Commonwealth of Massachusetts

Supreme Judicial Court

Suffolk, SS

No. SJC-08860

HILARY GOODRIDGE, ET. AL.,
Plaintiffs-Appellants,

v.

DEPARTMENT OF PUBLIC HEALTH
AND HOWARD KOH, COMMISSIONER,
Defendants-Appellees.

ON APPEAL FROM A FINAL JUDGMENT
OF THE SUPERIOR COURT

BRIEF OF DEFENDANTS – APPELLEES

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STATEMENT OF ISSUES

1. Given the language, history, and purpose of the marriage statutes as limited to unions of one man and one woman, should the Court construe those statutes to permit same-sex couples to marry, or should such a fundamental change in public policy be left to the Legislature?

2. Do Articles 6 or 7 of the Massachusetts Constitution--which, respectively, prohibit hereditary titles or appointments and establish the people's right to change their form of government for the common good --require allowing same-sex couples to marry?

3. Is a right to same-sex marriage so deeply rooted in the Commonwealth's history and so basic to our sense of ordered liberty to be deemed a "fundamental right" under the due process provisions of the Massachusetts Constitution; and, even if so, is declining to license same-sex marriages sufficiently grievous and coercive to be an unconstitutional intrusion on that right?

4. Do the statutes limiting marriage to opposite-sex couples violate the equal protection provisions of the Massachusetts Constitution, as properly construed, by intentionally discriminating on the basis of "sex," where they apply equally to all-male and all-female couples; and, even if the marriage statutes

discriminate on the basis of sexual orientation, should the Court take the unprecedented step of applying heightened scrutiny to that classification?

5. Have the plaintiffs met their burden of showing that the statutes limiting marriage to opposite-sex couples lack any conceivable rational basis; and, even if so, should the Court effectively rewrite hundreds of statutes to give same-sex couples all of the benefits and duties of marriage or leave the task of remedying any constitutional defects in the marriage statutes to the Legislature?

INTRODUCTION

Plaintiffs--seven same-sex couples--are asking this Court to reach the unprecedented conclusion that they have a statutory or constitutional right to marry. As legal bases for this purported right, plaintiffs rely on various state statutes and constitutional provisions, none of which can reasonably be construed--consistent with their language, history, and purpose--to confer such a right. Therefore, rather than break new ground in this highly controversial area, the Court should defer to the Legislature's policy judgment that limiting marriage to opposite-sex couples serves the broader public interest, at least at the present time. Although there are also legitimate policy arguments for

affording same-sex couples some or all of the benefits now more readily available to married couples, those arguments should be addressed to the Legislature, which--because of its public accountability and institutional ability to investigate the relevant facts, identify the practical implications, and weigh potentially conflicting policy interests--is the body best suited to decide whether, when, and how to make such a basic and far-reaching change in Massachusetts law.

Before addressing the legal issues raised by this case, it is important to identify two fundamental points on which the parties agree: First, there is no dispute that plaintiffs have both the statutory and constitutional right to be free from invidious discrimination on the basis of their sexual orientation. Indeed, all three branches of the Massachusetts government have been on the forefront in prohibiting discrimination against gay people and affording them various statutory and common-law rights not generally available in other states. And, second, there is no dispute that marriage is a vitally important institution. That is why a proposal to fundamentally alter the historic and common understanding of marriage--as limited to opposite-sex

couples--provokes so much political controversy and ought to be addressed by the political branches

STATEMENT OF THE CASE

Appellees are satisfied with appellants' statement of the prior proceedings and of the facts, except to state that the only material facts are that each of the plaintiff couples sought marriage licenses and were "politely" denied them solely because both members of each couple are of the same sex--either both male or both female--and were therefore deemed ineligible to marry under the applicable statutes. A. 42-47.

SUMMARY OF THE ARGUMENT

The Superior Court correctly interpreted state marriage statutes to limit marriage to opposite-sex couples. The language, history, and purpose of the marriage statutes all indicate that the Legislature intended to restrict marriage to opposite-sex couples. Construing the marriage statutes to permit same-sex marriage would also run afoul of separation of powers requirements. Although public attitudes toward nontraditional families have evolved since the marriage statutes were originally enacted, permitting same-sex couples to marry would nevertheless constitute a major change in established public policy, which should be left to the Legislature, not the courts, to accomplish.

(Pp. 9-26.)

The Superior Court also correctly held that nothing in the Massachusetts Constitution requires the allowance of same-sex marriages.[1] In contending that Massachusetts' marriage statutes are unconstitutional under various provisions of the Massachusetts Constitution, plaintiffs must overcome the strong presumption that all state statutes are constitutional. To do so, they must demonstrate beyond a reasonable doubt that there are no conceivable grounds supporting its validity. As the Superior Court concluded, plaintiffs have failed to meet that heavy burden. (Pp. 26-34.)

In particular, same-sex couples have no right to marry under Articles 6 and 7 of the Massachusetts Constitution, which are not equality provisions but, instead, prohibit hereditary titles or appointments and establish the people's right to change their form of government for the common good. Even where a statute is deemed to confer special privileges within the meaning of Article 6, it does not violate Article 6 unless the purpose of the challenged statute

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[1]Here and elsewhere, defendants use the phrase "same-sex marriage" as shorthand for "the right of same-sex couples to marry."

--not merely its indirect or incidental effect--is to confer such privileges. And, in determining whether a privilege is conferred for a legitimate purpose, under Article 6, or a statute furthers the "common good," under Article 7, the Legislature's judgment is conclusive. (Pp. 34-40.)

Same-sex couples also have no fundamental right to marry under the due process or liberty provisions of the Massachusetts Constitution. This Court has recognized as fundamental only those rights that are deeply rooted in the Commonwealth's history and tradition. As recognized by the Superior Court, restriction of marriage to one man and one woman is deeply rooted in the Commonwealth's legal tradition and practice, while allowance of same-sex marriage is not. (Pp. 40-46.)

To assess whether same-sex couples have a fundamental right to marry, their purported liberty interests should be broken down into their component parts, rather than viewed as one all-encompassing right. Such analysis reveals that the interests plaintiffs assert--i.e., in procreation, privacy, child-rearing, personal autonomy, intimate association, economic benefits, and emotional support--are either

not shared by same-sex couples, not implicated by the challenged statutes, or otherwise not entitled to enhanced protection. (Pp. 46-67.)

Moreover, even if same-sex couples had constitutionally protected interests in marriage, the present statutory scheme does not intrude on those interests to an extent that rises to the level of a constitutional deprivation. There is a fundamental difference, for purposes of constitutional due process analysis, between punishing or prohibiting activities and declining to officially endorse them. Thus, while forcing individuals to marry, bear or beget a child, or even associate against their will might well constitute such a constitutional deprivation, simply declining to give official state recognition and financial benefits to members of same-sex relationships does not. And many of plaintiffs' interests--i.e., those in child-rearing and various economic benefits--are or could be protected by other means. Thus, the level of intrusion effected by the polite denial of a marriage license is insufficiently coercive or grievous to constitute a constitutional deprivation. (Pp. 54-77.)

Nor do the marriage statutes violate the equality provisions of the Massachusetts Constitution. As recognized by the Superior Court, the classification at

issue here is between same-sex and opposite-sex couples, not between males and females. Nor was that legislative classification intended to discriminate on the basis of sex. Therefore, Article 1, which prohibits intentional discrimination on the basis of sex, but not de facto discrimination on the basis of sexual orientation--is of no help to plaintiffs here. Furthermore, because sexual orientation is not a "suspect class," any discrimination on the basis of sexual orientation would be subject only to the deferential rational-basis scrutiny correctly applied by the Superior Court here. (Pp. 77-102.)

As the Superior Court concluded, the existing marriage statutes readily pass muster under such deferential scrutiny. Among various rational bases proffered by the defendants below, the Superior Court focused on the Commonwealth's legitimate interest in encouraging and fostering procreation within marriage, and, like many other courts that have considered the issue, found it "rational for the Legislature to limit marriage to opposite-sex couples who, theoretically, are capable of procreation." The Legislature could also rationally believe that limiting marriage to opposite-sex couples would further the Commonwealth's legitimate interests in fostering a favorable setting

for child rearing and conserving scarce financial resources, even if the factual assumptions underlying such beliefs are unproven, untrue in many cases, or even wrong. As the Superior Court also recognized, while permitting same-sex marriage may be desirable as a matter of public policy, the decision of whether to do so properly rests with the Legislature. This Court should reach the same conclusion. (Pp. 103-128.)

ARGUMENT

I. SAME-SEX COUPLES DO NOT HAVE A STATUTORY RIGHT TO MARRY.

The Superior Court correctly concluded that the marriage statutes, as properly construed, do not permit same-sex couples to marry. A. 111-16. Interpreting the marriage statutes to permit same-sex couples to "marry," Pls. Br. at 12-16, and thereby giving same-sex couples all the benefits and responsibilities applicable to "married" couples, would be unprecedented in any American jurisdiction and contrary to this Court's construction of the term in other cases. Such a interpretation would also be contrary to the Legislature's intent, as determined by applying the established canons of statutory construction. Rather than accept plaintiffs' invitation to effectively rewrite hundreds, if not thousands, of statutory

provisions, see BBA Br. at 5-41, A-5--A-191, such a task, if deemed desirable for the public policy reasons plaintiffs assert, should be left to the Legislature.

A. All Courts That Have Considered the Issue Have Held or Assumed That "Marriage" Applies Only to Opposite-Sex Couples.

As this Court has long acknowledged, "marriage," within the meaning of Massachusetts statutes, is limited to unions of one man and one woman. Milford v. Worcester, 7 Mass. (1 Tyng) 48, 51 (1810)("[Marriage] is an engagement, by which a single man and a single woman, of sufficient discretion, take each other for husband and wife."); Adoption of Tammy, 416 Mass. 205, 207-08 (1993)("the laws of the Commonwealth do not permit [a same-sex couple] to enter into a legally cognizable marriage"). See also Connors v. City of Boston, 430 Mass. 31, 38-43 (1999)(finding provision of health insurance to city employees' domestic partners inconsistent with statute authorizing such coverage for employees' "dependents" and "spouses").[2] All of the

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[2]Contrary to plaintiffs' contention, Pls. Br. at 14 n.6, the quoted language from Tammy was not mere dicta: if the Court believed that the Commonwealth's laws did permit same-sex couples to marry, there would have been no need to construe the adoption statutes to permit same-sex couples to jointly petition for "step-parent" adoptions, which married couples are routinely permitted to do. See Tammy, 416 Mass. at 216. The same is true of the quoted language from the Connors case: if same-sex couples could marry, there would be

courts in other jurisdictions that have considered, more directly, whether same-sex couples have a statutory right to "marry" have also interpreted the applicable statutes to apply only to opposite sex couples.[3] As shown in the succeeding subsections--and as the Superior Court held, A. 111-16--applying the canons of statutory construction yields the same result.

B. The Plain and Ordinary Meaning of "Marriage" Is the Legal Union of a Man and Woman as Husband and Wife.

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no issue as to a municipality's authority to provide coverage for same-sex spouses of municipal employees.

[3] Baker v. State, 744 A.2d 864, 868-69 (Vt. 1999); Storrs v. Holcomb, 645 N.Y.S.2d 286, 287-88 (Sup. Ct. 1996), appeal dismissed, 666 N.Y.S.2d 835 (1997); Dean v. District of Columbia, 653 A.2d 307, 312-16 (D.C. 1995); Baehr v. Lewin, 852 P.2d 44, 56-57 (Haw. 1993); Singer v. Hara, 522 P.2d 1187, 1191 (Wash. Ct. App. 1974); Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971), appeal dismissed for lack of substantial federal question, 409 U.S. 810 (1972); Anonymous v. Anonymous, 325 N.Y.S.2d 499 (Sup. Ct. 1971). See also Rutgers Council v. Rutgers, 689 A.2d 828, 834-35 (N.J. Super. Ct. App. Div. 1997)(same-sex domestic partner not "spouse" within meaning of health insurance law and contract), cert. denied, 707 A.2d 151 (1998); Matter of Cooper, 592 N.Y.S.2d 797, 798-99 (App. Div.)(survivor of same-sex relationship not "surviving spouse" for purposes of right of election against decedent's will), appeal dismissed, 604 N.Y.S.2d 979 (1993); Adams v. Howerton, 486 F. Supp. 1119, 1122 (C.D. Cal. 1980)(man not another man's "spouse" for purposes of federal immigration law), aff'd, 673 F.2d 1036 (9th Cir.), cert. denied, 458 U.S. 1111 (1982); De Santo v. Barnsley, 476 A.2d 952, 953 (Pa. Super. 1984)(two men could not divorce because they could not "marry"); Rosengarten v. Downes, 802 A.2d 170 (Conn. App. Ct.), cert. granted, 806 A.2d 1066 (Conn. 2002)(same).

"'[T]he statutory language itself is the principal source of insight into the legislative purpose.'" Commonwealth v. Smith, 431 Mass. 417, 421 (2000). Where, as here, the statutory term in question--marriage--is not defined in the statute itself, the term must be construed as it is "commonly understood," Nile v. Nile, 432 Mass. 390, 394 (2000); see also G.L. c. 4, § 6, cl. 3 (undefined statutory terms "shall be construed according to the common and approved usage of the language"), that is, according to its "plain and ordinary meaning." Commonwealth v. Conaghan, 433 Mass. 105, 110 (2000). And the "usual[way of] determin[ing] the 'plain and ordinary meaning of a term [is] by its dictionary definition." Town of Boylston v. Comm'r of Revenue, 434 Mass. 398, 405 (2001). "Marriage" is defined by Black's Law Dictionary (7th ed. 1999) as "[t]he legal union of a man and woman as husband and wife"; and "husband," in turn, is defined as "[a] married man." Id. at 986, 746.[4]

Also relevant to determining what the Legislature

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[4]See also Webster's Third New International Dictionary (1964) defines marriage as "the state of being united to a person of the opposite sex as husband or wife." Id. at 1354; see also Webster's Ninth New Collegiate Dictionary 729 (1983) (defining "marriage" as "the institution whereby men and women are joined in a special kind of social and legal dependence for the purpose of founding and maintaining a family").

meant by an undefined term is the meaning ascribed to the term when the statute was enacted, codified, or amended. Connors, 430 Mass. at 41-42. In the mid-nineteenth century, when many of the marriage laws were codified in much their present form, compare Rev. Stat. c. 75, §§ 1, 2, 3, 4, 5, 7, 8, 9 (1836), and G.L. c. 207, §§ 1, 2, 3, 4, 19, 28 (2000 ed.), "[t]he word marriage [wa]s used to signify . . . a civil status, existing in one man and one woman legally united for life." Joel P. Bishop, Commentaries on the Law of Marriage § 29 (1856); see also Milford, 7 Mass. at 51. The second edition of Black's Law Dictionary, published in 1910, similarly defined marriage as the "civil status of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex."

C. Other Related Statutes Provide Additional Evidence That the Legislature Intended to Restrict Marriage to Opposite-Sex Couples.

Another language-based key to legislative intent is the use of gender-specific terms, Adams, 486 F. Supp. at 1122; Baker v. State, 744 A.2d at 869; Singer, 522 P.2d at 1191; Baker v. Nelson, 191 N.W.2d at 186; Dean, 653 A.2d at 313-14; Baehr, 852 P.2d at 60--such

as "man," "woman," "husband," and "wife"--which pervade not only the marriage statutes themselves but also those concerning the related subjects of divorce and domestic relations. E.g., G.L. c. 207, §§ 1, 2; c. 208, §§ 4, 23, 25, 40; c. 209, title and §§ 2-9. Contrary to plaintiffs' suggestion, Pls. Br. at 15, construing those gender-specific terms in a gender-neutral manner would be both "inconsistent with the manifest intent" of the Legislature and "repugnant to the context" of those terms, and therefore not permissible under G.L. c. 4, § 6 ("words of one gender may be construed to include the other gender" where not so "inconsistent" or "repugnant") (emphasis added).

For example, if the Legislature had intended the marriage statutes to apply to same-sex couples, it would not have used the gender-specific words contained in G.L. c. 207, §§ 1 and 2 (prohibiting a man from marrying certain female relatives and prohibiting a woman from marrying certain male relatives). See Rosengarten, 802 A.2d at 178. Rather, if these statutes were intended to apply to same-sex couples, these affinity and consanguity restrictions either would not be there, or, to be consistent, would have been extended, for example, to prohibit a man from marrying his father (just as a man cannot marry his

mother). Conversely, if applicable to same-sex couples, the plain language of these statutes would permit some marriages (e.g., between siblings) that the Legislature did not likely intend to sanction. Such a construction should therefore be rejected. Dean, 653 A.2d at 313-14 (plurality opinion).

Further evidence that the Legislature did not intend these gender-specific terms to be construed in a gender-neutral manner is contained in the legislation enacted in the wake of the Equal Rights Amendment ("ERA") to the Massachusetts Constitution. A Special Commission authorized to study the effect of the ratification of the then-pending Equal Rights Amendments to the United States and Massachusetts Constitutions recommended various amendments to other domestic relations statutes, but the only proposed change in the laws governing the capacity to marry was to equalize the age at which males and females may marry. Special Commission Authorized to Study the Effect of the Ratification of the Proposed [ERA] Upon the Laws, Business Communities and Public in the Commonwealth, Interim Report, S. Doc. No. 1689 (Oct. 19, 1976), at 21. After the state ERA was ratified, the Legislature did amend some domestic relations statutes to make them gender neutral, e.g., St. 1977,

c. 609 (so amending various sections of the divorce statutes); St. 1977, c. 581 (so amending various sections of the marriage statutes), but it did not eliminate the gender-specific requirements for marriage contained in G.L. c. 207, §§ 1 and 2, indicating that "the [Legislature did not contemplate that sexual equality included provision for same-sex marriage." Singer, 522 P.2d at 1189.

Even more recent and definitive evidence that the Legislature did not intend "marriage" to be construed to apply to same-sex couples is found in St. 1989, c. 516, which amended the state anti-discrimination statute to prohibit discrimination on the basis of sexual orientation. In so doing, the Legislature expressly stated that "[n]othing in this act shall be construed to legitimize or validate a 'homosexual marriage,' so-called, or to provide health insurance or related employee benefits to a 'homosexual spouse,' so-called." St. 1989, c. 516, § 19. By placing the terms "homosexual marriage" and "homosexual spouse" in quotation marks and qualifying those terms by the words "so-called," the Legislature indicated its understanding that "homosexual marriages" or "spouses" are not otherwise permitted under Massachusetts law.

