7 N.Y.3d 338

Daniel HERNANDEZ et al., Appellants,

v.

Victor L. ROBLES, as City Clerk of the City of New York, Respondent.

Sylvia Samuels et al., Appellants,

v.

New York State Department of Health et al., Respondents.

In the Matter of Elissa Kane et al., Appellants,

v.

John Marsolais, as Albany City Clerk, et al., Respondents.

Jason Seymour et al., Appellants,

v.

Julie Holcomb, as City Clerk of the City of Ithaca, et al., Respondents.

Court of Appeals of New York.

July 6, 2006.

Background: Same-sex couples brought action against administrator of New York City Marriage License Bureau, challenging constitutionality of Domestic Relations Law (DRL) provisions that did not permit same-sex marriage. The Supreme Court, New York County, Doris Ling-Cohan, J., entered summary judgment for same-sex couples. Administrator appealed. The Supreme Court, Appellate Division, 26 A.D.3d 98, 805 N.Y.S.2d 354, reversed. In separate case, same sex couple sued state Department of Health, claiming that DRL provisions limiting marriage to opposite sex couples was unconstitutional. The Supreme Court, Albany County, Teresi, J., granted summary judgment to Department, and couple appealed. The Court of Appeals, 4 N.Y.3d 825, 796 N.Y.S.2d 579, 829 N.E.2d 671, transferred case. The Supreme Court, Appellate Division, 29 A.D.3d 9, 811 N.Y.S.2d 136, affirmed. In third case, same-sex couples appealed from judgment of the Supreme Court, Albany County, Kavanagh, J., upholding denial of their requests for a marriage license. The Supreme Court, Appellate Division, 26 A.D.3d 661, 808 N.Y.S.2d 566, affirmed. In fourth case, appeal was taken from summary judgment of the Supreme Court, Tompkins County, Mulvey, J., entered in favor of the Department of Health in action challenging those portions of the DRL limiting marriage to one woman and one man. The Supreme Court, Appellate Division, 26 A.D.3d 661, 811 N.Y.S.2d 134, affirmed. Plaintiffs in all four cases appealed.

Holdings: The Court of Appeals, R.S. Smith, J., held that:

(1) Domestic Relations Law provisions limiting marriage to same-sex couples was supported by rational basis;

(2) provisions did not violate due process; and

(3) provisions did not violate equal protection.

Affirmed.

Graffeo, J., filed opinion concurring in the result in which G.B. Smith concurred.

Kaye, C.J., filed dissenting opinion in which Ciparick, J., concurred.

1. Marriage ⚿17.5(1)

Domestic Relations Law provisions governing marriage did not permit same-sex marriage. McKinney's DRL §§ 5 et seq., 10 et seq.

2. Constitutional Law ⚿224(2), 274(5)
Marriage ⚿17.5(1)

Domestic Relations Law provisions limiting marriage to same-sex couples

were supported by rational basis, for purposes of challenges under the equal protection and due process clauses of the New York Constitution; Legislature could rationally decide that, for the welfare of children, it was more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships, and that it was better, other things being equal, for children to grow up with both a mother and a father. (Per opinion of R.S. Smith, J., with two judges concurring, one judge concurring in the result, and one judge not taking part.) McKinney's Const. Art. 1, §§ 6, 11; McKinney's DRL §§ 5 et seq., 10 et seq.

3. Constitutional Law ⚿18

New York Constitution cannot afford less protection to citizens than the Federal Constitution does, but it can give more. (Per opinion of R.S. Smith, J., with two judges concurring, one judge concurring in the result, and one judge not taking part.)

4. Constitutional Law ⚿252.5

In deciding the validity of legislation under the Due Process Clause, courts first inquire whether the legislation restricts the exercise of a fundamental right, one that is deeply rooted in this Nation's history and tradition. (Per opinion of R.S. Smith, J., with two judges concurring, one judge concurring in the result, and one judge not taking part.) McKinney's Const. Art. 1, § 6.

5. Constitutional Law ⚿274(5)

Right to marry is unquestionably a fundamental right for due process purposes; right to marry someone of the same sex, however, is not "deeply rooted." (Per opinion of R.S. Smith, J., with two judges concurring, one judge concurring in the result, and one judge not taking part.) McKinney's Const. Art. 1, § 6.

6. Constitutional Law ⚿274(5)
Marriage ⚿17.5(1)

Domestic Relations Law provisions limiting marriage to same-sex couples did not restrict the exercise of a fundamental right, in violation of due process. (Per opinion of R.S. Smith, J., with two judges concurring, one judge concurring in the result, and one judge not taking part.) McKinney's Const. Art. 1, § 6; McKinney's DRL §§ 5 et seq., 10 et seq.

7. Constitutional Law ⚿274(5)
Marriage ⚿17.5(1)

Domestic Relations Law provisions limiting marriage to same-sex couples were rationally related to legitimate government interests in protecting the welfare of children, as required by due process clause of the New York Constitution. (Per opinion of R.S. Smith, J., with two judges concurring, one judge concurring in the result, and one judge not taking part.) McKinney's Const. Art. 1, § 6; McKinney's DRL §§ 5 et seq., 10 et seq.

8. Constitutional Law ⚿224(2)

Domestic Relations Law's restriction of marriage to opposite-sex couples was subject only to rational basis scrutiny in determining whether the restriction violated equal protection, not intermediate or heightened scrutiny. (Per opinion of R.S. Smith, J., with two judges concurring, one judge concurring in the result, and one judge not taking part.) McKinney's Const. Art. 1, § 11; McKinney's DRL §§ 5 et seq., 10 et seq.

9. Constitutional Law ⚿213.1(2)

Where rational basis scrutiny applies, general rule is that legislation challenged on equal protection grounds is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. (Per opinion of R.S. Smith, J., with

two judges concurring, one judge concurring in the result, and one judge not taking part.) McKinney's Const. Art. 1, § 11.

10. Constitutional Law ⚿224(2)
Marriage ⚿17.5(1)

Domestic Relations Law's restriction of marriage to opposite-sex couples was not irrationally over-inclusive or under-inclusive, in violation of the equal protection clause of the New York Constitution. (Per opinion of R.S. Smith, J., with two judges concurring, one judge concurring in the result, and one judge not taking part.) McKinney's Const. Art. 1, § 11; McKinney's DRL §§ 5 et seq., 10 et seq.

11. Constitutional Law ⚿213.1(2)

Rational basis scrutiny under the equal protection clause of the New York Constitution is highly indulgent towards the State's classifications. (Per opinion of R.S. Smith, J., with two judges concurring, one judge concurring in the result, and one judge not taking part.) McKinney's Const. Art. 1, § 11.

Lambda Legal Defense and Education Fund, Inc., New York City (Susan L. Sommer, David S. Buckel and Alphonso David of counsel), and Kramer Levin Naftalis & Frankel LLP (Jeffrey S. Trachtman, Norman C. Simon and Darren Cohen of counsel), for appellants in the first above-entitled action.

Michael A. Cardozo, Corporation Counsel, New York City (Leonard Koerner, Marilyn Richter and Ronald E. Sternberg of counsel), for respondent in the first above-entitled action.

Richard E. Barnes, Albany, and Paul Benjamin Linton, North-brook, Illinois, for New York State Catholic Conference, amicus curiae in the first above-entitled action.

Roger B. Adler, P.C., New York City (Roger Bennet Adler of counsel), for New York State Conservative Party, amicus curiae in the first above-entitled action.

American Center for Law & Justice Northeast, Inc., New Milford, Connecticut (Vincent P. McCarthy and Kristina J. Wenberg of counsel), admitted pro hac vice, for City Action Coalition, amicus curiae in the first above-entitled action.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York City (Roberta A. Kaplan and Andrew J. Ehrlich of counsel), American Civil Liberties Union Foundation (James D. Esseks and Sharon M. McGowan of counsel) and New York Civil Liberties Union Foundation (Donna Lieberman and Arthur Eisenberg of counsel), for appellants in the second above-entitled action.

Brian M. DeLaurentis, P.C., New York City (Brian M. DeLaurentis of counsel), for Lesbian, Gay, Bisexual and Transgender Law Association of Greater New York, Inc., amicus curiae in the first and second above-entitled actions.

Willkie Farr & Gallagher LLP, New York City (Martin Klotz, Joanna Rotgers and Jeffrey S. Siegel of counsel), for Women's Bar Association of the State of New York and others, amici curiae in the first and second above-entitled actions.

Fried, Frank, Harris, Shriver & Jacobson LLP, New York City (Bonnie Steingart, Jonathan F. Lewis, Jennifer L. Colyer, Edward J. Jacobs and Tico A. Almeida of counsel), for Academy for Jewish Religion and others, amici curiae in the first and second above-entitled actions.

Ross D. Levi, Albany, and Cravath, Swaine & Moore LLP, New York City (Gary A. Bornstein of counsel), for Empire State Pride Agenda and others, amici curi-

ae in the first and second above-entitled actions.

Jay Weiser, New York City, Lia Brooks, Robert H. Cohen, Allen Drexel, Bruce Wagner, Albany, William D. Frumkin, New York City, and Mark B. Wheeler, Ithaca, for Association of the Bar of the City of New York and others, amici curiae in the first and second above-entitled actions.

Norman L. Reimer, New York City, Ivan J. Dominguez, Kathryn Shreeves, Jean M. Swieca and H. Alexander Robinson, Washington, D.C., for New York County Lawyers' Association and another, amici curiae in the first and second above-entitled actions.

Ropes & Gray LLP, New York City (Douglas H. Meal of counsel), and Mary L. Bonauto, Boston, Massachusetts, admitted pro hac vice, for Gay & Lesbian Advocates & Defenders, amicus curiae in the first and second above-entitled actions.

Simpson Thacher & Bartlett LLP, New York City (Joseph F. Tringali, Robert J. Pfister and Paul A. Saso of counsel), for Anti–Defamation League and others, amici curiae in the first and second above-entitled actions.

LeBoeuf, Lamb, Greene & MacRae LLP, New York City (Vivian L. Polak, Jonathan A. Damon, Paul H. Cohen, Kathryn S. Catenacci, Desiree A. DiCorcia, Angela M. Papalaskaris and Colin G. Stewart of counsel), for Association to Benefit Children and others, amici curiae in the first and second above-entitled actions.

Norman J. Chachkin, New York City, and Victor A. Bolden for NAACP Legal Defense and Educational Fund, Inc., amicus curiae in the first and second above-entitled actions.

Suzanne B. Goldberg, New York City, Arnold & Porter LLP, New York City and Washington, D.C. (Robert C. Mason, Dorothy N. Giobbe, Joshua A. Brook, Jennifer L. Hogan, Helene B. Madonick, Christopher S. Rhee and Joshua I. Kaplan of counsel), and Costello Cooney & Fearon, PLLC, Syracuse (Samuel C. Young of counsel), for Suzanne B. Goldberg and others, amici curiae in the first and second above-entitled actions.

Genant Law Offices, Mexico (Robert Genant of counsel), and Liberty Counsel, Lynchburg, Virginia (Rena M. Lindevaldsen of counsel), for Concerned Women for America and another, amici curiae in the first and second above-entitled actions.

Whiteman, Osterman & Hanna LLP, Albany (Michael Whiteman, Heather D. Diddel and Andrew M. Johnson of counsel), Jenner & Block LLP, Washington, D.C. (Paul M. Smith, William M. Hohengarten and Eric Berger of counsel), and Nathalie F.P. Gilfoyle for American Psychological Association and others, amici curiae in the first and second above-entitled actions.

Alliance Defense Fund, Scottsdale, Arizona (Byron J. Babione, Benjamin W. Bull, Glen Lavy and Christopher R. Stovall of counsel), for Family Research Council, amicus curiae in the first and second above-entitled actions.

Kindlon and Shanks, P.C., Albany (Terence L. Kindlon and Kathy Manley of counsel), for appellants in the third above-entitled action.

John J. Reilly, Corporation Counsel, Albany (Patrick K. Jordan of counsel), for John Marsolais, respondent in the third above-entitled action.

Bixler & Stumbar, Ithaca (L. Richard Stumbar and Elizabeth J. Bixler of counsel), and LoPinto, Schlather, Geldenhuys & Salk (Mariette Geldenhuys and Diane V. Bruns of counsel), for appellants in the fourth above-entitled action.

Eliot Spitzer, Attorney General, Albany (Peter H. Schiff, Andrea Oser and Julie M. Sheridan of counsel), for Attorney General, intervenor in the first above-entitled action, and for New York State Department of Health and another, respondents in the second, third and fourth above-entitled actions.

Barth, Sullivan & Behr, Buffalo (Laurence D. Behr of counsel), and Marriage Law Foundation, Orem, Utah (Monte N. Stewart of counsel), for United Families International, amicus curiae in the first, second, third and fourth above-entitled actions.

