

EXHIBIT 8B

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13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 14 COUNTY OF SAN FRANCISCO
 UNLIMITED CIVIL JURISDICTION

15 Coordination Proceeding
 Special Title (Rule 1550(b))
 16 MARRIAGE CASES

17 RANDY THOMASSON, et al.,
 18 Petitioners/Plaintiffs,

19 vs.

20 GAVIN NEWSOM, et al.,
 21 Respondents/Defendants.

22 PROPOSITION 22 LEGAL DEFENSE AND
 23 EDUCATION FUND, et al.,

24 Petitioners/Plaintiffs,

25 vs.

26 CITY AND COUNTY OF SAN
 FRANCISCO, et al.,

27 Respondents/Defendants
 28

JUDICIAL COUNCIL COORDINATION
 PROCEEDING NO. 4365

Case No. 428-794
 (Consolidated with Case No. 503-943)

DECLARATION OF NANCY F. COTT IN
 OPPOSITION TO PLAINTIFFS' MOTION
 FOR SUMMARY JUDGMENT

BY FAX

Date Action Filed: March 11, 2004
 Trial Date: Not set

1 I, Nancy F. Cott, declare as follows:

2 1. I make this declaration of my own personal knowledge and would testify
3 competently to matters stated herein if called to do so.

4 2. On August 31, 2004, I signed a declaration in support of the City and County of San
5 Francisco's Constitutional Challenge to the California Marriage Statutes. In that declaration ("Cott
6 Opening Dec."), I summarized my qualifications as a Professor of American History at Harvard
7 University with expertise in the area of American social history and history of the family. The
8 claims and evidence in my Opening Declaration were supported by the decade of research I
9 conducted to write my book *Public Vows: A History of Marriage and the Nation*, (2000) Harvard
10 Univ. Press. The claims and evidence in this declaration are also supported by that research.

11 3. I have reviewed the Opening Brief in Support of Declaratory Judgment That the
12 California Marriage Laws Are Constitutional submitted to the court by the Proposition 22 Legal
13 Defense and Education Fund ("Prop 22 LDEF"), as well as the declaration of Allan C. Carlson
14 submitted in support thereof. I have also reviewed the Memorandum of Points and Authorities in
15 Support of Declaratory Judgment submitted to the court by the Campaign for California Families
16 ("CCF") as well as the declaration of Katherine Young submitted support thereof. I submit this
17 declaration in response to these documents and to supplement my Opening Declaration.

18 4. The Prop 22 LDEF has tried to undermine my scholarly reputation by citing my
19 approval of the "Affirmation of Family Diversity," which appears on the website of the Alternatives
20 to Marriage Project (AMP), and suggesting that I therefore approve everything else that appears on
21 the AMP website, including practices such as polyamory. Some time ago, a representative of AMP
22 sent me a copy of the Affirmation of Family Diversity and asked me to become a signatory to the
23 document. I reviewed the document, a true and correct copy of which is attached as Exhibit A to
24 this declaration, and approved the use of my name as a signatory to the document. I did not review
25 the website, and my signing the Affirmation of Family Diversity did not and does not now mean
26 that I subscribe to any or every viewpoint that may have been posted then or later on the AMP
27 website.

1 5. The Prop 22 LDEF states that "one of the types of 'healthy relationships' promoted
2 by the Alternatives to Marriage Project is polyamory, which includes open relationships,
3 relationships among three or more adults, or group marriage. The arguments in favor of marriage
4 for same-sex couples apply equally to incestuous or polygamous relationships." These statements
5 use the tactic of guilt by association to suggest that by signing the Affirmation of Family Diversity I
6 have endorsed polyamory, incest, and polygamy. The Affirmation of Family Diversity does not
7 even mention, much less approve polyamory, incest or polygamy. Furthermore, nothing in the
8 Affirmation of Family Diversity or currently on the AMP website asserts that polyamory is a
9 "healthy relationship" as the Prop 22 LDEF insinuates.

10 6. The Prop 22 LDEF argues that California law does not define marriage, that the
11 definition of marriage predates the state and the nation, and that the City has confused the legal
12 incidents of marriage with its definition. Prop 22 LDEF, OB at 2-3. They further argue that the
13 definition of marriage is a universal across time, culture, and religion while the legal incidences of
14 marriage are variable. *Id.* History does not support the claim that there is a universal definition of
15 marriage. Rather, marriage has taken many forms. (See Justice Murphy's dissent in *Cleveland v.*
16 *U.S.*, 329 U.S. 14 (1946).) At the time the United States was founded, monogamous marriage was
17 practiced by only a small minority of the globe's population. While monogamous marriage has
18 been a very important institution throughout American history, it too has changed dramatically over
19 the centuries. The common law definition of marriage that was in place when the United States was
20 founded was superseded by positive law in every state during the 19th and early 20th centuries. One
21 cannot discern a transcendent essence of marriage without regard to the many specific legal rights
22 and obligations that define marriage at any point in time.

