

SJC-08860

HILLARY GOODRIDGE & others¹ vs. DEPARTMENT OF
PUBLIC HEALTH & another.²

Suffolk. March 4, 2003. - November 18, 2003.

Present: Marshall, C.J., Greaney, Ireland, Spina, Cowin, Sosman,
& Cordy, JJ.

License. Marriage. Statute, Construction. Constitutional Law,
Police power, Equal protection of laws. Due Process of Law,
Marriage. Words, "Marriage."

Civil action commenced in the Superior Court Department on
April 11, 2001.

The case was heard by Thomas E. Connolly, J., on motions for
summary judgment.

The Supreme Judicial Court granted an application for direct
appellate review.

Mary Lisa Bonauto (Gary D. Buseck with her) for Hillary
Goodridge.

Judith S. Yogman, Assistant Attorney General, for Department
of Public Health.

The following submitted briefs for amici curiae:

Joseph P.J. Vrabel, Mark D. Mason, & Martin W. Healy for
Massachusetts Bar Association.

Leslie Cooper & James D. Esseks, of New York, Jon W.
Davidson & Shannon Minter, of California, Elliot M. Minberg &
Judith E. Schaeffer, of the District of Columbia, & John
Reinstein, Sarah R. Wunsch, Paul Holtzman, & Hugh Dun Rappaport
for Urban League of Eastern Massachusetts & others.

Paul Benjamin Linton, of Illinois, & Thomas M. Harvey for
Robert J. Araujo & others.

Dwight G. Duncan for Massachusetts Family Institute, Inc., &
others.

¹ Julie Goodridge, David Wilson, Robert Compton, Michael
Horgan, Edward Balmelli, Maureen Brodoff, Ellen Wade, Gary
Chalmers, Richard Linnell, Heidi Norton, Gina Smith, Gloria
Bailey, and Linda Davies.

² Commissioner of Public Health.

Glen Lavy, of Arizona, Stephen W. Reed, of California, & Bertin C. Emmons for National Association for Research and Therapy of Homosexuality, Inc., & others.

Robert W. Ash & Vincent P. McCarthy, of Connecticut, & Philip E. Cleary for The Common Good Foundation & others.

Don Stenberg, Attorney General of Nebraska, Mark L. Shurtleff, Attorney General of Utah, Brent A. Burnett, Assistant Attorney General of Utah, & Mark Barnett, Attorney General of South Dakota, for the State of Utah & others.

Chester Darling & Michael Williams for Massachusetts Citizens Alliance & another.

Daniel Avila for The Catholic Action League of Massachusetts.

Joshua K. Baker, of California, & Robert G. Caprera for José Martín de Agar & others.

Wendy J. Herdlein, of California, & James R. Knudsen for the Honorable Philip Travis & others.

Steven W. Fitschen, of Virginia, for The National Legal Foundation.

Jeffrey A. Shafer & David R. Langdon, of Ohio, William C. Duncan, of Utah, & Wendy J. Herdlein, of California, for Marriage Law Project.

Lisa Rae, Kenneth Elmore, Arthur Berney, & Josephine Ross for The Religious Coalition for the Freedom to Marry & others.

Ann DiMaria for The Ethics & Religious Liberty Commission & others.

Anthony Mirenda, Vickie L. Henry, Lucy Fowler, John M. Granberry, Rachel N. Lessem, & Gabriel M. Helmer for Robert F. Williams & others.

Kenneth J. Parsigian for Peter W. Bardaglio & others.

David Cruz, of New York, John Taylor Williams, Carol V. Rose, Debra Squires-Lee, Christopher Morrison, & Marni Goldstein Caputo for William E. Adams & others.

Martin J. Newhouse & Katharine Bolland for Coalition gaie et lesbienne du Québec & others.

Joseph Ureneck, pro se.

Teresa S. Collett, of Texas, & Luke Stanton for Free Market Foundation.

Peter F. Zupcofska, L. Tracee Whitley, Heidi A. Nadel, & Corin R. Swift for Boston Bar Association & another.

Mary Jo Johnson, Jonathan A. Shapiro, & Amy L. Nash for The Massachusetts Psychiatric Society & others.

Tony R. Maida, Nina Joan Kimball, & Justine H. Brousseau for Libby Adler & others.

Daryl J. Lapp, Kevin D. Batt, & Katharine Silbaugh for Monroe Inker & another.

David Zwiebel, Mordechai Biser, & Nathan J. Diament, of New York, & Abba Cohen, of the District of Columbia, for Agudath Israel of America & others.

MARSHALL, C.J. Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society. For those who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits. In return it imposes weighty legal, financial, and social obligations. The question before us is whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry. We conclude that it may not. The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens. In reaching our conclusion we have given full deference to the arguments made by the Commonwealth. But it has failed to identify any constitutionally adequate reason for denying civil marriage to same-sex couples.

We are mindful that our decision marks a change in the history of our marriage law. Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors.

Neither view answers the question before us. Our concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach. "Our obligation is to define the liberty of all, not to mandate our own moral code." Lawrence v. Texas, 123 S. Ct. 2472, 2480 (2003) (Lawrence), quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992).

Whether the Commonwealth may use its formidable regulatory authority to bar same-sex couples from civil marriage is a question not previously addressed by a Massachusetts appellate court.³ It is a question the United States Supreme Court left open as a matter of Federal law in Lawrence, supra at 2484, where it was not an issue. There, the Court affirmed that the core concept of common human dignity protected by the Fourteenth Amendment to the United States Constitution precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one's choice of an intimate partner. The Court also reaffirmed the central role that decisions whether to marry or have children bear in shaping one's identity.

³ For American appellate courts that have recently addressed this issue, see Standhardt v. Superior Court, 77 P.3d 451 (Ariz. Ct. App. 2003); Dean v. District of Columbia, 653 A.2d 307 (D.C. 1995); Baehr v. Lewin, 74 Haw. 530 (1993); Baker v. State, 170 Vt. 194, 242 (1999). Earlier cases include Adams v. Howerton, 486 F. Supp. 1119 (C.D. Cal. 1980), aff'd, 673 F.2d 1036 (9th Cir.), cert. denied, 458 U.S. 1111 (1982); Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973); Baker v. Nelson, 291 Minn. 310 (1971), appeal dismissed, 409 U.S. 810 (1972); Singer v. Hara, 11 Wash. App. 247 (1974). See also Halpern v. Toronto (City), 172 O.A.C. 276 (2003); Egale Canada, Inc. v. Canada (Attorney Gen.), 13 B.C.L.R. (4th) 1 (2003).

Id. at 2481. The Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution; it may demand broader protection for fundamental rights; and it is less tolerant of government intrusion into the protected spheres of private life.

Barred access to the protections, benefits, and obligations of civil marriage, a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community's most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principles of respect for individual autonomy and equality under law.

I

The plaintiffs are fourteen individuals from five Massachusetts counties. As of April 11, 2001, the date they filed their complaint, the plaintiffs Gloria Bailey, sixty years old, and Linda Davies, fifty-five years old, had been in a committed relationship for thirty years; the plaintiffs Maureen Brodoff, forty-nine years old, and Ellen Wade, fifty-two years old, had been in a committed relationship for twenty years and lived with their twelve year old daughter; the plaintiffs Hillary Goodridge, forty-four years old, and Julie Goodridge, forty-three years old, had been in a committed relationship for thirteen years and lived with their five year old daughter; the plaintiffs Gary Chalmers, thirty-five years old, and Richard Linnell, thirty-seven years old, had been in a committed relationship for

thirteen years and lived with their eight year old daughter and Richard's mother; the plaintiffs Heidi Norton, thirty-six years old, and Gina Smith, thirty-six years old, had been in a committed relationship for eleven years and lived with their two sons, ages five years and one year; the plaintiffs Michael Horgan, forty-one years old, and David Balmelli, forty-one years old, had been in a committed relationship for seven years; and the plaintiffs David Wilson, fifty-seven years old, and Robert Compton, fifty-one years old, had been in a committed relationship for four years and had cared for David's mother in their home after a serious illness until she died.

The plaintiffs include business executives, lawyers, an investment banker, educators, therapists, and a computer engineer. Many are active in church, community, and school groups. They have employed such legal means as are available to them -- for example, joint adoption, powers of attorney, and joint ownership of real property -- to secure aspects of their relationships. Each plaintiff attests a desire to marry his or her partner in order to affirm publicly their commitment to each other and to secure the legal protections and benefits afforded to married couples and their children.

The Department of Public Health (department) is charged by statute with safeguarding public health. See G. L. c. 17. Among its responsibilities, the department oversees the registry of vital records and statistics (registry), which "enforce[s] all laws" relative to the issuance of marriage licenses and the

keeping of marriage records, see G. L. c. 17, § 4, and which promulgates policies and procedures for the issuance of marriage licenses by city and town clerks and registers. See, e.g., G. L. c. 207, §§ 20, 28A, and 37. The registry is headed by a registrar of vital records and statistics (registrar), appointed by the Commissioner of Public Health (commissioner) with the approval of the public health council and supervised by the commissioner. See G. L. c. 17, § 4.

In March and April, 2001, each of the plaintiff couples attempted to obtain a marriage license from a city or town clerk's office. As required under G. L. c. 207, they completed notices of intention to marry on forms provided by the registry, see G. L. c. 207, § 20, and presented these forms to a Massachusetts town or city clerk, together with the required health forms and marriage license fees. See G. L. c. 207, § 19.

In each case, the clerk either refused to accept the notice of intention to marry or denied a marriage license to the couple on the ground that Massachusetts does not recognize same-sex marriage.^{4,5} Because obtaining a marriage license is a necessary

⁴ General Laws c. 207, § 37, provides: "The commissioner of public health shall furnish to the clerk or registrar of every town a printed list of all legal impediments to marriage, and the clerk or registrar shall forthwith post and thereafter maintain it in a conspicuous place in his office." The record does not reveal whether any of the clerks' offices that considered the plaintiffs' applications for a marriage license had posted such a list of impediments, or whether such list included as an impediment that the applicants are of the same sex.

