

SPINA, J. (dissenting, with whom Sosman and Cordy, JJ., join). What is at stake in this case is not the unequal treatment of individuals or whether individual rights have been impermissibly burdened, but the power of the Legislature to effectuate social change without interference from the courts, pursuant to art. 30 of the Massachusetts Declaration of Rights.¹

The power to regulate marriage lies with the Legislature, not with the judiciary. See Commonwealth v. Stowell, 389 Mass. 171, 175 (1983). Today, the court has transformed its role as protector of individual rights into the role of creator of rights, and I respectfully dissent.

¹ Article 30 of the Massachusetts Declaration of Rights provides that "the judicial [department] shall never exercise the legislative and executive powers . . . to the end it may be a government of laws and not of men."

1. Equal protection. Although the court did not address the plaintiffs' gender discrimination claim, G. L. c. 207 does not unconstitutionally discriminate on the basis of gender.² A claim of gender discrimination will lie where it is shown that differential treatment disadvantages one sex over the other. See Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, 378 Mass. 342, 349-352 (1979). See also United States v. Virginia, 518 U.S. 515 (1996). General Laws c. 207 enumerates certain qualifications for obtaining a marriage license. It creates no distinction between the sexes, but applies to men and women in precisely the same way. It does not create any disadvantage identified with gender as both men and women are similarly limited to marrying a person of the opposite sex. See Commonwealth v. King, 374 Mass. 5, 15-22 (1977) (law prohibiting prostitution not discriminatory based on gender because of equal application to men and women).

Similarly, the marriage statutes do not discriminate on the basis of sexual orientation. As the court correctly recognizes, constitutional protections are extended to individuals, not couples. Ante n.15. The marriage statutes do not disqualify individuals on the basis of sexual orientation from entering into marriage. All individuals, with certain exceptions

² Article 1 of the Massachusetts Declaration of Rights, as amended by art. 106 of the Amendments, the Equal Rights Amendment, states: "Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin."

not relevant here, are free to marry. Whether an individual chooses not to marry because of sexual orientation or any other reason should be of no concern to the court.

The court concludes, however, that G. L. c. 207 unconstitutionally discriminates against the individual plaintiffs because it denies them the "right to marry the person of one's choice" where that person is of the same sex. Ante at . To reach this result the court relies on Loving v. Virginia, 388 U.S. 1, 12 (1967), and transforms "choice" into the essential element of the institution of marriage. The Loving case did not use the word "choice" in this manner, and it did not point to the result that the court reaches today. In Loving, the Supreme Court struck down as unconstitutional a statute that prohibited Caucasians from marrying non-Caucasians. It concluded that the statute was intended to preserve white supremacy and invidiously discriminated against non-Caucasians because of their race. See id. at 11-12. The "choice" to which the Supreme Court referred was the "choice to marry," and it concluded that with respect to the institution of marriage, the State had no compelling interest in limiting the choice to marry along racial lines. Id. The Supreme Court did not imply the existence of a right to marry a person of the same sex. To the same effect is Perez v. Sharp, 32 Cal. 2d 711 (1948), on which the court also relies.

Unlike the Loving and Sharp cases, the Massachusetts Legislature has erected no barrier to marriage that intentionally

discriminates against anyone. Within the institution of marriage,³ anyone is free to marry, with certain exceptions that are not challenged. In the absence of any discriminatory purpose, the State's marriage statutes do not violate principles of equal protection. See Washington v. Davis, 426 U.S. 229, 240 (1976) ("invidious quality of a law claimed to be . . . discriminatory must ultimately be traced to a . . . discriminatory purpose"); Dickerson v. Attorney Gen., 396 Mass. 740, 743 (1986) (for purpose of equal protection analysis, standard of review under State and Federal Constitutions is identical). See also Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, supra. This court should not have invoked even the most deferential standard of review within equal protection analysis because no individual was denied access to the institution of marriage.

2. Due process. The marriage statutes do not impermissibly burden a right protected by our constitutional guarantee of due process implicit in art. 10 of our Declaration of Rights. There is no restriction on the right of any plaintiff to enter into marriage. Each is free to marry a willing person of the opposite sex. Cf. Zablocki v. Redhail, 434 U.S. 374 (1978) (fundamental right to marry impermissibly burdened by statute requiring court approval when subject to child support order).

Substantive due process protects individual rights against

³ Marriage is the civil union between a single man and a single woman. See Milford v. Worcester, 7 Mass. 48, 52 (1810).

unwarranted government intrusion. See Aime v. Commonwealth, 414 Mass. 667, 673 (1993). The court states, as we have said on many occasions, that the Massachusetts Declaration of Rights may protect a right in ways that exceed the protection afforded by the Federal Constitution. Ante at . See Arizona v. Evans, 514 U.S. 1, 8 (1995) (State courts afforded broader protection of rights than granted by United States Constitution). However, today the court does not fashion a remedy that affords greater protection of a right. Instead, using the rubric of due process it has redefined marriage.

Although art. 10 may afford greater protection of rights than the due process clause of the Fourteenth Amendment, our treatment of due process challenges adheres to the same standards followed in Federal due process analysis. See Commonwealth v. Ellis, 429 Mass. 362, 371 (1999). When analyzing a claim that the State has impermissibly burdened an individual's fundamental or other right or liberty interest, "[w]e begin by sketching the contours of the right asserted. We then inquire whether the challenged restriction burdens that right." Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 646 (1981). Where a right deemed "fundamental" is implicated, the challenged restriction will be upheld only if it is "narrowly tailored to further a legitimate and compelling governmental interest." Aime v. Commonwealth, supra at 673. To qualify as "fundamental" the asserted right must be "objectively, 'deeply rooted in this Nation's history and tradition,' [Moore v. East Cleveland, 431 U.S. 494, 503 (1977)]

(plurality opinion)] . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" Washington v. Glucksberg, 521 U.S. 702, 720-721 (1997), quoting Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937) (right to assisted suicide does not fall within fundamental right to refuse medical treatment because novel and unsupported by tradition) (citations omitted). See Three Juveniles v. Commonwealth, 390 Mass. 357, 367 (1983) (O'Connor, J., dissenting), cert. denied sub nom. Keefe v. Massachusetts, 465 U.S. 1068 (1984). Rights that are not considered fundamental merit due process protection if they have been irrationally burdened. See Massachusetts Fed'n of Teachers v. Board of Educ., 436 Mass. 763, 777-779 & n.14 (2002).

Although this court did not state that same-sex marriage is a fundamental right worthy of strict scrutiny protection, it nonetheless deemed it a constitutionally protected right by applying rational basis review. Before applying any level of constitutional analysis there must be a recognized right at stake. Same-sex marriage, or the "right to marry the person of one's choice" as the court today defines that right, does not fall within the fundamental right to marry. Same-sex marriage is not "deeply rooted in this Nation's history," and the court does not suggest that it is. Except for the occasional isolated decision in recent years, see, e.g., Baker v. State, 170 Vt. 194 (1999), same-sex marriage is not a right, fundamental or otherwise, recognized in this country. Just one example of the

Legislature's refusal to recognize same-sex marriage can be found in a section of the legislation amending G. L. c. 151B to prohibit discrimination in the workplace on the basis of sexual orientation, which states: "Nothing in this act shall be construed so as to legitimize or validate a 'homosexual marriage' . . ." St. 1989, c. 516, § 19. In this Commonwealth and in this country, the roots of the institution of marriage are deeply set in history as a civil union between a single man and a single woman. There is no basis for the court to recognize same-sex marriage as a constitutionally protected right.

3. Remedy. The remedy that the court has fashioned both in the name of equal protection and due process exceeds the bounds of judicial restraint mandated by art. 30. The remedy that construes gender specific language as gender neutral amounts to a statutory revision that replaces the intent of the Legislature with that of the court. Article 30 permits the court to apply principles of equal protection and to modify statutory language only if legislative intent is preserved. See, e.g., Commonwealth v. Chou, 433 Mass. 229, 238-239 (2001) (judicial rewriting of gender language permissible only when Legislature intended to include both men and women). See also Lowell v. Kowalski, 380 Mass. 663, 670 (1980). Here, the alteration of the gender-specific language alters precisely what the Legislature unambiguously intended to preserve, the marital rights of single men and women. Such a dramatic change in social institutions must remain at the behest of the people through the democratic

process.

Where the application of equal protection principles do not permit rewriting a statute in a manner that preserves the intent of the Legislature, we do not rewrite the statute. In Dalli v. Board of Educ., 358 Mass. 753 (1971), the court refused to rewrite a statute in a manner that would include unintended individuals. "To attempt to interpret this [statute] as including those in the category of the plaintiff would be to engage in a judicial enlargement of the clear statutory language beyond the limit of our judicial function. We have traditionally and consistently declined to trespass on legislative territory in deference to the time tested wisdom of the separation of powers as expressed in art. [30] of the Declaration of Rights of the Constitution of Massachusetts even when it appeared that a highly desirable and just result might thus be achieved." Id. at 759. Recently, in Connors v. Boston, 430 Mass. 31 (1999), we refused to expand health insurance coverage to include domestic partners because such an expansion was within the province of the Legislature, where policy affecting family relationships is most appropriate and frequently considered. Id. at 42-43. Principles of equal protection do not permit the marriage statutes to be changed in the manner that we have seen today.

This court has previously exercised the judicial restraint mandated by art. 30 and declined to extend due process protection to rights not traditionally coveted, despite recognition of their social importance. See Tobin's Case, 424 Mass. 250, 252-253

(1997) (receiving workers' compensation benefits not fundamental right); Doe v. Superintendent of Schs. of Worcester, 421 Mass. 117, 129 (1995) (declaring education not fundamental right); Williams v. Secretary of the Executive Office of Human Servs., 414 Mass. 551, 565 (1993) (no fundamental right to receive mental health services); Matter of Tocci, 413 Mass. 542, 548 n.4 (1992) (no fundamental right to practice law); Commonwealth v. Henry's Drywall Co., 366 Mass. 539, 542 (1974) (no fundamental right to pursue one's business). Courts have authority to recognize rights that are supported by the Constitution and history, but the power to create novel rights is reserved for the people through the democratic and legislative processes.

Likewise, the Supreme Court exercises restraint in the application of substantive due process "'because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.'" [Collins v. Harker Heights, 503 U.S. 115, 125 (1992).] By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action.

We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field,' [id.], lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court, Moore [v. East Cleveland, 431 U.S. 494, 502 (1977)] (plurality opinion)."
Washington v. Glucksberg, supra at 720.