Shapiro Forman Allen Sava & McPherson LLP, New York City (Laurie McPherson and Jason Vigna of counsel), Alicia Ouellette, Albany, and Stephen Clark for Alicia Ouellette and others, amici curiae in the first, second, third and fourth above-entitled actions.

Stephen P. Hayford, Albany, and Joshua K. Baker, Manassas, Virginia, for James Q. Wilson and others, amici curiae in the first, second, third and fourth above-entitled actions.

Coti & Sugrue, New York City (Ralph Coti of counsel), for Alliance for Marriage, amicus curiae in the first, second, third and fourth above-entitled actions.

Debevoise & Plimpton LLP, New York City (Kristin D. Kiehn, Eliza M. Sporn, Sally S. Pritchard and Jennifer E. Spain of counsel), for Parents, Families & Friends of Lesbians and Gays, Inc. and others, amici curiae in the first, second, third and fourth above-entitled actions.

Ruta & Soulios, LLP, New York City (Steven Soulios of counsel), for Pastor Gregory L. Wilk and others, amici curiae in the first, second, third and fourth above-entitled actions.

Law Offices of Brian W. Raum, P.C., New York City (Brian W. Raum of counsel), for Dr. Paul McHugh, M.D., and another, amici curiae in the first, second, third and fourth above-entitled actions.

OPINION OF THE COURT

R.S. SMITH, J.

We hold that the New York Constitution does not compel recognition of marriages between members of the same sex. Whether such marriages should be recognized is a question to be addressed by the Legislature.

Facts and Procedural History

Plaintiffs and petitioners (hereafter plaintiffs) are the members of 44 same-sex couples. Each couple tried unsuccess-fully to obtain a marriage license. Plaintiffs then began these four lawsuits, seeking declaratory judgments that the restriction of marriage to opposite-sex couples is invalid under the State Constitution. Defendants and respondents (hereafter defendants) are the license-issuing authorities of New York City, Albany and Ithaca; the State Department of Health, which instructs local authorities about the issuance of marriage licenses; and the State itself. In *Hernandez v. Robles*, Supreme Court granted summary judgment in plaintiffs' favor; the Appellate Division reversed. In *Samuels v. New York State Department of Health*, *Matter of Kane v. Marsolais* and *Seymour v. Holcomb*, Supreme Court granted summary judgment in defendants' favor, and the Appellate Division affirmed. We now affirm the orders of the Appellate Division.

Discussion

I

[1] All the parties to these cases now acknowledge, implicitly or explicitly, that the Domestic Relations Law limits marriage to opposite-sex couples. Some amici, however, suggest that the statute can be

read to permit same-sex marriage, thus mooting the constitutional issues. We find this suggestion untenable.

Articles 2 and 3 of the Domestic Relations Law, which govern marriage, nowhere say in so many words that only people of different sexes may marry each other, but that was the universal understanding when articles 2 and 3 were adopted in 1909, an understanding reflected in several statutes. Domestic Relations Law § 12 provides that "the parties must solemnly declare ... that they take each other as husband and wife." Domestic Relations Law § 15(1)(a) requires town and city clerks to obtain specified information from "the groom" and "the bride." Domestic Relations Law § 5 prohibits certain marriages as incestuous, specifying opposite-sex combinations (brother and sister, uncle and niece, aunt and nephew), but not same-sex combinations. Domestic Relations Law § 50 says that the property of "a married woman ... shall not be subject to her husband's control."

New York's statutory law clearly limits marriage to opposite-sex couples. The more serious question is whether that limitation is consistent with the New York Constitution.

II

New York is one of many states in which supporters of same-sex marriage have asserted it as a state constitutional right. Several other state courts have decided such cases, under various state constitutional provisions and with divergent results (*e.g., Goodridge v. Department of Pub. Health,* 440 Mass. 309, 798 N.E.2d 941 [2003] [excluding same-sex couples from marriage violates Massachusetts Constitution]; *Standhardt v. Superior Ct. ex rel. County of Maricopa,* 206 Ariz. 276, 77 P.3d 451 [Ct.App.2004] [constitutional right to marry under Arizona Constitution does not encompass marriage to same-sex partner]; *Morrison v. Sadler,* 821 N.E.2d 15 [Ind.2005] [Indiana Constitution does not require judicial recognition of same-sex marriage]; *Lewis v. Harris,* 378 N.J.Super. 168, 875 A.2d 259 [2005] [limitation of marriage to members of opposite sex does not violate New Jersey Constitution]; *Baehr v. Lewin,* 74 Haw. 530, 852 P.2d 44 [1993] [refusal of marriage licenses to couples of the same sex subject to strict scrutiny under Hawaii Constitution]; *Baker v. State,* 170 Vt. 194, 744 A.2d 864 [1999] [denial to same-sex couples of benefits and protections afforded to married people violates Vermont Constitution]). Here, plaintiffs claim that, by limiting marriage to opposite-sex couples, the New York Domestic Relations Law violates two provisions of the State Constitution: the Due Process Clause (art. I, § 6 ["No person shall be deprived of life, liberty or property without due process of law"]) and the Equal Protection Clause (art. I, § 11 ["No person shall be denied the equal protection of the laws of this state or any subdivision thereof"]).

We approach plaintiffs' claims by first considering, in section III below, whether the challenged limitation can be defended as a rational legislative decision. The answer to this question, as we show in section IV below, is critical at every stage of the due process and equal protection analysis.

III

[2] It is undisputed that the benefits of marriage are many. The diligence of counsel has identified 316 such benefits in New York law, of which it is enough to summarize some of the most important: Married people receive significant tax advantages, rights in probate and intestacy proceedings, rights to support from their spouses both during the marriage and af-

ter it is dissolved, and rights to be treated as family members in obtaining insurance coverage and making health care decisions. Beyond this, they receive the symbolic benefit, or moral satisfaction, of seeing their relationships recognized by the State.

The critical question is whether a rational legislature could decide that these benefits should be given to members of opposite-sex couples, but not same-sex couples. The question is not, we emphasize, whether the Legislature must or should continue to limit marriage in this way; of course the Legislature [359]may (subject to the effect of the federal Defense of Marriage Act [Pub. L. 104–199, 110 U.S. Stat. 2419]) extend marriage or some or all of its benefits to same-sex couples. We conclude, however, that there are at least two grounds that rationally support the limitation on marriage that the Legislature has enacted. Others have been advanced, but we will discuss only these two, both of which are derived from the undisputed assumption that marriage is important to the welfare of children.

First, the Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships. Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not. Despite the advances of science, it remains true that the vast majority of children are born as a result of a sexual relationship between a man and a woman, and the Legislature could find that this will continue to be true. The Legislature could also find that such relationships are all too often casual or temporary. It could find that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born. It thus could choose to offer an inducement—in the form of marriage and its attendant benefits—to opposite-sex couples who make a solemn, long-term commitment to each other.

The Legislature could find that this rationale for marriage does not apply with comparable force to same-sex couples. These couples can become parents by adoption, or by artificial insemination or other technological marvels, but they do not become parents as a result of accident or impulse. The Legislature could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus that promoting stability in opposite-sex relationships will help children more. This is one reason why the Legislature could rationally offer the benefits of marriage to opposite-sex couples only.

There is a second reason: The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like. It is obvious that there are exceptions to this general rule—some children who never know their fathers, or their [360]mothers, do far better than some who grow up with parents of both sexes—but the Legislature could find that the general rule will usually hold.

Plaintiffs, and amici supporting them, argue that the proposition asserted is simply untrue: that a home with two parents of different sexes has no advantage, from the point of view of raising children, over a home with two parents of the same sex. Perhaps they are right, but the Legislature could rationally think otherwise.

To support their argument, plaintiffs and amici supporting them refer to social

science literature reporting studies of same-sex parents and their children. Some opponents of same-sex marriage criticize these studies, but we need not consider the criticism, for the studies on their face do not establish beyond doubt that children fare equally well in same-sex and opposite-sex households. What they show, at most, is that rather limited observation has detected no marked differences. More definitive results could hardly be expected, for until recently few children have been raised in same-sex households, and there has not been enough time to study the long-term results of such child-rearing.

Plaintiffs seem to assume that they have demonstrated the irrationality of the view that opposite-sex marriages offer advantages to children by showing there is no scientific evidence to support it. Even assuming no such evidence exists, this reasoning is flawed. In the absence of conclusive scientific evidence, the Legislature could rationally proceed on the commonsense premise that children will do best with a mother and father in the home. (*See Goodridge,* 440 Mass. at 358–359, 798 N.E.2d at 979–980 [Sosman, J., dissenting].) And a legislature proceeding on that premise could rationally decide to offer a special inducement, the legal recognition of marriage, to encourage the formation of opposite-sex households.

In sum, there are rational grounds on which the Legislature could choose to restrict marriage to couples of opposite sex. Plaintiffs have not persuaded us that this long-accepted restriction is a wholly irrational one, based solely on ignorance and prejudice against homosexuals. This is the question on which these cases turn. If we were convinced that the restriction plaintiffs attack were founded on nothing but prejudice—if we agreed with plaintiffs that it is comparable to the restriction in *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), a prohibition on inter-racial[361] marriage that was plainly "designed to maintain White Supremacy" (*id.* at 11, 87 S.Ct. 1817)—we would hold it invalid, no matter how long its history. As the dissent points out, a long and shameful history of racism lay behind the kind of statute invalidated in *Loving.*

But the historical background of *Loving* is different from the history underlying this case. Racism has been recognized for centuries—at first by a few people, and later by many more—as a revolting moral evil. This country fought a civil war to eliminate racism's worst manifestation, slavery, and passed three constitutional amendments to eliminate that curse and its vestiges. *Loving* was part of the civil rights revolution of the 1950's and 1960's, the triumph of a cause for which many heroes and many ordinary people had struggled since our nation began.

It is true that there has been serious injustice in the treatment of homosexuals also, a wrong that has been widely recognized only in the relatively recent past, and one our Legislature tried to address when it enacted the Sexual Orientation Non–Discrimination Act four years ago (L. 2002, ch. 2). But the traditional definition of marriage is not merely a by-product of historical injustice. Its history is of a different kind.

The idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex. A court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted. We do not so conclude.

IV

Our conclusion that there is a rational basis for limiting marriage to opposite-sex couples leads us to hold that that limitation is valid under the New York Due Process and Equal Protection clauses, and that any expansion of the traditional definition of marriage should come from the Legislature.

[3] This Court is the final authority as to the meaning of the New York Constitution. This does not mean, of course, that we ignore the United States Supreme Court's interpretations of similarly worded clauses of the Federal Constitution. The governing principle is that our Constitution cannot afford less protection to our citizens than the Federal Constitution does, but it can give more (*People v. P.J. Video,* 68 N.Y.2d 296, 302, 508 N.Y.S.2d 907, 501 N.E.2d 556 [1986]). We have at times found our Due Process Clause to be more protective of rights than its federal counterpart, usually in cases involving the rights of criminal defendants (*e.g., People v. LaValle,* 3 N.Y.3d 88, 783 N.Y.S.2d 485, 817 N.E.2d 341 [2004]) or prisoners (*e.g., Cooper v. Morin,* 49 N.Y.2d 69, 424 N.Y.S.2d 168, 399 N.E.2d 1188 [1979]). In general, we have used the same analytical framework as the Supreme Court in considering due process cases, though our analysis may lead to different results. By contrast, we have held that our Equal Protection Clause "is no broader in coverage than the Federal provision" (*Under 21, Catholic Home Bur. for Dependent Children v. City of New York,* 65 N.Y.2d 344, 360 n. 6, 492 N.Y.S.2d 522, 482 N.E.2d 1 [1985]).

We find no inconsistency that is significant in this case between our due process and equal protection decisions and the Supreme Court's. No precedent answers for us the question we face today; we reject defendants' argument that the Supreme Court's ruling without opinion in *Baker v. Nelson,* 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972) bars us from considering plaintiffs' equal protection claims. But both New York and federal decisions guide us in applying the Due Process and Equal Protection clauses.