D. The History and Purpose of the Marriage Statutes Further Demonstrate That They Were Intended to Apply Only to Opposite-Sex Couples.

An examination of the history and purpose of the Massachusetts marriage statutes and of the times in which they were enacted leaves no doubt that the framers of those statutes intended to restrict marriage to opposite-sex couples. Massachusetts' marriage statutes were first enacted in colonial times, Commonwealth v. Munson, 127 Mass. 459, 460 (1879), and were derived from English common law, which, in turn, incorporated English ecclesiastical law.[5] Bishop, Commentaries §§ 7-18; Homer H. Clark, Jr., The Law of Domestic Relations in the United States 24 (2d ed. 1988); Commonwealth v. Knowlton, 2 Mass. (1 Tyng) 530, 534 (1807). "According to the English law, and to its American counterpart, the legal definition of marriage was clear and quite specific . . . . [It was] a . . . monogamous relationship between a man and a woman . . . ." Clark, supra, at 24.[6]

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[5]Defendants do not argue (and the Superior Court did not hold) that limiting marriage to same-sex couples is "justified" by religious law. Cf. Relig. Coal. Br. at 22-24.

[6]See also Nancy F. Cott, Public Vows: A History of Marriage and the Nation 10 (2000); Charles P. Kindregan, Jr., & Monroe L. Inker, Family Law & Practice, in 1 Mass. Prac. § 1.2 (2d ed. 1996).

Within that relationship there was a clear, gender-specific division of responsibility between its male and female members, with the husband responsible first for farming and later for financial support and the wife responsible for domestic work, child-bearing, and child-rearing. Id. at 7; Steven Mintz & Susan Kellogg, Domestic Revolutions: A Social History of American Family Life 47, 50-56 (1988). In particular, women were expected to bear many children at short intervals during their child-bearing years. Id. at 51.

Even as the concept of marriage shifted to a more companionate model, that model "did not imply sexual equality or a blurring of gender boundaries." Id. at 47; see also Cott, supra, at 157-58, 185-93, 218-22. The concept of same-sex unions was "'dismissed . . . out of hand.'" Michael Grossbend, Governing the Hearth: Law & the Family in Nineteenth-Century America 108 (1985)(quoting Bishop, supra, at 162). The statutes that derived from this common-law understanding of marriage as the union of a man and a woman should be interpreted consistently with that understanding. Commonwealth v. Burke, 392 Mass. 688, 690 (1984)("As has long been recognized, a statute should not be interpreted as being at odds with the common law 'unless the intent to alter it is clearly

expressed.'")(citation omitted).

Marriage, as so understood, was considered the most important civil institution, "the very basis of the whole fabric of civilized society," Bishop, supra; § 32. Its purpose was "to regulate, chasten, and refine, the intercourse between the sexes; and to multiply [and] preserve . . . the species." Milford, 7 Mass. at 52.[7]

Because of its importance for these purposes, marriage was strictly regulated by the states.[8] Id.; see also Grossbend, supra, at 68-73; Sherrer v. Sherrer, 334 U.S. 343, 354 (1948)(recognizing "vital importance" of state regulation of marriage). And the

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[7]See also Reynolds v. Reynolds, 85 Mass. (3 Allen) 605, 610 (1862)("the leading and most important object[] of the institution of marriage under our laws is the procreation of children who shall with certainty be known by their parents as the pure offspring of their union"); Singer, 522 P.2d at 1195 ("Marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race."); Adams, 486 F. Supp. at 1124 ("the main justification . . . for societal recognition and protection of the institution of marriage is procreation, perpetuation of the race").

[8]Among the states, Massachusetts was particularly strict in its regulation of marriage. Grossbend, supra, at 68-73. This Court's articulation of the importance of regulating marriage, Milford, 7 Mass. at 52, contrasts sharply with the Vermont Supreme Court's contemporaneous characterization of marriage as "'one of the natural rights of human nature'" that cannot be prohibited by the state. Overseers of Poor of Town of Newbury v. Overseers of Poor of Town of Brunswick, 2 Vt. 151 (1829).

primary means of regulation was by licensing, Grossbend, supra, at 93 (characterizing licensing as "society's first line of defense" in marriage regulation), the very form of regulation at issue here.

Given their historical context and the objects they were intended to accomplish, the marriage statutes cannot reasonably be construed to encompass same-sex marriages. As other courts and commentators have recognized, same-sex couples cannot procreate on their own and therefore cannot accomplish the "main object," Commonwealth v. Smith, 431 Mass. at 421, of marriage as historically understood. See, e.g., Adams, 486 F. Supp. at 1123; see also Grossbend, supra, at 108 (in same-sex union, "'none of the ends of matrimony would be thereby established'"; quoting Bishop, supra, at 162).

Many of the various statutory benefits of marriage that plaintiffs seek to obtain were also "designed with heterosexual marriage in mind." Richard A. Posner, Sex and Reason 313 (1992); see also Cott, supra, at 158, 191, 193, 222 (citing New Deal statutes, GI bills, income tax laws, and Welfare Reform Act as examples). Therefore, it may be inconsistent with the original purposes of those statutes for the court to automatically extend all marriage-related benefits to

same-sex couples. Although particular statutory benefits or protections might appropriately be held applicable to some or all same-sex couples, depending on the facts of a particular case and the language and purpose of a particular statute, that should be decided on a case-by-case basis,[9] rather than simply by construing "marriage," wherever that word appears, to apply to same-sex couples. As recognized by two Massachusetts family-law experts, "the context of the exact legal issue before the court may be controlling" in determining the meaning of "marriage" for various purposes. Kindregan & Inker, supra, at § 16.3.

While this Court has recognized "de facto parents" in particular factual and legal contexts, E.N.O. v. L.M.M., 429 Mass. 824, 829, cert. denied, 528 U.S. 1005 (1999); Tammy, 416 Mass. at 207; cf. Wilcox v. Trautz, 427 Mass. 326, 334 (1998)(holding that cohabiting unmarried couple could contract regarding parenting of

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[9]Compare Braschi v. Stahl Assocs. Co., 544 N.Y.S.2d 784, 789 (Ct. of Apps. 1989)(construing "family member" in rent control statute to include same-sex partner of tenant), with Matter of Cooper, 592 N.Y.S.2d at 798-99 (construing "surviving spouse" in inheritance statute to exclude same-sex partner of decedent), and Connors, 430 Mass. at 38-43, 36 n.11 (construing statute authorizing health insurance to "spouses" to preclude coverage for domestic partners but noting that provision of such coverage would not be tantamount to creating "marriage" for domestic partners).

their children, where terms are in children's best interest), Turner v. Lewis, 434 Mass. 331, 333 (2001)(holding that child's unmarried mother and paternal grandmother were "related by blood" within meaning of the domestic abuse statute), it has never recognized "de facto," or common-law, marriages. Collins v. Guggenheim, 417 Mass. 615, 617 (1994); Feliciano v. Rosemar Silver Co., 401 Mass. 141, (1987); Kindregan & Inker, supra, at § 16.3.[10] Nor is it necessary to do so for child protection reasons, since the legal protections applicable to children are not dependent on their parents being married. Tammy, 416 Mass. at 214.

Also relevant to the proper interpretation of the marriage statutes is the fact that the Registrar of Vital Records and Statistics, the state official charged with administering all laws relative to the recording of births, marriages, and deaths, G.L. c. 17, § 4; G.L. c. 46, §§ 1 et seq., has consistently interpreted the marriage statutes to permit only opposite-sex marriages. A. 47. That interpretation is

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[10] See also Baker v. State, 744 A.2d at 864 (distinguishing case construing "spouse," for purposes of adoption statute, to include same-sex partner of natural parent from case construing "marriage," for purposes of marriage statutes, to exclude same-sex couples); Rutgers, 689 A.2d at 831 (same).

entitled to deference, Grocery Mfrs., Inc. v. Dep't of Pub. Health, 379 Mass. 70, 75 (1979); and, to the extent the statute is otherwise deemed ambiguous, that interpretation should control. Felix A. Marino Co. v. Comm'r of Labor & Indus., 426 Mass. 458, 497 (1998).

E. If Same-Sex Marriage Is to Be Permitted in Massachusetts, That Far-Reaching Change in Public Policy Should Be Made by the Legislature, Not by the Courts.

In construing the marriage statutes, this Court is further constrained, by separation of powers principles, not to "engage in a judicial enlargement" of the statutory language beyond the meaning and scope intended by the Legislature. Pielech v. Massasoit Greyhound, Inc., 423 Mass. 534, 540 (1996), cert. denied, 520 U.S. 1131 (1997). Although public attitudes toward nontraditional families have evolved since the marriage statutes were originally enacted, permitting same-sex couples to marry would nevertheless constitute a major change in established public policy, which should be left to the Legislature, not the courts, to accomplish. Duracraft Corp. v. Holmes Prods. Corp., 427 Mass. 156, 167 (1998). "[T]he time tested wisdom of the separation of powers," Pielech, 423 Mass. at 540, requires courts "'to avoid judicial legislation in the guise of new constructions to meet

real or supposed new popular viewpoints, preserving always to the Legislature alone its proper prerogative of adjusting the statutes to changed conditions.'" Id. at 539 (citations omitted).[11]

This Court recently applied these very principles in construing a health insurance statute to preclude coverage for domestic partners. Connors, 430 Mass. at 42-43 ("[a]djustments in . . . legislation to reflect . . . new social and economic realities must come from the Legislature . . . ."). The Legislature has demonstrated its ability to respond to changing views of marriage by repealing statutory restrictions on interracial marriage, remarriage after divorce, and marriage by persons with mental disabilities. It should be permitted to do the same with respect to the opposite-sex restriction, if, when, and to whatever extent it deems appropriate.

These restraints on the proper scope of judicial (versus legislative) action apply "even when it

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[11]See also Singer, 522 P.2d at 1196 n.12 (recognizing "that public attitude toward homosexuals is undergoing substantial . . . change" but leaving it up to the legislature to decide whether to revise marriage laws to include same-sex relationships); De Santo, 476 A.2d at 956 (same); Rutgers, 689 A.2d at 837-38 (same); cf. Profs. of Hist. Br. at 41-45 (describing radical change in public policy effected by no-fault divorce legislation).

appear[s] that a highly desirable and just result might . . . be achieved" by a different construction, Pielech, 423 Mass. at 540, or when, conversely, interpreting a statute as the Legislature intended might result in injustice or hardship. Id. at 540; see also Connors, 430 Mass. at 43 (interpreting health insurance statute to exclude domestic partners of city employees, despite that, as a result, "some . . . employees may be without a critical social necessity"). Thus, although it may well be desirable, on policy grounds, to permit same-sex couples to have some or all of the benefits and burdens of marriage, the decision to confer or impose them should be made by the Legislature, not the courts. Richard A. Posner, Should There Be Homosexual Marriage? And If So, Who Should Decide?, 95 Mich. L. Rev. 1578, 1584-87 (May 1997).

Even where a statute, as construed consistently with legislative intent, is found to be unconstitutional--which is not so here for the reasons discussed below--such defects are properly remedied only by legislation, not by judicial rewriting. "'[S]tatutes are to be construed so as to avoid an unconstitutional result or the likelihood thereof,' but only 'if reasonable principles of interpretation permit

it.'" Pielech, 423 Mass. at 538-39 (citation omitted); see also Lowell v. Kowalski, 380 Mass. 663, 665 (1980) (declining to construe statute to avoid constitutional problem where to do so "does violence to the plain words" of statute). For this reason, even though the Vermont Supreme Court found Vermont's denial of marriage-related benefits to same-sex couples unconstitutional, it appropriately declined to interpret the Vermont marriage statutes to require the issuance of marriage licenses to same-sex couples but rather left it up to the state legislature to cure what it held to be a constitutional defect in the existing statutory scheme. Baker v. State, 744 A.2d at 886.

II. THE LEGISLATURE'S DECISION TO LIMIT MARRIAGE TO OPPOSITE-SEX COUPLES DOES NOT VIOLATE ANY OF PLAINTIFFS' RIGHTS UNDER THE MASSACHUSETTS CONSTITUTION.

A. Plaintiffs Bear a Heavy Burden in Challenging the Constitutionality of a State Statute.

As demonstrated above, the marriage statutes are appropriately construed as applicable only to opposite-sex couples. In contending that these statutes, as so construed, are unconstitutional under various provisions of the Massachusetts Constitution, plaintiffs must overcome the strong presumption that all state statutes are constitutional. St. Germaine v. Pendergast, 416 Mass. 698, 703 (1993). To do so, they

"must demonstrate beyond a reasonable doubt that there are no conceivable grounds supporting [the statute's] validity." Id.

This deferential standard is rooted in separation of powers principles, which are even stronger when a court is asked to invalidate, rather than simply interpret, a legislative enactment.[12] "[I]n deciding the constitutionality of legislative acts, it 'must never be forgotten, that (the Constitution of the Commonwealth) was not intended to contain a detailed system of practical rules, for the regulation of the government or people in after times; but that it was rather intended, after an organization of the government, and distributing the executive, legislative and judicial powers amongst its several departments, to declare a few broad, general, fundamental principles, for their guidance and general direction.'" Merriam v. Sec'y, 375 Mass. 246, 257 (1978)(citation omitted).

Thus, unless a legislative enactment falls clearly afoul of one of those "few, broad, general, fundamental principles," it must be upheld. "'[A]lthough the power

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[12]These separation of powers principles are, of course, inapplicable where the court is abrogating a judicially created doctrine or rule. See Lewis v. Lewis, 370 Mass. 619, 624-29 (1975)(cited in Profs. of Hist. Br. at passim); In re Jadd, 391 Mass. 227, 237 (1984)(cited in Profs. of Remed. Br. at 13, 19, 21).

of deciding on the constitutionality of legal enactments[] is one clearly vested in the judicial department,[13] it is to be resorted to and exercised with great caution and deliberation, and it is always to be presumed that a co[-]ordinate branch of the government has acted within the limits of its constitutional authority, until the contrary shall clearly and satisfactorily appear.'" Id. at 254 (citation omitted). Application of those principles to the Massachusetts marriage statutes requires that they be upheld as not clearly in conflict with any provision of the Massachusetts Constitution.

B. Same-Sex Couples Do Not Have a Right to Marry Under the Massachusetts Constitution.

In seeking to invalidate the Massachusetts marriage statutes, plaintiffs are asking the Court to recognize, and deem fundamental, a constitutional right of same-sex couples to marry--a right never recognized by any state or federal court[14] (with the exception of

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[13]Defendants do not argue that the constitutionality of the marriage statutes is a political question immune from judicial review. Cf. Profs. of Remed. Br. at 7.

[14]Although the Vermont Supreme Court found Vermont's statutory marriage scheme unconstitutional, it stopped short of recognizing a state constitutional right of same-sex couples to marry. Baker v. State, 744 A.2d at 886. The Hawaii Supreme Court, the only other court to hold that denying a marriage license to same-sex couples may (if unjustified) be

one Alaska trial court)[15] under either the federal or any state constitution.[16] As will be shown below, no basis for recognizing such a right can be found in the Massachusetts Constitution. This Court should decline to create one.

Plaintiffs seek to characterize the right at issue more broadly, as the right to marry or the right to choose a marriage partner. Pls. Br. at 16-32.

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unconstitutional under a state constitution, declined to find a right to same-sex marriage in the Hawaii Constitution, Baehr, 852 P.2d at 55-57, but premised its decision, instead, on the equality provisions of its constitution. Id. at 63-68. On remand, the trial court held that the state had failed to demonstrate that its marriage statute furthered a compelling state interest. Baehr v. Miike, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). While the case was on appeal, Hawaii amended its constitution to permit the Legislature to restrict marriage to opposite-sex couples, and the Hawaii Supreme Court then reversed and remanded the case to the trial court for judgment in the state's favor. Baehr v. Miike, 994 P.2d 566 (Haw. 1999).

[15]After the Alaska trial court recognized such a right under the express privacy provision of the Alaska Constitution, Brause v. Bur. of Vital Stats., No. 3AN-95-6562, 1998 WL 88743, at *3-*4 (Alaska Super. Ct. Feb. 27, 1998), Alaska amended its constitution to expressly limit marriage to opposite-sex couples, Alaska Const. art. 1, § 25, thereby mooting the case.

[16]According to plaintiffs' amici, no final appellate court of any foreign country has recognized a right to same-sex marriage either; and several such courts as well as the United Nations Human Rights Committee have affirmatively found no such right. Int'l Human Rights Orgs. Br. at 40 n.74, 42-43 & n.80. The Netherlands, the one nation that has permitted same-sex marriage, has done so by legislation, not by court order. Id. at 44-45.

However, to determine whether a constitutional right exists, the right must be specifically identified. Washington v. Glucksberg, 521 U.S. 702, 721-24 (1997) (requiring "careful description" of asserted constitutional right and rejecting description of "right to die" or "right to choose time and manner of death" in favor of right of "mentally competent, terminally ill adult to commit physician-assisted suicide"); Troxel v. Granville, 530 U.S. 57, 73 (2000) (requiring that constitutional due process protections be "elaborated with care" and declining to create per se parental due process right to control visitation by nonparents). Otherwise, it is not possible to determine whether the framers intended to create such a right; whether the right has been infringed; and, if so, whether the infringement is justified. Indeed, as discussed in section II(B)(2)(c) and II(E)(2), infra, making these determinations may require breaking down the asserted right to marry into its component interests and benefits, since, for example, same-sex couples may have a constitutional right to some of the benefits of marriage, e.g., those related to child-rearing, Youmans v. Ramos, 429 Mass. 774, 784 (1999); while there may be no such right to other benefits, such as health insurance, Ross v. Denver Dep't of

Health & Hosps., 883 P.2d 516, 521-22 (Colo. Ct. App. 1994), or inheritance from an intestate partner, see Woodward v. Comm'r of Soc. Sec., 435 Mass. 536, 542 (2002).

