time, the United States Supreme Court struck down a Texas statute prohibiting sodomy.[17]

The conjunction of these rulings suggested to some that the time was right for a major effort to secure same-sex marriage through

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[6] *See* William C. Duncan, *The Litigation to Redefine Marriage: Equality and Social Meaning*, 18 BYU J. PUB. L. 623 (2004) (discussing the history of same-sex marriage litigation from 1971 to 2003).

[7] 388 U.S. 1 (1967).

[8] Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971).

[9] *Id.*

[10] Baker v. Nelson, 409 U.S. 810 (1972).

[11] Hicks v. Miranda, 422 U.S. 332, 344 (1975).

[12] *See* Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1980), *cert. denied*, 458 U.S. 1111 (1982); Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973); DeSanto v. Barnsley, 476 A.2d 952, 952 (Pa. Super. Ct. 1984); Singer v. Hara, 522 P.2d 1187, 1189 (Wash. Ct. App. 1974), *denying cert. to*, No. 43391, 1974 WL 45234 (Wash. Oct. 10, 1974).

[13] Baehr v. Lewin, 852 P.2d 44, 67-68 (Haw. 1993).

[14] Brause v. Bureau of Vital Statistics, No. 3AN-95-6562CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998).

[15] HAW. CONST. art. I, § 23; *see also* ALASKA CONST. art. I, § 25.

[16] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).

[17] Lawrence v. Texas, 539 U.S. 558, 562, 566 (2003).

strategic litigation throughout the United States. Advocates of redefinition believe that same-sex marriage is inevitable and that it is time for many more states to embrace the future of marriage. Thus, litigation began in a series of states chosen for their likelihood of accepting claims for same-sex marriage. It has long been a tactic of same-sex marriage advocates to litigate in states based on "the political climate in the state" and "perhaps most important, the composition of the state judiciary."[18] As one legal activist noted, "'[t]he lawsuits we have done that have succeeded have been carefully planned and brought in states where we already had the legal building blocks by doing work on other issues.'"[19] Another legal activist explained that "the lawsuits are focused on states where public attitudes toward same-sex unions seem particularly friendly and where amending the state constitution to counter any ruling for same-sex marriage would be difficult."[20]

Maryland was among the states chosen through this forum shopping process for litigation in the post-*Goodridge* wave.[21] Suits were also filed in New York,[22] Washington,[23] Connecticut[24] and Iowa.[25] Also in the wake of the Massachusetts decision, the mayor of San Francisco began offering marriage licenses to same-sex couples, precipitating a lawsuit to clarify his authority to determine the state's marriage law.[26] This, in turn, led to a lawsuit regarding whether the state's marriage definition, enacted by voter initiative in 2000, violated California's constitution.[27]

For those who believed the time had come for same-sex marriage, the results were mixed. Over the next few years, the high courts of California, Connecticut, and Iowa all ruled that marriage redefinition was mandated by their state constitutions.[28] In contrast, the high

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[18] Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 611 n.194 (1994).

[19] Wyatt Buchanan, *Profound Issues in Seattle Lawsuit; State high court set to rule on gay rights*, S.F. CHRON., Jan. 3, 2006, at A1 (quoting Jennifer Pizer).

[20] Joan Biskupic, *Wave of Lawsuits Targets Bans on Same-Sex Marriage, Challenges argue some states' constitutions include right to gay and lesbian nuptials*, USA TODAY, Mar. 24, 2006, at 4A.

[21] *See Conaway*, 401 Md. 219, 932 A.2d 571 (addressing a challenge to the denial of marriage licenses to certain same-sex couples).

[22] Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006).

[23] Andersen v. King Cnty., 138 P.3d 963, 968 (Wash. 2006).

[24] Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 411 (Conn. 2008).

[25] Varnum v. Brien, 763 N.W.2d 862, 872 (Iowa 2009).

[26] Lockyer v. City and Cnty. of S.F., 95 P.3d 459, 462 (Cal. 2004).

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

[28] *Id.* at 400-02; *Kerrigan*, 957 A.2d at 412; *Varnum*, 763 N.W.2d at 872.

courts of Maryland, New York, and Washington ruled that defining marriage solely as the union of a husband and wife was consistent with their state constitutions.[29] Interestingly, in each state where the court has ruled that marriage laws are unconstitutional, the state attorney general either decided not to participate in defending the state's marriage law, as was the case in Iowa, or to only raise *pro forma* arguments and even disavow the kinds of arguments accepted in the states where courts upheld the marriage laws.[30]

The continued intransigence of citizens to accept the new marital regime has further complicated the preferred narrative of the ever-increasing acceptance of same-sex marriage. As previously noted, the people of Hawaii and Alaska approved amendments to their constitutions and either reserved to the legislature the definition of marriage (Hawaii) or preserved the impugned definition of marriage (Alaska) after adverse decisions by courts in those states. Subsequently, twenty-eight additional states amended their constitutions to define marriage.[31] Prominent among these is California. After the California Supreme Court ordered a redefinition of marriage, citizen groups quickly proposed Proposition 8, an amendment to the state constitution approved by voters in November 2008.[32] In November 2010, all three members of the Iowa Supreme Court who had joined the opinion ruling Iowa's marriage law unconstitutional, who were also on the ballot for retention, were voted out of office—an extremely unusual development.[33]

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[29] *Conaway*, 401 Md. at 325, 903 A.2d at 635; *Hernandez*, 855 N.E.2d at 12; *Andersen*, 138 P.3d at 1010.