The court has extruded a new right from principles of

substantive due process, and in doing so it has distorted the meaning and purpose of due process. The purpose of substantive due process is to protect existing rights, not to create new rights. Its aim is to thwart government intrusion, not invite it. The court asserts that the Massachusetts Declaration of Rights serves to guard against government intrusion into each individual's sphere of privacy. Ante at . Similarly, the Supreme Court has called for increased due process protection when individual privacy and intimacy are threatened by unnecessary government imposition. See, e.g., Lawrence v. Texas, 123 S. Ct. 2472 (2003) (private nature of sexual behavior implicates increased due process protection); Eisenstadt v. Baird, 405 U.S. 438 (1972) (privacy protection extended to procreation decisions within nonmarital context); Griswold v. Connecticut, 381 U.S. 479 (1965) (due process invoked because of intimate nature of procreation decisions). These cases, along with the Moe case, focus on the threat to privacy when government seeks to regulate the most intimate activity behind bedroom doors. The statute in question does not seek to regulate intimate activity within an intimate relationship, but merely gives formal recognition to a particular marriage. The State has respected the private lives of the plaintiffs, and has done nothing to intrude in the relationships that each of the plaintiff couples enjoy. Cf. Lawrence v. Texas, supra at 2484 (case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to

enter"). Ironically, by extending the marriage laws to same-sex couples the court has turned substantive due process on its head and used it to interject government into the plaintiffs' lives.

SOSMAN, J. (dissenting, with whom Spina and Cordy, JJ., join). In applying the rational basis test to any challenged statutory scheme, the issue is not whether the Legislature's rationale behind that scheme is persuasive to us, but only whether it satisfies a minimal threshold of rationality. Today, rather than apply that test, the court announces that, because it is persuaded that there are no differences between same-sex and opposite-sex couples, the Legislature has no rational basis for treating them differently with respect to the granting of marriage licenses.¹ Reduced to its essence, the court's opinion concludes that, because same-sex couples are now raising children, and withholding the benefits of civil marriage from their union makes it harder for them to raise those children, the State must therefore provide the benefits of civil marriage to same-sex couples just as it does to opposite-sex couples. Of course, many people are raising children outside the confines of traditional marriage, and, by definition, those children are being deprived of the various benefits that would flow if they were being raised in a household with married parents. That does

¹ The one difference that the court acknowledges -- that sexual relations between persons of the same sex does not result in pregnancy and childbirth -- it immediately brushes aside on the theory that civil marriage somehow has nothing to do with begetting children. Ante at - . For the reasons explained in detail in Justice Cordy's dissent, in which I join, the reasons justifying the civil marriage laws are inextricably linked to the fact that human sexual intercourse between a man and a woman frequently results in pregnancy and childbirth. Indeed, as Justice Cordy outlines, that fact lies at the core of why society fashioned the institution of marriage in the first place. Post at (Cordy, J., dissenting).

not mean that the Legislature must accord the full benefits of marital status on every household raising children. Rather, the Legislature need only have some rational basis for concluding that, at present, those alternate family structures have not yet been conclusively shown to be the equivalent of the marital family structure that has established itself as a successful one over a period of centuries. People are of course at liberty to raise their children in various family structures, as long as they are not literally harming their children by doing so. See Blixt v. Blixt, 437 Mass. 649, 668-670 (2002) (Sosman, J., dissenting), cert. denied, 537 U.S. 1189 (2003). That does not mean that the State is required to provide identical forms of encouragement, endorsement, and support to all of the infinite variety of household structures that a free society permits.

Based on our own philosophy of child rearing, and on our observations of the children being raised by same-sex couples to whom we are personally close, we may be of the view that what matters to children is not the gender, or sexual orientation, or even the number of the adults who raise them, but rather whether those adults provide the children with a nurturing, stable, safe, consistent, and supportive environment in which to mature. Same-sex couples can provide their children with the requisite nurturing, stable, safe, consistent, and supportive environment in which to mature, just as opposite-sex couples do. It is therefore understandable that the court might view the traditional definition of marriage as an unnecessary anachronism,

rooted in historical prejudices that modern society has in large measure rejected and biological limitations that modern science has overcome.

It is not, however, our assessment that matters. Conspicuously absent from the court's opinion today is any acknowledgment that the attempts at scientific study of the ramifications of raising children in same-sex couple households are themselves in their infancy and have so far produced inconclusive and conflicting results. Notwithstanding our belief that gender and sexual orientation of parents should not matter to the success of the child rearing venture, studies to date reveal that there are still some observable differences between children raised by opposite-sex couples and children raised by same-sex couples. See post at - (Cordy, J., dissenting). Interpretation of the data gathered by those studies then becomes clouded by the personal and political beliefs of the investigators, both as to whether the differences identified are positive or negative, and as to the untested explanations of what might account for those differences. (This is hardly the first time in history that the ostensible steel of the scientific method has melted and buckled under the intense heat of political and religious passions.) Even in the absence of bias or political agenda behind the various studies of children raised by same-sex couples, the most neutral and strict application of scientific principles to this field would be constrained by the limited period of observation that has been available. Gay and

lesbian couples living together openly, and official recognition of them as their children's sole parents, comprise a very recent phenomenon, and the recency of that phenomenon has not yet permitted any study of how those children fare as adults and at best minimal study of how they fare during their adolescent years. The Legislature can rationally view the state of the scientific evidence as unsettled on the critical question it now faces: Are families headed by same-sex parents equally successful in rearing children from infancy to adulthood as families headed by parents of opposite sexes? Our belief that children raised by same-sex couples should fare the same as children raised in traditional families is just that: a passionately held but utterly untested belief. The Legislature is not required to share that belief but may, as the creator of the institution of civil marriage, wish to see the proof before making a fundamental alteration to that institution.

Although ostensibly applying the rational basis test to the civil marriage statutes, it is abundantly apparent that the court is in fact applying some undefined stricter standard to assess the constitutionality of the marriage statutes' exclusion of same-sex couples. While avoiding any express conclusion as to any of the proffered routes by which that exclusion would be subjected to a test of strict scrutiny -- infringement of a fundamental right, discrimination based on gender, or discrimination against gays and lesbians as a suspect

classification -- the opinion repeatedly alludes to those concepts in a prolonged and eloquent prelude before articulating its view that the exclusion lacks even a rational basis. See, e.g., ante at (noting that State Constitution is "more protective of individual liberty and equality," demands "broader protection for fundamental rights," and is "less tolerant of government intrusion into the protected spheres of private life" than Federal Constitution); ante at (describing decision to marry and choice of marital partner as "among life's momentous acts of self-definition"); ante at - (repeated references to "right to marry" as "fundamental"); ante at - (repeated comparisons to statutes prohibiting interracial marriage, which were predicated on suspect classification of race); ante at - (characterizing ban on same-sex marriage as "invidious" discrimination that "deprives individuals of access to an institution of fundamental legal, personal, and social significance" and again noting that Massachusetts Constitution "protects matters of personal liberty against government incursion" more zealously than Federal Constitution); ante at (characterizing "whom to marry, how to express sexual intimacy, and whether and how to establish a family" as "among the most basic of every individual's liberty and due process rights"); ante at ("liberty interest in choosing whether and whom to marry would be hollow" if Commonwealth could "foreclose an individual from freely choosing the person" to marry); ante at (opining that in "overlapping realms of personal autonomy,

marriage, family life and child-rearing," characterized as "fundamentally private areas of life," court uses "integrated" analysis instead of "narrow focus"). See also ante at n.29 (suggesting that prohibition on same-sex marriage "impose[s] limits on personal beliefs"); ante at n.31] (suggesting that "total deference" to Legislature in this case would be equivalent to "strip[ping]" judiciary "of its constitutional authority to decide challenges" in such areas as forced sterilization, antimiscegenation statutes, and abortion, even though all cited examples pertain to fundamental rights analyzed under strict scrutiny, not under rational basis test); ante at (civil marriage as "a right of fundamental importance"); ante at (noting State policy of "preventing discrimination on the basis of sexual orientation"); ante at , (prohibition against same-sex marriage inconsistent with "gender neutral laws promoting stable families," and "rooted in persistent prejudices against" homosexuals); ante at (prohibition against same-sex marriage "violated the basic premises of individual liberty"). In short, while claiming to apply a mere rational basis test, the court's opinion works up an enormous head of steam by repeated invocations of avenues by which to subject the statute to strict scrutiny, apparently hoping that that head of steam will generate momentum sufficient to propel the opinion across the yawning chasm of the very deferential rational basis test.

Shorn of these emotion-laden invocations, the opinion ultimately opines that the Legislature is acting irrationally

when it grants benefits to a proven successful family structure while denying the same benefits to a recent, perhaps promising, but essentially untested alternate family structure. Placed in a more neutral context, the court would never find any irrationality in such an approach. For example, if the issue were government subsidies and tax benefits promoting use of an established technology for energy efficient heating, the court would find no equal protection or due process violation in the Legislature's decision not to grant the same benefits to an inventor or manufacturer of some new, alternative technology who did not yet have sufficient data to prove that that new technology was just as good as the established technology. That the early results from preliminary testing of the new technology might look very promising, or that the theoretical underpinnings of the new technology might appear flawless, would not make it irrational for the Legislature to grant subsidies and tax breaks to the established technology and deny them to the still unproved newcomer in the field. While programs that affect families and children register higher on our emotional scale than programs affecting energy efficiency, our standards for what is or is not "rational" should not be bent by those emotional tugs. Where, as here, there is no ground for applying strict scrutiny, the emotionally compelling nature of the subject matter should not affect the manner in which we apply the rational basis test.

Or, to the extent that the court is going to invoke such emotion-laden and value-laden rhetoric as a means of heightening

the degree of scrutiny to be applied, the same form of rhetoric can be employed to justify the Legislature's proceeding with extreme caution in this area. In considering whether the Legislature has a rational reason for postponing a dramatic change to the definition of marriage, it is surely pertinent to the inquiry to recognize that this proffered change affects not just a load-bearing wall of our social structure but the very cornerstone of that structure. See post at - (Cordy, J., dissenting). Before making a fundamental alteration to that cornerstone, it is eminently rational for the Legislature to require a high degree of certainty as to the precise consequences of that alteration, to make sure that it can be done safely, without either temporary or lasting damage to the structural integrity of the entire edifice. The court today blithely assumes that there are no such dangers and that it is safe to proceed (see ante at - , an assumption that is not supported by anything more than the court's blind faith that it is so.

More importantly, it is not our confidence in the lack of adverse consequences that is at issue, or even whether that confidence is justifiable. The issue is whether it is rational to reserve judgment on whether this change can be made at this time without damaging the institution of marriage or adversely affecting the critical role it has played in our society. Absent consensus on the issue (which obviously does not exist), or unanimity amongst scientists studying the issue (which also does

not exist), or a more prolonged period of observation of this new family structure (which has not yet been possible), it is rational for the Legislature to postpone any redefinition of marriage that would include same-sex couples until such time as it is certain that that redefinition will not have unintended and undesirable social consequences. Through the political process, the people may decide when the benefits of extending civil marriage to same-sex couples have been shown to outweigh whatever risks -- be they palpable or ephemeral -- are involved. However minimal the risks of that redefinition of marriage may seem to us from our vantage point, it is not up to us to decide what risks society must run, and it is inappropriate for us to abrogate that power to ourselves merely because we are confident that "it is the right thing to do." Ante at (Greaney, J., concurring).