⁵ The plaintiffs alleged that they met all of the facial qualifications to obtain marriage licenses pursuant to G. L. c. 207, and the department does not contest this assertion.

prerequisite to civil marriage in Massachusetts, denying marriage licenses to the plaintiffs was tantamount to denying them access to civil marriage itself, with its appurtenant social and legal protections, benefits, and obligations.⁶

On April 11, 2001, the plaintiffs filed suit in the Superior Court against the department and the commissioner seeking a judgment that "the exclusion of the [p]laintiff couples and other qualified same-sex couples from access to marriage licenses, and the legal and social status of civil marriage, as well as the protections, benefits and obligations of marriage, violates Massachusetts law." See G. L. c. 231A. The plaintiffs alleged violation of the laws of the Commonwealth, including but not limited to their rights under arts. 1, 6, 7, 10, 12, and 16, and Part II, c. 1, § 1, art. 4, of the Massachusetts Constitution.^{7,8}

⁶ The complaint alleged various circumstances in which the absence of the full legal protections of civil marriage has harmed them and their children. For example, Hillary and Julie Goodridge alleged that, when Julie gave birth to their daughter (whom Hillary subsequently coadopted) during a delivery that required the infant's transfer to neonatal intensive care, Hillary "had difficulty gaining access to Julie and their newborn daughter at the hospital"; Gary Chalmers and Richard Linnell alleged that "Gary pays for a family health insurance policy at work which covers only him and their daughter because Massachusetts law does not consider Rich to be a 'dependent.' This means that their household must purchase a separate individual policy of health insurance for Rich at considerable expense. . . . Gary has a pension plan at work, but under state law, because he is a municipal employee, that plan does not allow him the same range of options in providing for his beneficiary that a married spouse has and thus he cannot provide the same security to his family that a married person could if he should predecease Rich."

⁷ Article 1, as amended by art. 106 of the Amendments to the Massachusetts Constitution, provides: "All people are born free and equal and have certain natural, essential and unalienable

rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin."

Article 6 provides: "No man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public"

Article 7 provides: "Government is instituted for the common good; for the protection, safety, prosperity, and happiness of the people; and not for the profit, honor, or private interest of any one man, family or class of men: Therefore the people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it."

Article 10 provides, in relevant part: "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws"

Article 12 provides, in relevant part: "[N]o subject shall be . . . deprived of his property, immunities, or privileges, put out of the protection of the law . . . or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land."

Article 16, as amended by art. 77 of the Amendments, provides, in relevant part: "The right of free speech shall not be abridged." Part II, c. 1, § 1, art. 4, as amended by art. 112, provides, in pertinent part, that "full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this Commonwealth."

⁸ The department claims that the plaintiffs have waived their art. 12 and art. 16 claims on appeal. Because our holding today does not turn on art. 12 or art. 16, we do not consider the department's waiver argument.

The department, represented by the Attorney General, admitted to a policy and practice of denying marriage licenses to same-sex couples. It denied that its actions violated any law or that the plaintiffs were entitled to relief. The parties filed cross motions for summary judgment.

A Superior Court judge ruled for the department. In a memorandum of decision and order dated May 7, 2002, he dismissed the plaintiffs' claim that the marriage statutes should be construed to permit marriage between persons of the same sex, holding that the plain wording of G. L. c. 207, as well as the wording of other marriage statutes, precluded that interpretation. Turning to the constitutional claims, he held that the marriage exclusion does not offend the liberty, freedom, equality, or due process provisions of the Massachusetts Constitution, and that the Massachusetts Declaration of Rights does not guarantee "the fundamental right to marry a person of the same sex." He concluded that prohibiting same-sex marriage rationally furthers the Legislature's legitimate interest in safeguarding the "primary purpose" of marriage, "procreation." The Legislature may rationally limit marriage to opposite-sex couples, he concluded, because those couples are "theoretically . . . capable of procreation," they do not rely on "inherently more cumbersome" noncoital means of reproduction, and they are more likely than same-sex couples to have children, or more children.

After the complaint was dismissed and summary judgment entered for the defendants, the plaintiffs appealed. Both parties requested direct appellate review, which we granted.

II

Although the plaintiffs refer in passing to "the marriage statutes," they focus, quite properly, on G. L. c. 207, the marriage licensing statute, which controls entry into civil marriage. As a preliminary matter, we summarize the provisions of that law.

General Laws c. 207 is both a gatekeeping and a public records statute. It sets minimum qualifications for obtaining a marriage license and directs city and town clerks, the registrar, and the department to keep and maintain certain "vital records" of civil marriages. The gatekeeping provisions of G. L. c. 207 are minimal. They forbid marriage of individuals within certain degrees of consanguinity, §§ 1 and 2, and polygamous marriages. See G. L. c. 207, § 4. See also G. L. c. 207, § 8 (marriages solemnized in violation of §§ 1, 2, and 4, are void ab initio). They prohibit marriage if one of the parties has communicable syphilis, see G. L. c. 207, § 28A, and restrict the circumstances in which a person under eighteen years of age may marry. See G. L. c. 207, §§ 7, 25, and 27. The statute requires that civil marriage be solemnized only by those so authorized. See G. L. c. 207, §§ 38-40.

The record-keeping provisions of G. L. c. 207 are more

extensive. Marriage applicants file standard information forms and a medical certificate in any Massachusetts city or town clerk's office and tender a filing fee. G. L. c. 207, §§ 19-20, 28A. The clerk issues the marriage license, and when the marriage is solemnized, the individual authorized to solemnize the marriage adds additional information to the form and returns it (or a copy) to the clerk's office. G. L. c. 207, §§ 28, 30, 38-40 (this completed form is commonly known as the "marriage certificate"). The clerk sends a copy of the information to the registrar, and that information becomes a public record. See G. L. c. 17, § 4; G. L. c. 66, § 10.^{9,10}

⁹ The marital forms forwarded by the clerk or register must contain the "date of record, date and place of marriage, name, residence and official station of the person by whom solemnized; for each of the parties to be married the name, date and place of birth, residence, age, number of the marriage, as first or second, and if previously married, whether widowed or divorced, and the birth-given names of their parents." G. L. c. 46, § 1.

¹⁰ "The record of a marriage made and kept as provided by law by the person by whom the marriage was solemnized, or by the clerk or registrar, or a copy thereof duly certified, shall be

prima facie evidence of such marriage." G. L. c. 207, § 45. A "certificate of the [c]ommissioner's copy, signed by the [c]ommissioner or the [r]egistar, is admissible as evidence of the record." Secretary of the Commonwealth v. City Clerk of Lowell, 373 Mass. 178, 181-182 (1977).

In short, for all the joy and solemnity that normally attend a marriage, G. L. c. 207, governing entrance to marriage, is a licensing law. The plaintiffs argue that because nothing in that licensing law specifically prohibits marriages between persons of the same sex, we may interpret the statute to permit "qualified same sex couples" to obtain marriage licenses, thereby avoiding the question whether the law is constitutional. See School Comm. of Greenfield v. Greenfield Educ. Ass'n, 385 Mass. 70, 79 (1982), and cases cited. This claim lacks merit.

We interpret statutes to carry out the Legislature's intent, determined by the words of a statute interpreted according to "the ordinary and approved usage of the language." Hanlon v. Rollins, 286 Mass. 444, 447 (1934). The everyday meaning of "marriage" is "[t]he legal union of a man and woman as husband and wife," Black's Law Dictionary 986 (7th ed. 1999), and the plaintiffs do not argue that the term "marriage" has ever had a different meaning under Massachusetts law. See, e.g., Milford v. Worcester, 7 Mass. 48, 52 (1810) (marriage "is an engagement, by which a single man and a single woman, of sufficient discretion, take each other for husband and wife"). This definition of marriage, as both the department and the Superior Court judge point out, derives from the common law. See Commonwealth v. Knowlton, 2 Mass. 530, 535 (1807) (Massachusetts common law derives from English common law except as otherwise altered by Massachusetts statutes and Constitution). See also Commonwealth v. Lane, 113 Mass. 458, 462-463 (1873) ("when the statutes are

silent, questions of the validity of marriages are to be determined by the jus gentium, the common law of nations"); C.P. Kindregan, Jr., & M.L. Inker, *Family Law and Practice* § 1.2 (3d ed. 2002). Far from being ambiguous, the undefined word "marriage," as used in G. L. c. 207, confirms the General Court's intent to hew to the term's common-law and quotidian meaning concerning the genders of the marriage partners.

The intended scope of G. L. c. 207 is also evident in its consanguinity provisions. See Chandler v. County Comm'rs of Nantucket County, 437 Mass. 430, 435 (2002) (statute's various provisions may offer insight into legislative intent). Sections 1 and 2 of G. L. c. 207 prohibit marriages between a man and certain female relatives and a woman and certain male relatives, but are silent as to the consanguinity of male-male or female-female marriage applicants. See G. L. c. 207, §§ 1-2. The only reasonable explanation is that the Legislature did not intend that same-sex couples be licensed to marry. We conclude, as did the judge, that G. L. c. 207 may not be construed to permit same-sex couples to marry.¹¹

¹¹ We use the terms "same sex" and "opposite sex" when characterizing the couples in question, because these terms are

III

A

The larger question is whether, as the department claims, government action that bars same-sex couples from civil marriage constitutes a legitimate exercise of the State's authority to regulate conduct, or whether, as the plaintiffs claim, this categorical marriage exclusion violates the Massachusetts Constitution. We have recognized the long-standing statutory understanding, derived from the common law, that "marriage" means the lawful union of a woman and a man. But that history cannot and does not foreclose the constitutional question.