[30] *In re* Marriage Cases, 183 P.3d at 450; *Kerrigan*, 957 A.2d at 523-24 n.15; *Varnum*, 763 N.W.2d at 869.

[31] ALA. CONST. art. I, § 36.03; ARIZ. CONST. art. XXX, § 1; ARK. CONST. amend. 83, § 1; CAL. CONST. art. I, § 7.5; COLO. CONST. art. II, § 31; FLA. CONST. art. I, § 27; GA. CONST. art I, § 4, para. I; IDAHO CONST. art. III, § 28; KAN. CONST. art. 15, § 16; KY. CONST. § 233A; LA. CONST. art. XII, § 15; MICH. CONST. ch.1, art. I, § 25; MISS. CONST. art. 14, § 263A; MO. CONST. art. I, § 33; MONT. CONST. art. XII, § 7; NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; OR. CONST. Art. XV, § 5a; S.C. CONST. art. XVII, § 15; S.D. CONST. XXI, § 9; TENN. CONST. art. XI, § 18; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. I, § 15-A; WIS. CONST. art. XIII, § 13. After the Maine Legislature passed a bill defining marriage as the union of any two people, voters rejected the law in a November 2009 referendum. Abby Goodnough, *A Setback in Maine for Gay Marriage, but Medical Marijuana Law Expands*, N.Y. TIMES, Nov. 4, 2009, *available at* http://www.nytimes.com/2009/11/05/us/politics/05maine.html?_r=3.

[32] CAL. CONST. art. I, § 7.5. As noted above, this amendment has been challenged in federal court. *See generally supra* note 3, at 927.

[33] *See* Krissah Thompson, *Gay Marriage Fight Targeted Judges, Politicizing Rulings on Issue*, WASH. POST, Nov. 3, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/11/03/AR2010110307058.html.

III. MARYLAND: INTERRUPTING INEVITABILITY

The context surrounding the Maryland marriage decision illustrates some important tensions in the ongoing marriage debate.

First is the gap between the claim of inevitability and reality. The proponents of same-sex marriage explain their efforts in terms of inevitability—that Americans are belatedly becoming enlightened and accept the reality that "marriage equality" is an unavoidable feature of the family law of the future. This follows from the idea that redefinition is a fundamental right. If something is a fundamental right that right *must* be respected and, indeed will be, even if it may take time for full acceptance. The inevitability argument for same-sex marriage is premised on this precise belief.

The inevitability theme, however, is just inconsistent with recent experience. There is strong evidence that same-sex marriage is anything but inevitable, as we've seen in the Maryland case.

The second tension springs from the nature of the inevitability argument and, particularly, from its presuppositions as to rights. The inevitability narrative stigmatizes opponents of the marriage change by positing that people who oppose the "fundamental right" of same-sex marriage are bigots or discriminators, akin to those who believe that one race is superior to another. Shifting the focus of marriage to the straw man of individual rights shuts down discussion of the potential consequences and ramifications of the change in marriage.

Thus, interrupting the inevitability theme may allow for an open evaluation of the consequences and a discussion of the risks and trade-offs inherent in the redefinition of marriage to include same-sex couples. To the degree such a theme is accepted, however, this type of analysis is unlikely ever to occur, with ramifications and consequences only becoming clear later when retrenching is much more difficult.

The Court of Appeals of Maryland's decision in *Conaway v. Deane*, like similar decisions in Washington and New York and along with the explosion of state marriage amendments, makes two things clear. First, same-sex marriage is not an inevitable development as an empirical matter. In other words, the idea that redefining marriage is a foregone conclusion because it is so clearly a constitutional right is inconsistent with reality.

This first point is somewhat obvious. Where the majority of appellate decisions assessing the question have ruled that marriage laws defining marriage as the union of a man and a woman are constitutional and where the overwhelming majority of states have either amended their constitutions to protect this understanding of marriage, seen their citizens vote to reject same-sex marriage, or have

either statutes or court decisions defining marriage as the union of a man and woman, same-sex marriage is hardly inevitable. Similarly, the Maryland decision in *Conaway v. Deane* is evidence of that fact.

Second, a careful analysis of the claims for and against redefining marriage, elucidated by the Circuit Court and Court of Appeals decisions in *Conaway v. Deane*, illustrates the risks inherent in accepting the idea that redefinition is akin to a foregone conclusion just waiting for enshrinement in the law. As already noted, claiming that an assertion is actually a fundamental right creates a risk that discussion will end and, thus, that important social interests will be slighted by courts and legislators swayed by the inevitability argument.

To understand this second point, that failing to examine the logic of redefinition will have consequences, requires a close analysis of the competing court decisions. The contrast between the competing decisions illuminates what is lost when claims for redefinition as an inevitable triumph of human rights are accepted.

In *Deane v. Conaway*, nine same-sex couples and one individual who desired the right to marry another man, sued county clerks from various parts of Maryland who had denied marriage licenses to the couples after they had applied.[34] The couples claimed to be "representative" of other such couples in Maryland who have suffered "legal, financial, and emotional harm as a result of the same-sex prohibition" implicit in the state's definition of marriage.[35] They claimed that they would have received licenses "but for their sexual identities."[36]

The couples asserted four claims in their challenge to Maryland's marriage laws: that the law discriminated on the basis of gender in violation of the state's Equal Rights Amendment ("ERA"), that the law discriminated on the basis of sexual orientation, and that the law violated their fundamental right to marry under both the equal protection and due process provisions of the state constitution.[37]

The Circuit Court focused its analysis on the first claim.[38] The court began by holding that the marriage law constituted facial sex

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[34] Deane v. Conaway, No. 24-C-04-005390, 2006 WL 148145, at *1-2 (Md. Cir. Ct. Jan. 20, 2006).