As a matter of social history, today's opinion may represent a great turning point that many will hail as a tremendous step toward a more just society. As a matter of constitutional jurisprudence, however, the case stands as an aberration. To reach the result it does, the court has tortured the rational basis test beyond recognition. I fully appreciate the strength of the temptation to find this particular law unconstitutional -- there is much to be said for the argument that excluding gay and lesbian couples from the benefits of civil marriage is cruelly unfair and hopelessly outdated; the inability to marry has a profound impact on the personal lives of committed gay and lesbian couples (and their children) to whom we are personally

close (our friends, neighbors, family members, classmates, and co-workers); and our resolution of this issue takes place under the intense glare of national and international publicity. Speaking metaphorically, these factors have combined to turn the case before us into a "perfect storm" of a constitutional question. In my view, however, such factors make it all the more imperative that we adhere precisely and scrupulously to the established guideposts of our constitutional jurisprudence, a jurisprudence that makes the rational basis test an extremely deferential one that focuses on the rationality, not the persuasiveness, of the potential justifications for the classifications in the legislative scheme. I trust that, once this particular "storm" clears, we will return to the rational basis test as it has always been understood and applied. Applying that deferential test in the manner it is customarily applied, the exclusion of gay and lesbian couples from the institution of civil marriage passes constitutional muster. I respectfully dissent.

CORDY, J. (dissenting, with whom Spina and Sosman, JJ., join). The court's opinion concludes that the Department of Public Health has failed to identify any "constitutionally adequate reason" for limiting civil marriage to opposite-sex unions, and that there is no "reasonable relationship" between a disqualification of same-sex couples who wish to enter into a civil marriage and the protection of public health, safety, or general welfare. Consequently, it holds that the marriage statute cannot withstand scrutiny under the Massachusetts Constitution. Because I find these conclusions to be unsupportable in light of the nature of the rights and regulations at issue, the presumption of constitutional validity and significant deference afforded to legislative enactments, and the "undesirability of the judiciary substituting its notions of correct policy for that of a popularly elected Legislature" responsible for making such policy, Zayre Corp. v. Attorney Gen., 372 Mass. 423, 433 (1977), I respectfully dissent. Although it may be desirable for many reasons to extend to same-sex couples the benefits and burdens of civil marriage (and the plaintiffs have made a powerfully reasoned case for that extension), that decision must be made by the Legislature, not the court.

If a statute either impairs the exercise of a fundamental right protected by the due process or liberty provisions of our State Constitution, or discriminates based on a constitutionally suspect classification such as sex, it will be subject to strict

scrutiny when its validity is challenged. See Blixt v. Blixt, 437 Mass. 649, 655-656, 660-661 (2002), cert. denied, 537 U.S. 1189 (2003) (fundamental right); Lowell v. Kowalski, 380 Mass. 663, 666 (1980) (sex-based classification). If it does neither, a statute "will be upheld if it is 'rationally related to a legitimate State purpose.'" Hallett v. Wrentham, 398 Mass. 550, 557 (1986), quoting Paro v. Longwood Hosp., 373 Mass. 645, 649 (1977). This test, referred to in State and Federal constitutional jurisprudence as the "rational basis test,"¹ is virtually identical in substance and effect to the test applied to a law promulgated under the State's broad police powers (pursuant to which the marriage statutes and most other licensing and regulatory laws are enacted): that is, the law is valid if it is reasonably related to the protection of public health, safety, or general welfare. See, e.g., Leigh v. Board of Registration in Nursing, 395 Mass. 670, 682-683 (1985) (applying rational basis review to question of State exercise of police

¹ The rational basis standard applied under the Massachusetts Constitution and the Fourteenth Amendment to the United States Constitution is the same. See Chebacco Liquor Mart, Inc. v. Alcoholic Beverages Control Comm'n, 429 Mass. 721, 722-723 (1999).

power).

The Massachusetts marriage statute does not impair the exercise of a recognized fundamental right, or discriminate on the basis of sex in violation of the equal rights amendment to the Massachusetts Constitution. Consequently, it is subject to review only to determine whether it satisfies the rational basis test. Because a conceivable rational basis exists upon which the Legislature could conclude that the marriage statute furthers the legitimate State purpose of ensuring, promoting, and supporting an optimal social structure for the bearing and raising of children, it is a valid exercise of the State's police power.

A. Limiting marriage to the union of one man and one woman does not impair the exercise of a fundamental right. Civil marriage is an institution created by the State. In Massachusetts, the marriage statutes are derived from English common law, see Commonwealth v. Knowlton, 2 Mass. 530, 534 (1807), and were first enacted in colonial times. Commonwealth v. Munson, 127 Mass. 459, 460 (1879). They were enacted to secure public interests and not for religious purposes or to promote personal interests or aspirations. (See discussion infra at -). As the court notes in its opinion, the institution of marriage is "the legal union of a man and woman as husband and wife," ante at , and it has always been so under Massachusetts law, colonial or otherwise.

The plaintiffs contend that because the right to choose to marry is a "fundamental" right, the right to marry the person of

one's choice, including a member of the same sex, must also be a "fundamental" right. While the court stops short of deciding that the right to marry someone of the same sex is "fundamental" such that strict scrutiny must be applied to any statute that impairs it, it nevertheless agrees with the plaintiffs that the right to choose to marry is of fundamental importance ("among the most basic" of every person's "liberty and due process rights") and would be "hollow" if an individual was foreclosed from "freely choosing the person with whom to share . . . the . . . institution of civil marriage." Ante at . Hence, it concludes that a marriage license cannot be denied to an individual who wishes to marry someone of the same sex. In reaching this result the court has transmuted the "right" to marry into a right to change the institution of marriage itself.

This feat of reasoning succeeds only if one accepts the proposition that the definition of the institution of marriage as a union between a man and a woman is merely "conclusory" (as suggested, ante at [Greaney, J., concurring]), rather than the basis on which the "right" to partake in it has been deemed to be of fundamental importance. In other words, only by assuming that "marriage" includes the union of two persons of the same sex does the court conclude that restricting marriage to opposite-sex couples infringes on the "right" of same-sex couples of "marry."²

² The same semantic sleight of hand could transform every other restriction on marriage into an infringement of a right of fundamental importance. For example, if one assumes that a

group of mature, consenting, committed adults can form a "marriage," the prohibition on polygamy (G. L. c. 207, § 4), infringes on their "right" to "marry." In legal analysis as in mathematics, it is fundamentally erroneous to assume the truth of the very thing that is to be proved.

The plaintiffs ground their contention that they have a fundamental right to marry a person of the same sex in a long line of Supreme Court decisions, e.g., Turner v. Safley, 482 U.S. 78 (1987); Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942); that discuss the importance of marriage. In context, all of these decisions and their discussions are about the "fundamental" nature of the institution of marriage as it has existed and been understood in this country, not as the court has redefined it today. Even in that context, its "fundamental" nature is derivative of the nature of the interests that underlie or are associated with it.³ An examination of those interests reveals

³ Casting the right to civil marriage as a "fundamental right" in the constitutional sense is somewhat peculiar. It is not referred to as such in either the State or Federal Constitution, and unlike other recognized fundamental rights (such as the right to procreate, the right to be free of government restraint, or the right to refuse medical treatment), civil marriage is wholly a creature of State statute. If by enacting a civil marriage statutory scheme Massachusetts has created a fundamental right, then it could never repeal its own statute without violating the fundamental rights of its inhabitants.

that they are either not shared by same-sex couples or not implicated by the marriage statutes.

Supreme Court cases that have described marriage or the right to marry as "fundamental" have focused primarily on the underlying interest of every individual in procreation, which, historically, could only legally occur within the construct of marriage because sexual intercourse outside of marriage was a criminal act.⁴ In Skinner v. Oklahoma, supra, the first case to characterize marriage as a "fundamental" right, the Supreme Court stated, as its rationale for striking down a sterilization statute, that "[m]arriage and procreation are fundamental to the very existence of the race." Id. at 541. In concluding that a sterilized individual "is forever deprived of a basic liberty," id., the Court was obviously referring to procreation rather than marriage, as this court recognized in Matter of Moe, 385 Mass. 555, 560 (1982). Similarly, in Loving v. Virginia, supra, in which the United States Supreme Court struck down Virginia's antimiscegenation statute, the Court implicitly linked marriage with procreation in describing marriage as "fundamental to our very existence." Id. at 12. In Zablocki v. Redhail, supra, the Court expressly linked the right to marry with the right to procreate, concluding that "if [the plaintiff's] right to procreate means anything at all, it must imply some right to

⁴ For example, see G. L. c. 272, §§ 14 and 18, the Massachusetts adultery and fornication statutes.

enter the only relationship in which the State . . . allows sexual relations legally to take place." Id. at 386. Once again, in Turner v. Safley, supra, striking a State regulation that curtailed the right of an inmate to marry, the Court included among the important attributes of such marriages the "expectation that [the marriage] ultimately will be fully consummated." Id. at 96. See Milford v. Worcester, 7 Mass. 48, 52 (1810) (purpose of marriage is "to regulate, chasten, and refine, the intercourse between the sexes; and to multiply [and] preserve . . . the species"). Because same-sex couples are unable to procreate on their own, any right to marriage they may possess cannot be based on their interest in procreation, which has been essential to the Supreme Court's denomination of the right to marry as fundamental.

Supreme Court cases recognizing a right to privacy in intimate decision-making, e.g., Griswold v. Connecticut, supra (striking down statute prohibiting use of contraceptives); Roe v. Wade, 410 U.S. 113 (1973) (striking down statute criminalizing abortion), have also focused primarily on sexual relations and the decision whether or not to procreate, and have refused to recognize an "unlimited right" to privacy. Id. at 154. Massachusetts courts have been no more willing than the Federal courts to adopt a "universal[]" "privacy doctrine," Marcoux v. Attorney Gen., 375 Mass. 63, 67 (1978), or to derive "controversial 'new' rights from the Constitution." Aime v. Commonwealth, 414 Mass. 667, 674 n.10 (1993).

What the Griswold Court found "repulsive to the notions of privacy surrounding the marriage relationship" was the prospect of "allow[ing] the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives." Griswold v. Connecticut, supra at 485-486. See Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 658 (1981), quoting L. Tribe, American Constitutional Law 924 (1978) (finding it "difficult to imagine a clearer case of bodily intrusion" than being forced to bear a child). When Justice Goldberg spoke of "marital relations" in the context of finding it "difficult to imagine what is more private or more intimate than a husband and wife's marital relations[hip]," Griswold v. Connecticut, supra at 495 (Goldberg, J., concurring), he was obviously referring to sexual relations.⁵ Similarly, in Lawrence v. Texas, 123 S. Ct. 2472 (2003), it was the criminalization of private sexual behavior that the Court found violative of the petitioners'

⁵ While the facts of Griswold v. Connecticut, 381 U.S. 479 (1965), involved a married couple, later decisions clarify that its holding was not premised on the marriage relationship. See Carey v. Populations Servs. Int'l, 431 U.S. 678, 687 (1977) (stating that Griswold rested on the "right of the individual" to be free from governmental interference with child-bearing decisions [emphasis in original]); Eisenstadt v. Baird, 405 U.S. 438, 453-454 (1972) (same).

liberty interest.