The plaintiffs' claim that the marriage restriction

more accurate in this context than the terms "homosexual" or "heterosexual," although at times we use those terms when we consider them appropriate. Nothing in our marriage law precludes people who identify themselves (or who are identified by others) as gay, lesbian, or bisexual from marrying persons of the opposite sex. See Baehr v. Lewin, 74 Haw. 530, 543 n.11, 547 n.14 (1993).

violates the Massachusetts Constitution can be analyzed in two ways. Does it offend the Constitution's guarantees of equality before the law? Or do the liberty and due process provisions of the Massachusetts Constitution secure the plaintiffs' right to marry their chosen partner? In matters implicating marriage, family life, and the upbringing of children, the two constitutional concepts frequently overlap, as they do here. See, e.g., M.L.B. v. S.L.J., 519 U.S. 102, 120 (1996) (noting convergence of due process and equal protection principles in cases concerning parent-child relationships); Perez v. Sharp, 32 Cal. 2d 711, 728 (1948) (analyzing statutory ban on interracial marriage as equal protection violation concerning regulation of fundamental right). See also Lawrence, supra at 2482 ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests"); Bolling v. Sharpe, 347 U.S. 497 (1954) (racial segregation in District of Columbia public schools violates the due process clause of the Fifth Amendment to the United States Constitution), decided the same day as Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954) (holding that segregation of public schools in the States violates the equal protection clause of the Fourteenth Amendment). Much of what we say concerning one standard applies to the other.

We begin by considering the nature of civil marriage itself. Simply put, the government creates civil marriage. In

Massachusetts, civil marriage is, and since pre-Colonial days has been, precisely what its name implies: a wholly secular institution. See Commonwealth v. Munson, 127 Mass. 459, 460-466 (1879) (noting that "[i]n Massachusetts, from very early times, the requisites of a valid marriage have been regulated by statutes of the Colony, Province, and Commonwealth," and surveying marriage statutes from 1639 through 1834). No religious ceremony has ever been required to validate a Massachusetts marriage. Id.

In a real sense, there are three partners to every civil marriage: two willing spouses and an approving State. See DeMatteo v. DeMatteo, 436 Mass. 18, 31 (2002) ("Marriage is not a mere contract between two parties but a legal status from which certain rights and obligations arise"); Smith v. Smith, 171 Mass. 404, 409 (1898) (on marriage, the parties "assume[] new relations to each other and to the State"). See also French v. McAnarney, 290 Mass. 544, 546 (1935). While only the parties can mutually assent to marriage, the terms of the marriage -- who may marry and what obligations, benefits, and liabilities attach to civil marriage -- are set by the Commonwealth. Conversely, while only the parties can agree to end the marriage (absent the death of one of them or a marriage void ab initio), the Commonwealth defines the exit terms. See G. L. c. 208.

Civil marriage is created and regulated through exercise of the police power. See Commonwealth v. Stowell, 389 Mass. 171, 175 (1983) (regulation of marriage is properly within the scope

of the police power). "Police power" (now more commonly termed the State's regulatory authority) is an old-fashioned term for the Commonwealth's lawmaking authority, as bounded by the liberty and equality guarantees of the Massachusetts Constitution and its express delegation of power from the people to their government.

In broad terms, it is the Legislature's power to enact rules to regulate conduct, to the extent that such laws are "necessary to secure the health, safety, good order, comfort, or general welfare of the community" (citations omitted). Opinion of the Justices, 341 Mass. 760, 785 (1960).¹² See Commonwealth v. Alger, 7 Cush. 53, 85 (1851).

Without question, civil marriage enhances the "welfare of the community." It is a "social institution of the highest importance." French v. McAnarney, supra. Civil marriage anchors an ordered society by encouraging stable relationships over transient ones. It is central to the way the Commonwealth identifies individuals, provides for the orderly distribution of property, ensures that children and adults are cared for and supported whenever possible from private rather than public

¹² "The term public welfare has never been and cannot be precisely defined. Sometimes it has been said to include public convenience, comfort, peace and order, prosperity, and similar concepts, but not to include 'mere expediency.'" Opinion of the Justices, 333 Mass. 773, 778 (1955).

funds, and tracks important epidemiological and demographic data.

Marriage also bestows enormous private and social advantages on those who choose to marry. Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. "It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." Griswold v. Connecticut, 381 U.S. 479, 486 (1965). Because it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition.

Tangible as well as intangible benefits flow from marriage. The marriage license grants valuable property rights to those who meet the entry requirements, and who agree to what might otherwise be a burdensome degree of government regulation of their activities.¹³ See Leduc v. Commonwealth, 421 Mass. 433, 435 (1995), cert. denied, 519 U.S. 827 (1996) ("The historical aim of licensure generally is preservation of public health, safety, and welfare by extending the public trust only to those with proven qualifications"). The Legislature has conferred on "each party

¹³ For example, married persons face substantial restrictions, simply because they are married, on their ability freely to dispose of their assets. See, e.g., G. L. c. 208, § 34 (providing for the payment of alimony and the equitable division of property on divorce); G. L. c. 191, § 15, and G. L. c. 189 (rights of elective share and dower).

[in a civil marriage] substantial rights concerning the assets of the other which unmarried cohabitants do not have." Wilcox v. Trautz, 427 Mass. 326, 334 (1998). See Collins v. Guggenheim, 417 Mass. 615, 618 (1994) (rejecting claim for equitable distribution of property where plaintiff cohabited with but did not marry defendant); Feliciano v. Rosemar Silver Co., 401 Mass. 141, 142 (1987) (government interest in promoting marriage would be "subverted" by recognition of "a right to recover for loss of consortium by a person who has not accepted the correlative responsibilities of marriage"); Davis v. Misiano, 373 Mass. 261, 263 (1977) (unmarried partners not entitled to rights of separate support or alimony). See generally Attorney Gen. v. Desilets, 418 Mass. 316, 327-328 & nn. 10, 11 (1994).

The benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death. The department states that "hundreds of statutes" are related to marriage and to marital benefits. With no attempt to be comprehensive, we note that some of the statutory benefits conferred by the Legislature on those who enter into civil marriage include, as to property: joint Massachusetts income tax filing (G. L. c. 62C, § 6); tenancy by the entirety (a form of ownership that provides certain protections against creditors and allows for the automatic descent of property to the surviving spouse without probate) (G. L. c. 184, § 7); extension of the benefit of the homestead protection (securing up to \$300,000 in

equity from creditors) to one's spouse and children (G. L. c. 188, § 1); automatic rights to inherit the property of a deceased spouse who does not leave a will (G. L. c. 190, § 1); the rights of elective share and of dower (which allow surviving spouses certain property rights where the decedent spouse has not made adequate provision for the survivor in a will) (G. L. c. 191, § 15, and G. L. c. 189); entitlement to wages owed to a deceased employee (G. L. c. 149, § 178A [general] and G. L. c. 149, § 178C [public employees]); eligibility to continue certain businesses of a deceased spouse (e.g., G. L. c. 112, § 53 [dentist]); the right to share the medical policy of one's spouse (e.g., G. L. c. 175, § 108, Second [a] [3] [defining an insured's "dependent" to include one's spouse), see Connors v. Boston, 430 Mass. 31, 43 (1999) [domestic partners of city employees not included within the term "dependent" as used in G. L. c. 32B, § 2]); thirty-nine week continuation of health coverage for the spouse of a person who is laid off or dies (e.g., G. L. c. 175, § 110G); preferential options under the Commonwealth's pension system (see G. L. c. 32, § 12 [2] ["Joint and Last Survivor Allowance"]); preferential benefits in the Commonwealth's medical program, MassHealth (e.g., 130 Code Mass. Regs. § 515.012 [A] prohibiting placing a lien on long-term care patient's former home if spouse still lives there); access to veterans' spousal benefits and preferences (e.g., G. L. c. 115, § 1 [defining "dependents"] and G. L. c. 31, § 26 [State employment] and § 28 [municipal employees]); financial protections for spouses of

certain Commonwealth employees (fire fighters, police officers, prosecutors, among others) killed in the performance of duty (e.g., G. L. c. 32, §§ 100-103); the equitable division of marital property on divorce (G. L. c. 208, § 34); temporary and permanent alimony rights (G. L. c. 208, §§ 17 and 34); the right to separate support on separation of the parties that does not result in divorce (G. L. c. 209, § 32); and the right to bring claims for wrongful death and loss of consortium, and for funeral and burial expenses and punitive damages resulting from tort actions (G. L. c. 229, §§ 1 and 2; G. L. c. 228, § 1. See Feliciano v. Rosemar Silver Co., supra).

Exclusive marital benefits that are not directly tied to property rights include the presumptions of legitimacy and parentage of children born to a married couple (G. L. c. 209C, § 6, and G. L. c. 46, § 4B); and evidentiary rights, such as the prohibition against spouses testifying against one another about their private conversations, applicable in both civil and criminal cases (G. L. c. 233, § 20). Other statutory benefits of a personal nature available only to married individuals include qualification for bereavement or medical leave to care for individuals related by blood or marriage (G. L. c. 149, § 52D); an automatic "family member" preference to make medical decisions for an incompetent or disabled spouse who does not have a contrary health care proxy, see Shine v. Vega, 429 Mass. 456, 466 (1999); the application of predictable rules of child custody, visitation, support, and removal out-of-State when married

parents divorce (e.g., G. L. c. 208, § 19 [temporary custody], § 20 [temporary support], § 28 [custody and support on judgment of divorce], § 30 [removal from Commonwealth], and § 31 [shared custody plan]; priority rights to administer the estate of a deceased spouse who dies without a will, and requirement that surviving spouse must consent to the appointment of any other person as administrator (G. L. c. 38, § 13 [disposition of body], and G. L. c. 113, § 8 [anatomical gifts]); and the right to interment in the lot or tomb owned by one's deceased spouse (G. L. c. 114, §§ 29-33).

Where a married couple has children, their children are also directly or indirectly, but no less auspiciously, the recipients of the special legal and economic protections obtained by civil marriage. Notwithstanding the Commonwealth's strong public policy to abolish legal distinctions between marital and nonmarital children in providing for the support and care of minors, see Department of Revenue v. Mason M., 439 Mass. 665 (2003); Woodward v. Commissioner of Social Sec., 435 Mass. 536, 546 (2002), the fact remains that marital children reap a measure of family stability and economic security based on their parents' legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children. Some of these benefits are social, such as the enhanced approval that still attends the status of being a marital child. Others are material, such as the greater ease of access to family-based State and Federal benefits that attend the presumptions of one's

parentage.