A. Due Process

[4, 5] In deciding the validity of legislation under the Due Process Clause, courts first inquire whether the legislation restricts the exercise of a fundamental right, one that is "deeply rooted in this Nation's history and tradition" (*Washington v. Glucksberg,* 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 [1997], quoting *Moore v. East Cleveland,* 431 U.S. 494, 503, 97 S.Ct. 1932, 52 L.Ed.2d 531 [1977] [plurality op.]; *Hope v. Perales,* 83 N.Y.2d 563, 575, 611 N.Y.S.2d 811, 634 N.E.2d 183 [1994]). In this case, whether the right in question is "fundamental" depends on how it is defined. The right to marry is unquestionably a fundamental right (*Loving,* 388 U.S. at 12, 87 S.Ct. 1817; *Zablocki v. Redhail,* 434 U.S. 374, 384, 98 S.Ct. 673, 54 L.Ed.2d 618 [1978]; *Cooper,* 49 N.Y.2d at 79, 424 N.Y.S.2d 168, 399 N.E.2d 1188). The right to marry someone of the same sex, however, is not "deeply rooted"; it has not even been asserted until relatively recent times. The issue then becomes whether the right to marry must be defined to include a right to same-sex marriage.

Recent Supreme Court decisions show that the definition of a fundamental right for due process purposes may be either too narrow or too broad. In *Lawrence v. Texas,* 539 U.S. 558, 566, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), the Supreme Court criticized its own prior decision in *Bowers v. Hardwick,* 478 U.S. 186, 190, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986) for defining the right at issue as the right of "homosex-

uals to engage in sodomy." The *Lawrence* court plainly thought the right should [363] have been defined more broadly, as a right to privacy in intimate relationships. On the other hand, in *Washington v. Glucksberg,* 521 U.S. at 722, 723, 117 S.Ct. 2258, the Court criticized a lower federal court for defining the right at issue too broadly as a "right to die"; the right at issue in *Glucksberg,* the Court said, was really the "right to commit suicide" and to have assistance in doing so.

[6] The difference between *Lawrence* and *Glucksberg* is that in *Glucksberg* the relatively narrow definition of the right at issue was based on rational line-drawing. In *Lawrence,* by contrast, the court found the distinction between homosexual sodomy and intimate relations generally to be essentially arbitrary. Here, there are, as we have explained, rational grounds for limiting the definition of marriage to opposite-sex couples. This case is therefore, in the relevant way, like *Glucksberg* and not at all like *Lawrence*. Plaintiffs here do not, as the petitioners in *Lawrence* did, seek protection against state intrusion on intimate, private activity. They seek from the courts access to a state-conferred benefit that the Legislature has rationally limited to opposite-sex couples. We conclude that, by defining marriage as it has, the New York Legislature has not restricted the exercise of a fundamental right (*see also* concurring op. of Judge Graffeo at 368–374, 821 N.Y.S.2d at 782–787, 855 N.E.2d at 13–18).

[7] Where no fundamental right is at issue, legislation is valid under the Due Process Clause if it is rationally related to legitimate government interests (*Glucksberg,* 521 U.S. at 728, 117 S.Ct. 2258; *Hope,* 83 N.Y.2d at 577, 611 N.Y.S.2d 811, 634 N.E.2d 183). Again, our earlier discussion answers this question. Protecting the welfare of children is a legitimate governmental interest, and we have shown above that there is a rational relationship between that interest and the limitation of marriage to opposite-sex couples. That limitation therefore does not deprive plaintiffs of due process of law.

B. Equal Protection

[8] Plaintiffs claim that the distinction made by the Domestic Relations Law between opposite-sex and same-sex couples deprives them of the equal protection of the laws. This claim raises, first, the issue of what level of scrutiny should be applied to the legislative classification. The plaintiffs argue for strict scrutiny, on the ground that the legislation affects their fundamental right to marry (*see Alevy v. Downstate Med. Ctr. of State of N.Y.,* 39 N.Y.2d 326, 332, 384 N.Y.S.2d 82, 348 N.E.2d 537 [1976])—a contention we rejected above. Alternatively, plaintiffs argue for so-called intermediate or heightened scrutiny on two grounds. They say that the legislation [364] discriminates on the basis of sex, a kind of discrimination that has been held to trigger heightened scrutiny (*e.g., United States v. Virginia,* 518 U.S. 515, 532–533, 116 S.Ct. 2264, 135 L.Ed.2d 735 [1996]). They also say that discrimination on the basis of sexual preference should trigger heightened scrutiny, a possibility we left open in *Under 21, Catholic Home Bur. for Dependent Children v. City of New York,* 65 N.Y.2d at 364, 492 N.Y.S.2d 522, 482 N.E.2d 1. We reject both of these arguments, and hold that the restriction of marriage to opposite-sex couples is subject only to rational basis scrutiny.

By limiting marriage to opposite-sex couples, New York is not engaging in sex discrimination. The limitation does not put men and women in different classes, and give one class a benefit not given to the other. Women and men are treated

alike—they are permitted to marry people of the opposite sex, but not people of their own sex. This is not the kind of sham equality that the Supreme Court confronted in *Loving;* the statute there, prohibiting black and white people from marrying each other, was in substance anti-black legislation. Plaintiffs do not argue here that the legislation they challenge is designed to subordinate either men to women or women to men as a class.

However, the legislation does confer advantages on the basis of sexual preference. Those who prefer relationships with people of the opposite sex and those who prefer relationships with people of the same sex are not treated alike, since only opposite-sex relationships may gain the status and benefits associated with marriage. This case thus presents the question of what level of scrutiny is to be applied to legislation that classifies people on this basis. We held in *Under 21* that "classifications based on sexual orientation" would not be subject to strict scrutiny, but left open the question of "whether some level of 'heightened scrutiny' would be applied" in such cases (*id.* at 364, 492 N.Y.S.2d 522, 482 N.E.2d 1).

We resolve this question in this case on the basis of the Supreme Court's observation that no more than rational basis scrutiny is generally appropriate "where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement" (*Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 441, 105 S.Ct. 3249, 87 L.Ed.2d 313 [1985]). Perhaps that principle would lead us to apply heightened scrutiny to sexual preference discrimination in some cases, but not where we review legislation governing marriage and family relationships. A person's preference for the sort of sexual activity that cannot lead to the birth of children is relevant to the [365] State's interest in fostering relationships that will serve children best. In this area, therefore, we conclude that rational basis scrutiny is appropriate.

[9, 10] Where rational basis scrutiny applies, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest" (*id.* at 440, 105 S.Ct. 3249). Plaintiffs argue that a classification distinguishing between opposite-sex couples and same-sex couples cannot pass rational basis scrutiny, because if the relevant state interest is the protection of children, the category of those permitted to marry—opposite-sex couples—is both underinclusive and overinclusive. We disagree.

Plaintiffs argue that the category is underinclusive because, as we recognized above, same-sex couples, as well as opposite-sex couples, may have children. That is indeed a reason why the Legislature might rationally choose to extend marriage or its benefits to same-sex couples; but it could also, for the reasons we have explained, rationally make another choice, based on the different characteristics of opposite-sex and same-sex relationships. Our earlier discussion demonstrates that the definition of marriage to include only opposite-sex couples is not irrationally underinclusive.

In arguing that the definition is overinclusive, plaintiffs point out that many opposite-sex couples cannot have or do not want to have children. How can it be rational, they ask, to permit these couples, but not same-sex couples, to marry? The question is not a difficult one to answer. While same-sex couples and opposite-sex couples are easily distinguished, limiting marriage to opposite-sex couples likely to have children would require grossly intrusive inquiries, and arbitrary and unreliable

line-drawing. A legislature that regarded marriage primarily or solely as an institution for the benefit of children could rationally find that an attempt to exclude childless opposite-sex couples from the institution would be a very bad idea.

[11] Rational basis scrutiny is highly indulgent towards the State's classifications (*see Heller v. Doe,* 509 U.S. 312, 320–321, 113 S.Ct. 2637, 125 L.Ed.2d 257 [1993]). Indeed, it is "a paradigm of judicial restraint" (*Affronti v. Crosson,* 95 N.Y.2d 713, 719, 723 N.Y.S.2d 757, 746 N.E.2d 1049 [2001], *cert. denied sub nom. Affronti v. Lippman,* 534 U.S. 826, 122 S.Ct. 66, 151 L.Ed.2d 32 [2001]). We conclude that permitting marriage by all opposite-sex couples does not create an irrationally overnarrow or overbroad classification. The distinction between opposite-sex and same-sex couples enacted by the Legislature does not violate the Equal Protection Clause.

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We hold, in sum, that the Domestic Relations Law's limitation of marriage to opposite-sex couples is not unconstitutional. We emphasize once again that we are deciding only this constitutional question. It is not for us to say whether same-sex marriage is right or wrong. We have presented some (though not all) of the arguments against same-sex marriage because our duty to defer to the Legislature requires us to do so. We do not imply that there are no persuasive arguments on the other side—and we know, of course, that there are very powerful emotions on both sides of the question.

The dissenters assert confidently that "future generations" will agree with their view of this case (dissenting op at 396, 821 N.Y.S.2d at 803, 855 N.E.2d at 34). We do not predict what people will think generations from now, but we believe the present generation should have a chance to decide the issue through its elected representatives. We therefore express our hope that the participants in the controversy over same-sex marriage will address their arguments to the Legislature; that the Legislature will listen and decide as wisely as it can; and that those unhappy with the result—as many undoubtedly will be—will respect it as people in a democratic state should respect choices democratically made.

Accordingly, the orders of the Appellate Division in each case should be affirmed without costs.

GRAFFEO, J. (concurring).

We are asked by the 44 same-sex couples who commenced these four cases to declare that the denial of marriage licenses to same-sex couples violates the Due Process and Equal Protection clauses of the New York Constitution. Plaintiffs and petitioners (collectively referred to as plaintiffs) are representative of many homosexual couples living in committed relationships in our state, some of whom are raising children. They seek the societal recognition and legal and financial benefits accorded by the State to legally married couples. Respondents are the State of New York, the State Department of Health and local officials from the cities of New York, Albany and Ithaca who are involved either in overseeing the New York marriage licensing process or issuing marriage licenses.

Plaintiffs assert that the restriction of marriage to opposite-sex couples impedes the fundamental right to marry and amounts to gender or sexual orientation discrimination that does not withstand any level of constitutional analysis, whether 367 strict scrutiny, intermediate scrutiny or rational basis review. Because the determination of the proper level of constitutional review is crucial to the judicial reso-

lution of the issues in this case, I write separately to elaborate on the standard of review that should be applied under the precedent of this Court and the United States Supreme Court. I conclude that rational basis analysis is appropriate and, applying this standard, I concur in the result reached by the plurality that an affirmance is warranted in each of these cases.

This Court has long recognized that "[f]rom time immemorial the State has exercised the fullest control over the marriage relation," going so far as to observe that "[t]here are, in effect, three parties to every marriage, the man, the woman and the State" (*Fearon v. Treanor,* 272 N.Y. 268, 272, 5 N.E.2d 815 [1936], *appeal dismissed* 301 U.S. 667, 57 S.Ct. 933, 81 L.Ed. 1332 [1937]). The historical conception of marriage as a union between a man and a woman is reflected in the civil institution of marriage adopted by the New York Legislature. The cases before us present no occasion for this Court to debate whether the State Legislature should, as a matter of social welfare or sound public policy, extend marriage to same-sex couples. Our role is limited to assessing whether the current statutory scheme offends the Due Process or Equal Protection clauses of the New York Constitution. Because it does not, we must affirm. Absent a constitutional violation, we may not disturb duly enacted statutes to, in effect, substitute another policy preference for that of the Legislature.

The Statutory Scheme:

As a preliminary matter, although plaintiffs have abandoned the argument (raised in Supreme Court in both *Kane* and *Seymour*) that the Domestic Relations Law already authorizes same-sex marriage because it does not explicitly define marriage as a union between one man and one woman, several amici continue to suggest that this Court can avoid a constitutional analysis by simply interpreting the statutory scheme to allow same-sex marriage. Our role when construing a statute is to ascertain and implement the will of the Legislature unless we are prevented from doing so by constitutional infirmity. It would be inappropriate for us to interpret the Domestic Relations Law in a manner that virtually all concede would not comport with legislative intent.

There is no basis to conclude that, when the Legislature adopted the Domestic Relations Law more than a century ago, it contemplated the possibility of same-sex marriage, |368 much less intended to authorize it. In fact, the Domestic Relations Law contains many references to married persons that demonstrate that the Legislature viewed marriage as a union between one woman and one man—as seen by references to the parties to a marriage as the "bride" and "groom" (Domestic Relations Law § 15[1][a]) and "wife" and "husband" (Domestic Relations Law §§ 6, 12, 221, 248; *see also* CPLR 4502[b]). Notably, high courts of other states with statutory schemes comparable to New York's have interpreted the pertinent statutes as not authorizing same-sex marriage (*see Goodridge v. Department of Pub. Health,* 440 Mass. 309, 798 N.E.2d 941 [2003]; *Baker v. Nelson,* 291 Minn. 310, 191 N.W.2d 185 [1971], *appeal dismissed* 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 [1972]). And several of our prior cases alluded to the fact that the Domestic Relations Law precludes same-sex couples from marrying (*Levin v. Yeshiva Univ.,* 96 N.Y.2d 484, 494, 730 N.Y.S.2d 15, 754 N.E.2d 1099 [2001]; *Braschi v. Stahl Assoc. Co.,* 74 N.Y.2d 201, 210, 544 N.Y.S.2d 784, 543 N.E.2d 49 [1989]). Because the Domestic Relations Law does not authorize marriage between persons of the same sex, this Court must address plaintiffs' constitutional challenges

to the validity of the marriage scheme, which are at the heart of this litigation.