In Massachusetts jurisprudence, protected decisions generally have been limited to those concerning "whether or not to beget or bear a child," Matter of Moe, 385 Mass. 555, 564 (1982) (see Opinion of the Justices, 423 Mass. 1201, 1234-1235 [1996] ["focus of (the Griswold and Roe cases) and the cases following them has been the intrusion . . . into the especially intimate aspects of a person's life implicated in procreation and childbearing"]); how to raise a child, see Care & Protection of Robert, 408 Mass. 52, 58, 60 (1990); or whether or not to accept medical treatment, see Brophy v. New England Sinai Hosp., Inc., 398 Mass. 417, 430 (1986); Superintendent of Belchertown State Sch. v. Saikewicz, 373 Mass. 728, 742 (1977), none of which is at issue here. See also Commonwealth v. Balthazar, 366 Mass. 298, 301 (1974) (statute punishing unnatural and lascivious acts does not apply to sexual conduct engaged in by adults in private, in light of "articulation of the constitutional right of an individual to be free from government regulation of certain sex related activities").

The marriage statute, which regulates only the act of obtaining a marriage license, does not implicate privacy in the sense that it has found constitutional protection under Massachusetts and Federal law. Cf. Commonwealth v. King, 374 Mass. 5, 14 (1977) (solicitation of prostitution "while in a place to which the public had access" implicated no "constitutionally protected rights of privacy"); Marcoux v.

Attorney Gen., supra at 68 (right to privacy, at most, protects conduct "limited more or less to the hearth"). It does not intrude on any right that the plaintiffs have to privacy in their choices regarding procreation, an intimate partner or sexual relations.⁶ The plaintiffs' right to privacy in such matters does not require that the State officially endorse their choices in order for the right to be constitutionally vindicated.

Although some of the privacy cases also speak in terms of personal autonomy, no court has ever recognized such an open-ended right. "That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected" Washington v. Glucksberg, 521 U.S. 702, 727 (1997). Such decisions are protected not because they are important, intimate, and personal, but because the right or liberty at stake is "so deeply rooted in our history and traditions, or so fundamental to

⁶ Contrast Lawrence v. Texas, 123 S. Ct. 2472 (2003), in which the United States Supreme Court struck down the Texas criminal sodomy statute because it constituted State intrusion on some of these very choices.

our concept of constitutionally ordered liberty" that it is protected by due process. Id. Accordingly, the Supreme Court has concluded that while the decision to refuse unwanted medical treatment is fundamental, Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 278 (1990), because it is deeply rooted in our nation's history and tradition, the equally personal and profound decision to commit suicide is not because of the absence of such roots. Washington v. Glucksberg, supra.

While the institution of marriage is deeply rooted in the history and traditions of our country and our State, the right to marry someone of the same sex is not. No matter how personal or intimate a decision to marry someone of the same sex might be, the right to make it is not guaranteed by the right of personal autonomy.

The protected right to freedom of association, in the sense of freedom of choice "to enter into and maintain certain intimate human relationships," Roberts v. United States Jaycees, 468 U.S. 609, 617 (1984) (as an element of liberty or due process rather than free speech), is similarly limited and unimpaired by the marriage statute. As recognized by the Supreme Court, that right affords protection only to "certain kinds of highly personal relationships," id. at 618, such as those between husband and wife, parent and child, and among close relatives, id. at 619, that "have played a critical role in the culture and traditions of the Nation," id. at 618-619, and are "deeply rooted in this Nation's history and tradition." Moore v. East Cleveland, 431

U.S. 494, 498-499, 503 (1977) (distinguishing on this basis between family and nonfamily relationships). Unlike opposite-sex marriages, which have deep historic roots, or the parent-child relationship, which reflects a "strong tradition" founded on "the history and culture of Western civilization" and "is now established beyond debate as an enduring American tradition," Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); or extended family relationships, which have been "honored throughout our history," Moore v. East Cleveland, supra at 505, same-sex relationships, although becoming more accepted, are certainly not so "deeply rooted in this Nation's history and tradition" as to warrant such enhanced constitutional protection.

Although "expressions of emotional support and public commitment" have been recognized as among the attributes of marriage, which, "[t]aken together . . . form a constitutionally protected marital relationship" (emphasis added), Turner v. Safley, 482 U.S. 78, 95, 96 (1987), those interests, standing alone, are not the source of a fundamental right to marry. While damage to one's "status in the community" may be sufficient harm to confer standing to sue, Lowell v. Kowalski, 380 Mass. 663, 667 (1980), such status has never been recognized as a fundamental right. See Paul v. Davis, 424 U.S. 693, 701 (1976) (mere damage to reputation does not constitute deprivation of "liberty").

Finally, the constitutionally protected interest in child rearing, recognized in Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 534-535

(1925); and Care & Protection of Robert, supra at 58, 60, is not implicated or infringed by the marriage statute here. The fact that the plaintiffs cannot marry has no bearing on their independently protected constitutional rights as parents which, as with opposite-sex parents, are limited only by their continued fitness and the best interests of their children. Bezio v. Patenaude, 381 Mass. 563, 579 (1980) (courts may not use parent's sexual orientation as reason to deny child custody).

Because the rights and interests discussed above do not afford the plaintiffs any fundamental right that would be impaired by a statute limiting marriage to members of the opposite sex, they have no fundamental right to be declared "married" by the State.

Insofar as the right to marry someone of the same sex is neither found in the unique historical context of our Constitution⁷ nor compelled by the meaning ascribed by this court to the liberty and due process protections contained within it, should the court nevertheless recognize it as a fundamental right? The consequences of deeming a right to be "fundamental" are profound, and this court, as well as the Supreme Court, has been very cautious in recognizing them.⁸ Such caution is

⁷ The statutes from which our current marriage laws derive were enacted prior to or shortly after the adoption of our Constitution in 1780, and "may well be considered . . . as affording some light in regard to the views and intentions of [the Constitution's] founders." Merriam v. Secretary of the Commonwealth, 375 Mass. 246, 253 (1978).

⁸ Tobin's Case, 424 Mass. 250, 252-253 (1997) (no fundamental right to receive workers' compensation benefits); Doe

v. Superintendent of Schs. of Worcester, 421 Mass. 117, 129 (1995) (no fundamental right to education); Williams v. Secretary of the Executive Office of Human Servs., 414 Mass. 551, 565 (1993) (no fundamental right to receive mental health services); Matter of Tocci, 413 Mass. 542, 548 n.4 (1992) (no fundamental right to practice law); Rushworth v. Registrar of Motor Vehicles, 413 Mass. 265, 269 n.5 (1992) (no fundamental right to operate motor vehicle); English v. New England Med. Ctr., Inc., 405 Mass. 423, 429 (1989), cert. denied, 493 U.S. 1056 (1990) (no fundamental right to recover tort damages); Commonwealth v. Henry's Drywall Co., 366 Mass. 539, 542 (1974) (no fundamental right to pursue one's business). Cf. Aime v. Commonwealth, 414 Mass. 667, 674 n.10 (1993) (recognizing right to be free from physical restraint "does not involve judicial derivation of controversial 'new' rights from the Constitution"). See generally Williams v. Secretary of the Executive Office of Human Servs., supra at 566 (recognizing fundamental right to receive mental health services "would represent an enormous and unwarranted extension of the judiciary into the [Department of Mental Health]'s authority"); Ford v. Grafton, 44 Mass. App. Ct. 715, 730-731, cert. denied, 525 U.S. 1040 (1998), quoting DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 203 (1989) ("people of Massachusetts may choose by

required by separation of powers principles. If a right is found to be "fundamental," it is, to a great extent, removed from "the arena of public debate and legislative action"; utmost care must be taken when breaking new ground in this field "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of [judges]." Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

legislation to [provide remedies for "grievous harm"] . . . however, 'they should not have [such remedies] thrust upon them by this Court's expansion of the Due Process Clause . . .").

"[T]o rein in" the otherwise potentially unlimited scope of substantive due process rights, id. at 722, both Federal and Massachusetts courts have recognized as "fundamental" only those "rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' [Moore v. East Cleveland, supra at 503] . . . and 'implicit in the concept of ordered liberty.'" Id. at 720-721, quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937). See Dutil, petitioner, 437 Mass. 9, 13 (2002) (same). In the area of family-related rights in particular, the Supreme Court has emphasized that the "Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted." Moore v. East Cleveland, supra.⁹

Applying this limiting principle, the Supreme Court, as noted above, declined to recognize a fundamental right to physician-assisted suicide, which would have required "revers[ing] centuries of legal doctrine and practice, and strik[ing] down the considered policy choice of almost every State." Washington v. Glucksberg, supra at 723. While recognizing that public attitudes toward assisted suicide are currently the subject of "earnest and profound debate," the Court nevertheless left the continuation and resolution of that debate

⁹ See Michael H. v. Gerald D., 491 U.S. 110, 122-123 & n.3, 127 (1989) (plurality opinion) (limits on substantive due process rights center on "respect for the teachings of history"); Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring) (same).

to the political arena, "as it should be in a democratic society." Id. at 719, 735.

Similarly, Massachusetts courts have declined to recognize rights that are not so deeply rooted.¹⁰ As this court noted in considering whether to recognize a right of terminally ill patients to refuse life-prolonging treatment, "the law always lags behind the most advanced thinking in every area," and must await "some common ground, some consensus." Superintendent of Belchertown State Sch. v. Saikewicz, 373 Mass. 728, 737 (1977), quoting Burger, The Law and Medical Advances, 67 Annals Internal Med. Supp. 7, 15, 17 (1967). See Blixt v. Blixt, 437 Mass. 649,

¹⁰ Compare Curtis v. School Comm. of Falmouth, 420 Mass. 749, 756 (1995), cert. denied, 516 U.S. 1067 (1996), quoting Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); Aime v. Commonwealth, supra at 676 ("right to be free from governmental detention and restraint is firmly embedded in the history of Anglo-American law"); Brophy v. New England Sinai Hosp., Inc., 398 Mass. 417, 430 (1986) (right to make decisions to accept or reject medical treatment "has its roots deep in our history" and "has come to be widely recognized and respected"); and Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 649 (1981) (characterizing decision whether to bear a child as "hold[ing] a particularly important place in the history of the right of privacy" and finding "something approaching consensus" on right to refuse unwanted infringement of bodily integrity), with Trigones v. Attorney Gen., 420 Mass. 859, 863 (1995), quoting Medina v. California, 505 U.S. 437, 445 (1992) (upholding statute that does not "offend some principle of justice so rooted in the tradition and conscience of our people as to be ranked fundamental"); Three Juveniles v. Commonwealth, 390 Mass. 357, 364 (1983), cert. denied sub nom. Keefe v. Massachusetts, 465 U.S. 1068 (1984) (declining to find fundamental right to child-parent privilege where "[n]either Congress nor the Legislature of any State has seen fit to adopt a rule granting [such] a privilege . . ."); Commonwealth v. Stowell, 389 Mass. 171, 174 (1983), quoting Roe v. Wade, 410 U.S. 113, 152 (1973) (declining to recognize right not "implicit in the concept of ordered liberty").

662-663 n.22 (2002) ("social consensus about family relationships is relevant to the constitutional limits on State intervention").