It is undoubtedly for these concrete reasons, as well as for its intimately personal significance, that civil marriage has long been termed a "civil right." See, e.g., Loving v. Virginia, 388 U.S. 1, 12 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival"), quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Milford v. Worcester, 7 Mass. 48, 56 (1810) (referring to "civil rights incident to marriages"). See also Baehr v. Lewin, 74 Haw. 530, 561 (1993) (identifying marriage as a "civil right[]"); Baker v. State, 170 Vt. 194, 242 (1999) (Johnson, J., concurring in part and dissenting in part) (same). The United States Supreme Court has described the right to marry as "of fundamental importance for all individuals" and as "part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause." Zablocki v. Redhail, 434 U.S. 374, 384 (1978). See Loving v. Virginia, supra ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men").¹⁴

¹⁴ Civil marriage enjoys a dual and in some sense paradoxical

status as both a State-conferred benefit (with its attendant obligations) and a multi-faceted personal interest of "fundamental importance." Zablocki v. Redhail, 434 U.S. 376, 383 (1978). As a practical matter, the State could not abolish civil marriage without chaotic consequences. The "right to marry," id. at 387, is different from rights deemed "fundamental" for equal protection and due process purposes because the State could, in theory, abolish all civil marriage while it cannot, for example, abolish all private property rights.

Without the right to marry -- or more properly, the right to choose to marry -- one is excluded from the full range of human experience and denied full protection of the laws for one's "avowed commitment to an intimate and lasting human relationship." Baker v. State, supra at 229. Because civil marriage is central to the lives of individuals and the welfare of the community, our laws assiduously protect the individual's right to marry against undue government incursion. Laws may not "interfere directly and substantially with the right to marry." Zablocki v. Redhail, supra at 387. See Perez v. Sharp, 32 Cal. 2d 711, 714 (1948) ("There can be no prohibition of marriage except for an important social objective and reasonable means").¹⁵

¹⁵ The department argues that this case concerns the rights of couples (same sex and opposite sex), not the rights of individuals. This is incorrect. The rights implicated in this case are at the core of individual privacy and autonomy. See, e.g., Loving v. Virginia, 388 U.S. 1, 12 (1967) ("Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State"); Perez v. Sharp, 32 Cal. 2d 711, 716 (1948) ("The right to marry is the right of individuals, not of racial groups"). See also A.Z. v. B.Z., 431 Mass. 150, 162 (2000),

quoting Moore v. East Cleveland, 431 U.S. 494, 499 (1977) (noting "freedom of personal choice in matters of marriage and family life"). While two individuals who wish to marry may be equally aggrieved by State action denying them that opportunity, they do not "share" the liberty and equality interests at stake.

Unquestionably, the regulatory power of the Commonwealth over civil marriage is broad, as is the Commonwealth's discretion to award public benefits. See Commonwealth v. Stowell, 389 Mass. 171, 175 (1983) (marriage); Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 652 (1981) (Medicaid benefits). Individuals who have the choice to marry each other and nevertheless choose not to may properly be denied the legal benefits of marriage. See Wilcox v. Trautz, 427 Mass. 326, 334 (1998); Collins v. Guggenheim, 417 Mass. 615, 618 (1994); Feliciano v. Rosemar Silver Co., 401 Mass. 141, 142 (1987). But that same logic cannot hold for a qualified individual who would marry if she or he only could.

B

For decades, indeed centuries, in much of this country (including Massachusetts) no lawful marriage was possible between white and black Americans. That long history availed not when the Supreme Court of California held in 1948 that a legislative prohibition against interracial marriage violated the due process and equality guarantees of the Fourteenth Amendment, Perez v. Sharp, 32 Cal. 2d 711, 728 (1948), or when, nineteen years later, the United States Supreme Court also held that a statutory bar to interracial marriage violated the Fourteenth Amendment, Loving v. Virginia, 388 U.S. 1 (1967).¹⁶ As both Perez and Loving make

¹⁶ The department argues that the Loving decision did not profoundly alter the by-then common conception of marriage because it was decided at a time when antimiscegenation statutes were in "full-scale retreat." But the relationship the department draws between popular consensus and the

clear, the right to marry means little if it does not include the right to marry the person of one's choice, subject to appropriate government restrictions in the interests of public health,

constitutionality of a statute oppressive to a minority group ignores the successful constitutional challenges to an antimiscegenation statute, initiated some twenty years earlier. When the Supreme Court of California decided Perez v. Sharp, 32 Cal. 2d 711, 728 (1948), a precursor to Loving, racial inequality was rampant and normative, segregation in public and private institutions was commonplace, the civil rights movement had not yet been launched, and the "separate but equal" doctrine of Plessy v. Ferguson, 163 U.S. 537 (1896), was still good law. The lack of popular consensus favoring integration (including interracial marriage) did not deter the Supreme Court of California from holding that State's antimiscegenation statute to violate the plaintiffs' constitutional rights. Neither the Perez court nor the Loving Court was content to permit an unconstitutional situation to fester because the remedy might not reflect a broad social consensus.

safety, and welfare. See Perez v. Sharp, supra at 717 ("the essence of the right to marry is freedom to join in marriage with the person of one's choice"). See also Loving v. Virginia, supra at 12. In this case, as in Perez and Loving, a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance -- the institution of marriage -- because of a single trait: skin color in Perez and Loving, sexual orientation here. As it did in Perez and Loving, history must yield to a more fully developed understanding of the invidious quality of the discrimination.¹⁷

¹⁷ Recently, the United States Supreme Court has reaffirmed that the Constitution prohibits a State from wielding its formidable power to regulate conduct in a manner that demeans basic human dignity, even though that statutory discrimination may enjoy broad public support. The Court struck down a statute criminalizing sodomy. See Lawrence, supra at 2478 ("The liberty protected by the Constitution allows homosexual persons the right to make this choice").

The Massachusetts Constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution, even where both Constitutions employ essentially the same language. See Planned Parenthood League of Mass., Inc. v. Attorney Gen., 424 Mass. 586, 590 (1997); Corning Glass Works v. Ann & Hope, Inc. of Danvers, 363 Mass. 409, 416 (1973). That the Massachusetts Constitution is in some instances more protective of individual liberty interests than is the Federal Constitution is not surprising. Fundamental to the vigor of our Federal system of government is that "state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." Arizona v. Evans, 514 U.S. 1, 8 (1995).¹⁸

¹⁸ We have recognized that our Constitution may more extensively protect individual rights than the Federal Constitution in widely different contexts. See, e.g., Horsemen's Benevolent & Protective Ass'n v. State Racing Comm'n, 403 Mass. 692 (1989) (freedom from intrusive drug testing in highly regulated industry); Cepulonis v. Secretary of the Commonwealth, 389 Mass. 930 (1983) (inmates' right to register to vote); Batchelder v. Allied Stores Int'l, Inc., 388 Mass. 83 (1983)

(freedom to solicit signatures for ballot access in public election); Moe v. Secretary of Admin. & Fin., 382 Mass. 629 (1981) (right to State Medicaid payment for medically necessary abortions); Coffee-Rich, Inc. v. Commissioner of Pub. Health, 348 Mass. 414 (1965) (freedom to pursue one's lawful business).

The individual liberty and equality safeguards of the Massachusetts Constitution protect both "freedom from" unwarranted government intrusion into protected spheres of life and "freedom to" partake in benefits created by the State for the common good. See Bachrach v. Secretary of the Commonwealth, 382 Mass. 268, 273 (1981); Dalli v. Board of Educ., 358 Mass. 753, 759 (1971). Both freedoms are involved here. Whether and whom to marry, how to express sexual intimacy, and whether and how to establish a family -- these are among the most basic of every individual's liberty and due process rights. See, e.g., Lawrence, *supra* at 2481; Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992); Zablocki v. Redhail, 434 U.S. 374, 384 (1978); Roe v. Wade, 410 U.S. 113, 152-153 (1973); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Loving v. Virginia, *supra*. And central to personal freedom and security is the assurance that the laws will apply equally to persons in similar situations. "Absolute equality before the law is a fundamental principle of our own Constitution." Opinion of the Justices, 211 Mass. 618, 619 (1912). The liberty interest in choosing whether and whom to marry would be hollow if the Commonwealth could, without sufficient justification, foreclose an individual from freely choosing the person with whom to share an exclusive commitment in the unique institution of civil marriage.

The Massachusetts Constitution requires, at a minimum, that the exercise of the State's regulatory authority not be

"arbitrary or capricious." Commonwealth v. Henry's Drywall Co., 366 Mass. 539, 542 (1974).¹⁹ Under both the equality and liberty guarantees, regulatory authority must, at very least, serve "a legitimate purpose in a rational way"; a statute must "bear a reasonable relation to a permissible legislative objective." Rushworth v. Registrar of Motor Vehicles, 413 Mass. 265, 270 (1992). See, e.g., Massachusetts Fed'n of Teachers v. Board of Educ., 436 Mass. 763, 778 (2002) (equal protection); Coffee-Rich, Inc. v. Commissioner of Pub. Health, 348 Mass. 414, 422 (1965) (due process). Any law failing to satisfy the basic standards of rationality is void.

The plaintiffs challenge the marriage statute on both equal protection and due process grounds. With respect to each such claim, we must first determine the appropriate standard of review. Where a statute implicates a fundamental right or uses a suspect classification, we employ "strict judicial scrutiny." Lowell v. Kowalski, 380 Mass. 663, 666 (1980). For all other statutes, we employ the "'rational basis' test." English v. New England Med. Ctr., 405 Mass. 423, 428 (1989). For due process

¹⁹ The Massachusetts Constitution empowers the General Court to enact only those orders, laws, statutes, and ordinances "wholesome and reasonable," that are not "repugnant or contrary" to the Constitution, and that, in the Legislature's judgment, advance the "good and welfare" of the Commonwealth, its government, and all of its subjects. Part II, c. 1, § 1, art. 4. See Opinion of the Justices, 360 Mass. 877, 883 (1971), quoting Jones v. Robbins, 8 Gray 329, 343 (1857) (powers vested in government are set down in the Massachusetts Constitution "in a few plain, clear and intelligible propositions, for the better guidance and control, both of legislators and magistrates").

claims, rational basis analysis requires that statutes "bear[] a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare." Coffee-Rich, Inc. v. Commissioner of Pub. Health, *supra*, quoting Sperry & Hutchinson Co. v. Director of the Div. on the Necessaries of Life, 307 Mass. 408, 418 (1940). For equal protection challenges, the rational basis test requires that "an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class." English v. New England Med. Ctr., *supra* at 429, quoting Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 452 (1985) (Stevens, J., concurring).²⁰

²⁰ Not every asserted rational relationship is a "conceivable" one, and rationality review is not "toothless."