Due Process:

Plaintiffs argue that the Domestic Relations Law violates article I, § 6 of the New York Constitution, which provides that "[n]o person shall be deprived of life, liberty or property without due process of law." Their substantive due process challenge is predicated on the assertion that the New York Constitution precludes the State from defining marriage as a union between one man and one woman because the right to privacy derived therein grants each individual the unqualified right to select and marry the person of his or her choice. If the Due Process Clause encompasses this right, and if it is one of the bundle of rights deemed "fundamental" as plaintiffs contend, the Domestic Relations Law would be subjected to the most demanding form of constitutional review, with the State having the burden to prove that it is narrowly tailored to serve compelling state interests.

But it is an inescapable fact that New York due process cases and the relevant federal case law cited therein do not support plaintiffs' argument. While many U.S. Supreme Court decisions recognize marriage as a fundamental right protected under the Due Process Clause, all of these cases understood the marriage [369] right as involving a union of one woman and one man (*see e.g. Turner v. Safley,* 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 [1987]; *Zablocki v. Redhail,* 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 [1978]; *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 [1965]; *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 [1942]). Whether interpreting New York's Due Process Clause or its federal counterpart (which is textually identical), when this Court has addressed the fundamental right to marry, it has relied on federal precedent and similarly used the word "marriage" in its traditional sense. For example, in *Cooper v. Morin,* we grounded the right of pretrial detainees to have contact visits with family on the "fundamental right to marriage and family life ... and to bear and rear children" (49 N.Y.2d 69, 80, 424 N.Y.S.2d 168, 399 N.E.2d 1188 [1979], *cert. denied sub nom. Lombard v. Cooper,* 446 U.S. 984, 100 S.Ct. 2965, 64 L.Ed.2d 840 [1980]), citing U.S. Supreme Court cases highlighting the link between marriage and procreation. As the Third Department aptly noted in *Samuels,* to ignore the meaning ascribed to the right to marry in these cases and substitute another meaning in its place is to redefine the right in question and to tear the resulting new right away from the very roots that caused the U.S. Supreme Court and this Court to recognize marriage as a fundamental right in the first place.

Nor has this Court recognized a due process right to privacy distinct from that articulated by the U.S. Supreme Court. Although our Court has interpreted the New York Due Process Clause more broadly than its federal counterpart on a few occasions, all of those cases involved the rights of criminal defendants, prisoners or pretrial detainees, or other confined individuals and implicated classic liberty concerns beyond the right to privacy. Most recently, in *People v. LaValle,* 3 N.Y.3d 88, 783 N.Y.S.2d 485, 817 N.E.2d 341 (2004), the Court concluded that the anticipatory deadlock charge in the Death Penalty Act violated New York's Due Process Clause, even though it may have been upheld under the United States Constitution. Likewise, in *Cooper,* 49 N.Y.2d 69, 424 N.Y.S.2d 168, 399 N.E.2d 1188 (1979), we held that the New York Due Process Clause protected the right of pretrial detainees in a county jail to have nonconjugal

contact visits with family members, even though no such right had been deemed protected under the federal Due Process Clause. Even then, our analysis did not turn on recognition of broader family privacy rights than those articulated by the Supreme Court. Rather, the analysis focused on rejection of the rational basis test that the Supreme Court then applied to [370]assess jail regulations,[1] with this Court instead adopting a test that "balanc[ed] ... the harm to the individual resulting from the condition imposed against the benefit sought by the government through its enforcement" (*id.* at 79, 424 N.Y.S.2d 168, 399 N.E.2d 1188).

Most of our Due Process Clause decisions in the right to privacy realm have cited federal authority interchangeably with New York precedent, making no distinction between New York's constitutional provision and the federal Due Process Clause (*see e.g. Hope v. Perales*, 83 N.Y.2d 563, 575, 611 N.Y.S.2d 811, 634 N.E.2d 183 [1994]; *Matter of Raquel Marie X.*, 76 N.Y.2d 387, 559 N.Y.S.2d 855, 559 N.E.2d 418 [1990], *cert. denied sub nom. Robert C. v. Miguel T.*, 498 U.S. 984, 111 S.Ct. 517, 112 L.Ed.2d 528 [1990]; *Matter of Doe v. Coughlin*, 71 N.Y.2d 48, 523 N.Y.S.2d 782, 518 N.E.2d 536 [1987], *cert. denied* 488 U.S. 879, 109 S.Ct. 196, 102 L.Ed.2d 166 [1988]; *Rivers v. Katz*, 67 N.Y.2d 485, 504 N.Y.S.2d 74, 495 N.E.2d 337 [1986]). Our Court has not recognized a fundamental right to marry that departs in any respect from the right defined by the U.S. Supreme Court in cases like *Skinner* which acknowledged that marriage is "fundamental to the very existence and survival of the [human] race" because it is the primary institution supporting procreation and child-rearing (316 U.S. at 541, 62 S.Ct. 1110; *see also Zablocki*, 434 U.S. 374, 98 S.Ct. 673; *Griswold*, 381 U.S. 479, 85 S.Ct. 1678). The binary nature of marriage—its inclusion of one woman and one man—reflects the biological fact that human procreation cannot be accomplished without the genetic contribution of both a male and a female. Marriage creates a supportive environment for procreation to occur and the resulting offspring to be nurtured. Although plaintiffs suggest that the connection between procreation and marriage has become anachronistic because of scientific advances in assisted reproduction technology, the fact remains that the vast majority of children are conceived naturally through sexual contact between a woman and a man.

Plaintiffs' reliance on *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) for the proposition that the U.S. Supreme Court has established a fundamental "right to marry the spouse of one's choice" outside the male/female construct is misplaced. In *Loving*, an interracial couple argued that Virginia's antimiscegenation statute, which precluded "any white person in this State to marry any save a white person, or a person with no other admixture of [371]blood than white and American Indian" (*id.* at 5 n. 4, 87 S.Ct. 1817), violated the federal Due Process and Equal Protection clauses. The statute made intermarriage in violation of its terms a felony carrying a potential jail sentence of one to five years. The Lovings—a white man and a black woman—had married in violation of the law and

1. Eight years after *Cooper* was decided, the U.S. Supreme Court strengthened the federal test for assessing the efficacy of prison regulations that implicate fundamental rights, requiring the state to show that the restriction is reasonably related to a legitimate security or penological interest and is not an "exaggerated response" to such interests (*see Turner v. Safley*, 482 U.S. 78, 90, 107 S.Ct. 2254, 96 L.Ed.2d 64 [1987]).

been convicted, prompting them to challenge the validity of the Virginia law.

The Supreme Court struck the statute on both equal protection and due process grounds, but the focus of the analysis was on the Equal Protection Clause. Noting that "[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States," the Court applied strict scrutiny review to the racial classification, finding "no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification" (*id.* at 10, 11, 87 S.Ct. 1817). It made clear "that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause" (*id.* at 12, 87 S.Ct. 1817). There is no question that the Court viewed this antimiscegenation statute as an affront to the very purpose for the adoption of the Fourteenth Amendment—to combat invidious racial discrimination.

In its brief due process analysis, the Supreme Court reiterated that marriage is a right "fundamental to our very existence and survival" (*id.*, citing *Skinner*, 316 U.S. at 541, 62 S.Ct. 1110)—a clear reference to the link between marriage and procreation. It reasoned: "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes ... is surely to deprive all the State's citizens of liberty without due process of law" (*id.*). Although the Court characterized the right to marry as a "choice," it did not articulate the broad "right to marry the spouse of one's choice" suggested by plaintiffs here. Rather, the Court observed that "[t]he Fourteenth Amendment requires that *the freedom of choice to marry not be restricted by invidious racial discriminations*" (*id.* [emphasis added]).[2] Needless to say, a statutory scheme that burdens a fundamental right by making conduct criminal based on the race of the individual who engages in it is inimical to the [372] values embodied in the state and federal Due Process clauses. Far from recognizing a right to marry extending beyond the one woman and one man union,[3] it is evident from the *Loving* decision that the Supreme Court viewed marriage as fundamental precisely because

2. Plaintiffs cite *Crosby v. State of N.Y., Workers' Compensation Bd.*, 57 N.Y.2d 305, 312, 456 N.Y.S.2d 680, 442 N.E.2d 1191 (1982) and *People v. Shepard*, 50 N.Y.2d 640, 644, 431 N.Y.S.2d 363, 409 N.E.2d 840 (1980) for the proposition that the right to marry encompasses the unqualified right to marry the spouse of one's choice. But, in resolving controversies unrelated to the right to marry, those cases did not analyze the fundamental marriage right but merely cited *Loving* when including marriage in a list of rights that have received constitutional protection.

3. Of course, the rights and responsibilities attendant marriage have changed over time and there have always been differences between the states concerning the legal incidents of marriage, including differing age restrictions, consanguinity provisions and, unfortunately, some states—although not New York—once had antimiscegenation laws. With the exception of the recent extension of marriage to same-sex couples by the Supreme Judicial Court of Massachusetts (*see Opinions of the Justices to the Senate*, 440 Mass. 1201, 802 N.E.2d 565 [2004], clarifying *Goodridge*, 440 Mass. 309, 798 N.E.2d 941), the one element common to the institution across the nation and despite the passage of time has been its definition as a union between one man and one woman. This is how marriage is defined in the federal Defense of Marriage Act (Pub. L. 104–199, 110 U.S. Stat 2419; *see* 1 USC § 7), which provides that no state "shall be required to give effect to any public act, record, or judicial proceeding of any other State ... respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State" (28 USC § 1738C).

of its relationship to human procreation.[4]

Nor does the Supreme Court's recent federal due process analysis in *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) support defining the fundamental marriage right in the manner urged by [373]plaintiffs. In *Lawrence*, the Court overruled its prior decision in *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986) and struck as unconstitutional a Texas statute that criminalized consensual sodomy between adult individuals of the same sex. The holding in *Lawrence* is consistent with our Court's decision in *People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), *cert. denied* 451 U.S. 987, 101 S.Ct. 2323, 68 L.Ed.2d 845 (1981), which invalidated under a federal due process analysis a New York Penal Law provision that criminalized consensual sodomy between nonmarried persons.

In *Lawrence* the Supreme Court did not create any new fundamental rights, nor did it employ a strict scrutiny analysis. It acknowledged that laws that criminalize sexual conduct between homosexuals

> "have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals" (539 U.S. at 567, 123 S.Ct. 2472).

Criticizing the historical analysis in *Bowers*, it noted that, even though sodomy as well as other nonprocreative sexual activity had been proscribed, criminal statutes "directed at homosexual conduct as a distinct matter" (*id.* at 568, 123 S.Ct. 2472) were of recent vintage, having developed in the last third of the 20th century, and therefore did not possess "ancient roots" (*id.* at 570, 123 S.Ct. 2472).

Consistent with our analysis in *Onofre*, the *Lawrence* court held "that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons" (*id.* at 567, 123 S.Ct. 2472) because "liberty gives substantial protection to adult persons in deciding how to

4. Four years after *Loving*, the Minnesota Supreme Court upheld Minnesota's marriage laws in the face of a challenge brought by same-sex couples (*Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 [1971], *appeal dismissed* 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 [1972]). The court rejected the argument that the federal Due Process Clause encompassed a right to marry that extended to same-sex couples, noting that in *Loving* and its other privacy cases the U.S. Supreme Court had recognized that "[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis" (291 Minn. at 312, 191 N.W.2d at 186). The U.S. Supreme Court summarily dismissed the appeal "for want of a substantial federal question" (409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 [1972]). Under Supreme Court decisional law, as far as lower courts are concerned, "summary dismissals are ... to be taken as rulings on the merits ... in the sense that they rejected the specific challenges presented in the statement of jurisdiction and left undisturbed the judgment appealed from" (*Washington v. Confederated Bands & Tribes of Yakima Nation*, 439 U.S. 463, 477 n. 20, 99 S.Ct. 740, 58 L.Ed.2d 740 [1979] [internal quotation marks and citation omitted]) and "lower courts are bound by summary decisions ... until such time as the [Supreme] Court informs (them) that (they) are not" (*Hicks v. Miranda*, 422 U.S. 332, 344–345, 95 S.Ct. 2281, 45 L.Ed.2d 223 [1975] [internal quotation marks omitted]). Thus, with respect to the federal Due Process Clause, we must presume that *Loving* did not expand the fundamental right to marry in the manner suggested by plaintiffs in the cases before us. This observation does not, however, preclude this Court from interpreting the New York State Due Process Clause more expansively.

conduct their private lives in matters pertaining to sex" (*id.* at 572, 123 S.Ct. 2472). It reasoned that "moral disapproval"—the only justification Texas proffered for its law—is never an adequate basis for a criminal statute, a conclusion similar to this Court's observation in *Onofre* that "it is not the function of the Penal Law in our governmental policy to provide either a medium for the articulation or the apparatus for the intended enforcement of moral or theological values" (51 N.Y.2d at 488 n. 3, 434 N.Y.S.2d 947, 415 N.E.2d 936). Thus, in striking the sodomy law, the Supreme Court found that "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual" (*Lawrence,* 539 U.S. at 578, 123 S.Ct. 2472).