This is not to say that a statute that has no rational basis must nevertheless be upheld as long as it is of ancient origin. However, "[t]he long history of a certain practice . . . and its acceptance as an uncontroversial part of our national and State tradition do suggest that [the court] should reflect carefully before striking it down." Colo v. Treasurer & Receiver Gen., 378 Mass. 550, 557 (1979). As this court has recognized, the "fact that a challenged practice 'is followed by a large number of states . . . is plainly worth considering in determining whether the practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Commonwealth v. Kostka, 370 Mass. 516, 533 (1976), quoting Leland v. Oregon, 343 U.S. 790, 798 (1952).

Although public attitudes toward marriage in general and same-sex marriage in particular have changed and are still evolving, "the asserted contemporary concept of marriage and societal interests for which [plaintiffs] contend" are "manifestly [less] deeply founded" than the "historic institution" of marriage. Matter of the Estate of Cooper, 187 A.D.2d 128, 133-134 (N.Y. 1993). Indeed, it is not readily apparent to what extent contemporary values have embraced the concept of same-sex marriage. Perhaps the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures," Atkins v.

Virginia, 536 U.S. 304, 312 (2002), quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989). No State Legislature has enacted laws permitting same-sex marriages; and a large majority of States, as well as the United States Congress, have affirmatively prohibited the recognition of such marriages for any purpose. See P. Greenberg, *State Laws Affecting Lesbians and Gays*, National Conference of State Legislatures Legisbriefs at 1 (April/May 2001) (reporting that, as of May, 2001, thirty-six States had enacted "defense of marriage" statutes); 1 U.S.C. § 7 (2000); 28 U.S.C. § 1738C (2000) (Federal Defense of Marriage Act).

Given this history and the current state of public opinion, as reflected in the actions of the people's elected representatives, it cannot be said that "a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither . . . [is] a right to same-sex marriage . . . implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed." Baehr v. Lewin, 74 Haw. 530, 556-557 (1993). See Dean v. District of Columbia, 653 A.2d 307, 333 (D.C. 1995) (per curiam) (Ferren, J., concurring in part and dissenting in part); Baker v. Nelson, 291 Minn. 310, 312 (1971), appeal dismissed, 409 U.S. 810 (1972); Storrs v. Holcomb, 168 Misc. 2d 898, 899-900 (N.Y. Sup. Ct. 1996), dismissed, 245 A.D.2d

943 (N.Y. 1997).¹¹ In such circumstances, the law with respect to same-sex marriages must be left to develop through legislative processes, subject to the constraints of rationality, lest the court be viewed as using the liberty and due process clauses as vehicles merely to enforce its own views regarding better social policies, a role that the strongly worded separation of powers principles in art. 30 of the Declaration of Rights of our Constitution forbids, and for which the court is particularly ill suited.

B. The marriage statute, in limiting marriage to

¹¹ Because of the absence of deep historical roots, every court but one that has considered recognizing a fundamental right to same-sex marriage, has declined to do so. See, e.g., Standhardt v. Superior Court, 77 P.3d 451 (Ariz. Ct. App. 2003); Dean v. District of Columbia, 653 A.2d 307, 333 (D.C. 1995) (per curiam) (Ferren, J., concurring in part and dissenting in part); Baehr v. Lewin, 74 Haw. 530, 556-557 (1993); Baker v. Nelson, 291 Minn. 310, 312-314 (1971); Storrs v. Holcomb, 168 Misc. 2d 898, 899-900 (N.Y. Sup. Ct. 1996), dismissed, 245 A.D.2d 943 (N.Y. 1997). The one exception was the Alaska Superior Court, which relied on that State's Constitution's express and broadly construed right to privacy. Brause vs. Bureau of Vital Statistics, No. 3AN-95-6562CJ (Alaska Super. Ct. Feb. 27, 1998).

heterosexual couples, does not constitute discrimination on the basis of sex in violation of the Equal Rights Amendment to the Massachusetts Constitution. In his concurrence, Justice Greaney contends that the marriage statute constitutes discrimination on the basis of sex in violation of art. 1 of the Declaration of Rights as amended by art. 106 of the Amendments to the Constitution of the Commonwealth, the Equal Rights Amendment (ERA).¹² Such a conclusion is analytically unsound and inconsistent with the legislative history of the ERA.

The central purpose of the ERA was to eradicate discrimination against women and in favor of men or vice versa. See Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, 378 Mass. 342, 357 (1979). Consistent with this purpose, we have construed the ERA to prohibit laws that advantage one sex at the expense of the other, but not laws that treat men and women equally, id. at 346-349 (assuming that "separate but equal" treatment of males and females would be constitutionally permissible). The Massachusetts marriage statute does not subject men to different treatment from women; each is equally prohibited from precisely the same conduct. See Baker v. State, 170 Vt. 194, 215 n.13 (1999) ("there is no discrete class subject

¹² Article 106 is referred to as the Equal Rights Amendment.

to differential treatment solely on the basis of sex"). Compare Commonwealth v. King, 374 Mass. 5, 16 (1977) (law prohibiting prostitution applied to both male and female prostitutes and therefore did not discriminate), and Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 274-275 (1979) (declining to characterize veterans' preference as sex discrimination because it applied to both male and female veterans), with Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, supra, and Lowell v. Kowalski, 380 Mass. 663 (1980) (where statutes and rules at issue advantaged one sex over another).

Of course, a statute that on its face treats protected groups equally may still harm, stigmatize, or advantage one over the other. Such was the circumstance in Loving v. Virginia, 388 U.S. 1 (1967), where the Supreme Court struck down a State statute that made interracial marriage a crime, as constituting invidious discrimination on the basis of race. While the statute purported to apply equally to whites and nonwhites, the Court found that it was intended and structured to favor one race (white) and disfavor all others (nonwhites). The statute's legislative history demonstrated that its purpose was not merely to punish interracial marriage, but to do so for the sole benefit of the white race. As the Supreme Court readily concluded, the Virginia law was "designed to maintain White Supremacy." Id. at 11. Consequently, there was a fit between the class that the law was intended to discriminate against (nonwhite races) and the classification enjoying heightened protection (race).

By contrast, here there is no evidence that limiting marriage to opposite-sex couples was motivated by sexism in general or a desire to disadvantage men or women in particular. Moreover, no one has identified any harm, burden, disadvantage, or advantage accruing to either gender as a consequence of the Massachusetts marriage statute. In the absence of such effect, the statute limiting marriage to couples of the opposite sex does

not violate the ERA's prohibition of sex discrimination.¹³

¹³ Justice Greaney views Loving v. Virginia, 388 U.S. 1 (1967), as standing analogously for the proposition that just as a person cannot be barred from marrying another person because of his or her race, a person cannot be barred from marrying another person because of his or her sex. Ante at (Greaney, J., concurring). While superficially attractive, this analogy does not withstand closer scrutiny. Unlike Virginia's antimiscegenation statute, neither the purpose nor effect of the Massachusetts marriage statute is to advantage or disadvantage one gender over the other. This distinction is critical and was central to the Loving decision. More fundamentally, the statute at issue burdened marriage with a requirement that was both constitutionally suspect and unrelated to protecting either the

underlying purposes or nature of the institution. In contrast, the limitation of marriage to one man and one woman preserves both its structure and its historic purposes.

This conclusion is buttressed by the legislative history of the ERA, which was adopted by the voters on November 2, 1976, after being approved by constitutional conventions of the Legislature on August 15, 1973, (by a vote of 261-0) and May 14, 1975 (by a vote of 217-55).

In anticipation of its adoption, the Legislature enacted and, on June 21, 1975, the Governor approved a "Resolve providing for an investigation and study by a special commission relative to the effect of the ratification of the proposed amendments to the Constitution of the Commonwealth of Massachusetts and the Constitution of the United States prohibiting discrimination on account of sex upon the laws, business communities and public in the Commonwealth." Res. 1975, c. 26. One of the principal tasks of the commission was to catalog the aspects of the General Laws that would have to be amended for the statutory code to comply with the mandate of the proposed amendment that equality not be abridged on the basis of sex.¹⁴

On October 19, 1976, just before the general election at

¹⁴ The commission was composed of five State representatives, three State senators and three gubernatorial appointees. All of the gubernatorial appointees were attorneys.

which the amendment was to be considered, the commission filed its Interim Report, which focused on the effect of the Massachusetts ERA on the laws of the Commonwealth. 1976 Senate Doc. No. 1689. A section of the report, entitled "Areas Unaffected by the Equal Rights Amendment," addressed some of the legal regimes that would not be affected by the adoption of the ERA. One such area was "Homosexual Marriage," about which the commission stated:

"An equal rights amendment will have no effect upon the allowance or denial of homosexual marriages. The equal rights amendment is not concerned with the relationship of two persons of the same sex; it only addresses those laws or public-related actions which treat persons of opposite sexes differently. The Washington Court of Appeals has already stated that the equal rights amendment to its state constitution did not afford a basis for validating homosexual marriages. In Colorado, the attorney general has likewise issued an opinion that the state equal rights amendment did not validate homosexual marriage. There are no cases which have used a state equal rights amendment to either validate or require the allowance of homosexual marriages." (Footnotes omitted.) Id. at 21-22.¹⁵

The views of the commission were reflected in the public debate surrounding the passage of the ERA that focused on gender equality. See, e.g., Referenda reviewed, Boston Globe, Nov. 1, 1976, at 26; Voters' guide on nine state referendum measures,

¹⁵ The Washington case cited by the commission was Singer v. Hara, 11 Wash. App. 247 (1974).

Boston Herald American, Nov. 1, 1976, at 17. Claims that the ERA might be the basis for validating marriages between same-sex couples were labelled as "exaggerated" and "unfounded." For example, before the vote, the Boston Globe published an editorial discussing and urging favorable action on the ERA. In making its case, it noted that "[t]hose urging a no vote . . . argue that the amendment would . . . legitimize marriage between people of the same sex [and other changes]. In reality, the proposed amendment would require none of these things. Mass. ballot issues . . . 1 Equal Rights Amendment. Boston Globe, Nov. 1, 1976, at 29. And in the aftermath of the vote, the Boston Globe heralded the electorate's acceptance of "the arguments of proponents that the proposal would not result in many far-reaching or threatening changes." Referendums fared poorly, Boston Globe, Nov. 4, 1976, at 29.

While the court, in interpreting a constitutional amendment, is not bound to accept either the views of a legislative commission studying and reporting on the amendment's likely effects, or of public commentary and debate contemporaneous with its passage, it ought to be wary of completely disregarding what appears to be the clear intent of the people recently recorded in our constitutional history. This is particularly so where the plain wording of the amendment does not require the result it would reach.

C. The marriage statute satisfies the rational basis standard. The burden of demonstrating that a statute does not

satisfy the rational basis standard rests on the plaintiffs. It is a weighty one. "[A] reviewing court will presume a statute's validity, and make all rational inferences in favor of it. . . . The Legislature is not required to justify its classifications, nor provide a record or finding in support of them." (Citation omitted.) Paro v. Longwood Hosp., 373 Mass. 645, 650 (1977). The statute "only need[s to] be supported by a conceivable rational basis." Fine v. Contributory Retirement Appeal Bd., 401 Mass. 639, 641 (1988). See Massachusetts Fed'n of Teachers v. Board of Educ., 436 Mass. 763, 771-772 (2002). As this court stated in Shell Oil Co. v. Revere, 383 Mass. 682, 687-688 (1981):

"[I]t is not the court's function to launch an inquiry to resolve a debate which has already been settled in the legislative forum. '[I]t [is] the judge's duty . . . to give effect to the will of the people as expressed in the statute by their representative body. It is in this way . . . that the doctrine of separation of powers is given meaning.' Commonwealth v. Leis, 355 Mass. 189, 202 (1969) (Kirk, J., concurring).