Murphy v. Commissioner of the Dep't of Indus. Accs., 415 Mass. 218, 233 (1993), citing Mathews v. Lucas, 427 U.S. 495, 510 (1976). Statutes have failed rational basis review even in circumstances where no fundamental right or "suspect" classification is implicated. See, e.g., Murphy v. Commissioner of the Dep't of Indus. Accs., 415 Mass. 218, 226-227 (1993) (fee imposed on retention of counsel in administrative proceedings); Secretary of the Commonwealth v. City Clerk of Lowell, 373 Mass. 178, 186 (1977) (selection of surname for nonmarital child); Aetna Cas. & Sur. Co. v. Commissioner of Ins., 358 Mass. 272, 280-281 (1970) (automobile insurance ratesetting); Coffee-Rich, Inc. v. Commissioner of Pub. Health, 348 Mass. 414, 422 (1965) (sale of wholesome product); Mansfield Beauty Academy, Inc. v. Board of Registration of Hairdressers, 326 Mass. 624, 627 (1951) (right to charge for materials furnished to models by trade school); Opinion of the Justices, 322 Mass. 755, 760-761 (1948) (proposed statute concerning regulating cemeteries); Boston Elevated Ry. v. Commonwealth, 310 Mass. 528, 556-557 (1942) (legislation impairing contract right); Durgin v. Minot, 203 Mass. 26, 28 (1909) (statute authorizing certain board of health regulations).

The department argues that no fundamental right or "suspect" class is at issue here,²¹ and rational basis is the appropriate standard of review. For the reasons we explain below, we conclude that the marriage ban does not meet the rational basis test for either due process or equal protection. Because the statute does not survive rational basis review, we do not consider the plaintiffs' arguments that this case merits strict judicial scrutiny.

The department posits three legislative rationales for prohibiting same-sex couples from marrying: (1) providing a "favorable setting for procreation"; (2) ensuring the optimal setting for child rearing, which the department defines as "a two-parent family with one parent of each sex"; and (3) preserving scarce State and private financial resources. We consider each in turn.

²¹ Article 1 of the Massachusetts Constitution specifically prohibits sex-based discrimination. See post at (Greaney, J., concurring). We have not previously considered whether "sexual orientation" is a "suspect" classification. Our resolution of this case does not require that inquiry here.

The judge in the Superior Court endorsed the first rationale, holding that "the state's interest in regulating marriage is based on the traditional concept that marriage's primary purpose is procreation." This is incorrect. Our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family. General Laws c. 207 contains no requirement that the applicants for a marriage license attest to their ability or intention to conceive children by coitus. Fertility is not a condition of marriage, nor is it grounds for divorce. People who have never consummated their marriage, and never plan to, may be and stay married. See Franklin v. Franklin, 154 Mass. 515, 516 (1891) ("The consummation of a marriage by coition is not necessary to its validity").²² People who cannot stir from their deathbed may

²² Our marriage law does recognize that the inability to participate in intimate relations may have a bearing on one of the central expectations of marriage. Since the earliest days of the Commonwealth, the divorce statutes have permitted (but not required) a spouse to choose to divorce his or her impotent mate. See St. 1785, c. 69, § 3. While infertility is not a ground to void or terminate a marriage, impotency (the inability to engage in sexual intercourse) is, at the election of the disaffected spouse. See G. L. c. 207, § 14 (annulment); G. L. c. 208, § 1 (divorce). Cf. Martin v. Otis, 233 Mass. 491, 495 (1919) ("impotency does not render a marriage void, but only voidable at the suit of the party conceiving himself or herself to be wronged"); Smith v. Smith, 171 Mass. 404, 408 (1898) (marriage nullified because husband's incurable syphilis "leaves him no foundation on which the marriage relation could properly rest"). See also G. L. c. 207, § 28A. However, in Hanson v. Hanson, 287 Mass. 154 (1934), a decree of annulment for nonconsummation was reversed where the wife knew before the marriage that her husband had syphilis and voluntarily chose to marry him. We held that, given the circumstances of the wife's prior knowledge of the full extent of the disease and her consent to be married, the

marry. See G. L. c. 207, § 28A. While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.²³

husband's condition did not go "to the essence" of the marriage. Id. at 159.

²³ It is hardly surprising that civil marriage developed historically as a means to regulate heterosexual conduct and to promote child rearing, because until very recently unassisted heterosexual relations were the only means short of adoption by which children could come into the world, and the absence of widely available and effective contraceptives made the link between heterosexual sex and procreation very strong indeed. Punitive notions of illegitimacy, see Powers v. Wilkinson, 399 Mass. 650, 661 (1987), and of homosexual identity, see Lawrence, supra at 2478-2479, further cemented the common and legal understanding of marriage as an unquestionably heterosexual institution. But it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been. As one dissent

acknowledges, in "the modern age," "heterosexual intercourse, procreation, and childcare are not necessarily conjoined." Post at (Cordy, J., dissenting).

Moreover, the Commonwealth affirmatively facilitates bringing children into a family regardless of whether the intended parent is married or unmarried, whether the child is adopted or born into a family, whether assistive technology was used to conceive the child, and whether the parent or her partner is heterosexual, homosexual, or bisexual.²⁴ If procreation were a necessary component of civil marriage, our statutes would draw a tighter circle around the permissible bounds of nonmarital child bearing and the creation of families by noncoital means. The attempt to isolate procreation as "the source of a fundamental right to marry," post at (Cordy, J., dissenting), overlooks the integrated way in which courts have examined the complex and overlapping realms of personal autonomy, marriage, family life, and child rearing. Our jurisprudence recognizes that, in these nuanced and fundamentally private areas of life, such a narrow

²⁴ Adoption and certain insurance coverage for assisted reproductive technology are available to married couples, same-sex couples, and single individuals alike. See G. L. c. 210, § 1; Adoption of Tammy, 416 Mass. 205 (1993) (adoption); G. L. c. 175, § 47H; G. L. c. 176A, § 8K; G. L. c. 176B, § 4J; and G. L. c. 176G, § 4 (insurance coverage). See also Woodward v. Commissioner of Social Sec., 435 Mass. 536, 546 (2002) (posthumous reproduction); Culliton v. Beth Israel Deaconess Med. Ctr., 435 Mass. 285, 293 (2001) (gestational surrogacy).

focus is inappropriate.

The "marriage is procreation" argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage. Like "Amendment 2" to the Constitution of Colorado, which effectively denied homosexual persons equality under the law and full access to the political process, the marriage restriction impermissibly "identifies persons by a single trait and then denies them protection across the board." Romer v. Evans, 517 U.S. 620, 633 (1996). In so doing, the State's action confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect.²⁵

²⁵ Because our laws expressly or implicitly sanction so many kinds of opposite-sex marriages that do not or will never result in unassisted reproduction, it is erroneous to claim, as the dissent does, that the "theoretical[]" procreative capacity of opposite-sex couples, post at (Cordy, J., dissenting),

sufficiently justifies excluding from civil marriage same-sex couples who actually have children.

The department's first stated rationale, equating marriage with unassisted heterosexual procreation, shades imperceptibly into its second: that confining marriage to opposite-sex couples ensures that children are raised in the "optimal" setting. Protecting the welfare of children is a paramount State policy. Restricting marriage to opposite-sex couples, however, cannot plausibly further this policy. "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." Troxel v. Granville, 530 U.S. 57, 63 (2000). Massachusetts has responded supportively to "the changing realities of the American family," id. at 64, and has moved vigorously to strengthen the modern family in its many variations. See, e.g., G. L. c. 209C (paternity statute); G. L. c. 119, § 39D (grandparent visitation statute); Blixt v. Blixt, 437 Mass. 649 (2002), cert. denied, 537 U.S. 1189 (2003) (same); E.N.O. v. L.M.M., 429 Mass. 824, cert. denied, 528 U.S. 1005 (1999) (de facto parent); Youmans v. Ramos, 429 Mass. 774, 782 (1999) (same); and Adoption of Tammy, 416 Mass. 205 (1993) (coparent adoption). Moreover, we have repudiated the common-law power of the State to provide varying levels of protection to children based on the circumstances of birth. See G. L. c. 209C (paternity statute); Powers v. Wilkinson, 399 Mass. 650, 661 (1987) ("Ours is an era in which logic and compassion have impelled the law toward unburdening children from the stigma and the disadvantages heretofore attendant upon the status of

illegitimacy"). The "best interests of the child" standard does not turn on a parent's sexual orientation or marital status. See e.g., Doe v. Doe, 16 Mass. App. Ct. 499, 503 (1983) (parent's sexual orientation insufficient ground to deny custody of child in divorce action). See also E.N.O. v. L.M.M., supra at 829-830 (best interests of child determined by considering child's relationship with biological and de facto same-sex parents); Silvia v. Silvia, 9 Mass. App. Ct. 339, 341 & n.3 (1980) (collecting support and custody statutes containing no gender distinction).