[35] *Id.* at *1.

[36] *Id.*

[37] *Id.* at *3.

[38] *See generally id.* at *3-9 (demonstrating how the majority of the opinion was spent discussing this particular argument).

discrimination.[39] In the court's description, "[t]he relative genders of the two individuals are facts that lie at the very center of the matter; those whose genders are the same as their intended spouses may not marry, but those whose genders are different from their intended spouse may."[40] Thus, to the court, "the relative genders of a same-sex couple are the very crux of the matter."[41] Accordingly, since a woman could marry a male partner and a man could not "marry that same male partner" (assuming this does not involve polygamy), "compared to the woman, the man is disadvantaged solely because of his sex."[42] The court posits an analogy it finds "striking" to an earlier Maryland case in which a Maryland court transferred custody of daughters from the father to the mother because it believed the mother would better parent the daughters.[43]

Having decided the Maryland marriage law constituted sex discrimination, the trial court explained that strict scrutiny analysis was appropriate under the state ERA.[44] This conclusion was superfluous, however, because the court could find:

> no apparent compelling state interest in a statutory prohibition of same-sex marriage discriminating, on the basis of sex, against those individuals whose gender is identical to their intended spouses. Indeed, this Court is unable to even find that the prohibition of same-sex marriage rationally relates to a legitimate state interest.[45]

The clerks argued that, in the court's characterization, "promoting the traditional family unit, in which the heterosexual parents are married, and encouraging procreation and child-rearing within this traditional unit"[46] was a legitimate state interest served by the marriage law, and the plaintiffs "do not contend that these are not legitimate

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[39] *Id.* at *3.

[40] *Deane*, 2006 WL 148145, at *3.

[41] *Id.* at *4.

[42] *Id.* at *5. This line of reasoning is potentially limitless. For instance, could not one claim that the law limiting each person to one spouse constituted marital status discrimination? Following the court's logic, "but for" being married one would be free to marry another person. Thus, if one is single, one could marry, but if one is married, one could not. Again, following the court's logic, the only thing separating a person seeking polyamorous marriage and a single person who can marry is marital status and, hence, discrimination. The same could be said of age or relationship as well—all of which is to say that the court's logic is more circular than illuminating.

[43] *Id.* at *6 (citing Griffin v. Crane, 351 Md. 133, 716 A.2d 1029 (1998)).

[44] *Deane*, 2006 WL 148145, at *6.

[45] *Id.* at *7.

[46] *Id.*

state interests."[47] The court, however, said there was "no rational connection between the prevention of same-sex marriages and an increase or decrease in the number of heterosexual marriages or of children born to those unions."[48] The court says the law is based on overly broad assumptions about "the optimal environment for procreation" and that "the Legislature has little experience with same-sex marriage"[49] so its procreational purpose cannot be linked to the definition of marriage.[50] The court also claims that if the legislature were to justify its marriage law it "would have to have concluded that children raised by opposite-sex married couples are better-off than children raised by same-sex married couples"[51] and to do so "may have assumed that opposite-sex marriages less frequently end in divorce, that opposite-sex couples are better parents, or that opposite-sex couples focus more on their children's education."[52] The court says that these assumptions "are broad unsupported generalizations" and, thus, cannot justify the marriage law.[53]

The court then summarily disposes of the clerks' claim that the marriage law is justified by the need to keep Maryland law uniform with the law of other states and of the United States.[54] It argues that giving the benefits of marriage, but not the status, to same-sex couples would not be an appropriate solution to the problem identified by the court.[55] Doing so would simply demonstrate the irrationality of the distinction since, if statutes "make a married couple and a non-married couple essentially equivalent with respect to the effects of marriage,

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47 *Id.*

48 *Id.*

49 *Id.* It is very difficult to understand what the court means by this. It seems to be suggesting that if the Legislature knew more about same-sex marriage it would come to a different conclusion. But on what authority can the court possibly make such a claim? If this is what the court means, then any novel legal claim would have to be accepted since the Legislature would always be lacking in experience with the change and could thus not rationally arrive at reasons for preventing it. A more troubling possibility is that the court is suggesting that only it is equipped to know the implications of redefining marriage without experience, unlike the legislature that needs specific experience to comprehend them. The court then follows this interesting assertion by noting that under the rational basis test, the legislature can justify its actions by "rational speculation" and "does not need evidentiary support." *Id.* at *8. This statement, of course, directly contradicts the assertion regarding evidence.

50 *Deane*, 2006 WL 148145, at *7.

51 *Id.* at *8.

52 *Id.* It is of course, highly ironic that the court finds fault with the legislature for engaging in broad generalizations when it is basing its conclusion on assumptions of what the legislature *might have* assumed.