374 The right affirmed by the Supreme Court in *Lawrence* is not comparable to the new right to marry plaintiffs assert here, nor is the Texas statute criminalizing homosexual sodomy analogous to the marriage statutes under review. The Domestic Relations Law is not a penal provision and New York has not attempted to regulate plaintiffs' private sexual conduct or disturb the sanctity of their homes. And, in contrast to the Texas statute, New York's marriage laws are part of a longstanding tradition with roots dating back long before the adoption of our State Constitution.

New York's Due Process Clause simply does not encompass a fundamental right to marry the spouse of one's choice outside the one woman/one man construct. Strict scrutiny review of the Domestic Relations Law is therefore not warranted and, insofar as due process analysis is concerned, the statutory scheme must be upheld unless plaintiffs prove that it is not rationally related to any legitimate state interest.

Equal Protection:

Plaintiffs contend that, even if strict scrutiny analysis is not appropriate under the Due Process Clause, a heightened standard of review is nonetheless mandated under the Equal Protection Clause because New York's marriage laws create gender and sexual orientation classifications that require a more rigorous level of analysis than rational basis review.

The Equal Protection Clause, added to the New York Constitution in 1938, provides:

> "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state" (N.Y. Const., art. I, § 11).

Soon after the adoption of this provision, this Court recognized that it was modeled after its federal counterpart and "embodies" the federal equal protection command (*Dorsey v. Stuyvesant Town Corp.,* 299 N.Y. 512, 530, 87 N.E.2d 541 [1949], *cert. denied* 339 U.S. 981, 70 S.Ct. 1019, 94 L.Ed. 1385 [1950]; *see also, Under 21, Catholic Home Bur. for Dependent Children v. City of New York,* 65 N.Y.2d 344, 360 n. 6, 492 N.Y.S.2d 522, 482 N.E.2d 1 [1985] ["the State constitutional equal protection clause . . . is no broader in coverage than the Federal provision"]). Accordingly, this Court has consistently cited federal cases and applied federal

375 analysis to resolve equal protection claims brought under the federal and state constitutions (*see e.g. Matter of Aliessa v. Novello,* 96 N.Y.2d 418, 730 N.Y.S.2d 1, 754 N.E.2d 1085 [2001]; *People v. Liberta,* 64 N.Y.2d 152, 485 N.Y.S.2d 207, 474 N.E.2d 567 [1984], *cert. denied* 471 U.S.

1020, 105 S.Ct. 2029, 85 L.Ed.2d 310 [1985]).

The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike" (*Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 [1985]). Both the U.S. Supreme Court and this Court have applied three levels of review to legislative classifications. "[W]hen a statute classifies by race, alienage, or national origin" (*id.* at 440, 105 S.Ct. 3249), or when it burdens a fundamental right protected under the Due Process Clause, it is subjected to strict scrutiny meaning that it will be sustained only if it is narrowly tailored to serve a compelling state interest (*see Golden v. Clark*, 76 N.Y.2d 618, 623, 563 N.Y.S.2d 1, 564 N.E.2d 611 [1990]). Classifications based on gender or illegitimacy are reviewed under an intermediate level of scrutiny—meaning they will be sustained if "substantially related to the achievement of an important governmental objective" (*Liberta*, 64 N.Y.2d at 168, 485 N.Y.S.2d 207, 474 N.E.2d 567; *Clark v. Jeter*, 486 U.S. 456, 108 S.Ct. 1910, 100 L.Ed.2d 465 [1988]). Neither the Supreme Court nor this Court has recognized any other classifications as triggering heightened scrutiny and, therefore, all other statutory distinctions have been sustained if rationally related to a legitimate government interest (*see e.g. Golden*, 76 N.Y.2d 618, 563 N.Y.S.2d 1, 564 N.E.2d 611).

Plaintiffs argue that the Domestic Relations Law creates a classification based on gender that requires intermediate scrutiny because a woman cannot marry another woman due to her gender and a man cannot marry another man due to his gender. Respondents counter that the marriage laws are neutral insofar as gender is concerned because they treat all males and females equally—neither gender can marry a person of the same sex and both can marry persons of the opposite sex.

Respondents' interpretation more closely comports with the analytical framework for gender discrimination applied by this Court and the Supreme Court. The precedent establishes that gender discrimination occurs when men and women are not treated equally and one gender is benefitted or burdened as opposed to the other. For example, in *Liberta*, 64 N.Y.2d 152, 485 N.Y.S.2d 207, 474 N.E.2d 567, we held that the Penal Law's restriction of the crime of forcible rape to male offenders constituted gender discrimination and the restriction was struck on the basis that it failed to meet the intermediate scrutiny standard. Men and women were not treated equally because only men could be convicted of forcible rape; women who engaged in precisely the same conduct could [376] not be charged or convicted of the same offense. Similarly, in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982), the Supreme Court found that a publically-funded state university that refused to allow men admission to its nursing program had engaged in gender discrimination. The university improperly privileged female students by allowing them a benefit not available to similarly-situated male applicants. Likewise, in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994), a prosecutor was determined to have engaged in gender discrimination when he exercised 9 of his 10 peremptory challenges to strike males from the venire panel resulting in an all-female jury. There, the prosecutor did not apply jury selection criteria equally among males and females—he used almost all of his challenges to exclude men from the jury.

Plaintiffs cite *Loving* for the proposition that a statute can discriminate even if it

treats both classes identically. This misconstrues the *Loving* analysis because the antimiscegenation statute did not treat blacks and whites identically—it restricted who whites could marry (but did not restrict intermarriage between non-whites) for the purpose of promoting white supremacy. Virginia's antimiscegenation statute was the quintessential example of invidious racial discrimination as it was intended to advantage one race and disadvantage all others, which is why the Supreme Court applied strict scrutiny and struck it down as violating the core interest of the Equal Protection Clause.

In contrast, neither men nor women are disproportionately disadvantaged or burdened by the fact that New York's Domestic Relations Law allows only opposite-sex couples to marry—both genders are treated precisely the same way. As such, there is no gender classification triggering intermediate scrutiny.

Nor does the statutory scheme create a classification based on sexual orientation. In this respect, the Domestic Relations Law is facially neutral: individuals who seek marriage licenses are not queried concerning their sexual orientation and are not precluded from marrying if they are not heterosexual. Regardless of sexual orientation, any person can marry a person of the opposite sex. Certainly, the marriage laws create a classification that distinguishes between opposite-sex and same-sex couples and this has a disparate impact on gays and lesbians. However, a claim that a facially-neutral statute enacted without an invidious discriminatory intent has a disparate impact on a class (even a suspect class, such as one defined by race) is insufficient [377] to establish an equal protection violation [5] (*see Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 321, 631 N.Y.S.2d 565, 655 N.E.2d 661 [1995]; *People v. New York City Tr. Auth.*, 59 N.Y.2d 343, 350, 465 N.Y.S.2d 502, 452 N.E.2d 316 [1983]; *Washington v. Davis*, 426 U.S. 229, 240, 96 S.Ct. 2040, 48 L.Ed.2d 597 [1976]). Plaintiffs concede that the Domestic Relations Law was not enacted with an invidiously discriminatory intent—the Legislature did not craft the marriage laws for the purpose of disadvantaging gays and lesbians (*cf. Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 [1996]). Hence, there is no basis to address plaintiffs' argument that classifications based on sexual orientation should be subjected to intermediate scrutiny.

Rational Basis Review:

Thus, under both the Due Process and Equal Protection clauses, these cases turn on whether the Legislature's decision to confine the institution of marriage to couples composed of one woman and one man is rationally related to any legitimate state interest. In *Affronti v. Crosson*, 95 N.Y.2d 713, 719, 723 N.Y.S.2d 757, 746 N.E.2d 1049 (2001), *cert. denied sub nom. Affronti v. Lippman*, 534 U.S. 826, 122 S.Ct. 66, 151 L.Ed.2d 32 (2001), we explained that

> "[t]he rational basis standard of review is a paradigm of judicial restraint. On rational basis review, a statute will be upheld unless the disparate treatment is so unrelated to the achievement of any combination of legitimate purposes that it is irrational. Since the challenged statute is presumed to be valid, the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it . . . whether or not the basis has a foun-

5. Such disparate impact claims are usually brought under civil rights statutes that authorize them, such as the New York City Human Rights Law (*see e.g. Levin v. Yeshiva Univ.*, 96 N.Y.2d 484, 730 N.Y.S.2d 15, 754 N.E.2d 1099 [2001]).

> dation in the record. Thus, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." (Internal quotation marks, citations, brackets and emphasis omitted.)

Especially in the realm of social or economic legislation, "the Equal Protection Clause allows the States wide latitude . . . and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes" [378](*Cleburne,* 473 U.S. at 440, 105 S.Ct. 3249; *see generally Lovelace v. Gross,* 80 N.Y.2d 419, 427, 590 N.Y.S.2d 852, 605 N.E.2d 339 [1992]).

In these cases, respondents articulate a number of interests that they claim are legitimate and are advanced by the current definition of marriage. Given the extremely deferential standard of review, plaintiffs cannot prevail unless they establish that no conceivable legitimate interest is served by the statutory scheme. This means that if this Court finds a rational connection between the classification and any single governmental concern, the marriage laws survive review under both the Due Process and Equal Protection clauses.

As set forth in the plurality opinion, plaintiffs have failed to negate respondents' explanation that the current definition of marriage is rationally related to the State's legitimate interest in channeling opposite-sex relationships into marriage because of the natural propensity of sexual contact between opposite-sex couples to result in pregnancy and childbirth. Of course, marriage can and does serve individual interests that extend well beyond creating an environment conducive to procreation and child-rearing, such as companionship and emotional fulfillment. But here we are concerned with the State's interest in promoting the institution of marriage.

As Justice Robert Cordy pointed out in his dissent in *Goodridge v. Department of Pub. Health,* 440 Mass. at 381–382, 798 N.E.2d at 995 [Cordy, J., dissenting]:

> "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. . . . 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. . . . [A]n orderly society requires some mechanism for coping with the fact that sexual intercourse [between a man and a woman] commonly results in pregnancy and childbirth. The institution of marriage is that mechanism."

Since marriage was instituted to address the fact that sexual contact between a man and a woman naturally can result in [379]pregnancy and childbirth, the Legislature's decision to focus on opposite-sex couples is understandable. It is not irrational for the Legislature to provide an incentive for opposite-sex couples—for whom children may be conceived from casual, even momentary intimate relationships—to marry, create a family environment, and support their children. Although many same-sex couples share these family objectives and are competently raising children in a stable environment, they are simply not similarly situated to opposite-sex couples in this regard given the intrinsic differences in the assisted reproduction or

adoption processes that most homosexual couples rely on to have children.

As respondents concede, the marriage classification is imperfect and could be viewed in some respects as overinclusive or underinclusive since not all opposite-sex couples procreate, opposite-sex couples who cannot procreate may marry, and opposite-sex partners can and do procreate outside of marriage. It is also true that children being raised in same-sex households would derive economic and social benefits if their parents could marry. But under rational basis review, the classification need not be perfectly precise or narrowly tailored—all that is required is a reasonable connection between the classification and the interest at issue. In light of the history and purpose of the institution of marriage, the marriage classification in the Domestic Relations Law meets that test.

The Legislature has granted the benefits (and responsibilities) of marriage to the class—opposite-sex couples—that it concluded most required the privileges and burdens the institution entails due to inherent procreative capabilities. This type of determination is a central legislative function and lawmakers are afforded leeway in fulfilling this function, especially with respect to economic and social legislation where issues are often addressed incrementally (*see FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315–316, 113 S.Ct. 2096, 124 L.Ed.2d 211 [1993]). It may well be that the time has come for the Legislature to address the needs of same-sex couples and their families, and to consider granting these individuals additional benefits through marriage or whatever status the Legislature deems appropriate. Because the New York Constitution does not compel such a revision of the Domestic Relations Law, the decision whether or not to do so rests with our elected representatives.