The department has offered no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children. There is thus no rational relationship between the marriage statute and the Commonwealth's proffered goal of protecting the "optimal" child rearing unit. Moreover, the department readily concedes that people in same-sex couples may be "excellent" parents. These couples (including four of the plaintiff couples) have children for the reasons others do -- to love them, to care for them, to nurture them. But the task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws. While establishing the parentage of children as soon as possible is crucial to the safety and welfare of children, see Culliton v. Beth Israel Deaconness Med. Ctr., 435 Mass. 285, 292 (2001),

same-sex couples must undergo the sometimes lengthy and intrusive process of second-parent adoption to establish their joint parentage. While the enhanced income provided by marital benefits is an important source of security and stability for married couples and their children, those benefits are denied to families headed by same-sex couples. See, e.g., note 6, supra. While the laws of divorce provide clear and reasonably predictable guidelines for child support, child custody, and property division on dissolution of a marriage, same-sex couples who dissolve their relationships find themselves and their children in the highly unpredictable terrain of equity jurisdiction. See E.N.O. v. L.M.M., supra. Given the wide range of public benefits reserved only for married couples, we do not credit the department's contention that the absence of access to civil marriage amounts to little more than an inconvenience to same-sex couples and their children. Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of "a stable family structure in which children will be reared, educated, and socialized." Post at (Cordy, J., dissenting).²⁶

²⁶ The claim that the constitutional rights to bear and raise a child are "not implicated or infringed" by the marriage ban, post at (Cordy, J., dissenting), does not stand up to scrutiny. The absolute foreclosure of the marriage option for the class of parents and would-be parents at issue here imposes a heavy burden on their decision to have and raise children that is not suffered by any other class of parent.

No one disputes that the plaintiff couples are families, that many are parents, and that the children they are raising, like all children, need and should have the fullest opportunity to grow up in a secure, protected family unit. Similarly, no one disputes that, under the rubric of marriage, the State provides a cornucopia of substantial benefits to married parents and their children. The preferential treatment of civil marriage reflects the Legislature's conclusion that marriage "is the foremost setting for the education and socialization of children" precisely because it "encourages parents to remain committed to each other and to their children as they grow." Post at (Cordy, J., dissenting).

In this case, we are confronted with an entire, sizeable class of parents raising children who have absolutely no access to civil marriage and its protections because they are forbidden from procuring a marriage license. It cannot be rational under our laws, and indeed it is not permitted, to penalize children by depriving them of State benefits because the State disapproves of their parents' sexual orientation.

The third rationale advanced by the department is that limiting marriage to opposite-sex couples furthers the Legislature's interest in conserving scarce State and private financial resources. The marriage restriction is rational, it argues, because the General Court logically could assume that same-sex couples are more financially independent than married couples and thus less needy of public marital benefits, such as

tax advantages, or private marital benefits, such as employer-financed health plans that include spouses in their coverage.

An absolute statutory ban on same-sex marriage bears no rational relationship to the goal of economy. First, the department's conclusory generalization -- that same-sex couples are less financially dependent on each other than opposite-sex couples -- ignores that many same-sex couples, such as many of the plaintiffs in this case, have children and other dependents (here, aged parents) in their care.²⁷ The department does not contend, nor could it, that these dependents are less needy or deserving than the dependents of married couples. Second, Massachusetts marriage laws do not condition receipt of public and private financial benefits to married individuals on a demonstration of financial dependence on each other; the benefits are available to married couples regardless of whether they mingle their finances or actually depend on each other for support.

The department suggests additional rationales for

²⁷ It is also true that civil marriage creates legal dependency between spouses, which is simply not available to unmarried couples. See Part III A, supra.

prohibiting same-sex couples from marrying, which are developed by some amici. It argues that broadening civil marriage to include same-sex couples will trivialize or destroy the institution of marriage as it has historically been fashioned. Certainly our decision today marks a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries. But it does not disturb the fundamental value of marriage in our society.

Here, the plaintiffs seek only to be married, not to undermine the institution of civil marriage. They do not want marriage abolished. They do not attack the binary nature of marriage, the consanguinity provisions, or any of the other gate-keeping provisions of the marriage licensing law. Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race.²⁸ If anything, extending civil marriage to same-sex couples reinforces the importance of

²⁸ Justice Cordy suggests that we have "transmuted the 'right' to marry into the right to change the institution of marriage itself," post at (Cordy, J., dissenting), because marriage is intimately tied to the reproductive systems of the marriage partners and to the "optimal" mother and father setting for child rearing. Post at (Cordy, J., dissenting). That analysis hews perilously close to the argument, long repudiated by the Legislature and the courts, that men and women are so innately and fundamentally different that their respective "proper spheres" can be rigidly and universally delineated. An abundance of legislative enactments and decisions of this court negate any such stereotypical premises.

marriage to individuals and communities. That same-sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.²⁹

²⁹ We are concerned only with the withholding of the benefits, protections, and obligations of civil marriage from a certain class of persons for invalid reasons. Our decision in no way limits the rights of individuals to refuse to marry persons of the same sex for religious or any other reasons. It in no way limits the personal freedom to disapprove of, or to encourage others to disapprove of, same-sex marriage. Our concern, rather, is whether historical, cultural, religious, or other reasons permit the State to impose limits on personal beliefs concerning whom a person should marry.

It has been argued that, due to the State's strong interest in the institution of marriage as a stabilizing social structure, only the Legislature can control and define its boundaries. Accordingly, our elected representatives legitimately may choose to exclude same-sex couples from civil marriage in order to assure all citizens of the Commonwealth that (1) the benefits of our marriage laws are available explicitly to create and support a family setting that is, in the Legislature's view, optimal for child rearing, and (2) the State does not endorse gay and lesbian parenthood as the equivalent of being raised by one's married biological parents.³⁰ These arguments miss the point. The Massachusetts Constitution requires that legislation meet certain criteria and not extend beyond certain limits. It is the

³⁰ Justice Cordy's dissenting opinion, post at - and nn. 24-28 (Cordy, J., dissenting), makes much of the current "battle of the experts" concerning the possible long-term effects on children of being raised in households headed by same-sex parents. We presume that the Legislature is aware of these studies, see Mutual Loan Co. v. Martell, 200 Mass. 482, 487 (1909), aff'd, 222 U.S. 225 (1911), and has drawn the conclusion that a child's best interest is not harmed by being raised and nurtured by same-sex parents. See G. L. c. 210, § 7. See also Adoption of Tammy, 416 Mass. 205 (1993); 110 Code Mass. Regs. § 1.09 (3) (2000) ("The Department [of Social Services] shall not deny to any person the opportunity to become an adoptive or foster parent, on the basis of the . . . sexual orientation . . . of the person, or of the child, involved"). Either the Legislature's openness to same-sex parenting is rational in light of its paramount interests in promoting children's well-being, or irrational in light of its so-called conclusion that a household headed by opposite-sex married parents is the "optimal" setting for raising children. See post at (Cordy, J., dissenting). We give full credit to the Legislature for enacting a statutory scheme of child-related laws that is coherent, consistent, and harmonious. See New England Div. of the Am. Cancer Soc'y v. Commissioner of Admin., 437 Mass. 172, 180 (2002).

function of courts to determine whether these criteria are met and whether these limits are exceeded. In most instances, these limits are defined by whether a rational basis exists to conclude that legislation will bring about a rational result. The Legislature in the first instance, and the courts in the last instance, must ascertain whether such a rational basis exists. To label the court's role as usurping that of the Legislature, see, e.g., post at (Cordy, J., dissenting), is to misunderstand the nature and purpose of judicial review. We owe great deference to the Legislature to decide social and policy issues, but it is the traditional and settled role of courts to decide constitutional issues.³¹

³¹ If total deference to the Legislature were the case, the judiciary would be stripped of its constitutional authority to decide challenges to statutes pertaining to marriage, child rearing, and family relationships, and, conceivably, unconstitutional laws that provided for the forced sterilization of habitual criminals; prohibited miscegenation; required court approval for the marriage of persons with child support obligations; compelled a pregnant unmarried minor to obtain the consent of both parents before undergoing an abortion; and made sodomy a criminal offense, to name just a few, would stand.

Indeed, every State court that has recently considered the issue we decide today has exercised its duty in the same way, by carefully scrutinizing the statutory ban on same-sex marriages in light of relevant State constitutional provisions. See Brause vs. Bureau of Vital Statistics, No. 3AN-95-6562CJ (Alaska Super. Ct., Feb. 27, 1998) (concluding marriage statute violated right to privacy provision in Alaska Constitution) (superseded by constitutional amendment, art. I, § 25 of the Constitution of Alaska); Baehr v. Lewin, 74 Haw. 530, 571-580 (1993) (concluding marriage statute implicated Hawaii Constitution's equal protection clause; remanding case to lower court for further proceedings); Baker v. State, 170 Vt. 194, 197-198 (1999) (concluding marriage statute violated Vermont Constitution's common benefits clause). But see Standhardt v. Superior Court, 77 P.3d 451 (Ariz. Ct. App. 2003) (marriage statute does not violate liberty interests under either Federal or Arizona

Constitution). See also Halpern v. Toronto (City), 172 O.A.C. 276 (2003) (concluding marriage statute violated equal protection provisions of Canada's Charter of Rights and Freedoms); Eagle Canada, Inc. v. Canada (Attorney Gen.), 13 B.C.L.R. (4th) 1 (2003) (same).

The history of constitutional law "is the story of the extension of constitutional rights and protections to people once ignored or excluded." United States v. Virginia, 518 U.S. 515, 557 (1996) (construing equal protection clause of the Fourteenth Amendment to prohibit categorical exclusion of women from public military institute). This statement is as true in the area of civil marriage as in any other area of civil rights. See, e.g., Turner v. Safley, 482 U.S. 78 (1987); Loving v. Virginia, 388 U.S. 1 (1967); Perez v. Sharp, 32 Cal. 2d 711 (1948). As a public institution and a right of fundamental importance, civil marriage is an evolving paradigm. The common law was exceptionally harsh toward women who became wives: a woman's legal identity all but evaporated into that of her husband. See generally C.P. Kindregan, Jr., & M.L. Inker, *Family Law and Practice* §§ 1.9 and 1.10 (3d ed. 2002). Thus, one early Nineteenth Century jurist could observe matter of factly that, prior to the abolition of slavery in Massachusetts, "the condition of a slave resembled the connection of a wife with her husband, and of infant children with their father. He is obliged to maintain them, and they cannot be separated from him." Winchendon v. Hatfield, 4 Mass. 123, 129 (1808). But since at least the middle of the Nineteenth Century, both the courts and the Legislature have acted to ameliorate the harshness of the common-law regime. In Bradford v. Worcester, 184 Mass. 557, 562

(1904), we refused to apply the common-law rule that the wife's legal residence was that of her husband to defeat her claim to a municipal "settlement of paupers." In Lewis v. Lewis, 370 Mass. 619, 629 (1976), we abrogated the common-law doctrine immunizing a husband against certain suits because the common-law rule was predicated on "antediluvian assumptions concerning the role and status of women in marriage and in society." Id. at 621. Alarms about the imminent erosion of the "natural" order of marriage were sounded over the demise of antimiscegenation laws, the expansion of the rights of married women, and the introduction of "no-fault" divorce.³² Marriage has survived all of these transformations, and we have no doubt that marriage will continue to be a vibrant and revered institution.