53 *Id.*

54 *Id.*

55 *Deane*, 2006 WL 148145, at *9.

there simply is no rational reason to prevent the marriage."[56] The court ends by rejecting a claim that, in the court's words, the marriage law is justified by an interest in "promoting and preserving legislatively expressed societal values" because, to the court, "tradition and social values alone cannot support adequately a discriminatory statutory classification."[57]

The Court of Appeals took the case directly without waiting for an appeal through the Court of Special Appeals.[58] The majority began its legal analysis by directly addressing the sex discrimination claim.[59] The court noted that Maryland sex discrimination precedent "involved legislative classifications that gave certain rights to an entire class of men or women, to the exclusion of the opposite sex" thus making these cases distinguishable from Maryland's marriage law "that, on its face, applies equally to the members of both sexes."[60] The court examined in considerable detail the legislative history of the state and proposed federal Equal Rights Amendment, including contemporaneous arguments offered in support of ratification in Maryland.[61] The court concluded that "the primary purpose of the ERA was to eliminate discrimination as between men and woman as a class."[62] The court previously had occasion to apply the ERA in other cases and noted that "our applications of the ERA indicate that its primary purpose was to remedy the long history of subordination of women in this country, and to place men and women on equal ground as pertains to the enjoyment of basic legal rights under the law."[63] Having examined both sources of interpretation, the court concluded "the Legislature's and electorate's ultimate goal in putting in place the Maryland ERA was to put men and women on equal ground, and to subject to closer scrutiny any governmental action which singled out for disparate treatment men or women as discrete classes."[64] Thus, unless a challenged statute "grants, either on its face or in application, rights to men or women as a class, to the exclusion of an entire subsection of similarly situated members of the opposite sex, the provisions of the ERA are not implicated and the statutory classification under review is subjected to rational basis scrutiny,

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56 *Id.*
57 *Id.*
58 *Conaway*, 401 Md. at 238, 932 A.2d at 581.
59 *Id.* at 244, 932 A.2d at 585.
60 *Id.* at 246, 932 A.2d at 586 n.14.
61 *Id.* at 246-72, 932 A.2d at 587-603.
62 *Id.* at 250, 932 A.2d at 589.
63 *Id.* at 254, 932 A.2d at 591.
64 *Conaway*, 401 Md. at 260, 932 A.2d at 596.

unless there exists some other reason to apply heightened scrutiny."[65] Applied to the state's marriage law, the court found it did:

> not separate men and women into discrete classes for the purpose of granting to one class of persons benefits at the expense of the other class. Nor does the statute, facially or in its application, place men and women on an uneven playing field. Rather, the statute prohibits equally both men and women from the same conduct.[66]

The court specifically rejected the trial court's assignment of almost totemic significance to the mere mention of sex in the law: "a statute does not become unconstitutional simply because, in some manner, it makes reference to race or sex."[67]

The court also rejected the analogy to *Loving v. Virginia* as "inapt."[68] The court noted that the United States Supreme Court in *Loving* "determined that, although the statute applied on its face equally to all races, the underlying purpose was to sustain White Supremacy and to subordinate African-Americans and other non-Caucasians as a class."[69] So, for the court, "[a]bsent some showing that [the marriage law] was 'designed to subordinate either men to women or women to men as a class,' . . . we find the analogy to *Loving* inapposite."[70]

Having disposed of the sex discrimination claim, the court turned to the claim of sexual orientation discrimination. The court said the marriage law "does differentiate implicitly on the basis of sexual preference" but that such a category "is neither a suspect nor quasi-suspect class" subject to rational basis review.[71] The court admitted that:

> [h]omosexual persons have been the object of societal prejudice by private actors as well as by the judicial and legislative branches of federal and state governments. Gay, lesbian, and bisexual persons likewise have been subject to unique disabilities not truly indicative of their abilities to contribute meaningfully to society.[72]

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65 *Id.* at 263-64, 932 A.2d at 597-98.
66 *Id.* at 264, 932 A.2d at 598.
67 *Id.* at 268-69, 932 A.2d at 600.
68 *Id.* at 268, 932 A.2d at 600.
69 *Id.* at 269, 932 A.2d at 601.
70 *Conaway*, 401 Md. at 270, 932 A.2d at 601 (quoting *Hernandez*, 855 N.E.2d at 11).
71 *Id.* at 277, 932 A.2d at 605-06.
72 *Id.* at 282, 932 A.2d at 609.

The court held, however, that "we are not persuaded that gay, lesbian, and bisexual persons are so politically powerless that they are entitled to 'extraordinary protection from the majoritarian political process.'"[73] The court noted that "at least in Maryland, advocacy to eliminate discrimination against gay, lesbian, and bisexual persons based on their sexual orientation has met with growing successes in the legislative and executive branches of government," referencing anti-discrimination provisions in state code and regulations that include sexual orientation.[74] The court also said that given "the scientific and sociological evidence currently available to the public, we are unable to take judicial notice that gay, lesbian, and bisexual persons display readily-recognizable, immutable characteristics that define the group such that they may be deemed a suspect class."[75] Further, the court noted that the plaintiffs "point neither to scientific nor sociological studies, which have withstood analysis for evidentiary admissibility, in support of an argument that sexual orientation is an immutable characteristic."[76]

In its analysis of the argument that same-sex marriage was a fundamental right, the court said it could not rest on a "brief invocation of the cases outlining the importance of marriage generally and the other liberty interests that make up the fundamental rights panorama of personal autonomy."[77] Instead, the court agreed with other appellate courts "that the issue is framed more properly in terms of whether the right to choose same-sex marriage is fundamental."[78] The court noted that the right-to-marry cases "infer that the right to marry enjoys its fundamental status due to the male-female nature of the relationship and/or the attendant link to fostering procreation of our species."[79] Specifically, "virtually every Supreme Court case recognizing as fundamental the right to marry indicates as the basis for the conclusion the institution's inextricable link to procreation, which necessarily and biologically involves participation (in ways either intimate or remote) by a man and a woman."[80] The court accepted that "this latitudinously-stated right to marry" is fundamental, but the court noted that marriage "is nevertheless a public institution that