23 7. The Prop 22 LDEF asserts that "The City and their expert, Nancy Cott, show real or
24 feigned ignorance of California law when they claim that 'women, once married. . . lost[t] all of
25 their independent legal rights, including the right to hold property, and to sue or be sued. . . .'
26 Women have possessed these rights, at least in regard to their separate property, in California since
27 the adoption of the 1849 Constitution." Prop 22 LDEF, OB at 8. The Prop 22 LDEF has used my
28 words out of context. The text quoted from my declaration described the common law tradition of

1 marriage before the legal changes of the mid-19th century began to emancipate wives. My
2 declaration accurately describes the common law situation that was superseded by California's
3 constitution and other positive laws. The doctrine of coverture – a legal fiction of the common law
4 under which the married couple was a single unit for which the husband served as the legal
5 representative – was a complex doctrine consisting of many different components. Judges and
6 legislatures dismantled the doctrine piece by piece beginning in the early to mid nineteenth century.
7 Cott Opening Dec. pars. 28-32. In California, a portion of the work of dismantling the doctrine of
8 coverture was accomplished in the California Constitution of 1849. As the California Supreme
9 Court noted in *Dow v. Gould and Curry Silver Mining Co.*, the framers of the California
10 Constitution "swept out of existence many of the disabilities of the wife and some of the most
11 important rights of the husband. . . . but they neither intended to abrogate all the marital rights of the
12 husband nor to remove all the disabilities of the wife in respect to her property." 31 Cal. 629 at 641
13 (1867). It took step by step reforms over more than a century to dissolve the remaining rights of the
14 husband and disabilities of the wife enshrined in California law. Cott Opening Dec. at pars. 31-34.
15 Prop 22 LDEF suggests that the Supreme Court's decision in *Dow v. Gould and Curry Silver*
16 *Mining Co.* contradicts statements in my Opening Declaration, but this case, as well as the
17 Constitutional provision it interprets, are entirely consistent with the statements in my Opening
18 Declaration

19 8. My Opening Declaration noted that the law's treatment of interracial marriage
20 provides an example of the many ways in which the legal institution of civil marriage has changed
21 over time to reflect evolving social norms. Cott Opening Dec. par. 17-26. The Prop 22 LDEF
22 argues that the common law recognized marriages without reference to race and, citing *Pearson v.*
23 *Pearson*, 51 Cal.120, 124-25 (1875) asserts that even slaves were entitled to marry in California.
24 The *Pearson* case does not, however, contradict my assertions about interracial marriage in my
25 Opening Declaration, but rather supports my point that slaves could not marry legally. This case
26 involved an inheritance dispute between Mr. Pearson's daughter from his first marriage and his
27 second wife, a former slave. Contrary to Prop 22 LDEF's assertions, the Court found that the
28 decedent's marriage to the defendant "amounted to a relinquishment of his claim to further hold her

1 as a slave." The court continued, "At common law, if a man bound himself in a bond to his villein,¹
2 granted him an annuity, or gave him an estate, even for years, it was held to be an implied
3 manumission, 'for this was dealing with his villein on the footing of a freeman.'" Id. In upholding
4 the validity of the marriage, the court noted, "She certainly could not, in contemplation of law, be
5 both the slave and the wife of Pearson." Id at 125.

6 9. Allan Carlson agrees with many of the claims in my Opening Declaration. He states,
7 however, that paragraph 13 "implying that producing children or progeny is but a secondary
8 purpose of marriage is historically inaccurate." Carlson Dec. at par. 3. I have made no claims about
9 the primary or secondary purposes of marriage. Marriage is a complex institution that has served
10 many purposes over time. Over the last century, the many changes in marriage law reflect two
11 emphases. First, they reflect the critical role marriage plays in organizing both private and public
12 responsibilities for supporting dependents. Second, they reflect the increasing symmetry and
13 equality in the rights, roles, and responsibilities of the two partners. These legal changes have
14 moved in tandem with the increasing social importance placed on the values of love, intimacy and
15 emotional support between spouses.

16 10. As I have noted in paragraph 13 of my Opening Declaration, the state of California
17 has never required that individuals be willing and able to have children in order to marry. The Prop
18 22 LDEF Opening Brief suggests that inability or unwillingness to have children has been a basis to
19 annul a marriage. This suggestion is incorrect. Section 2210 of the California Family Code and its
20 predecessors have allowed a marriage to be voided if consent of either party was obtained by fraud.
21 The cases Prop 22 LDEF cites regarding annulment of marriages demonstrate only that consent to
22 marriage cannot be induced by fraudulent representations about procreation. Prop 22 LDEF at 21-
23 22. These cases do not reflect a state policy that married couples must or should procreate and do
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26 ¹ According to Black's Law Dictionary, a "villein" is "In feudal law, a person attached to a
27 manor, who was substantially in the condition of a slave, who performed the base and servile work
28 upon the manor for the lord, and was, in most respects, a subject of property belonging to him."
(1979) 5th edition.

1 not establish that procreation is today the primary purpose of marriage or that the state has *ever*
2 required procreation of married partners.