"This respect for the legislative process means that it is not the province of the court to sit and weigh conflicting evidence supporting or opposing a legislative enactment. . . .

"Although persons challenging the constitutionality of legislation may introduce evidence in support of their claim that the legislation is irrational . . . they will not prevail if 'the question is at least debatable' in view of the evidence which may have been available to the Legislature. United States v. Carolene Prods. Co., 304 U.S. 144, 154 (1938)."

The "time tested wisdom of the separation of powers" requires courts to avoid "judicial legislation in the guise of new constructions to meet real or supposed new popular viewpoints, preserving always to the Legislature alone its proper prerogative

of adjusting the statutes to changed conditions." Pielech v. Massasoit Greyhound, Inc., 423 Mass. 534, 539, 540 (1996), cert. denied, 520 U.S. 1131 (1997), quoting Commonwealth v. A Juvenile, 368 Mass. 580, 595 (1975).

In analyzing whether a statute satisfies the rational basis standard, we look to the nature of the classification embodied in the enactment, then to whether the statute serves a legitimate State purpose, and finally to whether the classification is reasonably related to the furtherance of that purpose. With this framework, we turn to the challenged statute, G. L. c. 207, which authorizes local town officials to issue licenses to couples of the opposite sex authorizing them to enter the institution of civil marriage.

1. Classification. The nature of the classification at issue is readily apparent. Opposite-sex couples can obtain a license and same-sex couples cannot. The granting of this license, and the completion of the required solemnization of the marriage, opens the door to many statutory benefits and imposes numerous responsibilities. The fact that the statute does not permit such licenses to be issued to couples of the same sex thus bars them from civil marriage. The classification is not drawn between men and women or between heterosexuals and homosexuals, any of whom can obtain a license to marry a member of the opposite sex; rather, it is drawn between same-sex couples and opposite-sex couples.

2. State purpose. The court's opinion concedes that the

civil marriage statute serves legitimate State purposes, but further investigation and elaboration of those purposes is both helpful and necessary.

Civil marriage is the institutional mechanism by which societies have sanctioned and recognized particular family structures, and the institution of marriage has existed as one of the fundamental organizing principles of human society. See C.N. Degler, *The Emergence of the Modern American Family*, in *The American Family in Social-Historical Perspective* 61 (3d ed. 1983); A.J. Hawkins, Introduction, in *Revitalizing the Institution of Marriage for the Twenty-First Century: An Agenda for Strengthening Marriage* xiv (2002); C. Lasch, *Social Pathologists and the Socialization of Reproduction*, in *The American Family in Social-Historical Perspective*, supra at 80; W.J. O'Donnell & D.A. Jones, *Marriage and Marital Alternatives* 1 (1982); L. Saxton, *The Individual, Marriage, and the Family* 229-230, 260 (1968); M.A. Schwartz & B.M. Scott, *Marriages and Families: Diversity and Change* 4 (1994); Wardle, "Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation, 24 *Harv. J.L. & Pub. Pol'y* 771, 777-780 (2001); J.Q. Wilson, *The Marriage Problem: How Our Culture Has Weakened Families* 28, 40, 66-67 (2002). Marriage has not been merely a contractual arrangement for legally defining the private relationship between two individuals (although that is certainly part of any marriage). Rather, on an institutional level, marriage is the "very basis of the whole fabric of

civilized society," J.P. Bishop, Commentaries on the Law of Marriage and Divorce, and Evidence in Matrimonial Suits § 32 (1852), and it serves many important political, economic, social, educational, procreational, and personal functions.

Paramount among its many important functions, the institution of marriage has systematically provided for the regulation of heterosexual behavior, brought order to the resulting procreation, and ensured a stable family structure in which children will be reared, educated, and socialized. See Milford v. Worcester, 7 Mass. 48, 52 (1810) (civil marriage "intended to regulate, chasten, and refine, the intercourse between the sexes; and to multiply, preserve, and improve the species"). See also P. Blumstein & P. Schwartz, *American Couples: Money, Work, Sex* 29 (1983); C.N. Degler, supra at 61; G. Douglas, *Marriage, Cohabitation, and Parenthood – From Contract to Status?*, in *Cross Currents: Family Law and Policy in the United States and England* 223 (2000); S.L. Nock, *The Social Costs of De-Institutionalizing Marriage*, in *Revitalizing the Institution of Marriage for the Twenty-First Century: An Agenda for Strengthening Marriage*, supra at 7; L. Saxton, supra at 239-240, 242; M.A. Schwartz & B.M. Scott, supra at 4-6; Wardle, supra at 781-796; J.Q. Wilson, supra at 23-32. Admittedly, heterosexual intercourse, procreation, and child care are not necessarily conjoined (particularly in the modern age of widespread effective contraception and supportive social welfare programs), but an orderly society requires some mechanism for

coping with the fact that sexual intercourse commonly results in pregnancy and childbirth. The institution of marriage is that mechanism.

The institution of marriage provides the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other. The partners in a marriage are expected to engage in exclusive sexual relations, with children the probable result and paternity presumed. See G. L. c. 209C, § 6 ("a man is presumed to be the father of a child . . . if he is or has been married to the mother and the child was born during the marriage, or within three hundred days after the marriage was terminated by death, annulment or divorce"). Whereas the relationship between mother and child is demonstratively and predictably created and recognizable through the biological process of pregnancy and childbirth, there is no corresponding process for creating a relationship between father and child.¹⁶ Similarly, aside from an act of heterosexual intercourse nine months prior to childbirth, there is no process for creating a relationship between a man and a woman as the parents of a particular child. The institution of marriage fills this void by formally binding the husband-father to his wife and child, and imposing on him the responsibilities of fatherhood. See J.Q. Wilson, supra at 23-32. See also P. Blumstein & P. Schwartz, supra at 29; C.N. Degler,

¹⁶ Modern DNA testing may reveal actual paternity, but it establishes only a genetic relationship between father and child.

supra at 61; G. Douglas, supra at 223; S.L. Nock, supra at 7; L. Saxton, supra at 239-240, 242; M.A. Schwartz & B.M. Scott, supra at 4-6; Wardle, supra at 781-796. The alternative, a society without the institution of marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic.

The marital family is also the foremost setting for the education and socialization of children. Children learn about the world and their place in it primarily from those who raise them, and those children eventually grow up to exert some influence, great or small, positive or negative, on society. The institution of marriage encourages parents to remain committed to each other and to their children as they grow, thereby encouraging a stable venue for the education and socialization of children. See P. Blumstein & P. Schwartz, supra at 26; C.N. Degler, supra at 61; S.L. Nock, supra at 2-3; C. Lasch, supra at 81; M.A. Schwartz & B.M. Scott, supra at 6-7. More macroscopically, construction of a family through marriage also formalizes the bonds between people in an ordered and institutional manner, thereby facilitating a foundation of interconnectedness and interdependency on which more intricate stabilizing social structures might be built. See M. Grossberg, *Governing the Hearth: Law and Family in Nineteenth-Century America* 10 (1985); C. Lasch, supra; L. Saxton, supra at 260; J.Q. Wilson, supra at 221.

This court, among others, has consistently acknowledged both

the institutional importance of marriage as an organizing principle of society, and the State's interest in regulating it.

See French v. McAnarney, 290 Mass. 544, 546 (1935) ("Marriage is not merely a contract between the parties. It is the foundation of the family. It is a social institution of the highest importance. The Commonwealth has a deep interest that its integrity is not jeopardized"); Milford v. Worcester, 7 Mass. 48, 52 (1810) ("Marriage, being essential to the peace and harmony, and to the virtues and improvements of civil society, it has been, in all well-regulated governments, among the first attentions of the civil magistrate to regulate [it]"). See also Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the [human] race"); Maynard v. Hill, 125 U.S. 190, 211 (1888) (marriage "is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress"); Murphy v. Ramsey, 114 U.S. 15, 45 (1885) ("no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman . . . the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement");

Reynolds v. United States, 98 U.S. 145, 165 (1878) ("Upon [marriage] society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal").

It is undeniably true that dramatic historical shifts in our cultural, political, and economic landscape have altered some of our traditional notions about marriage, including the interpersonal dynamics within it,¹⁷ the range of responsibilities required of it as an institution,¹⁸ and the legal environment in which it exists.¹⁹ Nevertheless, the institution of marriage remains the principal weave of our social fabric. See C.N. Degler, supra at 61; A.J. Hawkins, Introduction, in *Revitalizing the Institution of Marriage for the Twenty-First Century: An Agenda for Strengthening Marriage* xiv (2002); C. Lasch, supra at 80; W.J. O'Donnell & D.A. Jones, *Marriage and Marital Alternatives* 1 (1982); L. Saxton, supra at 229-230, 260; M.A. Schwartz & B.M. Scott, supra at 4; Wardle, supra at 777-780; J.Q. Wilson, supra at 28, 40, 66-67. A family defined by heterosexual marriage continues to be the most prevalent social structure into

¹⁷ The normative relationship between husband and wife has changed markedly due to the overwhelming movement toward gender equality both at home and in the marketplace.

¹⁸ The availability of a variety of social welfare programs and public education has in many instances affected the status of the marital family as the only environment dedicated to the care, protection, and education of children.

¹⁹ No-fault divorce has made the dissolution of marriage much easier than ever before.

which the vast majority of children are born, nurtured, and prepared for productive participation in civil society, see *Children's Living Arrangements and Characteristics: March, 2002*, United States Census Bureau Current Population Reports at 3 (June, 2003) (in 2002, 69% of children lived with two married parents, 23% lived with their mother, 5% lived with their father, and 4% lived in households with neither parent present).

It is difficult to imagine a State purpose more important and legitimate than ensuring, promoting, and supporting an optimal social structure within which to bear and raise children.

At the very least, the marriage statute continues to serve this important State purpose.²⁰

3. Rational relationship. The question we must turn to next is whether the statute, construed as limiting marriage to couples of the opposite sex, remains a rational way to further that purpose. Stated differently, we ask whether a conceivable rational basis exists on which the Legislature could conclude that continuing to limit the institution of civil marriage to

²⁰ "It is important to distinguish the individual interests in domestic relations from the social interest in the family and marriage as social institutions." Pound, *Individual Interests in the Domestic Relations*, 14 Mich. L. Rev. 177, 177 (1916). The court's opinion blurs this important distinction and emphasizes the personal and emotional dimensions that often accompany marriage. It is, however, only society's interest in the institution of marriage as a stabilizing social structure that justifies the statutory benefits and burdens that attend to the status provided by its laws. Personal fulfilment and public celebrations or announcements of commitment have little if anything to do with the purpose of the civil marriage laws, or with a legitimate public interest that would justify them.

members of the opposite sex furthers the legitimate purpose of ensuring, promoting, and supporting an optimal social structure for the bearing and raising of children.²¹

²¹ In support of its conclusion that the marriage statute does not satisfy the rational basis test, the court emphasizes that "[t]he 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." Ante at . This surprising statement misallocates the burden of proof in a constitutional challenge to the rational basis of a statute (see supra at -). It is the plaintiffs who must prove that supporting and promoting one form of relationship by providing (as is pointed out) literally hundreds of benefits, could not conceivably affect the decision-making of anyone considering whether to bear and raise a child. The department is not required to present

"evidence" of anything.