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[73] *Id.* at 286, 932 A.2d at 611 (internal citation omitted).
[74] *Id.*, 932 A.2d at 611.
[75] *Id.* at 291, 932 A.2d at 614.
[76] *Conaway*, 401 Md. 292, 932 A.2d 615.
[77] *Id.* at 297-98, 932 A.2d at 618.
[78] *Id.* at 299, 932 A.2d at 619.
[79] *Id.* at 299-300, 932 A.2d at 619.
[80] *Id.* at 302, 932 A.2d at 621.

historically has been subject to the regulation and police powers of the State."[81] Thus, "the fundamental right to marry is not absolute" with regulations related to age, relationship, and competency, and there is no precedent for a fundamental right to marry the person of one's choice despite that person being "lineally and directly related."[82] The court concluded that a right to same-sex marriage is not "so deeply imbedded in the history, tradition, and culture of this State and Nation that it should be deemed fundamental."[83] Examining "the current economic, political, and social climate" the court said it was "unwilling to hold that a right to same-sex marriage has taken hold to the point that it is implicit in the concept of ordered liberty or deeply rooted in the history and tradition of Maryland."[84] In support, the court noted that "Congress, as well as nearly every state in the Nation, has taken legislative action or otherwise enacted constitutional amendments limiting explicitly the institution of marriage to those unions between a man and a woman."[85]

The court finally addressed the state's justification for its marriage law.[86] The court agreed "that the State's asserted interest in fostering procreation is a legitimate governmental interest."[87] More specifically, "[i]n light of the fundamental nature of procreation, and the importance placed on it by the Supreme Court, safeguarding an environment most conducive to the stable propagation and continuance of the human race is a legitimate government interest."[88] To the court, the "'inextricable link' between marriage and procreation reasonably could support the definition of marriage as between a man and a woman only, because it is that relationship that is capable of producing biological offspring of both members (advances in reproductive technologies notwithstanding)."[89] In response to the argument that the state could have no interest in linking marriage and procreation since some married couples do not have children and some who have children do not marry, the court explained that to comport with rational basis, a law "need not be drawn with mathematical exactitude, and may contain imperfections that result in some degree

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81 *Id.* at 303-04, 932 A.2d at 622.
82 *Conaway*, 401 Md. 305-06, 932 A.2d 623.
83 *Id.* at 307, 932 A.2d at 624.
84 *Id.* at 308, 312, 932 A.2d at 625, 627.
85 *Id.* at 312, 932 A.2d at 627.
86 *Id.* at 315-24, 932 A.2d at 629-34.
87 *Id.* at 317, 932 A.2d at 630.
88 *Conaway*, 401 Md. 317, 932 A.2d 630.
89 *Id.* at 318, 932 A.2d at 630-31.

of inequality."[90] Additionally, "inquiry into the ability or willingness of a couple actually to bear a child during marriage would violate the fundamental right to marital privacy."[91] The court concluded that:

> the fundamental right to marriage and its ensuing benefits are conferred on opposite-sex couples not because of a distinction between whether various opposite-sex couples actually procreate, but rather because of the *possibility* of procreation. In such a situation, so long as the Legislature has not acted wholly unreasonably in granting recognition to the only relationship capable of bearing children traditionally within the marital unit [the courts are not to substitute their own judgment for the legislature's].[92]

Therefore, the Court of Appeals of Maryland rejected the constitutional claims and upheld Maryland's position on marriage law.

Three judges dissented from the majority opinion.[93] One did so only partially, arguing that while the status of marriage could be withheld from same-sex couples, the state ought to extend the benefits of marriage to them.[94] The other two would have accepted the absolutist take on sex discrimination.[95]

IV. THE FUTURE OF INEVITABILITY

The decision of the Circuit Court in *Deane v. Conaway* can serve as a proxy for the inevitability argument because it employs all of the presumptions of that argument as to the constitutional mandate for marriage redefinition. By contrast, the Court of Appeals decision in *Conaway v. Deane* exposes the problems with the argument.

Briefly, the problems inherent in the inevitability argument are that it distorts reality and elides the very real consequences of the change it claims is unavoidable. These problems are linked to one another.

In his important work of political science, Eric Voegelin described the tendency of ideologists in our time to merge the realm of an ideal utopian world with the reality of lived experience:

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[90] *Id.* at 321-22, 932 A.2d at 633.

[91] *Id.*, 932 A.2d at 633.

[92] *Id.* at 322-23, 932 A.2d at 633.

[93] *Id.* at 326, 932 A.2d at 635. They were Judge Raker, Judge Battaglia, and Chief Judge Bell.

[94] *Conaway*, 401 Md. 326, 932 A.2d 636 (Raker, J., concurring and dissenting).

[95] *See id.* at 356, 932 A.2d at 654 (Battaglia, J., dissenting); *see also id.* at 421, 932 A.2d at 693 (Bell, C.J., dissenting).