The fact that marriage is indisputably an important institution, see section I(D), supra, does not necessarily mean that same-sex marriage should be deemed "fundamental" for purposes of due process or equal protection analysis. For example, "while the court acknowledged in McDuffy [v. Sec'y of Exec. Office of Educ., 415 Mass. 545 (1993),] the importance of education . . . , the court . . . decline[d] to hold that a student's right to education is a 'fundamental right.'" Doe v. Super., 421 Mass. 117, 129 (1995).[17]

Similarly, the fact that marriage has been deemed "fundamental" in other contexts does not necessarily mean that same sex couples have a fundamental right to marry. See Doe v. Doe, 365 Mass. 556, 560 (1994) (recognizing "that in various contexts the Supreme

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[17]See also Tarin v. Comm'r of Div. of Med. Assist., 424 Mass. 743, 755-56 (1997)(recognizing importance of child support obligations but declining to have find constitutional right to have government subsidize those obligations); Three Juveniles v. Commonwealth, 390 Mass. 357, 364 (1983)(recognizing importance of family integrity but declining to find constitutional right to child-parent testimonial privilege).

Court has declared that certain interests associated with the marital relationship give rise to rights guaranteed by the Federal Constitution" but declining to recognize a fundamental right of a husband to prevent abortion); Zablocki v. Redhail, 434 U.S. 374, 386 (1978)("we do not mean to suggest that every state regulation which relates in any way to the incidents or prerequisites for marriage must be subjected to rigorous scrutiny").

If it were true, as plaintiffs suggest, that a fundamental right to marry "already exists for 'all individuals,'" Pls. Br. at 32 n.19 (citing Zablocki, 434 U.S. at 383), it would have been unnecessary for the Supreme Court to consider--as it did--whether the right to marry extended to the classes at issue in Loving v. Virginia, 388 U.S. 1 (1967); and Turner v. Safley, 482 U.S. 78 (1978).[18] Because Loving, Zablocki, and Turner each involved opposite-sex marriages, there was no need for the Court to expressly limit its holdings to opposite-sex marriages, but see Zablocki, 434 U.S. at 386 (concluding that "decision to

[18]See Loving, 388 U.S. at 12 (characterizing the right in question as "the freedom to marry, or not marry, a person of another race"); Turner v. Safley, 482 U.S. at 95, 97 (framing the issue as whether that right "appl[ies] to prison inmates").

marry and raise the child in a traditional family setting must receive [enhanced constitutional] protection")(emphasis added), or to consider whether the right to marry extends to same-sex couples, the question presented here.

In asserting a constitutional right to marry, plaintiffs rely on various provisions of the Massachusetts Constitution.[19] As recently reiterated by this Court, constitutional provisions "should be 'interpreted in the light of the conditions under which [they were] framed, the ends which [they] were designed

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[19]The provisions of the Massachusetts Constitution that plaintiffs rely on are Articles 1, 6, 7, and 10 of the Declaration of Rights. On appeal, they have abandoned any claim under the Preamble or Article 12, A. 48, and have effectively waived their claims under Article 16 and Part II, c. 1, § 1, art. 4, A. 48, by relegating their arguments on those provisions to footnotes, Pls. Br. at 17 n.10, 23-24 n.13. Commonwealth v. Lydon, 413 Mass. 309, 317-18 (1992) ("[a]rguments relegated to a footnote do not rise to the level of appellate argument" and, accordingly, are deemed waived). The same is true of arguments made only by amici, In re Harvard Pilgrim Health Care, Inc., 434 Mass. 51, 57 (2001), even where incorporated by reference in a party's brief. Town of Wellfleet v. Glaze, 403 Mass. 79, 80 n.2 (1988).

If the Court nevertheless reaches plaintiffs' Article 12 claim, it should reject it for the reasons given by the Superior Court. A. 125. If the Court nevertheless addresses the Preamble, the Court should follow the lead of other states' appellate courts in declining to view similar preambles to their states' constitutions as creating judicially enforceable rights. See, e.g., Sepe v. Daneker, 68 A.2d 101, 105 (R.I. 1949); Daugherty v. Wallace, 621 N.E.2d 1374, 1378 (Ohio Ct. App. 1993).

to accomplish, the benefits which [they] were expected to confer and the evils [they were] hoped to remedy.' '[Their] words are to be given their natural and obvious sense according to common and approved usage at the time of [their] adoption . . . .'" Mazzone v. Attorney Gen., 432 Mass. 515, 526 (2000). Because of the fundamental differences between constitutions and statutes, in interpreting the former, text and history properly play a greater role and modern judicial precedents a lesser one. McDuffy, 415 Mass. at 600; Akhil Amar, The Bill of Rights: Creation and Reconstruction 3-4, 301-07 (1998). As will be shown in the succeeding subsections, applying these principles to the constitutional provisions that plaintiffs rely upon yields no constitutional right of same-sex couples to marry.

1. Same-sex couples do not have a right to marry under Articles 6 and 7 of the Declaration of Rights.

The Vermont Supreme Court relied solely on the "common benefits" provision of the Vermont Constitution in invalidating Vermont's marriage statutes. Baker v. State, 744 A.2d at 869-86. That provision has no Massachusetts analog. The Massachusetts Constitution contains no mention of "common benefits"; and Articles 6 and 7 of the Declaration of Rights have been

interpreted much differently than the common benefits provision of the Vermont Constitution. As the Superior Court correctly concluded, Articles 6 and 7, as properly construed, cannot be deemed a source of plaintiffs' purported right to marry. A. 119-22. At best, those provisions provide no greater protection for such a right than the due process provisions on which plaintiffs also rely. Commonwealth v. Ellis, 429 Mass. 362, 371-72 (1999).

As is apparent from the language of Article 6,[20] it was intended to prohibit hereditary titles, public offices, or special privileges, as opposed to those earned by public service.[21] Hewitt v. Charier, 33 Mass. (16 Pick.) 353, 355 (1835); Brown v. Russell, 166

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[20]Article 6 provides: "No man, nor corporation or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public; and this title being in nature neither hereditary, nor transmissible to children, or descendants, or relations by blood, the idea of a man born a magistrate, lawgiver, or judge is absurd and unnatural."

[21]In the federal constitution, this principle is embodied in Article I, § 9, which expressly denies Congress the power to grant titles of nobility. This federal provision was interpreted quite literally by the First Congress, which relied on it in deciding not to confer an official title--other than simply "The President"--on the chief executive. Kent Greenfield, Original Penumbras: Constitutional Interpretation of the First Year of Congress, 26 Conn. L. Rev. 79, 121 & n.254 (Fall 1993).

Mass. 14, 22 (1896); Sheridan v. Gardner, 347 Mass. 8, 15 (1964); White v. City of Boston, 428 Mass. 250, 255 (1998). This text-based construction of Article 6 is confirmed by its historical roots and the "evils which it was hoped to remedy," Mazzone, 432 Mass. at 526, i.e., the evils of conferring hereditary titles, offices, or privileges, akin to the peerages and related privileges conferred by the Crown in England. Brown, 166 Mass. at 22.[22] In accordance with its language and history, this provision has been applied primarily in the context of public offices or employment.[23]

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[22]See also David McCullough, John Adams 222 (2001)(Adams intended Article 6 "to prevent the formation of a hereditary monarchy"); Bernard Bailyn, The Ideological Origins of the American Revolution 279-80, 280 n.46 (1967)(quoting John Adams' "'Sixth principle of revolution[,] . . . . *the necessity of resisting the introduction of a royal or Parliamentary nobility or aristocracy into the country*'"); Willi Paul Adams, The First American Constitutions: Republic Ideology and the Making of State Constitutions in the Revolutionary Era 166 (1980)("'The ideas of earthly superiority, preheminence and grandeur are educational, at least acquired, not innate.'" (quoting James Otis, A Vindication of the Conduct of the House of Representatives of the Province of the Massachusetts-Bay 15, 17-20 (1764)).

[23]E.g., Brown, 166 Mass. at 23-27 (applying Articles 6 and 7 to invalidate absolute veterans' preference for "public office" but questioning whether those articles extend, more generally, to public employment or to private members of professions that serve the public, such as doctors); Sheridan, 347 Mass. at 8 (finding Article 6 inapplicable to opportunity to serve on unpaid commission because not hereditary title

Even where a statute is deemed to confer special privileges within the meaning of Article 6, it does not violate Article 6 unless the purpose of the challenged statute--not merely its indirect or incidental effect--is to confer such privileges. Hewitt, 33 Mass. at 355-56. And, in determining whether the purpose for conferring such benefits is legitimate, the courts defer to the Legislature's judgment. Ellis, 429 Mass. at 371; see also Opinion of the Justices, 354 Mass. 799, 801 (1968)("'accepting [Legislature']s mandate as authoritative'"as to whether statute serves a "'legitimate public good'"; citation omitted).[24] Because the marriage statutes do not concern public employment, were not enacted for the purpose of conferring special privileges, see section II(D)(4),

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or office); White, 428 Mass. at 255 (limiting Article 6 to absolute preferences for public employment and therefore rejecting challenge to statute requiring that qualified disability retirees be reinstated to public employment); Opinion of the Justices, 303 Mass. 631, 654 (1939)(applying Articles 6 and 7, among other provisions, to opine that proposed statute excluding married women from public employment would be unconstitutional).

[24] The framers' intent that the Legislature should be the arbiter of the public good is further evidenced by Pt. 2, c. 1, § 1, art. 4, which confers on the Legislature "full power and authority . . . to make . . . all manner of wholesome and reasonable . . . laws . . . as they shall judge to be for the good and welfare of the commonwealth . . . and of the subjects of the same." (Emphasis added.)

infra; and embody a legislative determination that limiting marriage to opposite-sex couples furthers legitimate public interests, Article 6 affords no basis for invalidating those laws.

The purpose of Article 7[25] is equally clear from its text--i.e., to establish the people's right to institute and change their form of government for the common good. See Brown, 166 Mass. at 21-22; Ellis, 429 Mass. at 372 n.14. This provision was derived from the Declaration of Independence, which asserted the people's right to change their government as the basis for declaring independence from England.[26] The term

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

By relegating the underlined language to a footnote and focusing exclusively on the first clause, Pls. Br. at 44--which, in context, is merely a prefatory explanation for the declaration of the right that follows--plaintiffs distort the text of this provision and, thereby, the framers' intent. Plaintiffs' exclusive focus on the first part of Article 6, Pls. Br. at 44, similarly distorts that provision. See note 20, supra.

[26]"[I]t is the Right of the People to alter or to abolish [the Form of Government,] and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and

"common good," which was used interchangeably with the term "public good" during the Revolutionary period, Adams, supra, at 218, was also derived from the Declaration of Independence, which identified as the first evil to be remedied the King's refusal to assent to colonial laws, "the most wholesome and necessary for the public good." Id. at 221-22.

Consistent with this history and purpose, this Court has construed Article 7 as concerning the rights of the people to institute and change government, rather than as a basis for challenging statutory classifications (like the one at issue here). Ellis, 429 Mass. at 372 n.14; Town of Brookline v. Sec'y, 417 Mass. 406, 423 (1994)(same). Although the Court "ha[s] stated that art.7 may be one of those constitutional provisions under which 'equal protection . . . considerations arise,'" Brookline, 417 Mass. at 423 n. 19 (citation omitted), it "ha[s] never held that art. 7 creates an equal protection right." Id.[27] For

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Happiness." Declaration of Independence, para. 2.

[27]See generally Alexander J. Cella, The People of Massachusetts, A New Republic, and the Constitution of 1780: The Evolution of Principles of Popular Control of Political Authority 1774-1780, 14 Suffolk U. L. Rev. 975, 1004 (Summer 1980)("[T]he Constitution of 1780 . . . reflected to an extraordinary high degree a popular willingness to subordinate private interests . . . to the common good.").

purposes of Article 7, like Article 6, the laws made by the people, through their Legislature, are deemed conclusive as to what constitutes the public good. Loring v. Young, 239 Mass. 349, 373 (1921)(citing Article 7 for the proposition that "[s]overeignty in the Commonwealth resides in the people. . . . When their will [to make or change law] has been ascertained, it must prevail."). Thus, Article 7, like Article 6, provides no basis for invalidating the Legislature's decision to limit marriage to opposite-sex couples.

2. Same-sex couples do not have a right to marry under the due process and liberty provisions of the Massachusetts Constitution.

a. Separation of powers principles and the historical understanding of the term "liberty" counsel against an expansive interpretation of that term.

As recognized by the Supreme Court in applying the due process provisions of the United States Constitution, separation of powers principles dictate a cautious approach to recognizing or creating new "fundamental" rights. Because deeming a right to be fundamental greatly reduces the deference that is otherwise afforded to legislative and executive choices and, thereby, "to a great extent, place[s] the matter

outside the arena of public debate and legislative action. [courts] must . 'exercise the utmost care whenever [they] are asked to break new ground in this field,' lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of [judges]." Glucksberg, 521 U.S. at 720.[28] This reluctance to recognize new fundamental rights extends even into the area of marriage. Zablocki, 434 U.S. at 399 (concurring opinion)(rejecting strict scrutiny of marriage classifications because such "inquiry would cast doubt on the network of restrictions that the States have fashioned to govern marriage, including bans on . . . homosexual[] [marriage]").

This Court's "treatment of due process challenges to legislation has adhered to the same standards as those applied in Federal due process analysis."[29]

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[28]See also Bruce C. Hafen, The Constitutional Status of Marriage, Kinship, and Sexual Privacy: Balancing the Individual and Social Interests, 81 Mich. L. Rev. 463, 548 (Jan. 1983)("effect of . . . finding that a constitutional right is 'fundamental' . . . is to place the liberty so recognized almost beyond the reach of legislative regulation").

[29]"Although there are situations in which this [C]ourt has interpreted art. 12 of our Declaration of Rights as extending greater protection than the parallel provisions of the United States Constitution," Ellis, 429 Mass. at 371 (emphasis added), plaintiffs here have abandoned any claim under Article 12, see note 19, supra, and rely solely on Articles 1 and 10 in

Ellis, 429 Mass. at 371. Like the Supreme Court, this Court has been wary of recognizing or creating new fundamental rights under the Massachusetts Constitution.[30] If anything, the Massachusetts courts have been even more reluctant than the United States Supreme Court to invalidate statutes on substantive due process grounds. Even in the early 1900s, when the United States Supreme Court more readily overturned

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support of their due process claim. See Pls. Br. at 16-17.

[30]See, e.g., Tobin's Case, 424 Mass. 250, 252-53 (1997)(no fundamental right to receive workers' compensation benefits); Doe v. Super., 421 Mass. at 130 (no fundamental right to education); Williams v. Sec'y of EOHS, 414 Mass. 551, 565(1993) (no fundamental right to receive mental health services); Matter of Tocci, 413 Mass. 542, 548 n.4 (1992)(no fundamental right to practice law); Rushworth v. Registrar of Motor Vehicles, 413 Mass. 265, 269 n.5 (1992)(no fundamental right to operate motor vehicle); English v. New England Medical Ctr., Inc., 405 Mass. 423, 429 (1989)(no fundamental right to recover tort damages); Commonwealth v. Henry's Drywall Co., 366 Mass. 539, 542 (1974)(no fundamental right to pursue one's business); cf. Aime v. Commonwealth, 414 Mass. 667, 674 n.10 (1993)(recognizing right to be free from physical restraint "does not involve judicial derivation of controversial 'new' rights from the Constitution"). See generally Williams, 414 Mass. at 565 n.17 (recognizing fundamental right to receive mental health services "would represent an enormous and unwarranted extension of the judiciary into the DMH's authority"); Ford v. Town of Grafton, 44 Mass. App. Ct. 715, 730-31 ("The people of Massachusetts may choose by legislation to [provide remedies for "grievous harm"] . . . [;] however, 'they should not have [such remedies] thrust upon them by this Court's expansion of the Due Process Clause . . . .")(citation omitted), review denied, 427 Mass. 1108, cert. denied, 525 U.S. 1040 (1998).

legislation on such grounds, this Court generally refrained from doing so. Herbert P. Wilkins, Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution, 14 Suffolk U. L. Rev. 886, 890-91, 909-10 (Summer 1980).

The meaning of the term "liberty," as understood by the framers, also counsels against an expansive reading of the term. See generally Mazzone, 432 Mass. at 526 (words in constitutional provisions are to be construed "'according to common and approved usage at the time of [their] adoption'"); McDuffy, 415 Mass. at 561-62 (looking to meaning of constitutional term in 1780 even though that meaning "is no longer, or . . . much less, in vogue today"). At the time the Massachusetts Constitution was drafted, "'[l]iberty' consisted primarily in having a voice in legislation." Adams, supra, at 127. See also id. at 159; Bailyn, supra, at 86.

This meaning of liberty is also reflected in the context in which the term "liberty" appears in Article 10 of the Declaration of Rights.[31] Article 10

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[31]The term "liberties" also appears in Article 1 of the Declaration of Rights, which is primarily concerned with equality rather than due process. In that context, as well, the term has been construed to

recognizes the right of "[e]ach individual of the society . . . to be protected in the enjoyment of his life, liberty and property, according to the standing laws" and provides that "no part of the property of any individual can, with justice, be taken from him . . . without his own consent, or that of the representative body of the people" (emphasis added). Those liberty and property rights are summed up as follows: "In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent."[32] Art. 10.

Before moving away from the constitutional text to a consideration of more general due process principles, the absence of certain key words from the Massachusetts Constitution also bears noting. None of the provisions

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"mean[] a liberty regulated by law." Commonwealth v. Libbey, 216 Mass. 356, 357 (1914). The rights recognized in that provision are "subject to reasonable restraints made by general law for the common good." Id.

[32] Holden v. James, 11 Mass. 396 (1814), which plaintiffs cite for the proposition that Article 10 guarantees individual rights, Pls. Br. at 17, instead illustrates the application of this provision to ensure government "according to the standing laws" by prohibiting legislation exempting individuals by name from generally applicable laws. See also Sohier v. Mass. Gen. Hosp., 57 Mass. (3 Cush.) 483, 488 (1849)(invalidating statute settling individual estate).

on which plaintiffs rely contain any express mention of marriage.[33] Cf. McDuffy, 415 Mass. at 565 (finding constitutional duty to provide education based, in part, on express mention of education in Massachusetts Constitution). As one commentator explained with respect to the federal Constitution, "The silence of the Constitution on the entire subject of the family does not tell us that marriage and family were unimportant to the founders; it tells us, rather, that the Founders consciously accepted the regulation of family life embodied in the civil legislation. They did not view individual rights arising from family relationships . . . as political liberties needing protection by the Bill of Rights." Hafen, supra, 81 Mich. L. Rev. at 571.