[380] Chief Judge KAYE (dissenting).

Plaintiffs (including petitioners) are 44 same-sex couples who wish to marry. They include a doctor, a police officer, a public school teacher, a nurse, an artist and a state legislator. Ranging in age from under 30 to 68, plaintiffs reflect a diversity of races, religions and ethnicities. They come from upstate and down, from rural, urban and suburban settings. Many have been together in committed relationships for decades, and many are raising children—from toddlers to teenagers. Many are active in their communities, serving on their local school board, for example, or their cooperative apartment building board. In short, plaintiffs represent a cross-section of New Yorkers who want only to live full lives, raise their children, better their communities and be good neighbors.

For most of us, leading a full life includes establishing a family. Indeed, most New Yorkers can look back on, or forward to, their wedding as among the most significant events of their lives. They, like plaintiffs, grew up hoping to find that one person with whom they would share their future, eager to express their mutual lifetime pledge through civil marriage. Solely because of their sexual orientation, however—that is, because of who they love—plaintiffs are denied the rights and responsibilities of civil marriage. This State has a proud tradition of affording equal rights to all New Yorkers. Sadly, the Court today retreats from that proud tradition.

I. Due Process

Under both the state and federal constitutions, the right to due process of law protects certain fundamental liberty interests, including the right to marry. Central to the right to marry is the right to marry

the person of one's choice (*see e.g. Crosby v. State of N.Y., Workers' Compensation Bd.*, 57 N.Y.2d 305, 312, 456 N.Y.S.2d 680, 442 N.E.2d 1191 [1982] ["clearly falling within (the right of privacy) are matters relating to the decision of whom one will marry"]; *People v. Shepard*, 50 N.Y.2d 640, 644, 431 N.Y.S.2d 363, 409 N.E.2d 840 [1980] ["the government has been prevented from interfering with an individual's decision about whom to marry"]). The deprivation of a fundamental right is subject to strict scrutiny and requires that the infringement be narrowly tailored to achieve a compelling state interest (*see e.g. Carey v. Population Services Int'l*, 431 U.S. 678, 686, 97 S.Ct. 2010, 52 L.Ed.2d 675 [1977]).

Fundamental rights are those "which are, objectively, deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed" (*Washington v.* [381] *Glucksberg*, 521 U.S. 702, 720–721, 117 S.Ct. 2258, 138 L.Ed.2d 772 [1997] [internal quotation marks and citations omitted]). Again and again, the Supreme Court and this Court have made clear that the right to marry is fundamental (*see e.g. Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 [1967]; *Zablocki v. Redhail*, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 [1978]; *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 [1987]; *Matter of Doe v. Coughlin*, 71 N.Y.2d 48, 52, 523 N.Y.S.2d 782, 518 N.E.2d 536 [1987]; *Cooper v. Morin*, 49 N.Y.2d 69, 80, 424 N.Y.S.2d 168, 399 N.E.2d 1188 [1979]; *Levin v. Yeshiva Univ.*, 96 N.Y.2d 484, 500, 730 N.Y.S.2d 15, 754 N.E.2d 1099 [2001] [G.B. Smith, J., concurring] ["marriage is a fundamental constitutional right"]).

The Court concludes, however, that same-sex marriage is not deeply rooted in tradition, and thus cannot implicate any fundamental liberty. But fundamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights. Indeed, in recasting plaintiffs' invocation of their fundamental right to marry as a request for recognition of a "new" right to same-sex marriage, the Court misapprehends the nature of the liberty interest at stake. In *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), the Supreme Court warned against such error.

Lawrence overruled *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), which had upheld a Georgia statute criminalizing sodomy. In so doing, the *Lawrence* court criticized *Bowers* for framing the issue presented too narrowly. Declaring that "*Bowers* was not correct when it was decided, and it is not correct today" (539 U.S. at 578, 123 S.Ct. 2472), *Lawrence* explained that *Bowers* purported to analyze—erroneously—whether the Constitution conferred a "fundamental right upon homosexuals to engage in sodomy" (539 U.S. at 566, 123 S.Ct. 2472 [citation omitted]). This was, however, the wrong question. The fundamental right at issue, properly framed, was the right to engage in private consensual sexual conduct—a right that applied to both homosexuals and heterosexuals alike. In narrowing the claimed liberty interest to embody the very exclusion being challenged, *Bowers* "disclose[d] the Court's own failure to appreciate the extent of the liberty at stake" (*Lawrence*, 539 U.S. at 567, 123 S.Ct. 2472).

The same failure is evident here. An asserted liberty interest is not to be characterized so narrowly as to make inevitable the conclusion that the claimed right could not be fundamental because historically it has been denied to those who now seek to

exercise it (*see Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 847, 112 S.Ct. 2791, 120 L.Ed.2d 674 [1992] [it is "tempting ... to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government
382 interference by other rules of law when the Fourteenth Amendment was ratified.... But such a view would be inconsistent with our law"]).

Notably, the result in *Lawrence* was not affected by the fact, acknowledged by the Court, that there had been no long history of tolerance for homosexuality. Rather, in holding that "[p]ersons in a homosexual relationship may seek autonomy for the[ ] purpose[of making intimate and personal choices], just as heterosexual persons do" (539 U.S. at 574, 123 S.Ct. 2472), *Lawrence* rejected the notion that fundamental rights it had already identified could be restricted based on traditional assumptions about who should be permitted their protection. As the Court noted, "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom" (*Lawrence,* 539 U.S. at 579, 123 S.Ct. 2472; *see also id.* at 572, 123 S.Ct. 2472 ["(h)istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry" (internal quotation marks and citation omitted)]; *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 466, 105 S.Ct. 3249, 87 L.Ed.2d 313 [1985] [Marshall, J., concurring in the judgment in part and dissenting in part] ["what once was a 'natural' and 'self-evident' ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom"]).

Simply put, fundamental rights are fundamental rights. They are not defined in terms of who is entitled to exercise them.

Instead, the Supreme Court has repeatedly held that the fundamental right to marry must be afforded even to those who have previously been excluded from its scope—that is, to those whose *exclusion* from the right was "deeply rooted." [1] Well into the twentieth century, the sheer weight of precedent accepting the constitutionality of bans on interracial marriage was deemed sufficient justification in and of itself to perpetuate these discriminatory laws (*see e.g. Jones v. Lorenzen,* 441 P.2d 986, 989
383 [Okla. 1965] [upholding antimiscegenation law since the "great weight of authority holds such statutes constitutional"])—much as defendants now contend that same-sex couples should be prohibited from marrying because historically they always have been.

Just 10 years before *Loving* declared unconstitutional state laws banning marriage between persons of different races, 96% of Americans were opposed to interracial marriage (*see* brief of NAACP Legal Defense and Educational Fund, Inc., as amicus curiae in support of plaintiffs, at 5). Sadly, many of the arguments then raised in support of the antimiscegenation laws

1. In other contexts, this Court has also recognized that due process rights must be afforded to all, even as against a history of exclusion of one group or another from past exercise of these rights (*see e.g. Matter of Raquel Marie X.,* 76 N.Y.2d 387, 397, 559 N.Y.S.2d 855, 559 N.E.2d 418 [1990] [affording the right to custody of one's children to unwed fathers, despite a long history of excluding unwed fathers from that right]; *Rivers v. Katz,* 67 N.Y.2d 485, 495–496, 504 N.Y.S.2d 74, 495 N.E.2d 337 [1986] [affording the right to refuse medical treatment to the mentally disabled, despite a long history of excluding the mentally ill from that right]).

were identical to those made today in opposition to same-sex marriage (*see e.g. Kinney v. Commonwealth*, 71 Va. [30 Gratt] 858, 869 [1878] [marriage between the races is "unnatural" and a violation of God's will]; *Pace v. State*, 69 Ala. 231, 232 [1881] ["amalgamation" of the races would produce a "degraded civilization"]; *see also Lonas v. State*, 50 Tenn. [3 Heisk] 287, 310 [1871] ["(t)he laws of civilization demand that the races be kept apart"]).

To those who appealed to history as a basis for prohibiting interracial marriage, it was simply inconceivable that the right of interracial couples to marry could be deemed "fundamental." Incredible as it may seem today, during the lifetime of every Judge on this Court, interracial marriage was forbidden in at least a third of American jurisdictions. In 1948, New York was one of only 18 states in the nation that did not have such a ban. By 1967, when *Loving* was decided, 16 states still outlawed marriages between persons of different races. Nevertheless, even though it was the *ban* on interracial marriage—not interracial marriage itself—that had a long and shameful national tradition, the Supreme Court determined that interracial couples could not be deprived of their fundamental right to marry.

Unconstitutional infringements on the right to marry are not limited to impermissible racial restrictions. Inasmuch as the fundamental right to marry is shared by "all the State's citizens" (*Loving,* 388 U.S. at 12, 87 S.Ct. 1817), the State may not, for example, require individuals with child support obligations to obtain court approval before getting married (*see Zablocki*, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 [1978]). Calling *Loving* the "leading decision of this Court on the right to marry," Justice Marshall made clear in *Zablocki* that *Loving*

> "could have rested solely on the ground that the [384] statutes discriminated on the basis of race in violation of the Equal Protection Clause. But the Court went on to hold that laws arbitrarily deprived the couple of a fundamental liberty protected by the Due Process Clause, the freedom to marry . . . .
>
> "Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals" (434 U.S. at 383–384, 98 S.Ct. 673 [citation omitted]).

Similarly, in *Turner*, 482 U.S. 78, 107 S.Ct. 2254 (1987), the Supreme Court determined that the right to marry was so fundamental that it could not be denied to prison inmates (*see also Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 [1971] [state requirement that indigent individuals pay court fees to obtain divorce unconstitutionally burdened fundamental right to marry]).

Under our Constitution, discriminatory views about proper marriage partners can no more prevent same-sex couples from marrying than they could different-race couples. Nor can "deeply rooted" prejudices uphold the infringement of a fundamental right (*see People v. Onofre*, 51 N.Y.2d 476, 490, 434 N.Y.S.2d 947, 415 N.E.2d 936 [1980] ["disapproval by a majority of the populace . . . may not substitute for the required demonstration of a valid basis for intrusion by the State in an area of important personal decision"]). For these reasons, the NAACP Legal Defense and Educational Fund, as amicus, contends that

> "[a]lthough the historical experiences in this country of African Americans, on the one hand, and gay men and lesbians, on the other, are in many important ways quite different, the legal questions

raised here and in *Loving* are analogous. The state law at issue here, like the law struck down in *Loving,* restricts an individual's right to marry the person of his or her choice. We respectfully submit that the decisions below must be reversed if this Court follows the reasoning of the United States Supreme Court's decision in *Loving*" (brief of NAACP Legal Defense and Educational Fund, Inc., as amicus curiae in support of plaintiffs, at 3–4; *see also* brief of New York County Lawyers' Association and National Black Justice Coalition, as amici curiae in support of plaintiffs [detailing history of antimiscegenation laws and public attitudes toward interracial marriage]).

385 It is no answer that same-sex couples can be excluded from marriage because "marriage," by definition, does not include them. In the end, "an argument that marriage is heterosexual because it 'just is' amounts to circular reasoning" (*Halpern v. Attorney Gen. of Can.,* 65 OR3d 161, 172 OAC 276, ¶ 71 [2003]). "To define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question we are asked to decide" (*Goodridge v. Department of Pub. Health,* 440 Mass. 309, 348, 798 N.E.2d 941, 972–973 [2003] [Greaney, J., concurring]).

The claim that marriage has always had a single and unalterable meaning is a plain distortion of history. In truth, the common understanding of "marriage" has changed dramatically over the centuries (*see* brief of Professors of History and Family Law, as amici curiae in support of plaintiffs). Until well into the nineteenth century, for example, marriage was defined by the doctrine of coverture, according to which the wife's legal identity was merged into that of her husband, whose property she became. A married woman, by definition, could not own property and could not enter into contracts.[2] Such was the very "meaning" of marriage. Only since the mid-twentieth century has the institution of marriage come to be understood as a relationship between two equal partners, founded upon shared intimacy and mutual financial and emotional support. Indeed, as amici professors note, "The historical record shows that, through adjudication and legislation, all of New York's sex-specific rules for marriage have been invalidated save for the one at issue here."