> [i]n the Gnostic dream world . . . nonrecognition of reality is the first principle. As a consequence, types of action which in the real world would be considered morally insane because of the real effects which they have will be considered moral in the dream world because they intended an entirely different effect. The gap between intended and real effect will be imputed not to the Gnostic immorality of ignoring the structure of reality but to the immorality of some other person or society that does not behave as it should behave according to the dream conception of cause and effect.[96]

Edmund Burke, too, was aware of this dangerous tendency and "regarded speculative ideology as a form of metaphysical insanity which totally disregarded historical experience and the depravity in human nature regarding the uses of political power."[97]

The chief threats of "speculative ideology," or the new Gnosticism, thus derive from their need to ignore or distort reality to advance an invented notion of the ideal. If reality, as lived, is admitted, it will frustrate the ideological goal because those realities will make clear the goal is not achievable. If the goal is, as it so often seems to be, uniformitarian equality, factors that militate against the achievement of this goal, such as differences in capacity, must be ignored or repressed. Because the ideological goal is paramount, the risks inherent in the effort to enforce it are minimized or denied. These risks will include the loss of goods related to human diversity, various unintended consequences of change, and enforcement costs that may easily become increasingly steep and which will be felt as increasingly punitive. Having established an ideological goal, the temptation to pursue it "by any means necessary" is almost irresistible.

As to this latter point, Richard Weaver has noted that the "first step" for ideologists "is to confuse and paralyze the opposition by sowing widely and ostensibly" the notion that the ideological account of reality is the only possible account and that its eventual triumph is inevitable.[98] Dr. Weaver continues: "[o]nce you have convinced a man that he cannot operate on any representation of reality but your

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[96] ERIC VOEGELIN, THE NEW SCIENCE OF POLITICS: AN INTRODUCTION 169-70 (The University of Chicago Press 1952).

[97] Peter J. Stanlis, *Edmund Burke's Legal Erudition and Practical Politics: Ireland and the American Revolution*, 35 POL. SCI. REVIEWER 66, 70 (2006).

[98] Richard M. Weaver, *On Setting the Clock Right*, NATIONAL REVIEW, Oct. 12, 1957, *available at* http://www.nationalreview.com/nroriginals/?q=NGU4N2ZiNWNhY2ExZjdlMjA3Yzk2NDIyY2Q1MDA2NDE=.

own, you have him in a state of virtual impotence."[99] The challenge is that inevitability so rarely proves to be inevitable. "The second step is to regard this as nonsense as far as your own affairs go and to proceed to fashion the world according to your preferred concept of it."[100] So that rather than merely being a statement of historical law for the ideologically motivated, the claim of inevitability "is an expression of their will to power and their determination to overcome everything which stands in the way of the actualization of their dream."[101]

These observations have real application to the debate over marriage redefinition. The proposal that marriage must be redefined is the manifestation of an egalitarian ideological goal, frankly labeled by its proponents as "marriage equality."[102] It makes short shrift of opposing realities such as sex difference, procreation, specifically that it requires one person of either sex, tradition and history, and the channeling function of family law whereby legal understandings influence actual behavior. The marriage equality principle is widely proclaimed to be inevitable, such that opponents are accused of being on the wrong side of history.[103] Any concerns about the effect of the change are dismissed as naïve or invidious.

As with other claims of historical determinism, the inevitability of marriage equality is not so inevitable that it can be trusted to happen in its own time. Rather, activists feel the need to give the inevitable a shove forward and will do so heedless of normal restraints. The pursuit of the goal of marriage equality in Maryland, evidenced in the court decisions summarized above, illustrates this process.

The most obvious illustration is the trial court's decision to ignore the reality of sex difference.[104] By treating the mere mention of the sex of parties to a marriage as facially discriminatory and justifying strict scrutiny, the court implied that the law could not even take into consideration the reality that men and women are not interchangeable.[105] Ironically, this reading would gut any attempt to protect women in the law because such an effort must explicitly

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[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] William C. Duncan, *Same-Sex Couples and "The Exclusive Commitment": Untangling the Issues and Consequences: Marriage and the Utopian Temptation*, 59 RUTGERS L. REV. 265, 272 (2007).

[103] Scott J. Anderson, *Gay Republicans: GOP on 'wrong side of history,'* CNN, Sept. 2, 2008.

[104] *See Deane*, 2006 WL 148145; *see also* Md. State Bd. Of Barber Examiners v. Kuhn, 270 Md. 496, 503, 312 A.2d 216, 220 (1973).

[105] *See Deane*, 2006 WL 148145, at *3.

recognize that there are differences and these differences have import. If men and women are truly interchangeable what could be wrong with a club consisting only of the members of one sex? Under the court's analysis, one could expect no substantive difference in makeup if only men or only women were involved. This fungibility argument has been consistently rejected in United States Constitutional law.[106] The Supreme Court has specifically allowed for differential treatment of men and women in laws regarding statutory rape.[107] Any law protecting women from discrimination based on pregnancy or against violence similarly recognizes this reality.[108] The Court has stated that "[p]hysical differences between men and women, however, are enduring: 'The two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.'"[109] The non-ideological decision of the Court of Appeals easily avoided this error.