Nor does the term "privacy" appear anywhere in the Massachusetts Constitution. Marcoux v. Attorney Gen., 375 Mass. 63, 69 (1978)(so noting, in declining to recognize fundamental right to private possession and use of marijuana). Although some privacy rights have nevertheless been found to inhere in the Constitution,

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[33]The only mention of marriage in the Massachusetts Constitution is a provision granting jurisdiction over "[a]ll causes of marriage, divorce, and alimony . . . [to] the Governor and Council, until the Legislature shall, by law, make other provision." Mass. Constitution, pt. 2, c. 3, art. 5.

see, e.g., Moe v. Sec'y of Admin. & Fin., 382 Mass. 629, 649 (1981)(recognizing privacy right to choose whether or not to beget a child), the absence of an express mention of privacy counsels against further expansion of constitutional protection for such rights, such as that urged here. See McDuffy, 415 Mass. at 618 n.8 (declining to read word into Massachusetts Constitution that "does not appear in the constitutional language"). Indeed, the Alaska Superior Court, the only court that has recognized a constitutional right to same-sex marriage, did so under an express privacy provision of that state's constitution, which has been construed to reach "very public conduct," such as determining one's hair length. Brause, 1998 WL 88743 at *3 *4. Cf. Marcoux, 375 Mass. at 69 (distinguishing on that ground Alaska case finding a constitutional privacy right to possession of marijuana in the home).

b. Same-sex marriage is not deeply rooted in the Commonwealth's history and tradition or implicit in the concept of ordered liberty.

"[T]o rein in" the otherwise potentially unlimited scope of substantive due process rights, Glucksberg, 521 U.S. at 722, both federal and Massachusetts courts have recognized as "fundamental" only those "rights and

liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty.'" Id. at 720-21; In re Dubil, 437 Mass. 9, 13 (2002)(same). In the area of family-related rights in particular, the Supreme Court has emphasized that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted." Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion).[34]

Applying those limiting principles, the Supreme Court declined to recognize a fundamental right to physician-assisted suicide, which would have required "revers[ing] centuries of legal doctrine and practice, and strik[ing] down the considered policy choice of almost every State." Glucksberg, 521 U.S. at 723. While recognizing that public attitudes toward assisted suicide are currently the subject of "earnest and profound debate," the Court nevertheless left the continuation and resolution of that debate to the political arena, "as it should in a democratic

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[34]See also Griswold v. Connecticut, 381 U.S. 479, 491 (1965)(concurring opinion)(limits on substantive due process rights center on "respect for the teachings of history"); Michael H. v. Gerald D., 491 U.S. 110, 123 n.3, 127 (1989)(plurality opinion)(same).

society." Id. at 719, 735.

Massachusetts courts have similarly recognized as fundamental those rights that are deeply rooted in the Commonwealth's history and tradition[35] but declined to recognize rights that are not so deeply rooted.[36] For example, in considering whether to recognize a right of terminally ill patients to refuse life-prolonging treatment, this Court observed that "'the law always lags behind the most advanced thinking in every area," Super. v. Saikewicz, 373 Mass. 728, 737 (1977), and

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[35]E.g., Curtis v. Sch. Comm., 420 Mass. 749, 756 (1995)("'primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition'"), cert. denied, 516 U.S. 1067 (1996); Aime, 414 Mass. at 676 ("right to be free from governmental detention and restraint is firmly embedded in the history of Anglo-American law"); Brophy v. New England Sinai Hosp., Inc., 398 Mass. 417, 430 (1986)(right to make decisions to accept or reject medical treatment "has its roots deep in our history" and "has come to be widely recognized and respected"); Moe v. Sec'y, 382 Mass. at 649 (characterizing decision whether to bear a child as "hold[ing] a particularly important place in the history of the right to privacy" and finding "something approaching consensus" on right to refuse unwanted infringement of bodily integrity).

[36]Trigones v. Attorney Gen., 420 Mass. 859, 863 (1995)(upholding statute that does not "'offend some principle of justice so rooted in the tradition and conscience of our people as to be ranked fundamental'"); Three Juveniles, 390 Mass. at 364 (declining to find fundamental right to child-parent privilege where "[n]either Congress nor the Legislature of any State has seen fit to adopt a rule granting [such] a privilege"); Commonwealth v. Stowell, 389 Mass. 171, 174 (1983)(declining to recognize right not "implicit in the concept of ordered liberty").

must await "some common ground, some consensus." Id.; see also Blixt v. Blixt, 437 Mass. 649, 662 n.22 (2002) ("social consensus about family relationships is relevant to the constitutional limits on State intervention").

In making this argument, defendants are not contending that a statute that is found to have no rational basis must nevertheless be upheld as long as it is of ancient origin. However, "[t]he long history of a certain practice . . . and its acceptance as an uncontroversial part of our national and State tradition do suggest that [the Court] should reflect carefully before striking it down." Colo v. Treasurer & Receiver Gen., 378 Mass. 550, 557 (1979).

Nor do defendants contend that courts should decline to recognize a constitutional right simply because that right is unpopular. However, as this Court has also recognized, "The fact that a challenged practice is followed by a large number of states . . . is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Commonwealth v. Kostka, 370 Mass. 516, 533 (1976)(citation omitted).

Because of the absence of deep historical roots,

virtually every court that has considered recognizing a fundamental right to same-sex marriage, including the Superior Court in this case, A. 129, has declined to do so.[37] See, e.g., Baehr, 852 P.2d at 57; Baker v. Nelson, 191 N.W.2d at 186-87; Dean, 653 A.2d at 333 (plurality opinion); Storrs, 645 N.Y.S.2d at 287; Matter of Cooper, 592 N.Y.S.2d at 800. This Court should do the same. As discussed in section I(D), supra, restriction of marriage to unions of a man and a woman is deeply rooted in the Commonwealth's legal tradition and practice,[38] while allowance of same-sex marriage is not.[39] Indeed, because the statutes from

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[37]The one exception, as noted above, was the Alaska Superior Court, which relied on that state's constitution's express and broadly construed right to privacy. Brause, 1998 WL 88743 at *3-*4.

[38] By contrast, statutory restrictions on interracial marriage, such as that struck down in Loving, or on abortion, such as that struck down in Roe v. Wade, 410 U.S. 113 (1973), did not have such deep historical roots. See Grossbend, supra, at 126-27 ("Unlike most of the restrictions on marriage, the racial prohibition was an American innovation without English precedent."); Loving, 388 U.S. at 6 (Virginia's anti-miscegenation law was not enacted until 1924); Roe, 410 U.S. at 129 ("restrictive criminal abortion laws . . . are of relatively recent vintage . . .[,] not of ancient or even common-law origin").

[39]Although adoptions into "non-standard families" may have historical roots, Tammy, 416 Mass. at 212 n.4, no such roots exist for "non-standard" marriages. See Posner, supra, 95 Mich. L. Rev. at 1579-80; Peter Lubin & Dwight Duncan, Follow the Footnote or the Advocate as Historian of Same-Sex Marriage, 47 Cath. U. L. Rev. 1271 (Summer 1998); cf. Pls. Br. at 33 n.19.

which our current marriage laws derive were enacted prior to or shortly after the adoption of our Constitution in 1780, the statutes themselves "may well be considered . . . as affording some light in regard to the views and intentions of [the Constitution's] founders." Merriam, 375 Mass. at 253.

Although public attitudes toward marriage in general and same-sex marriage in particular have changed and are still evolving, "the asserted contemporary concept of marriage and societal interests for which [plaintiffs] contend" are "manifestly [less] deeply founded" than the "historic institution" of marriage. Cooper, 592 N.Y.S.2d at 800. Perhaps the "'clearest and most reliable objective evidence of contemporary values,'" Atkins v. Virginia, 122 S. Ct. 2242, 2247 (2002)(citation omitted), is the fact that no state legislature has enacted laws permitting same-sex marriages; and a large majority of states, as well as the United States Congress, have affirmatively prohibited the recognition of such marriages for any purpose.[40] Pam Greenberg, State Laws Affecting

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[40]Current public attitudes toward same-sex marriage are very different from public attitudes toward other marriage-related rights at the time they were deemed "fundamental." When Loving was decided, prohibition of interracial marriage "was in full-scale retreat and any societal consensus on the matter

Lesbians and Gays, Legisbrief, April/May 2001, at 1 (reporting that, as of May 2001, 36 states had enacted "defense of marriage" statutes); 1 U.S.C. § 7; 28 U.S.C. § 1738C (federal defense of marriage act). And, in the last presidential election campaign, all of the Democratic and Republican candidates for president and vice president opposed the legalization of same-sex marriage. David O. Coolidge & William C. Duncan, Reaffirming Marriage: A Presidential Priority, 24 Harv. J.L. & Pub. Pol'y 623, 624-26 (Spring 2001).

Consistent with this national view, prospects for same-sex marriage legislation in Massachusetts continue to appear remote. Rick Klein. The Issues: Rights for same sex couples, Boston Sunday Globe, Sept. 15, 2002, at B4; Yvonne Abraham, O'Brien reflects on race, future; expresses sorrow she "disappointed" backers, Boston Globe, Dec. 16, 2002, at B1 (reporting O'Brien's

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plainly had collapsed." David D. Meyer, The Paradox of Family Privacy, 53 Vand. L. Rev. 527, 591 (March 2000). Only a minority of states had anti-miscegenation statutes on their books, and 14 states had recently repealed such laws. 388 U.S. at 6; see also Richard Kluger, Simple Justice 751 (1975)(Loving decision evoked "barely a murmur of objection in the land"). Similarly, when Zablocki was decided, no other state had restricted marriage on the basis of indigency, 434 U.S. at 403 (concurring opinion)(characterizing statute as "unprecedented"); and when Griswold was decided, all but two states had repealed their laws forbidding the use of contraceptives by married couples. 381 U.S. at 519 n.13; Posner, supra, 95 Mich. L. Rev. at 1586.

view that same-sex marriage legislation is "an extremely remote possibility"). Although limited domestic partnership legislation has been proposed in several successive years, e.g., S. 1208 (1999); S. 2044 (1999); H. 4947 (1999); H. 5254 (2000), no such legislation has yet been enacted. The successful candidate in the recent gubernatorial election opposed the legalization of same-sex marriage or civil unions, Excerpts from Debate: Remarks touch on . . . civil unions, Boston Globe, Oct. 2, 2002, at B5; while his main opponent had pledged to support civil union legislation and sign same-sex marriage legislation if enacted by the Legislature. Rick Klein & Stephanie Ebbert, O'Brien would back gay marriages, Boston Globe, Oct. 16, 2002, at A1. The Massachusetts populace also remains sharply divided on this issue. To our Readers, Boston Sunday Globe, Sept. 29, 2002, at A2 (acknowledging, in context of announcing future publication of same-sex unions and commitment ceremonies, that "legal rights of same-sex couples remain subjects of intense controversy").

Given that history and the current state of public opinion, as reflected in the actions of the people's elected representatives, it cannot be said that "a right to same-sex marriage is so rooted in the

traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither . . . [is] a right to same-sex marriage . . . implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed." Baehr, 852 P.2d at 57; see also Baker v. Nelson, 191 N.W.2d at 186; Dean, 653 A.2d at 333 (plurality opinion); Storrs, 645 N.Y.S.2d at 287. For these reasons, the Superior Court correctly concluded that "plaintiffs' request to reverse the Commonwealth's centuries-old legal tradition of restricting marriage to opposite-sex couples . . . should be directed to the Legislature, not the courts." A. 129.

c. None of the interests encompassed in the right to marry, as recognized for opposite-sex couples, require extending that right to same-sex couples.

The conclusion that same-sex couples have no fundamental right to marry is confirmed by examining the underlying interests plaintiffs assert in the marriage relationship. Rather than merely assume that an all-encompassing right to marry exists and extends to same-sex couples, it is necessary to focus more specifically on the underlying interests that have been

deemed fundamental to see whether they are applicable here. As recognized by one commentator, because "the right to marry can only be conceptualized as the right to . . . forge a linkage between a variety of different rights and obligations[,] . . . the key question must be which of these rights or linkages merit special constitutional protection" in this context. Earl M. Maltz, Constitutional Protection for the Right to Marry: A Dissenting View, 60 Geo. Wash. L. Rev. 949, 951 (April 1992). In undertaking that analysis, "the first question should be, what is the nature of the liberty interest at stake, and does it meet the established test for preferred constitutional status"? Hafen, supra, 81 Mich. L. Rev. at 52. A close examination of the cases discussing the importance of marriage or recognizing a fundamental right to marry reveals that the underlying interests being discussed or protected are either not shared by same-sex couples, not implicated by the challenged statutes, or otherwise not entitled to enhanced protection.

(1) Procreation

As discussed above with respect to the interpretation of Massachusetts marriage statutes, marriage has historically been considered important because of its relation to procreation. See section

I(D), supra. Similarly, the Supreme Court cases that have recognized a fundamental right to marry have also focused primarily on the underlying interest in procreation. In Skinner v. Oklahoma, 316 U.S. 535 (1942), the first case to characterize marriage as a "fundamental" right, the Supreme Court stated, as its rationale for striking down a sterilization statute, that "[m]arriage and procreation are fundamental to the very existence of the race." Id. at 541. In concluding that a sterilized individual "is forever deprived of a basic liberty," id., the Court was obviously referring to procreation rather than marriage, as this Court recognized in Matter of Moe, 385 Mass. 555, 560 (1982). Similarly, in Loving, the Supreme Court implicitly linked marriage with procreation in describing marriage as "fundamental to our very existence."[41] 388 U.S. at 12. And, in

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[41]Loving was decided primarily on race discrimination grounds; and, even in the brief (two-paragraph) due process section of its opinion, the Court focused less on the fundamental nature of the right to marry than on the "unsupportable . . . basis" --i.e., "invidious racial discrimination[]"--on which the right was denied, 388 U.S. at 12, leading the Minnesota Supreme Court to characterize Loving as invalidating the statute at issue there "solely on the grounds of its patent racial discrimination" and therefore to provide no support for a fundamental right to same-sex marriage. Baker v. Nelson, 191 N.W.2d at 187. By dismissing the appeal from that decision for lack of a substantial federal question, 409 U.S. 810

Zablocki, the Court expressly linked the right to marry with the right to procreate: "[I]f [plaintiff]'s right to procreate means anything at all, it must imply some right to enter the only relationship in which the State . . . allows sexual relations legally to take place." 434 U.S. at 386. Once again, in Turner v. Safley, the Court included among other attributes of inmate marriages the "expectation that [the marriage] ultimately will be fully consummated." 482 U.S. at 96. Since same-sex couples are, by definition, unable to procreate on their own, any right to marriage they may possess cannot be based on the interest in procreation, which was essential to the Supreme Court's denomination of the right to marry as fundamental.

(ii) Privacy

Plaintiffs' reliance on a right to privacy is equally unavailing for much the same reasons, among others. See Cass R. Sunstein, Homosexuality & the Constitution, 70 Ind. L.J. 1, 3 (Winter 1994) (finding right to privacy an unlikely source of gay and lesbian rights); Kendall Thomas, Beyond the Privacy Principle, 92 Colum. L. Rev. 1431 (1992)(same). The Supreme Court

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(1972), the Supreme Court effectively agreed with that conclusion. Hicks v. Miranda, 422 U.S. 332, 344 (1975) (dismissal on that ground constitutes holding that constitutional claims were unsubstantial).

cases recognizing a right to privacy--e.g., Griswold (striking down statute prohibiting use of contraceptives); Roe (striking down statute criminalizing abortion)--like those recognizing a right to marry, have focused primarily on the decision whether or not to procreate, which is not implicated here, and have refused to recognize an "unlimited right to privacy." Roe, 410 U.S. at 154.

While the Massachusetts Constitution has been found to provide greater protection to certain privacy rights--e.g., those involving abortion--than the federal constitution, Moe v. Sec'y, 382 Mass. at 651, Massachusetts courts have been no more willing than the federal courts to adopt a "universal[]" "privacy doctrine," Marcoux, 375 Mass. at 67, or to "derive[] controversial 'new' rights from the Constitution." Aime, 414 Mass. at 676 n.10. The difference between Massachusetts and federal abortion jurisprudence is not in whether the right to abortion is deemed fundamental but in how to determine whether that right has been unconstitutionally burdened. Planned Parenthood League v. Attorney Gen., 424 Mass. 586, 591 (1997). And, under both the state and federal constitutions, the standard of review of abortion restrictions is considerably more deferential than the strict scrutiny

ordinarily applied to deprivations of "fundamental" rights. Meyer, supra, at 536 40.

Furthermore, what the Griswold Court found "repulsive to the notions of privacy surrounding the marriage relationship" was the prospect of "allow[ing] the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives." 381 U.S. at 485-86; see also Moe v. Sec'y, 382 Mass. at 658 (finding it "'difficult to imagine a clearer case of bodily intrusion'" than being forced to bear a child). The statutes at issue here, which regulate only the public act of obtaining a marriage license, do not implicate privacy in that sense. Cf. Commonwealth v. King, 374 Mass. 5, 14 (1977)(solicitation of prostitution "while in a place to which the public had access" implicated no "constitutionally protected rights of privacy"); Marcoux, 375 Mass. at 68 (right to privacy, at most, protects conduct "limited more or less to the hearth"); Opinion of the Justices, 375 Mass. 795, 807 (1978) (right to privacy does not protect state officials' financial affairs from disclosure).

Also, when the Griswold Court spoke of "marital relations" in the context of finding it "difficult to imagine what is more private or more intimate than a

husband and wife's marital relations," 381 U.S. at 495 (concurring opinion), it was obviously referring to sexual relations, rather than the more abstract privacy interests plaintiffs assert here.[42] Even assuming that sexual relations between gay men or lesbians are constitutionally protected, but see Bowers v. Hardwick, 478 U.S. 186 (1986), nothing in the statutes challenged here implicates any interest in the privacy of plaintiffs' sexual relations, cf. GLAD v. Attorney Gen., 436 Mass. 132, 133-34 (2002)(reaffirming that private consensual sexual conduct is not prohibited by statutes criminalizing sodomy or "unnatural acts").

(iii) Child-Rearing

Nor is the constitutionally protected interest in child-rearing, recognized in Meyer v. Nebraska, 262 U.S. 390, 399 (1923), Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925); and Care & Prot. of Robert, 408 Mass. 52, 58, 60 (1990), implicated here.[43] The fact that plaintiffs cannot marry has no bearing on

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[42]While the facts of the Griswold case involved a married couple, later cases clarify that its holding was not premised on the marriage relationship. See Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972) (stating that Griswold rested on the "right of the individual" to be free from governmental interference with child-bearing decisions); Carey v. Population Servs. Int'l, 431 U.S. 678, 687 (1977)(same).