That restrictions on same-sex marriage are prevalent cannot in itself justify their retention. After all, widespread public opposition to interracial marriage in the years before *Loving* could not sustain the antimiscegenation laws. "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice" (*Lawrence,* 539 U.S. at 577–578, 123 S.Ct. 2472 [internal quotation marks and citation omitted]; *see also id.* at 571, 123 S.Ct. 2472 [fundamental right to engage in private consensual sexual conduct extends to homosexuals, notwithstanding that "for centuries there have been powerful voices to condemn homosexual 386 conduct as immoral"]). The long duration of a constitutional wrong cannot justify its perpetuation, no matter how strongly tradition or public sentiment might support it.

II. Equal Protection

By virtue of their being denied entry into civil marriage, plaintiff couples are

2. Moreover, until as recently as 1984, a husband could not be prosecuted for raping his wife (*see People v. Liberta,* 64 N.Y.2d 152, 485 N.Y.S.2d 207, 474 N.E.2d 567 [1984]).

deprived of a number of statutory benefits and protections extended to married couples under New York law. Unlike married spouses, same-sex partners may be denied hospital visitation of their critically ill life partners. They must spend more of their joint income to obtain equivalent levels of health care coverage. They may, upon the death of their partners, find themselves at risk of losing the family home. The record is replete with examples of the hundreds of ways in which committed same-sex couples and their children are deprived of equal benefits under New York law. Same-sex families are, among other things, denied equal treatment with respect to intestacy, inheritance, tenancy by the entirety, taxes, insurance, health benefits, medical decisionmaking, workers' compensation, the right to sue for wrongful death and spousal privilege. Each of these statutory inequities, as well as the discriminatory exclusion of same-sex couples from the benefits and protections of civil marriage as a whole, violates their constitutional right to equal protection of the laws.

Correctly framed, the question before us is not whether the marriage statutes properly benefit those they are intended to benefit—any discriminatory classification does that—but whether there exists any legitimate basis for *excluding* those who are not covered by the law. That the language of the licensing statute does not expressly reference the implicit exclusion of same-sex couples is of no moment (*see* Domestic Relations Law § 13 ["persons intended to be married" must obtain a marriage license]). The Court has, properly, construed the statutory scheme as prohibiting same-sex marriage. That being so, the statute, in practical effect, becomes identical to—and, for purposes of equal protection analysis, must be analyzed as if it were—one explicitly providing that "civil marriage is hereby established for couples consisting of a man and a woman," or, synonymously, "marriage between persons of the same sex is prohibited."

On three independent grounds, this discriminatory classification is subject to heightened scrutiny, a test that defendants concede it cannot pass.

387 A. Heightened Scrutiny

1. Sexual Orientation Discrimination

Homosexuals meet the constitutional definition of a suspect class, that is, a group whose defining characteristic is "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others" (*Cleburne,* 473 U.S. at 440, 105 S.Ct. 3249). Accordingly, any classification discriminating on the basis of sexual orientation must be narrowly tailored to meet a compelling state interest (*see e.g. Alevy v. Downstate Med. Ctr. of State of N.Y.,* 39 N.Y.2d 326, 332, 384 N.Y.S.2d 82, 348 N.E.2d 537 [1976]; *Matter of Aliessa v. Novello,* 96 N.Y.2d 418, 431, 730 N.Y.S.2d 1, 754 N.E.2d 1085 [2001]).

"No single talisman can define those groups likely to be the target of classifications offensive to the Fourteenth Amendment and therefore warranting heightened or strict scrutiny" (*Cleburne,* 473 U.S. at 472 n. 24, 105 S.Ct. 3249 [Marshall, J., concurring in the judgment in part and dissenting in part]). Rather, such scrutiny is to be applied when analyzing legislative classifications involving groups who "may well be the target of the sort of prejudiced, thoughtless, or stereotyped action that offends principles of equality found in" the Constitution (*id.* at 472, 105 S.Ct. 3249).

Although no single factor is dispositive, the Supreme Court has generally looked to

three criteria in determining whether a group subject to legislative classification must be considered "suspect." First, the Court has considered whether the group has historically been subjected to purposeful discrimination. Homosexuals plainly have been, as the Legislature expressly found when it recently enacted the Sexual Orientation Non–Discrimination Act (SONDA), barring discrimination against homosexuals in employment, housing, public accommodations, education, credit and the exercise of civil rights. Specifically, the Legislature found

> "that many residents of this state have encountered prejudice on account of their sexual orientation, and that this prejudice has severely limited or actually prevented access to employment, housing and other basic necessities of life, leading to deprivation and suffering. The legislature further recognizes that this prejudice has fostered a general climate of hostility and distrust, leading in some instances to [388]physical violence against those perceived to be homosexual or bisexual" (L. 2002, ch. 2, § 1; *see also* brief of Parents, Families & Friends of Lesbians and Gays, Inc., et al., as amici curiae in support of plaintiffs, at 22–49 [detailing history of state-sanctioned discrimination against gays and lesbians]).

Second, the Court has considered whether the trait used to define the class is unrelated to the ability to perform and participate in society. When the State differentiates among its citizens "on the basis of stereotyped characteristics not truly indicative of their abilities" (*Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313, 96 S.Ct. 2562, 49 L.Ed.2d 520 [1976]), the legislative classification must be closely scrutinized. Obviously, sexual orientation is irrelevant to one's ability to perform or contribute.

Third, the Court has taken into account the group's relative political powerlessness. Defendants contend that classifications based on sexual orientation should not be afforded heightened scrutiny because, they claim, homosexuals are sufficiently able to achieve protection from discrimination through the political process, as evidenced by the Legislature's passage of SONDA in 2002. SONDA, however, was first introduced in 1971. It failed repeatedly for 31 years, until it was finally enacted just four years ago. Further, during the Senate debate on the Hate Crimes Act of 2000, one Senator noted that "[i]t's no secret that for years we could have passed a hate-crimes bill if we were willing to take out gay people, if we were willing to take out sexual orientation" (New York State Senate Debate on Senate Bill S 4691–A, June 7, 2000, at 4609 [statement of Senator Schneiderman]; *accord id.* at 4548–4549 [statement of Senator Connor]). The simple fact is that New York has not enacted anything approaching comprehensive statewide domestic partnership protections for same-sex couples, much less marriage or even civil unions.

In any event, the Supreme Court has never suggested that racial or sexual classifications are not (or are no longer) subject to heightened scrutiny because of the passage of even comprehensive civil rights laws (*see Cleburne*, 473 U.S. at 467, 105 S.Ct. 3249 [Marshall, J., concurring in the judgment in part and dissenting in part]). Indeed, sex discrimination was first held to deserve heightened scrutiny in 1973—*after* passage of title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, federal laws prohibiting sex discrimination. Such measures acknowledge—rather [389]than mark the end of—a history of purposeful discrimination (*see Frontiero v. Richardson*, 411 U.S. 677, 687–688, 93 S.Ct. 1764, 36 L.Ed.2d 583 [1973] [citing

antidiscrimination legislation to support conclusion that classifications based on sex merit heightened scrutiny]).

Nor is plaintiffs' claim legitimately answered by the argument that the licensing statute does not discriminate on the basis of sexual orientation since it permits homosexuals to marry persons of the opposite sex and forbids heterosexuals to marry persons of the same sex. The purported "right" of gays and lesbians to enter into marriages with different-sex partners to whom they have no innate attraction cannot possibly cure the constitutional violation actually at issue here. "The right to marry is the right of individuals, not of . . . groups" (*Perez v. Sharp,* 32 Cal.2d 711, 716, 198 P.2d 17, 20 [1948]). "Human beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains" (32 Cal.2d at 725, 198 P.2d at 25). Limiting marriage to opposite-sex couples undeniably restricts gays and lesbians from marrying their chosen same-sex partners whom "to [them] may be irreplaceable" (*id.*)—and thus constitutes discrimination based on sexual orientation.[3]

2. Sex Discrimination

The exclusion of same-sex couples from civil marriage also discriminates on the basis of sex, which provides a further basis for requiring heightened scrutiny. Classifications based on sex must be substantially related to the achievement of important governmental objectives (*see e.g. Craig v. Boren,* 429 U.S. 190, 197, 97 S.Ct. 451, 50 L.Ed.2d 397 [1976]), and must have an "exceedingly persuasive justification" (*Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 724, 102 S.Ct. 3331, 73 L.Ed.2d 1090 [1982] [citations omitted]).

Under the Domestic Relations Law, a woman who seeks to marry another woman is prevented from doing so on account of her sex—that is, because she is not a man. If she were, she would be given a marriage license to marry that woman. That [390] the statutory scheme applies equally to both sexes does not alter the conclusion that the classification here is based on sex. The "equal application" approach to equal protection analysis was expressly rejected by the Supreme Court in *Loving:* "[W]e reject the notion that the mere 'equal application' of a statute containing [discriminatory] classifications is enough to remove the classifications from the [constitutional] proscription of all invidious . . . discriminations" (388 U.S. at 8, 87 S.Ct. 1817). Instead, the *Loving* court held that "[t]here can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race [where the] statutes proscribe generally accepted conduct if engaged in by members of different races" (*id.* at 11, 87 S.Ct. 1817; *see also Johnson v. California,* 543 U.S. 499, 506, 125 S.Ct. 1141, 160 L.Ed.2d 949 [2005]; *McLaughlin v. Florida,* 379 U.S. 184, 191, 85 S.Ct. 283, 13 L.Ed.2d 222 [1964]; *Anderson v. Martin,* 375 U.S. 399, 403–404, 84 S.Ct. 454, 11 L.Ed.2d 430 [1964]; *Shelley v. Kraemer,* 334 U.S. 1, 21–22, 68 S.Ct. 836, 92 L.Ed. 1161 [1948]; *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 141–142, 114 S.Ct. 1419, 128 L.Ed.2d 89 [1994] [government exercise of peremptory challenges on the basis

3. Indeed, the true nature and extent of the discrimination suffered by gays and lesbians in this regard is perhaps best illustrated by the simple truth that each one of the plaintiffs here could lawfully enter into a marriage of convenience with a complete stranger of the opposite sex tomorrow, and thereby immediately obtain all of the myriad benefits and protections incident to marriage. Plaintiffs are, however, denied these rights because they each desire instead to marry the person they love and with whom they have created their family.

of gender constitutes impermissible sex discrimination even though based on gender stereotyping of both men and women]).

3. Fundamental Right

"Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests" (*Lawrence,* 539 U.S. at 575, 123 S.Ct. 2472). Because, as already discussed, the legislative classification here infringes on the exercise of the fundamental right to marry, the classification cannot be upheld unless it is necessary to the achievement of a compelling state interest (*see Onofre,* 51 N.Y.2d at 492 n. 6, 434 N.Y.S.2d 947, 415 N.E.2d 936; *Alevy,* 39 N.Y.2d at 332, 384 N.Y.S.2d 82, 348 N.E.2d 537; *Eisenstadt v. Baird,* 405 U.S. 438, 447 n. 7, 92 S.Ct. 1029, 31 L.Ed.2d 349 [1972]). "[C]ritical examination of the state interests advanced in support of the classification is required" (*Zablocki,* 434 U.S. at 383, 98 S.Ct. 673 [internal quotation marks and citations omitted]). And if "the means selected by the State for achieving" even "legitimate and substantial interests" unnecessarily impinge on the right to marry, the statutory distinction "cannot be sustained" (*id.* at 388, 98 S.Ct. 673).

B. Rational–Basis Analysis

Although the classification challenged here should be analyzed using heightened scrutiny, it does not satisfy even rational-basis review, which requires that the classification "rationally further[391] a legitimate state interest" (*Affronti v. Crosson,* 95 N.Y.2d 713, 718, 723 N.Y.S.2d 757, 746 N.E.2d 1049 [2001], *cert. denied sub nom. Affronti v. Lippman,* 534 U.S. 826, 122 S.Ct. 66, 151 L.Ed.2d 32 [2001]). Rational-basis review requires *both* the existence of a legitimate interest *and* that the classification rationally advance that interest. Although a number of interests have been proffered in support of the challenged classification at issue, none is rationally furthered by the exclusion of same-sex couples from marriage. Some fail even to meet the threshold test of legitimacy.

Properly analyzed, equal protection requires that it be the legislated *distinction* that furthers a legitimate state interest, not the discriminatory law itself (*see e.g. Cooper,* 49 N.Y.2d at 78, 424 N.Y.S.2d 168, 399 N.E.2d 1188; *Romer v. Evans,* 517 U.S. 620, 633, 116 S.Ct. 1620, 134 L.Ed.2d 855 [1996]). Were it otherwise, an irrational or invidious exclusion of a particular group would be permitted so long as there was an identifiable group that benefitted from the challenged legislation. In other words, it is not enough that the State have a legitimate interest in recognizing or supporting opposite-sex marriages. The relevant question here is whether there exists a rational basis for *excluding* same-sex couples from marriage, and, in fact, whether the State's interests in recognizing or supporting opposite-sex marriages are rationally *furthered* by the exclusion.