In considering whether such a rational basis exists, we defer to the decision-making process of the Legislature, and must make deferential assumptions about the information that it might consider and on which it may rely. See Shell Oil Co. v. Revere, 383 Mass. 682, 688 (1981) (court considers "evidence which may have been available to the Legislature" [emphasis added]); Slome v. Chief of Police of Fitchburg, 304 Mass. 187, 189 (1939) ("any rational basis of fact that can be reasonably conceived" may support legislative finding); Mutual Loan Co. v. Martell, 200 Mass. 482, 487 (1909), aff'd, 222 U.S. 225 (1911) ("Legislature may be supposed to have known" relevant facts).

We must assume that the Legislature (1) might conclude that the institution of civil marriage has successfully and continually provided this structure over several centuries²²; (2) might consider and credit studies that document negative consequences that too often follow children either born outside

²² See C.N. Degler, *The Emergence of the Modern American Family*, in *The American Family in Social-Historical Perspective* 61 (3d ed. 1983); A.J. Hawkins, *Introduction*, in *Revitalizing the Institution of Marriage for the Twenty-First Century: An Agenda for Strengthening Marriage* xiv (2002); C. Lasch, *Social Pathologists and the Socialization of Reproduction*, in *The American Family in Social-Historical Perspective*, 80 (3d ed. 1983); W.J. O'Donnell & D.A. Jones, *The Law of Marriage and Marital Alternatives* 1 (1982); L. Saxton, *The Individual, Marriage and the Family* 229-230, 260 (1968); M.A. Schwartz & B.M. Scott, *Marriages and Families: Diversity and Change* 4 (1994); Wardle, "Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation, 24 *Harv. J.L. & Pub. Pol'y* 771, 777-780 (2001); J.Q. Wilson, *The Marriage Problem: How Our Culture has Weakened Families* 28, 40, 66-67 (2002).

of marriage or raised in households lacking either a father or a mother figure,²³ and scholarly commentary contending that children and families develop best when mothers and fathers are partners in their parenting²⁴; and (3) would be familiar with many recent studies that variously: support the proposition that children raised in intact families headed by same-sex couples fare as well on many measures as children raised in similar families headed by opposite-sex couples²⁵; support the

²³ See Rodney, Behavioral Differences between African American Male Adolescents with Biological Fathers and Those Without Biological Fathers in the Home, 30 J. Black Stud. 45, 53 (1999) (African-American juveniles who lived with their biological fathers displayed fewer behavioral problems than those whose biological fathers were absent from home); Chilton, Family Disruption, Delinquent Conduct and the Effect of Subclassification, 37 Am. Soc. Rev. 93, 95 (1972) (proportion of youth charged with juvenile offenses who were not living in husband-wife family was larger than comparable proportion of youth charged with juvenile offenses who were living in husband-wife family); Hoffmann, A National Portrait of Family Structure and Adolescent Drug Use, 60 J. Marriage & Fam. 633 (1998) (children from households with both mother and father reported relatively low use of drugs, whereas children from households without their natural mothers and from other family type households had highest prevalence of drug use). See also D. Blankenhorn, Fatherless America: Confronting Our Most Urgent Social Problem 25 (1995).

²⁴ H.B. Biller & J.L. Kimpton, The Father and the School-Aged Child, in *The Role of The Father in Child Development* 143 (3d ed. 1997); H.B. Biller, *Fathers and Families: Paternal Factors in Child Development* 1-3 (1993); Lynne Marie Kohm, The Homosexual "Union": Should Gay and Lesbian Partnerships be Granted the Same Status as Marriage? 22 J. Contemp. L. 51, 61 & nn.53, 54 (1996) ("[s]tatistics continue to show that the most stable family for children to grow up in is that consisting of a father and a mother").

²⁵ See, e.g., Patterson, Family Relationships of Lesbians and Gay Men, 62 J. Marriage & Fam. 1052, 1060, 1064-1065 (2000) (concluding that there are no significant differences between children of same-sex parents and children of heterosexual parents in aspects of personal development).

proposition that children of same-sex couples fare worse on some measures²⁶; or reveal notable differences between the two groups

²⁶ See, e.g., Cameron, *Homosexual Parents*, 31 *Adolescence* 757, 770-774 (1996) (concluding results of limited study consonant with notion that children raised by homosexuals disproportionately experience emotional disturbance and sexual victimization).

of children that warrant further study.²⁷

²⁷ See, e.g., Stacey, (How) Does the Sexual Orientation of Parents Matter?, 66 Amer. Soc. Rev. 159, 172, 176-179 (2001) (finding significant statistical differences in parenting practices, gender roles, sexual behavior but noting that "heterosexism" and political implications have constrained research). See also Coleman, Reinvestigating Remarriage: Another Decade of Progress, 62 J. Marriage & Fam. 1288 (2000) (concluding that future studies of the impact of divorce and remarriage on children should focus on "nontraditional" stepfamilies, particularly same-sex couples with children, because the impact of such arrangements have been overlooked in other studies).

We must also assume that the Legislature would be aware of the critiques of the methodologies used in virtually all of the comparative studies of children raised in these different environments, cautioning that the sampling populations are not representative, that the observation periods are too limited in time,²⁸ that the empirical data are unreliable, and that the hypotheses are too infused with political or agenda driven bias.

See, e.g., R. Lerner & A.K. Nagai, *No Basis: What the Studies Don't Tell Us About Same-Sex Parenting*, Marriage Law Project (Jan. 2001) (criticizing forty-nine studies on same-sex parenting -- at least twenty-six of which were cited by amici in this case -- as suffering from flaws in formulation of hypotheses, use of experimental controls, use of measurements, sampling and statistical testing, and finding false negatives); Stacey, (How)

²⁸ In Massachusetts, for example, the State's adoption laws were only recently interpreted to permit adoption by same-sex partners. Adoption of Tammy, 416 Mass. 205 (1993). It is fair to assume that most of the children affected by that ruling, who properly would be the subject of study in their teenage and adult years, are still only children today.

Does the Sexual Orientation of Parents Matter, 66 Am. Soc. Rev. 159, 159-166 (2001) (highlighting problems with sampling pools, lack of longitudinal studies, and political hypotheses).

Taking all of this available information into account, the Legislature could rationally conclude that a family environment with married opposite-sex parents remains the optimal social structure in which to bear children, and that the raising of children by same-sex couples, who by definition cannot be the two sole biological parents of a child and cannot provide children with a parental authority figure of each gender,²⁹ presents an alternative structure for child rearing that has not yet proved itself beyond reasonable scientific dispute to be as optimal as the biologically based marriage norm. See Baker v. State, 170 Vt. 194, 222 (1999) ("conceivable that the Legislature could conclude that opposite-sex partners offer advantages in th[e] area [of child rearing], although . . . experts disagree and the

²⁹ This family structure raises the prospect of children lacking any parent of their own gender. For example, a boy raised by two lesbians as his parents has no male parent. Contrary to the suggestion that concerns about such a family arrangement is based on "stereotypical" views about the differences between sexes, ante at n.28, concern about such an arrangement remains rational. It is, for example, rational to posit that the child himself might invoke gender as a justification for the view that neither of his parents "understands" him, or that they "don't know what he is going through," particularly if his disagreement or dissatisfaction involves some issue pertaining to sex. Given that same-sex couples raising children are a very recent phenomenon, the ramifications of an adolescent child's having two parents but not one of his or her own gender have yet to be fully realized and cannot yet even be tested in significant numbers. But see note 25, supra, regarding studies of children raised without parents of each gender.

answer is decidedly uncertain"). Cf. Marcoux v. Attorney Gen., 375 Mass. 63, 65 (1978). Working from the assumption that a recognition of same-sex marriages will increase the number of children experiencing this alternative, the Legislature could conceivably conclude that declining to recognize same-sex marriages remains prudent until empirical questions about its impact on the upbringing of children are resolved.³⁰

The fact that the Commonwealth currently allows same-sex couples to adopt, see Adoption of Tammy, 416 Mass. 205 (1993), does not affect the rationality of this conclusion. The eligibility of a child for adoption presupposes that at least one of the child's biological parents is unable or unwilling, for some reason, to participate in raising the child. In that sense, society has "lost" the optimal setting in which to raise that child -- it is simply not available. In these circumstances, the principal and overriding consideration is the "best interests of the child," considering his or her unique circumstances and the options that are available for that child. The objective is an

³⁰ The same could be true of any other potentially promising but recent innovation in the relationships of persons raising children.

individualized determination of the best environment for a particular child, where the normative social structure -- a home with both the child's biological father and mother -- is not an option. That such a focused determination may lead to the approval of a same-sex couple's adoption of a child does not mean that it would be irrational for a legislator, in fashioning statutory laws that cannot make such individualized determinations, to conclude generally that being raised by a same-sex couple has not yet been shown to be the absolute equivalent of being raised by one's married biological parents.

That the State does not preclude different types of families from raising children does not mean that it must view them all as equally optimal and equally deserving of State endorsement and support.³¹ For example, single persons are allowed to adopt

³¹ The plaintiffs also argue that because the State requires insurance companies to provide coverage for diagnosing and treating infertility unrestricted to those who are married, G. L. c. 175, § 47H, limiting marriage to opposite-sex couples is contrary to its currently stated public policy, and, therefore no longer rational. This argument is not persuasive. The fact that the Legislature has seen fit to require that health insurers cover the medical condition of infertility, for all subscribers, is not inconsistent with the State's policy of encouraging and endorsing heterosexual marriage as the optimum structure in which to bear and raise children. There is no rule that requires the State to limit every law bearing on birth and child rearing to the confines of heterosexual marriage in order to vindicate its policy of supporting that structure as optimal. Just as the insurance laws relating to infertility coverage cannot be said to be a State endorsement of childbirth out of wedlock, they cannot be said to represent an abandonment of the State's policy regarding a preference that children be born into and raised in the context of heterosexual marriage.

children, but the fact that the Legislature permits single-parent adoption does not mean that it has endorsed single parenthood as an optimal setting in which to raise children or views it as the equivalent of being raised by both of one's biological parents.³²

The same holds true with respect to same-sex couples -- the fact that they may adopt children means only that the Legislature has concluded that they may provide an acceptable setting in which to raise children who cannot be raised by both of their biological parents. The Legislature may rationally permit adoption by same-sex couples yet harbor reservations as to whether parenthood by same-sex couples should be affirmatively encouraged to the same extent as parenthood by the heterosexual couple whose union produced the child.³³

³² Indeed, just recently, this court reasoned that the Legislature could permissibly conclude that children being raised by single parents "may be at heightened risk for certain kinds of harm when compared with children of so-called intact families," because such children "may not have or be able to draw on the resources of two parents" when having to cope with some form of loss. Blixt v. Blixt, 437 Mass. 649, 663, 664 (2002), cert. denied, 537 U.S. 1189 (2003). In that case, the differences between single parents and parents raising a child together sufficed to justify subjecting single parents to the grandparent visitation statute, G. L. c. 119, § 39D. Id. at 662-664. Because the statute implicated fundamental parental rights, its classifications had to survive strict scrutiny, id. at 660, not the mere rational basis test at issue in today's opinion. The fact that single people can adopt children did not insulate them from differential treatment with respect to their parental rights.