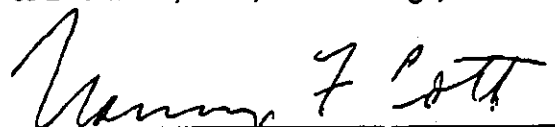
3 11. Katherine Young concludes that authorizing marriage among partners of the same
4 sex would not expand the norm of marriage but would break it. Young at par.76. This argument
5 reminds me of arguments offered against women's suffrage throughout the late 19th and early 20th
6 century when the campaign for women's right to vote was at full strength. Many opponents argued
7 that allowing women to vote would be fatal not only to the political arena but also to marriages and
8 families. If women voted, these opponents said, household unity would dissolve, and this would
9 undermine the health of society as a whole. To preserve society, then, women must not be allowed
10 to vote. History has shown that admitting women to the voting arena did not undermine households
11 and society did not fall apart. In fact, admitting women into the voting arena has improved both the
12 political process and society as a whole. As in many other areas of law, California was a leader in
13 the movement for women's suffrage. The voters approved Senate Amendment No. 8 to the
14 California Constitution granting women the right to vote at a special election in October, 1911, nine
15 years before the nineteenth amendment to the United States Constitution was ratified in 1920. In
16 California, as elsewhere, opponents of Amendment No. 8 predicted disaster. Similar threats of
17 doom have accompanied many of the changes in the institution of marriage. As a historian of
18 marriage who has studied its many changes in the United States over centuries, I do not find
19 marriage to be so fragile. Especially since changes in California law have stripped from the
20 definition of marriage its references to traditional gender roles, the marriage institution should be
21 able to accommodate partners of the same sex. I believe that admitting same-sex couples to the

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1 American norm of monogamous marriage will prove beneficial rather than harmful both to the
2 institution of marriage and to society.

3 12. I declare under penalty of perjury under the laws of the State of California that the
4 foregoing is true and correct. Executed this 29thth day of December, 2004, at Cambridge,
5 Massachusetts.


NANCY F. COTT, Ph.D.

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EXH. A

Affirmation of Family Diversity

The Affirmation of Family Diversity has been signed by over 1,000 experts, authors, therapists, religious leaders, community leaders, and citizens. The full list of signatories is online at www.unmarried.org/family.html, where additional people sign every day.

WE BELIEVE that all families should be valued, that the well-being of children is critical to our nation's future, and that people who care for one another should be supported in their efforts to build healthy, happy relationships.

One of America's strengths is its diversity, which includes not only a wide range of races, ethnicities, creeds, abilities, genders, and sexual orientations, but also a range of family forms. One family form is marriage, and we agree with the newly-formed "Marriage Movement" that marriages should be supported. What worries us is the mistaken notion that marriage is the only acceptable relationship or family structure.

Well more than one in three American adults are currently unmarried. Policies that benefit only married relationships routinely exclude this considerable percentage of ordinary people, whose lives and families do not fit the married ideal upheld by the marriage movement.

The family diversity that exists in America today includes people who have chosen not to marry and those who are prevented from marrying, such as same-sex couples. It includes people who have chosen to live together before marriage (the majority of marriages today are preceded by cohabitation) and those who are single. It includes older people and disabled people, who may risk losing needed benefits if they get married. And it includes children, half of whom live in a family structure other than their two married parents.

We believe it is essential to recognize, embrace, and support the family diversity that exists today. Stigmatizing people who are divorced, punishing single parents, casting stepfamilies as less-than-perfect, shaming unmarried couples, and ignoring the needs of gay, lesbian, bisexual, and transgender people are not positive approaches for supporting families.

Many opponents of diverse families misrepresent and oversimplify both the history and research on which they base their claims. The picture that is painted by these opponents is bleak. In reality, however, there are millions of happy, healthy unmarried families. The challenge is to find effective approaches to supporting these successful families, as well as the ones who are having difficult times.

We believe:

- that discrimination on the basis of marital status should be prohibited
- that policies designed to help children should focus on supporting all the types of families in which children live
- that laws and policies should be changed to allow for the full range of families to be recognized (this includes domestic partner benefits, family and medical leave, hospital visitation, and survivors' benefits)
- that more research is needed on unmarried relationships and families, so that we can address their needs directly
- that same-sex couples should be able to choose marriage as an option
- that there is much we can learn from the countries around the world that have already taken steps to recognize diverse families
- that the challenge that lies before us as a nation is how to support *all* relationships and families, not just married ones.

Let us not forget how many people were oppressed, humiliated, and stigmatized during historical eras in which it was considered unacceptable to be single, divorced, or gay. We celebrate the strides we have taken in recent decades towards making the world more supportive of the vibrant diversity of families that exist. We support principles that work toward creating happy, healthy, loving relationships and families for all people, married and unmarried.

**Alternatives
to Marriage
PROJECT**

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Select Signatories of the Affirmation of Family Diversity

Affiliations are listed for identification purposes only.

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Donald A. Bloch, M.D., Co-Chair, Collaborative Family Healthcare Association
Nancy Cott, History and American Studies, Yale University
Margaret Cerullo, Professor of Sociology and Feminist Studies, Hampshire College
Thomas Coleman, Executive Director, American Association for Single People
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Suzanne B. Goldberg, Rutgers-Newark School of Law
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Dan Woog, author of *Friends and Family: True Stories of Gay America's Straight Allies*