1. Children

Defendants primarily assert an interest in encouraging procreation within marriage. But while encouraging opposite-sex couples to marry before they have children is certainly a legitimate interest of the State, the *exclusion* of gay men and lesbians from marriage in no way furthers this interest. There are enough marriage licenses to go around for everyone.

Nor does this exclusion rationally further the State's legitimate interest in encouraging heterosexual married couples to procreate. Plainly, the ability or desire to procreate is not a prerequisite for marriage. The elderly are permitted to marry, and many same-sex couples do indeed have children. Thus, the statutory classifi-

cation here—which prohibits only same-sex couples, and no one else, from marrying—is so grossly underinclusive and overinclusive as to make the asserted rationale in promoting procreation "impossible to credit" (*Romer,* 517 U.S. at 635, 116 S.Ct. 1620).[4] Indeed, even the *Lawrence* dissenters observed that "encouragement of procreation" could not "possibly" be a justification [392]for denying marriage to gay and lesbian couples, "since the sterile and the elderly are allowed to marry" (539 U.S. at 605, 123 S.Ct. 2472 [Scalia, J., dissenting]; *see also Lapides v. Lapides,* 254 N.Y. 73, 80, 171 N.E. 911 [1930] ["inability to bear children" does not justify an annulment under the Domestic Relations Law]).

Of course, there are many ways in which the government could rationally promote procreation—for example, by giving tax breaks to couples who have children, subsidizing child care for those couples, or mandating generous family leave for parents. Any of these benefits—and many more—might convince people who would not otherwise have children to do so. But no one rationally decides to have children because gays and lesbians are excluded from marriage.

In holding that prison inmates have a fundamental right to marry—even though they cannot procreate—the Supreme Court has made it clear that procreation is not the sine qua non of marriage. "Many important attributes of marriage remain . . . after taking into account the limitations imposed by prison life . . . . [I]nmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship" (*Turner,* 482 U.S. at 95–96, 107 S.Ct. 2254). Nor is there any conceivable rational basis for allowing prison inmates to marry, but not homosexuals. It is, of course, no answer that inmates could potentially procreate once they are released—that is, once they are no longer prisoners—since, as nonprisoners, they would then undeniably have a right to marry even in the absence of *Turner.*

Marriage is about much more than producing children, yet same-sex couples are excluded from the entire spectrum of protections that come with civil marriage—purportedly to encourage other people to procreate. Indeed, the protections that the State gives to couples who do marry—such as the right to own property as a unit or to make medical decisions for each other—are focused largely on the adult relationship, rather than on the couple's possible role as parents. Nor does the [393]plurality even attempt to explain how offering only heterosexuals the right to visit a sick loved one in the hospital, for example, conceivably furthers the State's interest in encouraging opposite-sex couples to have children, or indeed how excluding same-sex couples from each of the specific legal benefits of civil marriage—even apart from the totality of marriage itself—does not independently violate plaintiffs' rights to equal protection of the laws. The breadth of protections that the marriage laws make unavailable to gays and lesbians is "so far removed" from the State's asserted goal of promoting procrea-

4. Although the plurality asserts that the Legislature could not possibly exclude from marriage opposite-sex couples unable to have children because to do so would require "grossly intrusive inquiries" (plurality op. at 365, 821 N.Y.S.2d at 780, 855 N.E.2d at 11), no explanation is given as to why the Legislature could not easily remedy the irrationality inherent in allowing all childless couples to marry—if, as the plurality believes, the sole purpose of marriage is procreation—by simply barring from civil marriage all couples in which both spouses are older than, say, 55. In that event, the State would have no need to undertake intrusive inquiries of any kind.

tion that the justification is, again, "impossible to credit" (*Romer,* 517 U.S. at 635, 116 S.Ct. 1620).

The State plainly has a legitimate interest in the welfare of children, but excluding same-sex couples from marriage in no way furthers this interest. In fact, it undermines it. Civil marriage provides tangible legal protections and economic benefits to married couples and their children, and tens of thousands of children are currently being raised by same-sex couples in New York. Depriving these children of the benefits and protections available to the children of opposite-sex couples is antithetical to their welfare, as defendants do not dispute (*see e.g. Baker v. State,* 170 Vt. 194, 219, 744 A.2d 864, 882 [1999] ["(i)f anything, the exclusion of same-sex couples from the legal protections incident to marriage exposes *their* children to the precise risks that the State argues the marriage laws are designed to secure against"]; *cf. Matter of Jacob,* 86 N.Y.2d 651, 656, 636 N.Y.S.2d 716, 660 N.E.2d 397 [1995] ["(t)o rule otherwise would mean that the thousands of New York children actually being raised in homes headed by two unmarried persons could have only one legal parent, not the two who want them"]). The State's interest in a stable society is rationally advanced when families are established and remain intact irrespective of the gender of the spouses.

Nor may the State legitimately seek either to promote heterosexual parents over homosexual parents, as the plurality posits, or to discourage same-sex parenting. First, granting such a preference to heterosexuals would be an acknowledgment of purposeful discrimination against homosexuals, thus constituting a flagrant equal protection violation. Second, such a preference would be contrary to the stated public policy of New York, and therefore irrational (*see* 18 NYCRR 421.16[h][2] [applicants to be adoptive parents "shall not be rejected solely on the basis of homosexuality"]; *see also Jacob,* 86 N.Y.2d at 668, 636 N.Y.S.2d 716, 660 N.E.2d 397 [same-sex partner of a legal parent may adopt that parent's [394] child; "(a)ny proffered justification for rejecting (adoptions) based on a governmental policy disapproving of homosexuality or encouraging marriage would not apply"]; brief of American Psychological Association et al., as amici curiae in support of plaintiffs, at 34–43 [collecting the results of social scientific research studies which conclude that children raised by same-sex parents fare no differently from, and do as well as, those raised by opposite-sex parents in terms of the quality of the parent-child relationship and the mental health, development and social adjustment of the child]; brief of Association to Benefit Children et al., as amici curiae in support of plaintiffs, at 31–35 [same conclusion]).[5]

2. Moral Disapproval

The government cannot legitimately justify discrimination against one group of persons as a mere desire to preference another group (*see Metropolitan Life Ins. Co. v. Ward,* 470 U.S. 869, 882 and n. 10, 105 S.Ct. 1676, 84 L.Ed.2d 751 [1985]). Further, the Supreme Court has held that classifications "drawn for the purpose of disadvantaging the group burdened by the

5. Nor could the State have a legitimate interest in privileging some children over others depending on the manner in which they were conceived or whether or not their parents were married (*see Jacob,* 86 N.Y.2d at 667, 636 N.Y.S.2d 716, 660 N.E.2d 397 [depriving children of legal relationship with de facto parents "based solely on their biological mother's sexual orientation or marital status . . . raise(s) constitutional concerns"]; *Levy v. Louisiana,* 391 U.S. 68, 71, 88 S.Ct. 1509, 20 L.Ed.2d 436 [1968] [child born out of wedlock may not be denied rights enjoyed by other citizens]).

law" can never be legitimate (*Romer*, 517 U.S. at 633, 116 S.Ct. 1620), and that "a bare ... desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest" (*Department of Agriculture v. Moreno*, 413 U.S. 528, 534, 93 S.Ct. 2821, 37 L.Ed.2d 782 [1973]; *see also Onofre*, 51 N.Y.2d at 490, 434 N.Y.S.2d 947, 415 N.E.2d 936 ["disapproval by a majority of the populace ... may not substitute for the required demonstration of a valid basis for intrusion by the State in an area of important personal decision"]; *Palmore v. Sidoti*, 466 U.S. 429, 433, 104 S.Ct. 1879, 80 L.Ed.2d 421 [1984] ["(p)rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect"]; *Lawrence*, 539 U.S. at 571, 123 S.Ct. 2472 [no legitimate basis to penalize gay and lesbian relationships notwithstanding that "for centuries there have been powerful voices to condemn homosexual conduct as immoral"]; *id.* at 583, 123 S.Ct. 2472 [O'Connor, J., concurring in the judgment] ["(m)oral disapproval" of homosexuals cannot be a legitimate state interest]).

[395] 3. Tradition

That civil marriage has traditionally excluded same-sex couples—i.e., that the "historic and cultural understanding of marriage" has been between a man and a woman—cannot in itself provide a rational basis for the challenged exclusion. To say that discrimination is "traditional" is to say only that the discrimination has existed for a long time. A classification, however, cannot be maintained merely "for its own sake" (*Romer*, 517 U.S. at 635, 116 S.Ct. 1620). Instead, the classification (here, the exclusion of gay men and lesbians from civil marriage) must advance a state interest that is separate from the classification itself (*see Romer*, 517 U.S. at 633, 635, 116 S.Ct. 1620). Because the "tradition" of excluding gay men and lesbians from civil marriage is no different from the classification itself, the exclusion cannot be justified on the basis of "history." Indeed, the justification of "tradition" does not explain the classification; it merely repeats it. Simply put, a history or tradition of discrimination—no matter how entrenched—does not make the discrimination constitutional (*see also Goodridge*, 440 Mass. at 332 n. 23, 798 N.E.2d at 961 n. 23 ["it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been"]).[6]

4. Uniformity

The State asserts an interest in maintaining uniformity with the marriage laws of other states. But our marriage laws *currently* are not uniform with those of other states. For example, New York—unlike most other states in the nation—permits first cousins to marry (*see* Domestic Relations Law § 5). This disparity has caused no trouble, however, because well-settled principles of comity resolve any conflicts. The same well-settled principles of comity would resolve any conflicts arising from any disparity involving the recognition of same-sex marriages.

It is, additionally, already impossible to maintain uniformity among all the states, inasmuch as Massachusetts has now legalized same-sex marriage. Indeed, of the seven jurisdictions that border New York State, only Pennsylvania currently[396] affords no legal status to same-sex relationships. Massachusetts, Ontario and Quebec all authorize same-sex marriage; Vermont

6. Ultimately, as the *Lawrence* dissenters recognized, " 'preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples" (539 U.S. at 601, 123 S.Ct. 2472 [Scalia, J., dissenting]), an illegitimate basis for depriving gay and lesbian couples of the equal protection of the laws.

and Connecticut provide for civil unions (*see* Vt. Stat. Ann., tit. 15, § 1204[a]; Conn. Gen. Stat. § 46b–38nn); and New Jersey has a statewide domestic partnership law (*see* NJ Stat. Ann. § 26:8A–1 *et seq.*). Moreover, insofar as a number of localities within New York offer domestic partnership registration, even the law within the state is not uniform. Finally, and most fundamentally, to justify the exclusion of gay men and lesbians from civil marriage because "others do it too" is no more a justification for the discriminatory classification than the contention that the discrimination is rational because it has existed for a long time. As history has well taught us, separate is inherently unequal.

III. The Legislature

The Court ultimately concludes that the issue of same-sex marriage should be addressed by the Legislature. If the Legislature were to amend the statutory scheme by making it gender neutral, obviously the instant controversy would disappear. But this Court cannot avoid its obligation to remedy constitutional violations in the hope that the Legislature might some day render the question presented academic. After all, by the time the Court decided *Loving* in 1967, many states had already repealed their antimiscegenation laws. Despite this trend, however, the Supreme Court did not refrain from fulfilling its constitutional obligation.

The fact remains that although a number of bills to authorize same-sex marriage have been introduced in the Legislature over the past several years, none has ever made it out of committee (*see* 2005 N.Y. Senate–Assembly Bill S 5156, A 7463; 2005 N.Y. Assembly Bill A 1823; 2003 N.Y. Senate Bill S 3816; 2003 N.Y. Assembly Bill A 7392; 2001 N.Y. Senate Bill S 1205; *see also* 2005 N.Y. Senate–Assembly Bill S 1887–A, A 3693–A [proposing establishment of domestic partnerships]; 2004 N.Y. Senate–Assembly Bill S 3393–A, A 7304–A [same]).

It is uniquely the function of the Judicial Branch to safeguard individual liberties guaranteed by the New York State Constitution, and to order redress for their violation. The Court's duty to protect constitutional rights is an imperative of the separation of powers, not its enemy.

I am confident that future generations will look back on today's decision as an unfortunate misstep.

[397]Judges G.B. SMITH and READ concur with Judge R.S. SMITH.

Judge GRAFFEO concurs in result in a separate opinion in which Judge G.B. SMITH concurs.

Chief Judge KAYE dissents in another opinion in which Judge CIPARICK concurs.

Judge ROSENBLATT taking no part.

In each case: Order affirmed, without costs.