³³ Similarly, while the fact that our laws have evolved to include a strong affirmative policy against discrimination on the basis of sexual orientation, have decriminalized intimate adult conduct, and have abolished the legal distinctions between marital and nonmarital children, may well be a reason to celebrate a more open and humane society, they ought not be the basis on which to conclude that there is no longer a rational

In addition, the Legislature could conclude that redefining the institution of marriage to permit same-sex couples to marry would impair the State's interest in promoting and supporting heterosexual marriage as the social institution that it has determined best normalizes, stabilizes, and links the acts of procreation and child rearing. While the plaintiffs argue that they only want to take part in the same stabilizing institution, the Legislature conceivably could conclude that permitting their participation would have the unintended effect of undermining to some degree marriage's ability to serve its social purpose. See Commonwealth v. Stowell, 389 Mass. 171, 175 (1983) (given State's

basis for the current marriage law. See ante at . To conclude the latter based on the former threatens the process of social reform in a democratic society. States must be free to experiment in the realm of social and civil relations, incrementally and without concern that a step or two in one direction will determine the outcome of the experiment as a matter of law. If they are not, those who argue "slippery slope" will have more ammunition than ever to resist any effort at progressive change or social experimentation, and will be able to put the lie to the arguments of the proponents of such efforts, that an incremental step forward does not preordain a result which neither the people nor their elected representatives may yet be prepared to accept.

broad concern with institution of marriage, it has "legitimate interest in prohibiting conduct which may threaten that institution").

As long as marriage is limited to opposite-sex couples who can at least theoretically procreate, society is able to communicate a consistent message to its citizens that marriage is a (normatively) necessary part of their procreative endeavor; that if they are to procreate, then society has endorsed the institution of marriage as the environment for it and for the subsequent rearing of their children; and that benefits are available explicitly to create a supportive and conducive atmosphere for those purposes. If society proceeds similarly to recognize marriages between same-sex couples who cannot procreate, it could be perceived as an abandonment of this claim, and might result in the mistaken view that civil marriage has little to do with procreation: just as the potential of procreation would not be necessary for a marriage to be valid, marriage would not be necessary for optimal procreation and child rearing to occur.³⁴ In essence, the Legislature could conclude

³⁴ The court contends that the exclusive and permanent commitment of the marriage partnership rather than the begetting of children is the sine qua non of civil marriage, ante at , and that "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." Ante at . The court has it backward. Civil marriage is the product of society's critical need to manage procreation as the inevitable consequence of intercourse between members of the opposite sex. Procreation has always been at the root of marriage and the reasons for its existence as a social

institution. Its structure, one man and one woman committed for life, reflects society's judgment as how optimally to manage procreation and the resultant child rearing. The court, in attempting to divorce procreation from marriage, transforms the form of the structure into its purpose. In doing so, it turns history on its head.

The court compounds its error by likening the marriage statute to Colorado's "Amendment 2" which was struck by the United States Supreme Court in Romer v. Evans, 517 U.S. 620, 633 (1996). That amendment repealed all Colorado laws and ordinances

that the consequence of such a policy shift would be a diminution in society's ability to steer the acts of procreation and child rearing into their most optimal setting.³⁵ Hall-Omar Baking Co.

that barred discrimination against homosexuals, and prohibited any governmental entity from adopting similar statutes. The amendment withdrew from homosexuals, but no others, legal protection from a broad range of injuries caused by private and governmental discrimination, "imposing a broad and undifferentiated disability on a single named group." Id. at 632. As the Court noted, its sheer breadth seems "inexplicable by anything but animus toward the class it affects." Id. The comparison to the Massachusetts marriage statute, which limits the institution of marriage (created to manage procreation) to opposite-sex couples who can theoretically procreate, is completely inapposite.

³⁵ Although the marriage statute is overinclusive because it comprehends within its scope infertile or voluntarily nonreproductive opposite-sex couples, this overinclusiveness does

v. Commissioner of Labor & Indus., 344 Mass. 695, 700 (1962)

("Legislative classification is valid if it is rational and bears some relationship to the object intended to be accomplished"

[emphasis added]).

not make the statute constitutionally infirm. See Massachusetts Fed'n of Teachers v. Board of Educ., 436 Mass. 763, 778 (2002) ("Some degree of overinclusiveness or underinclusiveness is constitutionally permissible . . ."). The overinclusiveness present here is constitutionally permissible because the Commonwealth has chosen, reasonably, not to test every prospective married couple for fertility and not to demand of fertile prospective married couples whether or not they will procreate. It is satisfied, rather, to allow every couple whose biological opposition makes procreation theoretically possible to join the institution.

The court recognizes this concern, but brushes it aside with the assumption that permitting same-sex couples to marry "will not diminish the validity or dignity of opposite-sex marriage," ante at , and that "we have no doubt that marriage will continue to be a vibrant and revered institution." Ante at .

Whether the court is correct in its assumption is irrelevant. What is relevant is that such predicting is not the business of the courts. A rational Legislature, given the evidence, could conceivably come to a different conclusion, or could at least harbor rational concerns about possible unintended consequences of a dramatic redefinition of marriage.³⁶

³⁶ Concerns about such unintended consequences cannot be dismissed as fanciful or far-fetched. Legislative actions taken in the 1950's and 1960's in areas as widely arrayed as domestic relations law and welfare legislation have had significant unintended adverse consequences in subsequent decades including the dramatic increase in children born out of wedlock, and the destabilization of the institution of marriage. See Nonmarital Childbearing in the United States 1940-99, National Center for Health Statistics, 48 Nat'l Vital Stat. Reps. at 2 (Oct. 2000) (nonmarital childbirths increased from 3.8% of annual births in 1940 to 33% in 1999); M.D. Bramlett, *Cohabitation, Marriage,*

Divorce, and Remarriage in the United States, National Center for Health Statistics, Vital & Health Stat. at 4-5 (July 2002) (due to higher divorce rates and postponement of marriage, proportion of people's lives spent in marriage declined significantly during later half of Twentieth Century).

There is no question that many same-sex couples are capable of being good parents, and should be (and are) permitted to be so. The policy question that a legislator must resolve is a different one, and turns on an assessment of whether the marriage structure proposed by the plaintiffs will, over time, if endorsed and supported by the State, prove to be as stable and successful a model as the one that has formed a cornerstone of our society since colonial times, or prove to be less than optimal, and result in consequences, perhaps now unforeseen, adverse to the State's legitimate interest in promoting and supporting the best possible social structure in which children should be born and raised. Given the critical importance of civil marriage as an organizing and stabilizing institution of society, it is eminently rational for the Legislature to postpone making fundamental changes to it until such time as there is unanimous scientific evidence, or popular consensus, or both, that such changes can safely be made.³⁷

³⁷ "[T]he State retains wide latitude to decide the manner in which it will allocate benefits." Moe v. Secretary of Admin. &

Fin., 382 Mass. 629, 652 (1981). To the extent that the Legislature concludes that one form of social relationship is more optimal than another for the bearing and raising of children, it is free to promote and support the one and not the other, so long as its conclusion is rational, and does not discriminatorily burden the exercise of a fundamental right. Id.

Cf. Rust v. Sullivan, 500 U.S. 173, 192-193 (1991) ("Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problems in another way").

There is no reason to believe that legislative processes are inadequate to effectuate legal changes in response to evolving evidence, social values, and views of fairness on the subject of same-sex relationships.³⁸ Deliberate consideration of, and incremental responses to rapidly evolving scientific and social understanding is the norm of the political process -- that it may seem painfully slow to those who are already persuaded by the arguments in favor of change is not a sufficient basis to conclude that the processes are constitutionally infirm. See, e.g., Massachusetts Fed'n of Teachers v. Board of Educ., 436 Mass. 763, 778 (2002); Mobil Oil v. Attorney Gen., 361 Mass. 401, 417 (1972) (Legislature may proceed piecemeal in addressing perceived injustices or problems). The advancement of the rights, privileges, and protections afforded to homosexual members of our community in the last three decades has been significant, and there is no reason to believe that that evolution will not continue. Changes of attitude in the civic,

³⁸ Legislatures in many parts of the country continue to consider various means of affording same-sex couples the types of benefits and legal structures that married couples enjoy. For example, in 1999 the California Legislature established the first Statewide domestic partner registry in the nation, and in each of the years 2001, 2002, and 2003 substantially expanded the rights and benefits accruing to registered partners. Cal. Fam. Code §§ 297 et seq. (West Supp. 2003). See also comments of Massachusetts Senate President Robert Traviglino to the effect that he intends to bring civil union legislation to the floor of the Senate for a vote. Mass. Senate Eyes Civil Unions: Move Comes as SJC Mulls Gay Marriages, Boston Globe, Sept. 7, 2003, at A1.

social, and professional communities have been even more profound. Thirty years ago, The Diagnostic and Statistical Manual, the seminal handbook of the American Psychiatric Association, still listed homosexuality as a mental disorder. Today, the Massachusetts Psychiatric Society, the American Psychoanalytic Association, and many other psychiatric, psychological, and social science organizations have joined in an amicus brief on behalf of the plaintiffs' cause. A body of experience and evidence has provided the basis for change, and that body continues to mount. The Legislature is the appropriate branch, both constitutionally and practically, to consider and respond to it. It is not enough that we as Justices might be personally of the view that we have learned enough to decide what is best. So long as the question is at all debatable, it must be the Legislature that decides. The marriage statute thus meets the requirements of the rational basis test. Accord Standhardt v. Superior Court, 77 P.3d 451 (Ariz. Ct. App. 2003) (marriage statutes rationally related to State's legitimate interest in encouraging procreation and child rearing within marriage); Baker v. Nelson, 291 Minn. 310, 313 (1971) ("equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry"); Singer v. Hara, 11 Wash. App. 247, 262-263 (1974) ("There can be no doubt that there exists a rational basis for the state to limit the definition of marriage to exclude same-sex relationships").

D. Conclusion. While "the Massachusetts Constitution protects matters of personal liberty against government intrusion at least as zealously, and often more so than does the Federal Constitution," ante at - , this case is not about government intrusions into matters of personal liberty. It is not about the rights of same-sex couples to choose to live together, or to be intimate with each other, or to adopt and raise children together. It is about whether the State must endorse and support their choices by changing the institution of civil marriage to make its benefits, obligations, and responsibilities applicable to them. While the courageous efforts of many have resulted in increased dignity, rights, and respect for gay and lesbian members of our community, the issue presented here is a profound one, deeply rooted in social policy, that must, for now, be the subject of legislative not judicial action.