[43]The parental rights cases plaintiffs cite, Pls. Br. at 31-32, therefore have no bearing on this case.

their independently protected constitutional rights as parents,[44] which, as with opposite-sex parents, are limited only by their continued fitness and the best interests of their children. Bezio v. Patenaude, 381 Mass. 563, 579 (1980)(courts may not use parent's sexual orientation as reason to deny child custody).

(iv) Personal Autonomy

Although some of the privacy cases also speak in terms of freedom of choice or personal autonomy, no court has ever recognized such an open-ended right. "That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected . . . ." Glucksberg, 521 U.S. at 727; see also Baehr, 852 P.2d at 57 (declining "'to lend talismanic effect' to abstract phrases such as

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[44]Since each of the plaintiffs who have children are either the birth parents or adoptive parents of their children, A. 22, 24, 25, 33, the Court need not consider here whether nonparents have any constitutionally protected interest in child-rearing. Although the Court has recognized the status of "de facto parents" in various contexts, e.g., E.N.O., 429 Mass. at 829, it has never suggested that such status enjoys constitutional protection. Cf. Adoption of a Minor, 386 Mass. 741, 749, 750 (1982) ("foster parents have no 'liberty interest' in adoption," even though foster family shares "many attributes of a natural family").

'intimate decision' or 'personal autonomy'"; citation omitted). As recognized by one commentator, "true autonomy as a guiding principle is simply unrealistic about the need for law in an organized society. As Justice Holmes put it, 'pretty much all law consists in forbidding men to do some things that they want to do . . . .'" Hafen, supra, 81 Mich. L. Rev. at 525 (citation omitted).

Rather, the protected choices generally have been limited to those concerning "whether or not to beget or bear a child," Matter of Moe, 385 Mass. 555, 564 (1982); see also Opinion of the Justices, 423 Mass. 1201, 1234-35 (1996)("focus of [Griswold and Roe] and the cases following them has been the intrusion . . . into the especially intimate aspects of a person's life implicated in procreation and childbearing"); how to raise a child, see Robert, 408 Mass. at 58, 60; or whether or not to accept medical treatment, see Brophy, 398 Mass. at 430; Saikewicz, 373 Mass. at 742, none of which is implicated here. Even in those protected spheres, the right to choose is not unlimited.[45]

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[45]See Leigh v. Bd. of Reg. in Nursing, 399 Mass. 558, 562 (1987)(declining to extend a woman's right to choose abortion "to guarantee a woman the right to choose the manner and circumstances in which her baby is born"); Yannas v. Frondistou Yannas, 395 Mass. 704, 709 (1985)(declining to extend parent's right to make

Moreover, as discussed in section II(C), infra, to constitute an infringement of a right to personal choice, "the State action must be coercive or compulsory in nature." Tarin, 424 Mass. at 756. Where, as here, the government is not infringing plaintiffs' ability to enter into relationships of their choosing, but simply failing to confer state-sanctioned benefits on the basis of such relationships, no personal autonomy right is implicated.

(v) Intimate Association

The protected right to freedom of association, in the sense of freedom of choice "to enter into and maintain certain intimate human relationships,"[46]

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decisions about child-rearing to create a presumption in favor of joint physical custody); Glucksberg, 521 U.S. at 722 (declining to extend right to refuse medical treatment to right to choose time and manner of death).

[46]In that sense, freedom of association is protected as an element of liberty or due process rather than as an element of freedom of expression, Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984), and is therefore discussed here. As pointed in note 19, supra, plaintiffs have effectively waived their Article 16 freedom of expression and association claims on appeal.

If the Court nevertheless addresses those claims, it should reject plaintiffs' freedom of speech claims for the reasons given by the Superior Court. A. 130. And, because marriage is not protected speech, the Court should reject plaintiffs' freedom of association claim as well. Freedom of association, in the sense encompassed by freedom of expression, is simply the "right to associate for the purpose of engaging in those activities protected by the First Amendment--

Roberts, 468 U.S. at 617, is similarly limited. As recognized by the Supreme Court, that right affords protection only to "certain kinds of personal relationships," id. at 618--such as those between husband and wife, parent and child, and among close relatives, id. at 619--that "have played a critical role in the culture of the Nation" and "are deeply rooted in this Nation's history and tradition." Moore, 431 U.S. at 498-99, 503 (distinguishing on this basis between family and nonfamily relationships). Unlike opposite-sex marriages, which have deep historic roots, see section II(B)(2)(b), supra; or the parent-child relationship, which reflects a "strong tradition" founded on "the history and culture of Western civilization" and "is now established beyond debate as an enduring American tradition," Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); or extended family relationships, which have been "honored throughout our history,"[47] Moore, 431 U.S. at 505, same-sex

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speech, assembly, petition for the redress of grievances and the exercise of religion." Roberts, 468 U.S. at 618; accord Donaldson v. Farrakhan, 436 Mass. 94, 102 (2002). Since marriage is not protected speech, and plaintiffs claim no interference with any right to associate for political or religious purposes, Article 16 affords no basis for their asserted constitutional right to marry.

[47]Even a biological relationship does not necessarily enjoy constitutional protection. See Lehr

relationships, although recently becoming more accepted, are certainly not so "deeply rooted in this Nation's history and tradition" as to warrant such enhanced constitutional protection.[48]

(vi) Economic Interests

As to plaintiffs' economic interests in the various government benefits restricted, by law, to spouses, it has been clear, for at least a half-century, that such economic interests are not entitled to constitutional due process protection. Indeed this Court has characterized those "[c]ases . . . where Justices of a bygone era used substantive due process to invalidate economic legislation with which they

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v. Robertson, 463 U.S. 248 (1983)(biological father who fails to participate in child rearing has no due process right to contest child's adoption). Nor does the "existence of strong emotional bonds between [children and their caretakers] . . . inherently grant them a fundamental right to . . . intimate association." Lofton v. Kearney, 157 F. Supp. 2d 1372, 1379 (S.D. Fla. 2001).

[48]See Shahar v. Bowers, 114 F.3d 1097, 1099 (11th Cir. 1997) (expressing "considerable doubt" that a woman has an associational right to marry another woman, "[g]iven the culture and traditions of the Nation"), cert. denied, 522 U.S. 1049 (1998); Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 845 (1977) (distinguishing between traditional and foster families on this basis); Adoption of a Minor, 386 Mass. at 749-50 (same). In upholding orders for visitation between children and adults outside the traditional nuclear family, this Court was protecting the children's best interests, not the adults' freedom to associate. Blixt, 437 Mass. at 664; E.N.O., 429 Mass. at 831-32.

disagreed . . . as symbols of judicial usurpation of power." Aime, 414 Mass. at 674 n.10. Although marriage also confers economic rights and responsibilities between the spouses themselves, most such rights and obligations can also be created by contract outside of a marital relationship, Wilcox v. Trautz, 427 Mass. 326, 332 (1998); see section II(C), infra, and therefore are not implicated by the statutes challenged here.

(vii) Emotional Support and Commitment

Although "expressions of emotional support and public commitment" have been recognized as among the attributes of marriage, which, "taken together . . . form a constitutionally protected marital relationship," Turner v. Safley, 482 U.S. at 95 96 (emphasis added), those interests, standing alone, cannot be the source of a fundamental right to marry. While damage to one's "status in the community," may be sufficient harm to confer standing to sue, Lowell, 380 Mass. at 667, such status has never been recognized as a fundamental right.[49] See Paul v. Davis, 424 U.S.

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[49]The Lowell court used that phrase and the phrase "second-class person" only in the context of finding that plaintiff had been "adversely affected" by the challenged statute and therefore had standing to challenge it. Id. at 667. Plaintiffs therefore overreach in relying on that language to suggest that

693, 701 (1976)(mere damage to reputation does not constitute deprivation of "liberty").

If plaintiffs have no fundamental right to the various interests in marriage discussed above, then they have no such right to be declared "married" by the state, just as the unmarried father in Michael H. had no fundamental right simply to be declared a "natural father." 491 U.S. at 126. Even the Vermont Supreme Court, which found Vermont's marriage statutes unconstitutional, declined to hold that "the denial of a marriage license operates per se to deny constitutionally-protected rights." Baker v. State, 744 A.2d at 886.

C. Even If Plaintiffs' Interests in Marriage Were Constitutionally Protected, the Marriage Statutes' Intrusion on Those Interests Does Not Rise to the Level of a Constitutional Deprivation.

Even assuming that same-sex couples had constitutionally protected interests in marriage, plaintiffs would still have to demonstrate that the present statutory scheme intrudes on those interests

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they have a legal right to marry one another or that they have suffered a deprivation of constitutional proportion. Pls. Br. at 10. Indeed, the Lowell case was not a substantive due process case at all but was decided solely on equal protection grounds, id. at 665 n.5; and the challenged statute was upheld in all but one respect, id. at 670, despite its adverse effect on the plaintiff.

"to an extent which would constitute an unconstitutional interference by the State "[50] Curtis, 420 Mass. at 757. To satisfy this "threshold requirement," Curtis, 420 Mass. at 757, "the State action at issue must be coercive or compulsory in nature." Id.

"'It is the State's affirmative act of restraining the individual's freedom to act on his own behalf . . . which is the "deprivation of liberty" triggering the protections of the Due Process Clause.'" Williams v. Hartman, 413 Mass. 398, 403 (1992)(citations omitted). In the marriage and family context, in particular, the due process provisions have acted as "a shield for the private citizen against government action," Doe v. Doe, 365 Mass. at 563, rather than a sword requiring the government to act. Thus, while forcing individuals to marry, bear or beget a child, have an abortion, take debilitating medication, or even associate against their will would certainly constitute such a constitutional deprivation, A.Z. v. B.Z., 431 Mass. 150, 160 (2000); Doe v. Doe, 365 Mass. at 560; Roe, 410

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[50]While defendants do not dispute that plaintiffs have suffered sufficient harm to have standing to bring this lawsuit, cf. Lowell, 380 Mass. at 670, that level of harm is considerably less than what is required to succeed in establishing a constitutional deprivation.

U.S. at 153; Saikewicz, 373 Mass. at 744; Roberts, 468 U.S. at 617-21, declining to give official state recognition and financial benefits to members of same-sex relationships does not. Massachusetts' marriage statutes are not statutes of exclusion, like the provision at issue in Romer v. Evans, 517 U.S. 620 (1996), but "statutes of inclusion of opposite-sex couples who may wish to enter a particular legal status recognized by the state." Dean, 653 A.2d at 362 (concurring opinion); see also Opinions of the Justices, 427 Mass. 1211, 1218-19 (1998)(finding no constitutional injury in providing publicly funded health insurance to some groups but not others).

As recognized by the Supreme Court, there is a fundamental difference between punishing or prohibiting activities and declining to officially endorse them. Rust v. Sullivan, 500 U.S. 173, 193 (1991). Compare the "polite" denials of marriage licenses at issue here, A. 43-47, with, for example, the coercive government conduct that gave rise to the Loving case.[51]

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[51]The Lovings "were awakened early in the morning as three law officers . . . opened the unlocked door of their home, walked into their bedroom, and shined a flashlight in their faces. . . . [The] Sheriff . . . demanded to know what the two of them were doing in bed together. Mildred answered, 'I'm his wife,' while Richard pointed to the District of Columbia marriage certificate that hung on their bedroom wall. 'That's

Similarly, what concerned the Supreme Court in Griswold was the prospect of "allow[ing] the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives." 381 U.S. at 485-86. See also Moore, 431 U.S. at 499 (finding it significant, for due process purposes, that challenged provision "makes a crime of a grandmother's choice to live with her grandson")(emphasis added). Indeed, in concurring in the Griswold decision, Justice Goldberg distinguished, on this very basis, the criminal law against the use of contraceptives invalidated there "from statutes saying who may marry." 381 U.S. at 499. By comparison to the government actions at issue in those cases, the level of intrusion effected by the polite denial of a marriage license is insufficiently "coercive" to constitute a constitutional deprivation.

Nor is the denial of marriage licenses "sufficiently grievous" in a constitutional sense, to invoke due process protection. See Whalen v. Roe, 429

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no good here,' [the] Sheriff . . . replied. . . . [T]hen he and his two deputies hauled the Lovings off to a nearby jail . . . ." They were subsequently indicted for violating the state's criminal anti-miscegenation statute and, after pleading guilty, were sentenced to one year in jail, suspended on the condition that they leave the state and not return for 25 years. Robert A. Pratt, Crossing the Color Line: A Historical Assessment and Personal Narrative of Loving v. Virginia, 41 How. L. J. 229, 236 (Winter 1998).

U.S. 589, 600 (1977). Such protection is warranted where "the governmental action . . . provides no outlet" for those adversely affected, Tarin, 424 Mass. at 756, but not where the affected parties have other means, even if less effective or more costly, of furthering their protected interests. For example, where a father remains able "to nurture his children and to participate in decisions concerning . . . their care," a statute's interference with his ability to financially support his children and actively participate in their lives in other ways, "does not . . . place[] any coercive constitutional burden on him." Id. at 757; see also Parham v. Hughes, 441 U.S. 347, 355-56 (1979)(rejecting father's challenge to paternity statute, which could be used by mothers but not fathers to establish paternity, on ground that father could establish his parental rights by other means).

Without being married, plaintiffs can obtain many of the same benefits through other means, such as partnership agreements, Wilcox, 427 Mass. at 330 (recognizing right of unmarried cohabitants to enter into enforceable partnership agreements);[52] dissolution

[52]Such agreements are more readily enforceable than antenuptial agreements. Andrea D. Heinbach &

agreements; domestic partner registration, under which many Massachusetts employers and some municipalities provide benefits to domestic partners of their employees or residents; property transfers; gifts; life insurance; powers of attorney; health-care proxies and living wills; coparenting agreements; standby and emergency guardianships; name changes; wills; trusts; and burial instructions. Maureen H. Monks et al., Planning and Drafting Legal Instruments for Nontraditional Families, in Representing Nontraditional Families 1-50 (Katherine Triantafillou ed., 2000).[53]

In recent years, Massachusetts courts have demonstrated a willingness to find certain statutory and common-law benefits applicable to nontraditional families, including same-sex couples. As illustrated by the facts of this case, members of same-sex couples can adopt their partners' children.[54] Tammy, 416 Mass.

Pierce J. Reed, Wilcox v. Trautz: The Recognition of Relationship Contracts in Massachusetts, 43 B. B.J. 6, 19 (Nov./Dec. 1999).

[53]See also Brenda Maddox, Married & Gay: An Intimate Look at a Different Relationship 209 (1982); Anne B. Brown, Note, The Evolving Definition of Marriage, 31 Suffolk U. L. Rev. 917, 937-39 (1998); Heinbach & Reed, supra, at 19-20; Patricia Wen, Cohabitors' pacts tie legal knot for unwed, Boston Globe, Dec. 12, 2002, at A1.

[54]Massachusetts was the second state in the nation to allow adoptions by same-sex parents. Amy J. Galatis, Note, Can We Have a "Happy" Family? Adoption by Same-Sex Parents in Massachusetts, 6 Suffolk J.

205; Adoption of Galen, 425 Mass. 201 (1997); and, even without adoption, some same-sex couples have succeeded in having both of their names listed on the child's birth certificate. Knoll v. Beth Israel Deaconess Med. Ctr., Inc., Suffolk Probate and Family Court, No. 00W1343 (June 28, 2000).[55] As this Court has further acknowledged, the adopted children of same-sex couples enjoy all of the rights of inheritance, child support, and insurance that children of opposite-sex parents have. Tammy, 416 Mass. at 214.

Trial & Appellate Advoc. 7 (2001).

[55]See also E.N.O., 429 Mass. at 824 (holding that same-sex partner of child's mother was child's "de facto" parent for purposes of visitation with child after couple separated); Turner v. Lewis, 434 Mass. at 336 (construing "related by blood" in chapter 209A to include relationship between child's mother and paternal grandparent); Youmans, 429 Mass. 774 (upholding order of visitation between child and "de facto" parent, the child's aunt); Reep v. Comm'r of Dep't of Employ. & Training, 412 Mass. 845 (1992)(holding that former employee's decision to move because her opposite-sex domestic partner was relocating his business constituted "urgent, compelling, and necessitous" reason to leave her employment for purposes of entitling her to unemployment compensation); Hatton v. Meade, 23 Mass. App. Ct. 356 (1987)(upholding imposition of constructive trust in favor of woman upon house of man with whom she had intimate relationship); Connolly v. Michell, Nos. 99-E-0183, -0184 (Middlesex Prob. & Fam. Ct. Apr. 2002)(imposing child-support obligation on same-sex "de facto" parent); Dalessio v. Mass. Mut. Life Ins. Co., No. 00-070 (Hampden Super. Ct. May 28, 2001)(presence of opposite-sex domestic partner of client at meeting with attorney did not waive attorney-client privilege).

Also, by legislation, nonmarital children now have the same right to child support as marital children.[56] G.L. c. 209C, § 1. And, by executive order, state employees are entitled to bereavement leave upon the death, and sick leave upon the illness, of a domestic partner, Exec. Order No. 340 (Sept. 23, 1992); and state and county prisons, jails, hospitals, and other residential facilities are required to afford domestic partners the same visitation privileges established for spouses at each facility. Exec. Order No. 341 (Sept. 23, 1992).

Other benefits that plaintiffs seek--such as those conferred on spouses by the federal tax, immigration, and social security laws and those available to married couples in other states--are not within the Commonwealth's power to provide. Even if same-sex couples were permitted to marry in Massachusetts, the "Defense of Marriage Acts," enacted by the federal government and most states, would prevent such marriages from being recognized for purposes of federal or most other states' laws.[57] See, e.g., Rosengarten,

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[56]In some respects--including the privacy of their birth records, G.L. c. 46, § 2A--nonmarital children enjoy greater protection than marital children.