We also reject the argument suggested by the department, and elaborated by some amici, that expanding the institution of civil marriage in Massachusetts to include same-sex couples will lead to interstate conflict. We would not presume to dictate how another State should respond to today's decision. But neither should considerations of comity prevent us from according Massachusetts residents the full measure of protection available

³² One prominent historian of marriage notes, for example, that in the Nineteenth Century, the Reverend Theodore Woolsey led the charge against expanding the grounds for divorce, arguing that the "the only divinely approved (and therefore truly legitimate) reason for divorce was adultery" and that only the innocent party to a marriage terminated by reason of adultery be permitted to remarry. Cott, *Public Vows: A History of Marriage and the Nation* 106 (2000). See id. at 44-45, for a general discussion of resistance to the demise of antimiscegenation laws.

under the Massachusetts Constitution. The genius of our Federal system is that each State's Constitution has vitality specific to its own traditions, and that, subject to the minimum requirements of the Fourteenth Amendment, each State is free to address difficult issues of individual liberty in the manner its own Constitution demands.

Several amici suggest that prohibiting marriage by same-sex couples reflects community consensus that homosexual conduct is immoral. Yet Massachusetts has a strong affirmative policy of preventing discrimination on the basis of sexual orientation. See G. L. c. 151B (employment, housing, credit, services); G. L. c. 265, § 39 (hate crimes); G. L. c. 272, § 98 (public accommodation); G. L. c. 76, § 5 (public education). See also, e.g., Commonwealth v. Balthazar, 366 Mass. 298 (1974) (decriminalization of private consensual adult conduct); Doe v. Doe, 16 Mass. App. Ct. 499, 503 (1983) (custody to homosexual parent not per se prohibited).

The department has had more than ample opportunity to articulate a constitutionally adequate justification for limiting civil marriage to opposite-sex unions. It has failed to do so. The department has offered purported justifications for the civil marriage restriction that are starkly at odds with the comprehensive network of vigorous, gender-neutral laws promoting stable families and the best interests of children. It has failed to identify any relevant characteristic that would justify shutting the door to civil marriage to a person who wishes to

marry someone of the same sex.

The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason. The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual.³³ "The

³³ It is not dispositive, for purposes of our constitutional analysis, whether the Legislature, at the time it incorporated the common-law definition of marriage into the first marriage laws nearly three centuries ago, did so with the intent of discriminating against or harming persons who wish to marry another of the same sex. We are not required to impute an invidious intent to the Legislature in determining that a statute of long standing has no applicability to present circumstances or violates the rights of individuals under the Massachusetts Constitution. That the Legislature may have intended what at the time of enactment was a perfectly reasonable form of discrimination -- or a result not recognized as a form of discrimination -- was not enough to salvage from later constitutional challenge laws burdening nonmarital children or denying women's equal partnership in marriage. See, e.g., Trimble v. Gordon, 430 U.S. 762 (1977) (nonmarital children); Angelini v. OMD Corp., 410 Mass. 653, 662, 663 (1987) ("The traditional common law rules which discriminated against children born out of wedlock have been discarded" and "[w]e have recognized that placing additional burdens on [nonmarital] children is unfair because they are not responsible for their [status]"); Silvia v. Silvia, 9 Mass. App. Ct. 339, 340-341 (1980) (there now exists "a comprehensive statutory and common law pattern which places marital and parental obligations on both the husband and wife"). We are concerned with the operation of challenged laws on the parties before us, and we do not inhibit our inquiry on the ground that a statute's original enactors had a benign or at the time constitutionally unassailable purpose. See Colo v. Treasurer & Receiver Gen., 378 Mass. 550, 557 (1979), quoting Walz v. Tax Comm'n of the City of N.Y., 397 U.S. 664, 678 (1970) ("the mere fact that a certain practice has gone unchallenged for a long period of time cannot alone immunize it from constitutional invalidity, 'even when that span of time

Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (construing Fourteenth Amendment). Limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.

IV

We consider next the plaintiffs' request for relief. We preserve as much of the statute as may be preserved in the face of the successful constitutional challenge. See Mayor of Boston v. Treasurer & Receiver Gen., 384 Mass. 718, 725 (1981); Dalli v. Board of Educ., 358 Mass. 753, 759 (1971). See also G. L. c. 4, § 6, Eleventh.

covers our entire national existence and indeed predates it"); Merit Oil Co. v. Director of Div. on the Necessaries of Life, 319 Mass. 301, 305 (1946) (constitutional contours of State's regulatory authority coextensive "with the changing needs of society").

Here, no one argues that striking down the marriage laws is an appropriate form of relief. Eliminating civil marriage would be wholly inconsistent with the Legislature's deep commitment to fostering stable families and would dismantle a vital organizing principle of our society.³⁴ We face a problem similar to one that recently confronted the Court of Appeal for Ontario, the highest court of that Canadian province, when it considered the constitutionality of the same-sex marriage ban under Canada's Federal Constitution, the Charter of Rights and Freedoms (Charter). See Halpern v. Toronto (City), 172 O.A.C. 276 (2003).

Canada, like the United States, adopted the common law of England that civil marriage is "the voluntary union for life of one man and one woman, to the exclusion of all others." Id. at , quoting Hyde v. Hyde, [1861-1873] All E.R. 175 (1866). In holding that the limitation of civil marriage to opposite-sex couples violated the Charter, the Court of Appeal refined the

³⁴ Similarly, no one argues that the restrictions on incestuous or polygamous marriages are so dependent on the marriage restriction that they too should fall if the marriage restriction falls. Nothing in our opinion today should be construed as relaxing or abrogating the consanguinity or polygamous prohibitions of our marriage laws. See G. L. c. 207, §§ 1, 2, and 4. Rather, the statutory provisions concerning consanguinity or polygamous marriages shall be construed in a gender neutral manner. See Califano v. Westcott, 443 U.S. 76, 92-93 (1979) (construing word "father" in unconstitutional, underinclusive provision to mean "parent"); Browne's Case, 322 Mass. 429, 430 (1948) (construing masculine pronoun "his" to include feminine pronoun "her"). See also G. L. c. 4, § 6, Fourth ("words of one gender may be construed to include the other gender and the neuter unless such construction would be "inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute").

common-law meaning of marriage. We concur with this remedy, which is entirely consonant with established principles of jurisprudence empowering a court to refine a common-law principle in light of evolving constitutional standards. See Powers v. Wilkinson, 399 Mass. 650, 661-662 (1987) (reforming the common-law rule of construction of "issue"); Lewis v. Lewis, 370 Mass. 619, 629 (1976) (abolishing common-law rule of certain interspousal immunity).

We construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others. This reformulation redresses the plaintiffs' constitutional injury and furthers the aim of marriage to promote stable, exclusive relationships. It advances the two legitimate State interests the department has identified: providing a stable setting for child rearing and conserving State resources. It leaves intact the Legislature's broad discretion to regulate marriage. See Commonwealth v. Stowell, 389 Mass. 171, 175 (1983).

In their complaint the plaintiffs request only a declaration that their exclusion and the exclusion of other qualified same-sex couples from access to civil marriage violates Massachusetts law. We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution. We vacate the summary judgment for the department. We remand this case to the Superior Court for entry of judgment consistent with this opinion. Entry of

judgment shall be stayed for 180 days to permit the Legislature to take such action as it may deem appropriate in light of this opinion. See, e.g., Michaud v. Sheriff of Essex County, 390 Mass. 523, 535-536 (1983).

So ordered.

GREANEY, J. (concurring). I agree with the result reached by the court, the remedy ordered, and much of the reasoning in the court's opinion. In my view, however, the case is more directly resolved using traditional equal protection analysis.

(a) Article 1 of the Declaration of Rights, as amended by art. 106 of the Amendments to the Massachusetts Constitution, provides:

"All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin."

This provision, even prior to its amendment, guaranteed to all people in the Commonwealth -- equally -- the enjoyment of rights that are deemed important or fundamental. The withholding of relief from the plaintiffs, who wish to marry, and are otherwise eligible to marry, on the ground that the couples are of the same gender, constitutes a categorical restriction of a fundamental right. The restriction creates a straightforward case of discrimination that disqualifies an entire group of our citizens and their families from participation in an institution of paramount legal and social importance. This is impermissible under art. 1.

Analysis begins with the indisputable premise that the deprivation suffered by the plaintiffs is no mere legal

inconvenience. The right to marry is not a privilege conferred by the State, but a fundamental right that is protected against unwarranted State interference. See Zablocki v. Redhail, 434 U.S. 374, 384 (1978) ("the right to marry is of fundamental importance for all individuals"); Loving v. Virginia, 388 U.S. 1, 12 (1967) (freedom to marry is "one of the vital personal rights essential to the orderly pursuit of happiness by free men" under due process clause of Fourteenth Amendment); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (marriage is one of "basic civil rights of man"). See also Turner v. Safley, 482 U.S. 78, 95-96 (1987) (prisoners' right to marry is constitutionally protected). This right is essentially vitiated if one is denied the right to marry a person of one's choice. See Zablocki v. Redhail, supra at 384 (all recent decisions of United States Supreme Court place "the decision to marry as among the personal decisions protected by

the right of privacy").¹

¹ It makes no difference that the referenced decisions consider the right to marry in the context of the Fourteenth Amendment to the United States Constitution rather than in the context of our Constitution. As explained by the court, ante at n.18, a fundamental right under the Federal Constitution enjoys at least a comparable measure of protection under our State Constitution. See Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 651 (1981).