The trial court also ignored biological differences between men and women. It argued that the marriage law employing a husband-wife definition of marriage was analogous to an earlier court decision that expressed preference for a mother raising daughters in assigning child custody.[110] In making this analogy, however, the court failed to consider the obvious problem with such a decision—that it would separate a parent from a child; not that it would separate a female child from a male parent. The problem in that case was not sex segregation; it was disrupting a parental relationship on the basis of the sex of one parent. In other words, it would have been just as problematic if that earlier court had said the mother received custody of all sons because mothers do a better job parenting sons than fathers. There would be a form of sex integration in such a decision but the key problem—disadvantaging a parent because of that parent's sex—would not have been addressed. Similarly, in its exclusive focus on the irrelevant question of parenting skills,[111] the trial court elided the much more salient reality that a child born to a married mother and father will usually be the child of both, while a child born to a parent in a same-sex couple never will be the child of both members of the couple.

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[106] *See, e.g.*, Ballard v. United States, 329 U.S. 187, 193 (1946) (holding that men and women are not fungible).

[107] Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981).

[108] 42 U.S.C. § 2000e(k) (2011); Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

[109] United States v. Virginia, 518 U.S. 515, 533 (1996) (quoting *Ballard*, 329 U.S. at 193).

[110] *See supra* notes 34 and 43 and accompanying text.

[111] *See supra* notes 34 and 43 and accompanying text.

The analysis of the trial court also distorted other realities. The Court of Appeals noted two of these constitutional realities in its rejection of the sex discrimination analysis and the suspect class discussion of the court below.[112] The trial court's curiously government-centered analysis of the state's interaction with marriage is another example of distorted understanding. The court asserted that Maryland was trying to advance the state's interests related to procreation through the "*prevention* of same-sex marriages."[113] This is not an accurate statement of the state's posture in regard to marriage. In retaining the longstanding conception of marriage as the union of a husband and wife in its law, the court is not preventing same-sex couples from having relationships, even of calling these relationships marriages. Instead, the state is choosing to promote an understanding of marriage that is necessarily child-centered by retaining a definition that encompasses only those types of relationships that may result in the birth of children without third party participation. Prohibiting same-sex couples from making personal choices and promoting their choice by redefining marriage to include it are not the only two possibilities open to the state.[114] It may, as it does, choose to allow a wide realm of personal choice to same-sex couples while retaining formal recognition of the uniqueness of the male-female bond.

The trial court's analysis distorted the public interests in marriage. As noted earlier, the court assumed that the legislature must have enacted its definition of marriage because it believed opposite-sex couples make better parents than same-sex couples.[115] Thus, it described the state interest as promoting a unit "in which the heterosexual parents are married."[116] It is instructive to note how easily the Court of Appeals determined that the issue was not, contrary to the trial court's findings, some sort of favoritism among various sexual arrangements. Rather, as the Court of Appeals noted, the legal distinction between male-female couples and other arrangements is based on some deep and "inextricable" realities—specifically, that "it is that relationship that is capable of producing biological offspring of both members (advances in reproductive technologies

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[112] *See supra* notes 44-53, 63-66 and accompanying text.

[113] *See supra* notes 79-92 and accompanying text.

[114] *See* Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy; Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 545-47, 561-62 (1983).

[115] *See supra* notes 49-53 and accompanying text.

[116] *Deane*, 2006 WL 148145, at *7.

notwithstanding)."[117] A child born to a marriage of his or her parents is guaranteed to have a legally enforceable relationship with both parents. In defining marriage consistent with this reality, the law encourages the kinds of couples whose relationship can result in the birth of children. Even though having children may not be the specific intention of every married couple, they can commit to one another and their children through their union. It simultaneously encourages the people who create children to jointly care for them and makes real a legal, social, and practical tie between the child and his or her own parents.

Marriage advances the state's procreation-related interest even when a specific married couple cannot or do not have a child. This couple can provide a close substitute for a child otherwise deprived of a relationship with his or her own biological parents and, by their faithfulness to their marital commitment, they do not create children with other people who will grow up in a fatherless or motherless home. Redefining marriage, by contrast, would legally enshrine an understanding of marriage that necessarily has nothing to do with children. Certainly same-sex married couples could have children, but this decision would have no intrinsic link to their marital status. In other words, redefining marriage makes even more tenuous the relationship between marriage and children that has already been stretched by cultural trends like divorce, cohabitation, and unwed parenting. It would thus make it impossible for marriage law to channel male-female sexual relations into a child-centered union. In fact, the state would be legally precluded from doing so because if a class of spouses are in a type of relationship that always and everywhere cannot result in children without third party participation, clearly the legal category of which they are a part cannot be child-centered. In other words, enshrining a definition of marriage that necessarily has nothing to do with children necessarily follows a legal redefinition to include same sex couples. The new, adult-centered, understanding of marriage may provide benefits to the parties to a marriage, but it cannot and will not provide the basic public goods marriage has served. If forced to rely only on the trial court's analysis of the state interests in marriage, these likely costs of redefinition would never be clear; only the Court of Appeals decision raises them.

Another risk inherent in the redefinition of marriage, but not disclosed by the triumphalist argument for same-sex marriage, is the risk that marriage will lose any social meaning and become merely an

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[117] *Conaway*, 401 Md. at 318, 932 A.2d at 630-31.

individualist arrangement. This is inherent in the adult-centered understanding of marriage that follows from redefinition. The Court of Appeals noted that marriage is a "public institution" in which the state has a valid interest.[118] Again, this point would have been missed in the more ideological account of the trial court.