[57]The suggestion that "once any state begins allowing same-sex couples to marry, the federal government may well return to its previous practice of

802 A.2d at 178 (even without state DOMA, Connecticut court declines to recognize Vermont civil union).

Many private employers and several municipalities in Massachusetts, see, e.g., City of Cambridge Mun. Code § 2.119, already provide various benefits to the domestic partners of their employees or residents.[58] Levi, supra, at 137, 138-39, 146 n.53. That more do not do so is attributable not to the marriage statutes, which do not prohibit such benefits, but to business decisions of individual employers, many of whom do not provide benefits even to their own employees. There is also nothing prohibiting the Legislature from providing further benefits and protections to same-sex couples, as other states have done. See, e.g., 2001 Cal. Legis. Serv. c. 893 (permitting domestic partners to sue for wrongful death, be exempt from state income tax on partner's health benefits, file for disability and make

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deferring to the state definitions of marriage," BBA Br. at 24 n.19, is fanciful; federal and state DOMA laws were enacted precisely for the purpose of precluding interstate or federal recognition of any same-sex marriages permitted by a state.

[58]The Connors case (invalidating Boston's domestic partnership ordinance) "has no effect on either domestic partnership benefits provided by private employers or municipal domestic partner benefits other than group health insurance." Jennifer L. Levi, Massachusetts' Domestic Partnership Challenge: Hope for a Better Future, 9 L. & Sexuality 137, 138 (1999-2000).

medical decisions for incapacitated partner, and take sick leave to care for partner or partner's child).

Similarly, with or without the availability of state-issued marriage licenses, same sex couples remain free to publicly express their commitment, through private or religious ceremonies or other means,[59] see, e.g., A. 22, 25, 36; Relig. Coal. Br. at 17-22, and to provide emotional support to one another. The legal right to marry would not create a right obtain each other's emotional support, which the law cannot require or enforce even between married couples. Doe v. Doe, 365 Mass. at 563.

While it may be more costly for plaintiffs to obtain various benefits and protections without the benefit of state-sanctioned marriage, and while some benefits may still be unavailable, any such financial harm falls far short of the much more "coercive financial incentives" that this Court found to constitute a constitutional deprivation of the right to choose abortion. Moe v. Sec'y, 382 Mass. at 649.

Because, as the Superior Court held, any

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[59]Contrary to amici's assertion, Profs. of Express. Br. at 11-12 & n.4., such ceremonies are taken seriously by the media and the public. See Mark Jurkowitz, Globe to publish same-sex unions: Newspaper cites community interest, Boston Sunday Globe, Sept. 29, 2002, at B3.

constitutionally protected rights that plaintiffs may have in obtaining a marriage license have not been "grievously" or "coercively" infringed, A. 133, the Court need not even inquire into the state's interests in limiting marriage to opposite-sex couples. Curtis, 420 Mass. at 757 and n.5. Those legitimate interests, nevertheless, are discussed in section II(E)(2), infra.

D. The Marriage Statutes Do Not Unconstitutionally Discriminate Against Same-Sex Couples.

1. The language, history, and purpose of Articles 1 and 10 of the Declaration of Rights do not indicate any intent to require the Legislature to permit same-sex marriage.

In support of their equal protection claims, plaintiffs rely on Articles 1, 6, 7, and 10 of the Declaration of Rights. Pls. Br. at 42. As discussed in section II(B)(1), supra, Articles 6 and 7 cannot reasonably be construed as conferring individual rights in general or equal protection rights in particular. Similarly, as discussed in section II(B)(2), Article 10 was concerned primarily with establishing a right to government "according to standing laws," art. 10, rather than with conferring individual civil rights. Therefore, the present discussion will focus primarily on Article 1, the only provision that even mentions

"equality," and then briefly revisit Article 10 in the equality context.

As originally enacted, Article 1 did not expressly prohibit discrimination[60] but merely declared that "[a]ll men are born free and equal," language adopted almost verbatim from the Declaration of Independence ("all men are created equal"). In neither document were those words intended to create individual rights. John M. Lundin, The Law of Equality Before Equality Was Law, 49 Syracuse L. Rev. 1137, 1140-41 (1999). Rather, the framers "were . . . concerned . . . not with the need to recast the social order nor with the problems of economic inequality and the injustices of stratified societies but with the need to . . . fight off the apparent growth of prerogative power." Bailyn, supra, at 283. The equality they were seeking was equality with the inhabitants of England. Adams, supra, at 166; David Skeels, Due Process and the Massachusetts Constitution, 84 Mass. L. Rev. 76, 80 (Fall 1999).

For example, opposition to the Stamp Act and other restrictive trade laws was based on their

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[60]The last sentence of Article 1--providing that "[e]quality of the law shall not be denied or abridged because of sex, race, color, creed, or national origin--was added in 1976 by the Equal Rights Amendment ("ERA"), Amend. art. 106. That amendment also changed the word "men" in the first sentence to "people."

"discrimination against merchants in the colonies," which "'constituted an unnatural Difference between Men . . . born equally free, and entitled to the same civil rights,'" Adams, supra, at 167 (citation omitted); and pamphlets published at that time all "limited the application of the principle of equality to justifying the rejection of parliamentary supremacy over the colonies." Id. at 171. "Even Thomas Paine . . . did not apply the postulate of equality to social conditions and political rights within the colonies." Id.

By including a declaration of equality in the Massachusetts Constitution, the framers did not intend to guarantee individual equal rights or initiate social reform. Id. at 180-86. Nor was Article 1 originally construed in that manner. For example, in 1849, this Court rejected an Article 1 challenge to segregated but otherwise equal schools, deferring to legislative and local judgment. Roberts v. City of Boston, 59 Mass. (5 Cush.) 198, 205, 207-09 (1849).

A century later, presumably dissatisfied with Article 1's limited reach, the Legislature and the people amended Article 1 to provide a more express protection of equal rights, in the form of the ERA. The adoption of that amendment lends support to a

limited construction of the first sentence of Article 1--which declares that "[a]ll people are born free and equal"--to avoid rendering superfluous the second sentence--which prohibits denial of equal rights because of certain specified characteristics. If the first sentence is construed broadly to prohibit the denial or abridgement of equality on any basis, including those listed in the ERA, then the second sentence would be "mere surplusage." Powers v. Sec'y of Admin., 412 Mass. 119, 124 (1992)(rejecting proposed construction of constitutional phrase for that reason).

Nor is the ERA itself of any help to the plaintiffs here, as the Superior Court recognized. A. 116 n.6. When that amendment and its federal counterpart were being considered, neither was viewed as having any effect on the allowance or denial of same-sex marriages. See Special Commission, supra, at 21. The ERA's prohibition of sex discrimination, in particular, was seen as "not concerned with the relationship of two persons of the same sex . . . [but] only . . . [with] those laws or public-related actions which treat persons of opposite sexes differently."[61]

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[61]Even opponents of the state ERA did not contend that the ERA was intended to require the allowance of same-sex marriages but only that such marriages would be an "unintended consequence" of the ERA. Pls. Brf.,

Id. at 21 & 28-29 nn.66 & 67 (citing Singer, 522 P.2d 1187, and 1975 Op. A.G. of Colo. (Apr. 24, 1975)). In the words of one commentator on the federal ERA, "In other words, if a state decided to legalize marriages between men and men, it would be required to legalize marriages between women and women, or vice versa. But otherwise the amendment would have no effect on legalizing sexual preference." Mary F. Berry, Why ERA Failed: Politics, Women's Rights, and the Amending Process of the Constitution (1986); see also Thomas I. Emerson & Barbara G. Lifton, Should the E.R.A. Be Ratified?, 228 Conn. B.J. 227, 233 (Dec. 1980)(federal ERA "would not legalize homosexual marriages or otherwise affect laws dealing with homosexual couples").

Further evidence that the ERA was not intended to require recognition of same-sex marriage is found in St. 1989, c. 516, which amended the state anti-discrimination statute to prohibit discrimination on the basis of sexual orientation. In so doing, the Legislature expressly stated that "[n]othing in this act shall be construed to legitimize or validate a 'homosexual marriage' so called." Id. Because this

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Add. 4.

statute was enacted not long after the ERA was ratified, it "may well be considered . . . as affording some light in regard to the views and intentions" of the framers of the ERA itself. Cf. Merriam, 375 Mass. at 254 (so stating about redistricting statute enacted shortly after redistricting constitutional amendment). If the Legislature believed that the ERA already protected against sexual orientation discrimination, enactment of this statute would have been unnecessary. On the other hand, if the Legislature believed that the ERA required the allowance of same-sex marriage, the Legislature presumably would not have excluded "homosexual marriage" from statutory protection.

Plaintiffs also rely on Article 10 as a source of equality rights. However, as discussed in section II(B)(2)(a), above, that provision was designed to ensure government by consent of the governed, as expressed in the "standing laws" enacted by their representatives. Because of that underlying intent, the "critical inquiry" under Article 10 is not whether the challenged statute "favors one person or group at the expense of another," Kienzler v. Dalkon Shield Claimants Trust, 426 Mass. 87, 91 (1997), but whether it "can be said to have some legitimate public purpose." Id. at 91. Indeed, "'the Legislature may go

so far as to confer an outright bounty on selected individuals,'" id. at 90-91 (citation omitted), without violating Article 10, as long as "'some public purpose is promoted, . . . as to which the Legislature's judgment will weigh heavily.'" Id. at 91(citation omitted); see also Opinions of the Justices, 427 Mass. at 1218-19 (opining that providing health insurance benefits to employees' domestic partners would not violate Article 10 rights of other employees, any more than providing health insurance coverage to employees' dependents would violate rights of employees without dependents). Thus Article 10 adds no further equal rights protection.

2. The marriage statutes do not discriminate on the basis of sex.[62]

Limiting marriage to opposite-sex couples is not a denial of "[e]quality . . . because of sex," within the meaning of the ERA. Consistent with the ERA's central purpose--i.e., to eradicate discrimination against women (and other named groups) and in favor of men or

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[62]Plaintiffs complain that the trial court rejected their sex discrimination claim without sufficient analysis. Pls. Br. at 48 & n.30. However, because the sex discrimination issue is purely a legal one, which is properly reviewed de novo by this Court, the brevity of the Superior Court's analysis of that issue is inconsequential. See Jancey v. Sch. Comm., 427 Mass. 603, 606 (1998).

vice versa, Attorney Gen. v. Mass. Intersch. Athletic Ass'n (MIAA), 378 Mass. 342, 357 (1979)--this Court has construed the ERA to prohibit laws that advantage one sex at the expense of the other, e.g., id. at 349-52, but not laws that treat men and women equally, id. at 346-49 (assuming that "separate but equal" treatment of males and females would be constitutionally permissible). As the Vermont Supreme Court recognized about that state's marriage statutes, "[T]here is no discrete class subject to differential treatment solely on the basis of sex; each sex is equally prohibited from precisely the same conduct," Baker v. State, 744 A.2d at 880 n.13. For that reason, the Vermont Supreme Court rejected same-sex couples' sex discrimination claim, id., as have all but one of the appellate courts that have considered such claims.[63] But see Baehr, 852 P.2d at 64 (plurality opinion)(holding that state's marriage laws discriminated on basis of sex, but remanding case to the trial court to consider sufficiency of justification).[64]

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[63]See, e.g., Singer, 522 P.2d at 1191-92; Baker v. Nelson, 191 N.W.2d at 186-87; Dean, 653 A.2d at 363 n.2 (concurring opinion); see also Paul B. Linton, Same-Sex Marriage Under State Equal Rights Amendments, 46 St. Louis L.J. 909, 961-62 (Fall 2002).

[64]In so holding, the Hawaii Supreme Court based its decision on the equal protection provision of that state's constitution, Baehr, 852 P.2d at 67 (plurality

Courts have applied this same rationale in rejecting claims of "sex" discrimination in other contexts as well. For example, in King, 374 Mass. at 16, this Court held that a law prohibiting prostitution did not discriminate based on sex because it applied to both male and female prostitutes.[65] See also Pers. Adm'r v. Feeney, 442 U.S. 256, 274 (1979)(declining to characterize veterans' preference as sex discrimination because it applied to both male and female veterans). Like the statutes challenged in those cases, the marriage statutes challenged here apply equally to

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opinion), which, unlike the Massachusetts ERA, was expressly intended to proscribe discrimination based on sexual orientation, as the state conceded in that case. Baehr v. Miike, Civ. No. 91-1394-05, slip op. at 2 n.1 (Dec. 9, 1999).

[65]See also Phillips v. Wisc. Pers. Comm'n, 482 N.W.2d 121, 129 (Wisc. Ct. App. 1992) (rejecting sex-discrimination challenge to state's denial of health insurance coverage for state employee's same-sex partner on ground that such "coverage is unavailable to unmarried companions of both male and female employees"); State v. Walsh, 713 S.W.2d 508, 510 (Mo. 1986) (rejecting sex-discrimination challenge to sodomy statute because it "applies equally . . . to men and women [in] prohibit[ing] both classes from engaging in sexual activity with members of their own sex"); Steffa v. Stanley, 350 N.E.2d 886, 889 (Ill. App. Ct. 1976)(bar of tort actions between spouses "applies equally to male and female" and therefore "cannot be said to discriminate on the basis of sex" under state ERA); Grant v. South-West Trains, Ltd., Case C-249/96, 1998 E.C.R. I-261, I-646 (1998)(available at http://europa.eu.int)(denying travel benefits for employee's same-sex partner not sex discrimination because policy applies equally to male and female employees).

males and females. Those statutes therefore do not violate the ERA's proscription of "sex" discrimination.[66] In this respect, the marriage statutes challenged here are very different from the statute at issue in Lowell and the rule at issue in MIAA, which advantaged one sex over the other.

Although, in Loving, the Supreme Court rejected the state's argument that the challenged anti-miscegenation statute did not discriminate on account of race because it applied equally to whites and nonwhites,[67] 388 U.S. at 8, the Loving Court had strong reasons--not present here--to conclude that the statute

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[66]An example of a marriage classification that would constitute sex discrimination would be a statute allowing two women but not two men to marry. Singer, 522 P.2d at 1192 n.8.

[67]Other cases that plaintiffs characterize as "rejecting the 'equal discrimination defense.'" Pls. Br. at 50 n.12, do not, in fact, do so. Instead, either the court found discrimination against one group, or no such "equal discrimination" defense was even raised. See Califano v. Westcott, 443 U.S. 76, 84-89 (1979)(government conceded that challenged provision was gender-based; court's conclusion that it was also "gender-biased" rested on fact that it discriminated against families in which the female spouse was the wage earner); United Bldg. & Constr. Trades Council v. Camden, 465 U.S. 208, 220(1984) (holding that out-of-state residents had standing to seek review of allegedly discriminatory statute, despite fact that statute also affected some in-state residents); Hunter v. Underwood, 471 U.S. 222, 230-31 (1985)(government conceded that challenged provision was motivated by discrimination against blacks, even though provision also affected some whites).

nevertheless "invidious[ly] discriminat[ed] on the basis of race." Id. at 11, 12.

First, the statute, on its face, was expressly based on race.[68] See Dean, 653 A.2d at 362 (concurring opinion)(distinguishing Loving on this ground); cf. Buchanan v. Dep't of Employment & Training, 393 Mass. 329, 334 (1984)(distinguishing Lowell and MIAA cases on that ground).

Second, the statute's legislative history demonstrated that it was intended not merely to punish interracial marriages but to do so for the sole benefit of the white race, leading the Court to conclude that the law was "designed to maintain White Supremacy." Loving, 388 U.S. at 11; see also May It Please the Court 280 (Peter Irons & Stephanie Guitton eds., 1993) (law struck down in Loving originally entitled "'A Bill to Preserve the White Race'")(quoting from transcript of oral argument in Loving).

Third, consistent with its purpose, the act did not apply equally to members of all races; it applied only to interracial marriages involving whites, not to marriages between two members of other races, such as

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[68]As plaintiffs emphasize, Pls. Br. at 13-14, the marriage statutes do not expressly limit marriage to opposite-sex couples.

blacks or American Indians. Loving, 388 U.S. at 11 n.11.

Fourth, the definition of "white" contained in the statute--"'no trace whatever of any blood other than Caucasian'" (or no more than 1/16 American Indian blood, reflecting a "desire to recognize as an integral and honored part of the white race the descendants of . . . Pocahantas" and her white husband, id. at 5 n.4) --facially discriminated particularly against blacks, the only other race mentioned in the statute.

And, fifth, the statute's requirement that registrars "verify" applicants' "racial composition," id. at 5 n.4, 7, was invidious in itself.[69] (By contrast, nothing in the marriage statutes requires applicants to "verify" their sex or sexual orientation.)

Thus, in Loving, there was a fit between the class that the law was intended to discriminate against (non-white races) and the classification enjoying heightened

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[69]Perez v. Lippold, 198 P.2d 17 (Cal. 1948), on which plaintiffs also rely, shares these same distinctions, see id. at 22-34 (relying heavily on inference that statute was motivated by desire to prevent "contamination" of "superior" white race by members of other "inferior" races, including blacks), as does McLaughlin v. Florida, 379 U.S. 184 (1964)(inferring that statute prohibiting interracial cohabitation was motivated by discriminatory animus against blacks).

protection (race). By contrast, as discussed in section II(D)(4), infra, there is no evidence that limiting marriage to opposite-sex couples was motivated by sexism in general or a desire to disadvantage women in particular. Rather, as discussed in section II(E)(2)(b), restricting marriage to opposite-sex couples recognizes the equally indispensable contribution of both sexes to the marriage relationship. See Baker v. State, 744 A.2d at 880 n.13 (rejecting Loving analogy); Baker v. Nelson, 191 N.W.2d at 187 (same); Singer, 522 P.2d at 1191-92 (same); Edward Stein, Evaluating the Sex Discrimination Argument for Lesbian & Gay Rights, 49 UCLA L. Rev. 471, 496-504 (Dec. 2001)(explaining flaws in Loving analogy).

Plaintiffs' attempt to analogize their sex discrimination claim to the marital status discrimination claim in Attorney Gen. v. Desilets, 418 Mass. 316 (1994), Pls. Br. at 53 n.37, is equally unavailing, if not self-defeating. While plaintiffs here take pains to characterize their equality claim as "the individual's right to be free from sex discrimination," Pls. Br. at 52 n.36 (emphasis added), this Court characterized the "discriminating difference" in the Desilets case as being between two

kinds of "couples," married and unmarried. 418 Mass. at 320 (emphasis added) The same is true here: If the marriage statutes discriminate at all, they do so not between individuals of different sexes but between two types of couples, same-sex and opposite-sex.[70]

For these reasons--because the ERA was not intended to require the allowance of same-sex marriage, because the marriage statutes are not expressly sex-based, and because those statutes equally affect males and females--this Court should reject plaintiffs' claim that they are being discriminated against "because of sex" in violation of Article 1.