Because our marriage statutes intend, and state, the ordinary understanding that marriage under our law consists only of a union between a man and a woman, they create a statutory classification based on the sex of the two people who wish to marry. See Baehr v. Lewin, 74 Haw. 530, 564 (1993) (plurality opinion) (Hawaii marriage statutes created sex-based classification); Baker v. State, 170 Vt. 194, 253 (1999) (Johnson, J., concurring in part and dissenting in part) (same).

That the classification is sex based is self-evident. The marriage statutes prohibit some applicants, such as the plaintiffs, from obtaining a marriage license, and that prohibition is based solely on the applicants' gender. As a factual matter, an individual's choice of marital partner is constrained because of his or her own sex. Stated in particular terms, Hillary Goodridge cannot marry Julie Goodridge because she (Hillary) is a woman. Likewise, Gary Chalmers cannot marry Richard Linnell because he (Gary) is a man. Only their gender prevents Hillary and Gary from marrying their chosen partners under the present law.²

² In her separate opinion in Baker v. State, 170 Vt. 194, 253 (1999) (Johnson, J., concurring in part and dissenting in part), Justice Johnson described the equal protection defect in Vermont's marriage statutes in a slightly different, but no less persuasive, fashion:

"A woman is denied the right to marry another woman because her would-be partner is a woman, not because one or both are lesbians. Similarly, a man is denied the right to marry another man because his would-be partner is a man, not because one or both are gay. Thus, an individual's right to marry a person of the same sex is prohibited solely on the basis of sex, not on the basis of sexual orientation.

Indeed, sexual orientation does not appear as a qualification for marriage under the marriage statutes. The State makes no inquiry into the sexual practices or identities of a couple seeking a license."

A classification may be gender based whether or not the challenged government action apportions benefits or burdens uniformly along gender lines. This is so because constitutional protections extend to individuals and not to categories of people. Thus, when an individual desires to marry, but cannot marry his or her chosen partner because of the traditional opposite-sex restriction, a violation of art. 1 has occurred. See Commonwealth v. Chou, 433 Mass. 229, 237-238 (2001) (assuming statute enforceable only across gender lines may offend Massachusetts equal rights amendment). I find it disingenuous, at best, to suggest that such an individual's right to marry has not been burdened at all, because he or she remains free to chose another partner, who is of the opposite sex.

The equal protection infirmity at work here is strikingly similar to (although, perhaps, more subtle than) the invidious discrimination perpetuated by Virginia's antimiscegenation laws and unveiled in the decision of Loving v. Virginia, supra. In its landmark decision striking down Virginia's ban on marriages between Caucasians and members of any other race on both equal protection and substantive due process grounds, the United States Supreme Court soundly rejected the proposition that the equal application of the ban (i.e., that it applied equally to whites and blacks) made unnecessary the strict scrutiny analysis traditionally required of statutes drawing classifications according to race, see id. at 8-9, and concluded that "restricting the freedom to marry solely because of racial

classifications violates the central meaning of the Equal Protection Clause." Id. at 12. That our marriage laws, unlike antimiscegenation laws, were not enacted purposely to discriminate in no way neutralizes their present discriminatory character.

With these two propositions established (the infringement on a fundamental right and a sex-based classification), the enforcement of the marriage statutes as they are currently understood is forbidden by our Constitution unless the State can present a compelling purpose further by the statutes that can be accomplished in no other reasonable manner.³ See Blixt v. Blixt, 437 Mass. 649, 655-656 (2002), cert. denied, 537 U.S. 1189 (2003); Lowell v. Kowalski, 380 Mass. 663, 667-669 (1980). This

³ Some might say that the use of the so-called strict scrutiny formula is too facile in the sense that, once a court focuses on the formula as a dispositional tool, the result is automatically preordained -- the statute will fail because the State cannot possibly sustain its heavy burden to overcome the presumption of arbitrary and invidious discrimination. This is not so. See, e.g., Blixt v. Blixt, 437 Mass. 649, 656-657 (2002), cert. denied, 537 U.S. 1189 (2003) (concluding G. L. c. 119, § 39D, grandparent visitation statute, furthered compelling State interest in mitigating potential harm to children in nonintact families).

the State has not done. The justifications put forth by the State to sustain the statute's exclusion of the plaintiffs are insufficient for the reasons explained by the court to which I add the following observations.

The rights of couples to have children, to adopt, and to be foster parents, regardless of sexual orientation and marital status, are firmly established. See E.N.O. v. L.M.M., 429 Mass. 824, 829, cert. denied, 528 U.S. 1005 (1999); Adoption of Tammy, 416 Mass. 205, 210-211 (1993). As recognized in the court's opinion, and demonstrated by the record in this case, however, the State's refusal to accord legal recognition to unions of same-sex couples has had the effect of creating a system in which children of same-sex couples are unable to partake of legal protections and social benefits taken for granted by children in families whose parents are of the opposite sex. The continued maintenance of this caste-like system is irreconcilable with, indeed, totally repugnant to, the State's strong interest in the welfare of all children and its primary focus, in the context of family law where children are concerned, on "the best interests of the child." The issue at stake is not one, as might ordinarily be the case, that can be unilaterally and totally deferred to the wisdom of the Legislature. "While the State retains wide latitude to decide the manner in which it will allocate benefits, it may not use criteria which discriminatorily burden the exercise of a fundamental right." Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 652 (1981). Nor can the State's

wish to conserve resources be accomplished by invidious distinctions between classes of citizens. See Plyler v. Doe, 457 U.S. 202, 216-217, 227 (1982).⁴

⁴ The argument, made by some in the case, that legalization of same-sex marriage in Massachusetts will be used by persons in other States as a tool to obtain recognition of a marriage in their State that is otherwise unlawful, is precluded by the provisions of G. L. c. 207, §§ 11, 12, and 13.

A comment is in order with respect to the insistence of some that marriage is, as a matter of definition, the legal union of a man and a woman. To define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question we are asked to decide.⁵ This case calls for a higher level of legal analysis. Precisely, the case requires that we confront ingrained assumptions with respect to historically accepted roles of men and women within the institution of marriage and requires that we reexamine these assumptions in light of the unequivocal language of art. 1, in order to ensure that the governmental conduct challenged here conforms to the supreme charter of our Commonwealth. "A written constitution is the fundamental law for the government of a sovereign State. It is the final statement of the rights, privileges and obligations of the citizens and the ultimate grant of the powers and the conclusive definition of the limitations of the departments of State and of public officers To its provisions the conduct of all governmental affairs must conform. From its terms there is no appeal."

Loring v. Young, 239 Mass. 349, 376-377 (1921). I do not doubt

⁵ Because marriage is, by all accounts, the cornerstone of our social structure, as well as the defining relationship in our personal lives, confining eligibility in the institution, and all of its accompanying benefits and responsibilities, to opposite-sex couples is basely unfair. To justify the restriction in our marriage laws by accusing the plaintiffs of attempting to change the institution of marriage itself, terminates the debate at the outset without any accompanying reasoned analysis.

the sincerity of deeply held moral or religious beliefs that make inconceivable to some the notion that any change in the common-law definition of what constitutes a legal civil marriage is now, or ever would be, warranted. But, as matter of constitutional law, neither the mantra of tradition, nor individual conviction, can justify the perpetuation of a hierarchy in which couples of the same sex and their families are deemed less worthy of social and legal recognition than couples of the opposite sex and their families. See Lawrence v. Texas, 123 S. Ct. 2472, 2486 (2003) (O'Connor, J., concurring) (moral disapproval, with no other valid State interest, cannot justify law that discriminates against groups of persons); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992) ("Our obligation is to define the liberty of all, not to mandate our own moral code").

(b) I am hopeful that our decision will be accepted by those thoughtful citizens who believe that same-sex unions should not be approved by the State. I am not referring here to acceptance in the sense of grudging acknowledgment of the court's authority to adjudicate the matter. My hope is more liberating. The plaintiffs are members of our community, our neighbors, our coworkers, our friends. As pointed out by the court, their professions include investment advisor, computer engineer, teacher, therapist, and lawyer. The plaintiffs volunteer in our schools, worship beside us in our religious houses, and have children who play with our children, to mention just a few ordinary daily contacts. We share a common humanity and

participate together in the social contract that is the foundation of our Commonwealth. Simple principles of decency dictate that we extend to the plaintiffs, and to their new status, full acceptance, tolerance, and respect. We should do so because it is the right thing to do. The union of two people contemplated by G. L. c. 207 "is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." Griswold v. Connecticut, 381 U.S. 479, 486 (1965). Because of the terms of art. 1, the plaintiffs will no longer be excluded from that association.⁶

⁶ Justice Cordy's separate opinion points out, correctly, that, when art. 1 was revised by the people in 1976, it was not then intended to be relied on to approve same sex marriage. Post at (Cordy, J., dissenting). (Justice Spina adverts to the same proposition in his separate opinion, post at [Spina, J., dissenting]). Decisions construing the provision cited in Justice Cordy's opinion are interesting, but obviously inapposite because they have not dealt in any significant way with the issue before us. Nonetheless, the separate opinion concludes, from what was intended in 1976, and from various cases discussing art. 1, that the revised provision cannot be used to justify the result I reach.

In so reasoning, the separate opinion places itself squarely on the side of the original intent school of constitutional interpretation. As a general principle, I do not accept the philosophy of the school. The Massachusetts Constitution was never meant to create dogma that adopts inflexible views of one time to deny lawful rights to those who live in another. The provisions of our Constitution are, and must be, adaptable to changing circumstances and new societal phenomena, and, unless and until the people speak again on a specific subject, conformable in their concepts of liberty and equality to what is

fair, right, and just. I am cognizant of the voters' intent in passing the amendment to art. 1 in 1976. Were the revision alone the basis for change, I would be reluctant to construe it favorably to the plaintiffs, in view of the amendment's recent passage and the voters' intent. The court's opinion, however, rests in part on well-established principles of equal protection that are independent of the amendment. It is on these principles that I base my opinion.