Specifically, endorsing a redefinition of marriage would mean endorsing a purely contractual understanding of marriage, since it involves no larger social interests, only the interests of the adult parties. It is true that the adoption of no-fault divorce has moved the states much closer to this kind of understanding, but same-sex marriage would largely complete the transition. Same-sex marriage merges the public and intimate spheres by conferring public recognition not on the basis of social goods like responsible procreation but on purely private choices. It makes marriage a contingent belonging—a linking of two autonomous individuals as an action of will. The displaced understanding of marriage certainly involves an element of choice, but the realities of biology, sexual complementarity, and the dependence and vulnerability that come with pregnancy make it impossible to speak of much of what is experienced in marriage between a man and a woman as freely chosen. As F.H. Bradley noted, "[m]arriage is a contract, a contract to pass out of the sphere of contract."[119] The initial choice of marriage creates obligations and liabilities, as well as joys and opportunities, which are not properly understood as bargained for. If we continue to embrace a purely contingent notion of marriage we will see a continued "waning of belonging" which ignores "the organic correlations between autonomy and dependence, which lies at the heart of human existence."[120] To legally enshrine the concept of contingent belonging as the *sine qua non* of marriage is what redefining marriage to center it entirely on adult choice would do.

As discussed above, inevitability seems often to need a push. In many states, that shove has come from State Attorneys General who decline to defend marriage laws so as to prevent courts from grappling with (or to allow courts so inclined to ignore) the real consequences of changing the definition of marriage. It can also be supplied by courts

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[118] *Id.* at 303-04, 932 A.2d at 622.

[119] Francis Herbert Bradley, *Ethical Studies*, *reprinted in* CONSERVATIVE TEXTS: AN ANTHOLOGY 58 n.1 (Roger Scruton ed., 1991).

[120] Akira Morita, *Amae and Belonging—An Encounter of the Japanese Psyche and the Waning of Belonging in America*, 8 (2001), http://www.law2.byu.edu/organizations/marriage_family/past_conferences/feb2011/drafts/Morita%20Akira,%20Amae%20and%20Belonging,%202011.%201.%2020.pdf.

who inappropriately apply subjective legal standards like rationality to avoid them. If a court labels a practice irrational, what recourse do citizens have? They can hope that a higher court, as in the case of Maryland, will correct the mistake, but this is not always possible.

The argument from inevitability seeks purposely to prevent the possibility of correction of a mistaken analysis of the costs of same-sex marriage. Professor Weaver explains that "[i]f you teach a representation of man which pictures him as nothing more than a cork bobbing on the surface of forces he cannot control, you may expect him to default on his responsibilities."[121] If the drumbeat of inevitability begins to intimidate opponents of the change from expressing their opposition, as it is indeed intended to do, one can expect them to default on their responsibility to safeguard marriage. If on the other hand, the partisans of same-sex marriage "should admit that this future" of inevitable marriage redefinition:

> is only their subjective feeling which they are determined to objectify, they [will be] bound to show that it is somehow better or more deserving of realization than that espoused by the other side. In this case they will have to abandon any argument based on our presumptive inability to turn the clock back. For they are now conceding that there is no order which will come necessarily with the passage of time; there are only contemplated and willed orders; we can have one or another, and our choice must take us back to some standard of values about which men can differ.[122]

V. CONCLUSION

Proponents of marriage redefinition failed in their first attempt to impose the inevitable, or what they claim is inevitable, on the state of Maryland through litigation. As this article is being written, they are now attempting to do so by using the legislative process. While unsuccessful this past legislative session, only time will tell if marriage redefinition proponents will be successful through the legislature.

A careful application of the law prevented the redefinition of marriage in the Court of Appeals of Maryland. That court appropriately resisted the idea that the state's constitution required a redefinition of marriage. In doing so, the Court of Appeals resisted the

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[121] Weaver, *supra* note 98.

[122] *Id.*

distorting effect of the argument that same-sex marriage is a basic human right, the denial of which is everywhere and always a manifestation of atavistic bigotry. It allowed the consensus of millennia of human experience to stand because the court was willing to recognize that this consensus reflected realities of human life, the denial of which would have consequences.

The legislature is being encouraged to do the opposite—to pretend that there are no differences between men and women and to accept that any recognition of these differences and their very real consequences for children and society would be to derogate a human right. Members of the legislature are being told that they will be on the wrong side of history if they do not redefine marriage so as to include any two persons.

Whatever happens in the legislature, it is helpful that the Maryland courts have taken steps to clarify the stakes.

Marriage is, as the Court of Appeals noted, a social institution. As such, to adopt the words Edmund Burke used to describe constitutional liberties, it is part of an "entailed inheritance derived to us from our forefathers, and to be transmitted to our posterity."[123]

In *Bleak House*, an inheritance was dissipated in litigation. In that novel, the expectations of possible beneficiaries to a will were disappointed when the costs of the litigation entirely consumed the estate that was in dispute. The ongoing litigation to redefine marriage threatens the same result. If the arguments rejected by the Court of Appeals of Maryland are eventually accepted in the legislature or in other courts, the social significance of marriage could be extinguished only to be replaced with an empty legal construct meant only to ratify the relationship choices of adults.[124] Such an outcome would also frustrate the expectations of children that they will be able to grow up in a world where their rightful inheritance, the opportunity for a relationship with a mother and father, will be secured.

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[123] EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 119 (Penguin Classics 1986) (1790).

[124] A change, moreover, likely to frustrate even the expectations of adults, who may feel their own marriages devalued if they are essentially the legal equivalent of a cell phone contract (albeit easier to escape from).