3. Sexual orientation is not a suspect class for purposes of equal protection analysis.

Even if the marriage statutes could be deemed to discriminate on the basis of sexual orientation, such discrimination would not trigger strict scrutiny of the justifications for such discrimination because sexual orientation, unlike sex,[71] has never been viewed as a

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[70]Defendants do not contend that discrimination against couples is immune from review under Article 1, cf. Pls. Br. at 52, but only that discrimination against same-sex couples is not discrimination "because of sex."

[71]On appeal, plaintiffs have prudently abandoned any claim that discrimination on the basis of sexual orientation is discrimination on the basis of "sex" within the meaning of the ERA. Cf. Macauley v. MCAD, 379 Mass. 279, 281 (1979)(rejecting that argument for

"suspect class" for purposes of Article 1 analysis. See Powers v. Wilkinson, 399 Mass. 650, 657 nn. 10, 11 (1987)(strict scrutiny applies to sex discrimination but not to classifications not listed in ERA). In support of their plea that this Court recognize sexual orientation as a suspect classification, plaintiffs cite only one intermediate appellate court decision holding sexual orientation to be a suspect classification, Tanner v. Oregon Health Scis. Univ., 971 P.2d 435, 447 (Or. App. 1998); and that court's analysis was forcefully rejected by the Vermont Supreme Court. Baker v. State, 744 A.2d at 878 n.10. As far as defendants have been able to determine, virtually every other appellate court that has considered the issue has declined to recognize sexual orientation as a suspect classification for purposes of the equal protection provisions of the federal or any state constitution.[72] See, e.g., Equal. Found., Inc. v. City

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purposes of state statutory prohibition of sex discrimination); DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329-30 (9th Cir. 1979)(same re federal anti-discrimination statute).

[72]One panel of the United States Court of Appeals for the Ninth Circuit briefly held that gay people are a suspect class. Watkins v. United States Army, 847 F.2d 1329, 1349 (9th Cir. 1988), but soon after withdrew that opinion and disposed of the case on other grounds. 875 F.2d 699 (9th Cir. 1989), cert. denied, 498 U.S. 957 (1990).

Although it is true that many of the cases

of Cincinnati II, 128 F.3d 289, 294 (6th Cir. 1997), and cases cited therein, cert. denied, 525 U.S. 943 (1998); Schroeder v. Hamilton Sch. Dist, 282 F.3d 946, 950 (7th Cir.), cert. denied, 123 S. Ct. 435 (2002);

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rejecting strict scrutiny of sexual orientation classifications arose in a military context where the government's interests are particularly strong, Urban League Br. at 25 n.38, the strength of the government's interests, although relevant to justifying discrimination, play no role in the threshold determination of whether a class should be treated as suspect. There is no question that, even in the military context, racial classifications, for example, would be treated as suspect for purposes of equal protection analysis.

None of the California cases cited by plaintiffs on this point, Pls. Br. at 78-79 & n.56, actually hold sexual orientation to be a suspect class for purposes of equal protection analysis. In People v. Garcia, 92 Cal. Rptr. 2d 339 (Ct. App. 2000), the court did not hold that lesbians were a suspect class for equal protection purposes but only that they were a "cognizable class" that could not be excluded, as such, from a jury under state and federal guarantees of a representative jury, a much lower standard, which has been satisfied by groups such as daily wage earners, Thiel v. S. Pac. Co., 328 U.S. 217 (1946), who obviously would not be characterized as "suspect" for equal protection purposes. (Massachusetts courts have not recognized gay people as a protected class even for jury selection purposes. Toney v. Zarynoff's, Inc., 52 Mass. App. Ct. 554, 556, review denied, 435 Mass. 1107 (2001).) Another intermediate appellate court's passing reference to sexual orientation as an example of a suspect class, in Children's Hosp. & Medical Ctr. v. Bonta, 118 Cal. Rptr. 2d 629, 650 (Ct. App. 2002), was simply mistaken as a matter of California law, as evidenced by the third case plaintiffs cite, Gay Law Students Ass'n v. Pac. Tel. & Tel. Co., 24 Cal. 3d 458 (1979), in which the California Supreme Court applies the rational basis test, the same standard applicable "to all other members of our polity," in determining whether discrimination against gay people violated the state's equal protection clause. Id. at 467.

cf. Romer, 517 U.S. at 632-33 (applying rational basis scrutiny to strike down provision discriminating against homosexuals). This Court should decline plaintiffs' invitation to deviate from that well-worn path.

As with recognition of new "fundamental rights," see section II(B)(2)(a), recognition of new suspect classes raises serious separation of powers concerns because of the strict judicial scrutiny of legislative choices that results. For that reason, "the courts have been very reluctant, as they should be" to designate various classifications as "suspect" for purposes of equal protection analysis. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441 (1985). As recognized by the Supreme Court in declining to confer quasi-suspect class status on the mentally retarded, a decision to confer this status has broad ramifications beyond a particular case, id. at 446, because it creates a presumption that every classification on that basis is irrational, id. at 454 (concurring opinion), 446, and thereby upsets the ordinary distribution of power between the legislative and judicial branches with respect to any legislation differentially affecting the class in question. From a separation of powers perspective, it is therefore far

preferable for courts to consider the rationality of classifications on a statute-by-statute basis, rather than to denominate a class as suspect and thereby "presume that any given legislative action [affecting that class] is rooted in considerations that the Constitution will not tolerate." Id. at 446. For example, as discussed in section II(E)(1), infra, some classifications on the basis of sexual orientation may be rationally related "to the purpose that [a particular statute] purportedly intend[s] to serve," while others may not. Cleburne, 473 U.S. at 454 (concurring opinion).

Consistent with those principles, Massachusetts courts have appropriately declined to recognize any suspect or quasi-suspect classes beyond those recognized by the United States Supreme Court under the Fourteenth Amendment to the federal constitution and those expressly listed in the ERA.[73] Powers v. Wilkinson, 399 Mass. at 657 n.11 ("suspect

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[73]Contrary to amici's assertion, Profs. of State Con. Law Br. at 24, this Court did not rely on Article 1 in applying heightened scrutiny to sex-based classifications before the ERA. Rather, in Commonwealth v. MacKenzie, 368 Mass. 613 (1975)(cited by amici), the plaintiffs raised both federal and state equal protection claims, and the Court based its heightened scrutiny not on Article 1 but solely on Supreme Court precedents under the 14th Amendment. Id. at 615-16 & nn. 1, 2.

classifications are only those of 'sex, race, color, creed or national origin'"; quoting ERA); Soares v. Gotham Ink, Inc., 32 Mass. App. Ct. 921, 923 (1992)(rescript)("Classifications that have been recognized under Federal and State law as suspect are alienage, race, and national ancestry. Massachusetts also recognizes classifications based on gender as suspect."). Suspect status has been denied for various other proffered classifications, including indigency, Commonwealth v. Tessier, 371 Mass. 828, 831 (1977); marital status, Desilets, 418 Mass. at 327; Harding v. DeAngelis, 39 Mass. App. Ct. 455, 458 n.3 (1995), review denied, 422 Mass. 1102 (1996); mental illness, Williams, 414 Mass. at 564; age, Tobin's Case, 424 Mass. at 252; handicap, id. at 252 n.5; and illegitimacy, Powers v. Wilkinson, 399 Mass. at 657 n.11. Cf. Commonwealth v. Soares, 377 Mass. 461, 488-89 (1979)("view[ing] the ERA as definitive, in delineating those generic group affiliations which may not permissibly form the basis for juror exclusion").

Not only is "sexual orientation" not listed in the ERA itself, evincing an intent not to afford heightened scrutiny to such classifications, cf. Macauley v. MCAD, 379 Mass. 279, 282 (1979)(declining to interpret anti-discrimination statute to apply to sexual orientation

because of absence of express mention (at that time) of such discrimination in the statute), but doing so would also be inconsistent with applicable equal protection standards. Without disputing that gays and lesbians have historically been discriminated against and putting aside the question whether sexual orientation is an "immutable" characteristic,[74] gay people are presently not in "such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). Rather, as the Appeals Court recognized in another context, "[w]hile bias against homosexuals may exist in some people, [this] Court has not yet determined that there exists an 'indurated and pervasive prejudice' against homosexuals."[75] Toney, 52 Mass. App. Ct. at

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[74]The Court need not resolve this sensitive issue because "[i]mmutability is neither a necessary nor a sufficient basis for treatment of as a suspect class." Sunstein, supra, at 9. For example, the fact that blood relationships are immutable does not render siblings a suspect class, while the fact that one can change one's religion does not make religious classifications any the less suspect.

[75]Plaintiffs' reliance on the marriage statutes themselves as evidence of purposeful discrimination on the basis of sexual orientation, Pls. Br. at 69-70, assumes one of the necessary, but unsatisfied, elements of plaintiffs' equal protection claim--that limiting marriage to opposite-sex couples is intentional discrimination. See section II(D)(4), infra.

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As was true of the mentally retarded when the Supreme Court denied suspect status to that class, "lawmakers have been addressing the[] difficulties [of gay people] in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary." Cleburne, 473 U.S. at 443. More than ten years ago, the Legislature took steps to prevent or remedy discrimination against this group by amending the anti-discrimination statute, G.L. c. 151B, to prohibit discrimination on the basis of sexual orientation in employment, housing, public accommodation, and credit.[76] St. 1989, c. 516. In 1993, they also amended the education law, G.L. c. 76, § 5, to prohibit such discrimination in schools. St. 1993, c. 282. Most recently, they amended the Hate Crimes Act, G.L. c. 265, § 39, to add sexual orientation to the prohibited bases for intimidation, St. 1996, c. 163, § 2, making "[w]hat was previously implicit . . . now

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[76]Massachusetts was among the first states to enact such legislation, see Nan D. Hunter et al., The Rights of Lesbians & Gay Men: The Basic ACLU Guide to a Gay Person's Rights 204-08 (1992), and is still one of only 13 states to have done so. See Pam Greenberg, supra, at 1; Stein, supra at 476 n.13; Antibias protections for gays are approved, Boston Globe, Dec. 18, 2002, at A2.

explicit: persons have a right under the laws of the Commonwealth not to be beaten up because of their sexual orientation." Commonwealth v. Zawatsky, 41 Mass. App. Ct. 392, 398 (1996). Even in the area of marriage, the Massachusetts Legislature, unlike those of most other states, has declined to enact a so-called "defense of marriage act" expressly banning same-sex marriage and denying the various benefits of marriage to same-sex couples.[77]

This legislative action and inaction, "which could hardly have occurred and survived without public support, negates any claim that [gay people] are politically powerless in the sense that they have no ability to attract the attention of the lawmakers.[78] Any minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much

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[77]While a proposed constitutional amendment to that effect garnered enough signatures, through the people's initiative process, to be presented to the Legislature, see Albano v. Attorney Gen., 437 Mass. 156, 157 n.3 (2002), the joint session adjourned without approving the proposed amendment, see H.4840 (2002);http://www.state.ma.us/legis/history/h04840.htm, thereby precluding it from appearing on the ballot (absent further action by the joint session). Amend. art. 48, Init., pt. IV, § 2.

[78]Gay people have also met with increasing success in gaining local, state, and federal elected offices themselves. Boston Herald, Gay candidates, activists make political strides, Nov. 6, 2002, at 22.

economic and social legislation would now be suspect." Cleburne, 473 U.S. at 445. Therefore, if gay people were deemed a suspect class, "it would be difficult to find a principled way to distinguish a variety of other groups . . . who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large," id., such as the elderly, indigent, or mentally or physically disabled.

As recognized by the Vermont Supreme Court in declining to grant suspect status to sexual orientation classifications, "adverse social or political stereotyping," standing alone, is not sufficient to warrant such enhanced protection from otherwise presumptively valid legislative action. Baker v. State, 744 A.2d at 878 n.10. Indeed, "[i]t is difficult to imagine a legal framework that could provide less predictability in the outcome of future cases than one which gives a court free reign to decide which groups have been the subject of 'adverse social or political stereotyping.'" Id.

Of course, as further recognized by the Supreme Court with respect to the mentally retarded, declining to recognize gay people as a suspect class "does not leave them entirely unprotected from invidious

discrimination." Cleburne, 473 U.S. at 446. As discussed above, civil and criminal remedies are available to redress such discrimination, as are the constitutional protections available to everyone else, including the right to be free from statutory classifications having no rational basis. As illustrated by the Romer case, that rational basis standard of judicial review effectively protects gay people from invidious discrimination while not unduly interfering with the Legislature's prerogative to enact legislation rationally related to legitimate public interests.

4. Any discrimination effected by the marriage statutes is not intentional and therefore not prohibited by Article 1.

A final, and fatal, problem with plaintiffs' equal protection claim, which plaintiffs fail to address on appeal, is that Article 1, like the Fourteenth Amendment to the United States Constitution, prohibits only "intentional" discrimination. MIAA, 378 Mass. at 358."[79] Unlike in Loving, where the challenged statute

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[79]See also Ford, 44 Mass. App. Ct. at 730 (showing of intentional discrimination necessary to establish violation of 14th Amendment); Washington v. Davis, 426 U.S. 229 (1976)(for federal equal protection clause to be violated, "the invidious quality of a law claimed to be . . . discriminatory must ultimately be traced to a . . . discriminatory purpose"); Feeney, 442 U.S. at 274 (same); Murphy v. Dep't of Corr., 429 Mass. 736, 739

was "designed to maintain White Supremacy," 388 U.S. at 11, or in Romer, where the challenged constitutional amendment was "born of animosity toward a class of persons," 517 U.S. at 632, and designed "for the purpose of disadvantaging the group burdened by the law," id., plaintiffs do not allege--much less provide any evidence--that any such discriminatory intent underlay the enactment of the marriage statutes challenged here. See Baker v. State, 744 A.2d at 880 n.13 (rejecting sex-discrimination challenge to marriage statute and distinguishing Loving, on ground that statute "'can[not] be traced to a discriminatory purpose'").[80]

Nor is there any evidence that the statutes are being administered "with an evil eye [or] an unequal hand." Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886). To the contrary, the local officials who denied marriage licenses to the plaintiffs did so "politely," A. 122-45, based on the Registrar's good-faith interpretation of state law, id., rather than on

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n.3 (1999)(equal protection standard identical under state and federal constitutions).

[80]See also Dean, 653 A.2d at 363 (concurring opinion)(same); Califano v. Jobst, 434 U.S. 47, 58 (1977)(rejecting equal protection claim where "[n]o one suggests that Congress was motivated by antagonism toward any class of marriages or marriage partners").

any discriminatory animus. Any inference of discriminatory intent on the part of the defendants is further precluded by the many steps the Department of Public Health has taken, through its Gay, Lesbian, Bisexual, and Transgender Health Access Project and its Bureau of Family and Community Health, to address the healthcare needs of gay people. See, e.g., http://www.glbthealth.org; Raja Mishra, A need for shelter: Havens elude many victims of gay domestic violence, Boston Globe, Dec. 18, 2002, at A1.

The mere existence of disparate treatment or impact of a law on a particular group "does not furnish adequate basis for an inference that the discrimination was [impermissibly] motivated.'" Ford, 44 Mass. App. Ct. at 730. "Such 'de facto' discrimination does not violate the Equal Protection Clause." Commonwealth v. Leis, 355 Mass. 189, 198 (1969); see also King, 374 Mass. at 17 n.10 (fact that most prostitutes are women not sufficient to establish that statute prohibiting prostitution violates ERA). Thus, even if the marriage statutes could be shown to discriminate on the basis of sex or sexual orientation, Article 1 would provide no basis for invalidating them.

E. **The Legislature Could Rationally Believe That Limiting Marriage to Opposite Sex Couples Serves Legitimate State Interests.**

1. **Under applicable due process and equal protection standards, the marriage statutes are presumptively valid and must be upheld unless plaintiffs can demonstrate the absence of any conceivable rational basis for limiting marriage to opposite-sex couples.**

Even if the marriage statutes did deprive plaintiffs of a constitutional right or intentionally discriminate between them and other similarly situated individuals, such deprivation or discrimination would not render the marriage statutes unconstitutional but would only require that such deprivation or discrimination be sufficiently justified. As the Supreme Court emphasized in striking down one marriage restriction, the Court "d[id] not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny." Zablocki, 434 U.S. at 386. Since this case involves neither a fundamental right, see section II(B)(2), supra, nor a suspect classification, see section II(B)(2) & (3), supra, the justifications for limiting marriage to opposite-sex couples are not subject to strict or heightened scrutiny, Mass. Fed'n of Teachers v. Bd. of Educ., 436

Mass. 763, 777 (2002), as plaintiffs contend.[81] Pls. Br. at 34-35, 61-79.

Instead, whether these statutes are reviewed under the equal protection or the due process provisions of the Massachusetts Constitution, the standard is essentially the same as under the Fourteenth Amendment to the United States Constitution, Herbert P. Wilkins, The State Constitution Matters, 44 B. B.J. 4, 4 (Dec. 2000)(federal and state due process and equal protection standards are "identical")[82]--the statute is

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[81]Contrary to plaintiffs' contention, Pls. Br. at 34-35, even though the Zablocki Court characterized the right to marry as "fundamental," 434 U.S. at 383, it applied something less than strict scrutiny to the challenged statute, see id. at 383, 386, 388. See also Moe v. Sec'y, 382 Mass. at 655-56 (applying less than strict scrutiny even where fundamental right is at stake); Meyer, supra, at 529 (observing that, notwithstanding Supreme Court's statements as to "fundamental" nature of family and privacy rights, Court has actually applied less than strict scrutiny in such cases).

[82]See also McNeil v. Comm'r of Corr., 417 Mass. 818, 826 (1994)(state and federal equal protection standards the same); Blixt, 437 Mass. at 652 (substantive due process standards for review of legislation the same); Dutil, 437 Mass. at 10-11 n.2 (same); Ellis, 429 Mass. at 371 (same). Although the state and federal due process standards have sometimes been worded differently, "'[a]ny difference between the two standards is narrow.'" Rushworth, 413 Mass. at 269 (citation omitted); see also Lee A. Dean, Due Process, in Developments in State Constitutional Law: 1992, 24 Rutgers L. J. 1177 (Summer 1993)(Rushworth effectively overruled Sperry & Hutchinson Co. v. McBride, 307 Mass. 408 (1940)). And the accepted shorthand name for both standards is "rational basis" scrutiny. Rushworth, 413 Mass. at 269 n.5.

presumed to be constitutional and will be upheld "if it is rationally related to a legitimate State interest."[83] Tobin's Case, 424 Mass. at 253. And "'[a] classification will be considered rationally related to a legitimate purpose "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification,"'"

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[83]The Court should reject plaintiffs' attempt to evade this deferential standard of review by characterizing their claim as an "as applied" challenge to the administration of the marriage statutes rather than a facial challenge to the statutes themselves. Pls. Br. at 70, 80 n.57, 96 n.70; see also Profs. of Express. Br. at 15 n.8. Because plaintiffs' challenge is not merely to the statutes as applied to their particular factual situations, but to the statutes' wholesale disallowance of any same-sex marriages, their challenge is properly characterized as a facial one, see Blixt, 437 Mass. at 652, even though limited to one aspect of the statutory scheme, see id. at 659 (characterizing challenge to grandparent visitation statute as facial even though challenge was limited to one subclass of parents affected by statute).

Moreover, once the Court determines (as it should for the reasons discussed in section I), that the marriage statutes, as properly construed, do not permit same-sex marriage, plaintiffs cannot challenge the application of the statutes to prohibit them from marrying, but only the validity of the statutes themselves. As this Court recently recognized, an equal protection challenge to the limited coverage of a statute "is necessarily to the validity of the statute itself. It is therefore a facial challenge." Commonwealth v. Chou, 433 Mass. 229, 238 (2001); see also King, 374 Mass. at 18 ("it cannot be fairly argued that there is discriminatory enforcement" in applying statute only to group covered by statute); Moore, 431 U.S. at 494 (characterizing as facially invalid a statute that selects certain categories of relatives who may live together and others who may not).

Mass. Fed'n, 436 Mass. at 777 (citations omitted), even if the conceivable bases hypothesized by the state are debatable and unproven, Leis, 355 Mass. at 198, and "even if it is 'probably not true' that those reasons are valid in the majority of cases." Kimel v. Bd. of Regents, 528 U.S. 62, 86 (2000).[84] Under rational basis review, as opposed to strict scrutiny, even "a slim demonstration of potential harm" is sufficient to sustain the statute. Marcoux, 375 Mass. at 66.[85] The burden of proving, beyond a reasonable doubt, "that there are no conceivable grounds supporting [the statute's] validity" is on the challenging party. St. Germaine, 416 Mass. at 703. (emphasis added).

"In the absence of evidence that the Legislature harbored an illegitimate motive or had no rational

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[84]See also FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993) (legislative classifications "may be based on rational speculation unsupported by evidence or empirical data"); Vaughn v. Sullivan, 83 F.3d 907, 913 (7th Cir. 1996)(declining to characterize proffered justification, "[w]rong or not," as "irrational"); Blixt, 437 Mass. at 690 (dissenting opinion)("Loose approximations, based on marginally rational assumptions, suffice for that highly deferential test.").

[85]Leis, 355 Mass. at 195, 198 (even absent "scientific proof," Legislature may act to prevent possible, but presently unknown, harm); Blixt, 437 Mass. at 690 (dissenting opinion) ("[t]he rational basis test can resort to mere possibilities as justification for classifications"); cf. id. at 656 (sustaining statute under strict scrutiny based on "actual or potential harm").

reason to draw the distinction as it did, the court must defer to the Legislature's classification." Murphy, 429 Mass. at 741.[86] "The deference to legislative judgments implicit in this standard of review does not reflect 'an abdication of the judicial role,' but rather a 'recognition of the . . . undesirability of the judiciary substituting its notions of correct policy for that of a popularly elected Legislature.'" Blue Hills Cemetery, Inc. v. Bd. of Reg. in Embalming & Funeral Directing, 379 Mass.

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[86]This standard is substantially more deferential to legislative classifications than the one applied by the Vermont Supreme Court in invalidating Vermont's marriage statutes--i.e., whether the challenged classification "is reasonably necessary to accomplish the State's claimed objectives." Baker v. State, 744 A.2d at 878; see also id. at 894 (concurring opinion) (characterizing that standard as "a more active standard of constitutional review than the Fourteenth Amendment, as interpreted by the United States Supreme Court"), or the standard applied by the Hawaii Supreme Court in Baehr, 852 P.2d at 50 (characterizing state equal protection clause as more expansive than federal one).

This Court has repeatedly declined to adopt such a higher "rational basis plus" level of scrutiny, even where privacy interests are at stake. See English, 405 Mass. at 428-29; Murphy, 429 Mass. at 740 n.4. In the few cases in which this Court has invalidated statutes or regulations under the rational basis test, it did so because the "Commonwealth has not asserted, and th[e] court is unable to conceive of, any rational purpose" for the challenged classification. Murphy, 429 Mass. at 742; see also Wilkins, supra, 14 Suffolk U.L. Rev. at 915, not because the Court was applying heightened scrutiny, as amici suggest, see Profs. of State Con. Law Br. at 44-45.

368, 372 (1979)(citation omitted). As will be shown in section II(E)(2), infra, the challenged statutes readily meet this standard.

The first step in rational basis scrutiny is to identify the nature of the statutory classification. See Tarin, 424 Mass. at 755. As discussed in sections II(D)(2) & (3), above, and as recognized by the Vermont Supreme Court in its same-sex marriage decision, the classification here is between same-sex and opposite-sex couples, not between men and women or between heterosexuals and gay people. Baker v. State, 744 A.2d at 880.

In considering the rationality of the proffered bases for limiting marriage to opposite-sex couples, it is also important to focus on the benefit directly affected, rather than on the "ripple effect" of that benefit on other benefits. Tarin, 424 Mass. at 755. Because the rationality of limiting the subsidiary benefits of marriage to opposite-sex couples may vary from benefit to benefit, same-sex couples may have a right to some, but not necessarily all, of the benefits that presently are limited or more readily available to married people. As recognized by the Supreme Court, determining the rationality of statutes denying specific benefits to a particular group depends on

whether the statutes are "grounded in a sufficient factual context" to enable the court to assess the existence of a rational relationship between the statute and any legitimate state interest. Romer, 517 U.S. at 632.[87]

Any claim concerning the denial of particular benefits to same-sex couples should therefore be decided in future, more concrete cases where those particular benefits are directly at issue, rather than wholesale and in the abstract in this single case. See Posner, Sex & Reason, supra, at 313; Dean, 653 A.2d at 364 n. 7 (concurring opinion). Nevertheless, because plaintiffs have focused primarily on such indirect benefits, the Commonwealth's interests in limiting such benefits to opposite-sex couples will be discussed here along with the Commonwealth's interests in limiting marriage itself.

2. Several conceivable rational bases justify limiting marriage to opposite sex couples.

The defendants acknowledge that the possible

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[87]See also Sunstein, supra, at 4 ("[I]rrationality cannot be assessed in the abstract. It requires close encounter with the particular government action at issue in various settings."); Linda S. Eckols, The Marriage Mirage: The Personal & Social Identity Implications of Same-Gender Matrimony, 5 Mich. J. Gender & L. 353, 398 (1999)(courts should adjudicate same-sex couples' rights to particular benefits on case-by-case basis).

rational bases for limiting marriage to opposite-sex couples posited below may be offensive to some people. However, neither the defendants nor the Court need endorse the Legislature's policy judgments. Rather, the task for this Court is to determine whether the legislative choice to limit marriage is supported by any conceivable rational bases, no matter how "hardheaded" or "hardhearted." Bd. of Trustees v. Garrett, 531 U.S. 356, 367-68 (2001). If, as defendants argue, such rational bases exist, the Court's inquiry must end and the policy decision must stand.

a. ***The Legislature could rationally believe that limiting marriage to opposite-sex couples serves the Commonwealth's legitimate interest in fostering and protecting the link between marriage and procreation.***[88]

The Commonwealth's power to regulate marriage, including the power to set qualifications for entering into that legally sanctioned relationship, "is unquestioned." Stowell, 389 Mass. at 174.[89] It is

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[88]Defendants do not proffer a legislative rationale of increasing the number of marriages involving procreation. Cf. Pls. Br. at 87.

[89]See also Milford, 7 Mass. at 48 ("it has been, in all well-regulated governments, among the first attentions of the civil magistrate to regulate marriages; by defining the characters and relations of parties who may marry"); Reynolds v. United States, 98 U.S. 145, 166 (1878) (it is "within the legitimate

equally well-established that the primary purpose for such regulation is to provide a favorable setting for procreation. See section I(D), supra. As the Superior Court held,[90] A. 132-33, and as numerous other courts have recognized in upholding marriage statutes like ours, that purpose is at least rational, if not compelling.[91]

Considering marriage's central purpose of providing a favorable setting for procreation, it is not irrational for the Legislature to permit marriage between opposite-sex couples, who are at least

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scope of the power of every civil government to determine" what form of marriage "shall be the law of social life under its dominion"); Pennoyer v. Neff, 95 U.S. 714, 734-35 (1877)(state "has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created"); Zablocki, 434 U.S. at 392 (concurring opinion)("A State may not only 'significantly interfere with decisions to enter into the marital relationship,' . . . but may in many circumstances absolutely prohibit it." (citation omitted)).

[90]Because the Superior Court found this rationale sufficient, in itself, to justify the opposite-sex limitation, it did not address the other rationales proffered by the defendants. The court did not "decline to accept" those rationales. Cf. Inker & Kindregan Br. at 46 n.30.

[91]See, e.g., Adams, 486 F. Supp. at 1124 ("state has a compelling interest in encouraging and fostering procreation"); Singer, 522 P.2d at 1197 (characterizing this interest as "of basic importance in our society"); Dean, 653 A.2d at 337 (finding that this "central purpose . . . provides the kind of rational basis . . . permitting limitation of marriage to heterosexual couples").

theoretically capable of procreation on their own, but not between same-sex couples, who are not.[92] Like the United States Constitution, the Massachusetts Constitution requires only "that all persons in the same category and in the same circumstances be treated alike,'" P.B.C. v. D.H., 396 Mass. 68, 74 (1985)(citation omitted), not that "'things which are different in fact . . . be treated in law as if they were the same.'" Michael M. v. Super. Ct., 450 U.S. 464, 469 (1981)(citation omitted). Under this doctrine, if "the classification . . . reflects preexisting differences," Lee v. Comm'r of Revenue, 395 Mass. 527, 533 (1985), between those disadvantaged and advantaged under the law, then the disparate treatment of these two groups is constitutionally permissible.

For example, in MacKenzie, 368 Mass. at 617, this Court held that "[b]ecause of significant circumstantial differences between unwed fathers and

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[92]See, e.g., H.R. Rep. No. 104-664, at 14 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2918 (House Judiciary Committee Report recommending passage of federal defense of marriage act)("were it not for the possibility of begetting children inherent in heterosexual unions, society would have no particular interest in encouraging citizens to come together in a committed relationship"); Sunstein, supra, at 6 ("It is at least rational . . . to say that marriage is reserved for cases in which children can potentially result from the married couple.").

unwed mothers, it is permissible for the Legislature to focus statutory attention exclusively on the fathers of illegitimate children."[93] For that reason, the Court upheld a statute requiring unwed fathers (but not unwed mothers) to pay child support and pregnancy expenses,[94] finding that "'the different treatment of men and women reflects . . . the demonstrable fact that male and female' . . . (parents of illegitimate children) 'are not similarly situated'" with respect to the purpose of the statute--i.e., to address the social problem of defaulting fathers. Id. at 618 (citation omitted).[95]

Application of this analysis to the distinction, for marriage purposes, between same-sex and opposite-

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[93]Although the MacKenzie case was decided before passage of the ERA, this Court has repeatedly "acknowledged the appropriateness of its analysis subsequent to the adoption of the State ERA." Lowell, 380 Mass. at 660 n.9 (citing MIAA, 378 Mass. at 357).

[94]That statute was subsequently repealed and replaced by one treating mothers and fathers alike for child support enforcement purposes. St. 1977, c. 848.

[95]See also Lowell, 380 Mass. at 668 (upholding "distinction between rights to inherit from a natural father and . . . a natural mother . . . based on the greater difficulty of proving paternity than of proving maternity"); Ross, 883 P.2d at 521 (upholding denial of sick-leave benefits to care for same-sex partner because plaintiff was not similarly situated to married employees who received such benefits to care for "immediate family" members); Nguyen v. INS, 533 U.S. 53, 63-69 (2001)(upholding different treatment of fathers and mothers for immigration purposes because "fathers and mothers are not similarly situated with regard to the proof of biological parenthood").

sex couples, demonstrates the rationality of this distinction. Because same sex couples cannot procreate on their own,[96] while opposite-sex couples (at least presumably) can, these two classes are not "similarly situated" with respect to the primary, procreation-related purpose of the marriage statutes. See section I(D), supra. Because of this fundamental "preexisting difference" between same- and opposite-sex couples, permitting only the latter group to marry survives rational basis scrutiny. Baker v. Nelson, 191 N.W.2d at 186; Singer, 522 P.2d at 1195-97.

Although, as plaintiffs point out, not all opposite-sex couples are able to procreate. Pls. Br. at 84, that is immaterial for purposes of rational basis review. Under that deferential standard, "some amount of underinclusiveness or overinclusiveness is permissible," Murphy, 429 Mass. at 741; and a statutory classification will be upheld "even where the lines of

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[96]The inability of same-sex couples to procreate on their own is a characteristic that pertains to all members of that class, distinguishing this case from MIAA, where not all members of the disadvantaged group possessed the potentially distinguishing characteristic (athletic superiority). See 378 Mass. at 358 (acknowledging that if all boys were athletically superior to girls "total separation [of the sexes] might be justifiable"). Nor is this distinction between opposite- and same-sex couples a "stereotyped notion." Pls. Br. at 59 n.43. Given the current state of reproductive technology, it is an indisputable fact.

distinction seem imprecise." Id. at 741.[97]

Indeed, as recognized by other courts in similar cases, "[t]here is no real alternative to some overbreadth in achieving this goal." Adams, 486 F. Supp. at 1124. "The alternative would be to inquire of each couple, before issuing a marriage license, as to their plans for children and to give sterility tests to all applicants . . . . Such tests and inquiries would themselves raise serious constitutional questions." Id. at 1124-25 (citing Griswold, 381 U.S. at 485-86); see also Dean, 653 A.2d at 363-64 n.5; Baker v. Nelson, 191 N.W.2d at 187; Cooper, 592 N.Y.S.2d at 800 (all rejecting over-/underinclusiveness argument as to ability to procreate).

Even if procreation is defined more broadly to include the use of assisted reproductive technologies, the Legislature could still be concerned about the

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[97]See also Blixt, 437 Mass. at 662 (upholding different treatment of single-parent and two-parent families, even though the identified differences between them do not exist in all cases); Pet'n of Dep't of Pub. Welf., 383 Mass. 573, 582 (1981)("legislature reasonably could have concluded" that children born to incarcerated mothers are at higher risk of harm, even though some such children are not); cf. Baker v. State, 744 A.2d at 881-82 (rejecting procreation rationale as underinclusive under heightened scrutiny applicable under Vermont Constitution); MIAA, 378 Mass. at 358-64 (rejecting rationales for sex-based classification as overinclusive under strict scrutiny applicable to sex discrimination claim).

increased use of such technologies that could result from allowing same-sex marriages. Because creation of the children of same-sex parents necessarily involves at least one third party and often involves the use of new technology and untested legal arrangements, the Legislature could well be concerned that permitting same-sex marriage--and thereby further encouraging the use of such novel technological and legal mechanisms--would give rise to further ethical and legal disputes as to the rights and responsibilities of the various parties and the validity of the operative legal documents. As the Court recently recognized, the Department of Public Health has an important public health interest in obtaining and maintaining accurate information about a child's genetic parents, Culliton v. Beth Israel Deaconess Med. Ctr., 435 Mass. 285, 293 (2001), which is particularly problematic where one or both of the "parents" listed on the child's birth certificate is not the child's genetic parent, as is necessarily true of all same-sex "procreation."[98]

This Court has already repeatedly commented on the Legislature's failure to provide legislative solutions

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[98]Again, the fact that many opposite-sex couples also use assisted reproductive technology is immaterial for purposes of rational basis scrutiny.

to such problems. R.R. v. M.H., 426 Mass. at 501, 513 (1998); Smith v. Brown, 430 Mass. 1005, 1006 (1999); A.Z., 431 Mass. at 156; Culliton, 435 Mass. at 293; Woodward, 435 Mass. at 556-57. Until it does so, the Legislature may be wary of creating additional ones.

b. The Legislature could rationally believe that limiting marriage to opposite-sex couples serves the Commonwealth's legitimate interest in fostering a favorable setting for child-rearing.[99]

In addition to their primary purpose of linking marriage and procreation per se, the marriage statutes were originally intended to ensure that children would not only be born in wedlock but also reared by their mothers and fathers in one self-sufficient family unit with specialized roles for wives and husbands. See section I(D), supra. Even though sex roles today are not as specialized as they were when the marriage statutes were first enacted,[100] the Legislature could still rationally believe that a favorable setting for

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[99]Defendants do not proffer a legislative rationale that limiting marriage to opposite-sex couples promotes better child-rearing by opposite-sex couples. Pls. Br. at 88-89.

[100]Even today, gender-specific roles for husbands and wives persist. Jeanne A. Batalova & Philip N. Cohen, Premarital Cohabitation and Housework: Couples in Cross-National Perspective, 64 J. Marriage & Fam. 743-755 (Aug. 2002)(reporting that "wives assume the bulk of family responsibilities even in dual income families").

raising children is a two-parent family with one parent of each sex.[101]

In limiting marriage to opposite-sex couples, the Legislature could believe that "father[s] and mother[s] each have something special to offer their son[s] or daughter[s]," Henry B. Biller & Jon L. Kimpton, The Father and the School-Aged Child, in The Role of the Father in Child Development 143, 159 (Michael Lamb, ed., 3rd ed. 1997), and that "[c]hildren and families develop best when fathers and mothers are partners in parenting." Henry B. Biller, Fathers & Families: Paternal Factors in Child Development 8 (1993).[102]

Although many single people and same-sex couples

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[101]See H.R. Rep. 104-664, supra, at 13 n.50 (citing Hillary R. Clinton, It Takes a Village 50 (1995) (traditional two-parent family "has proven the most durable and effective means of meeting children's needs over time")); Doug Ireland, Remembering Herve: Defense of Marriage Act, The Nation, June 24, 1996, at 6 (quoting President Clinton's reasons for signing the federal Defense of Marriage Act as including "need to do things to strengthen the American family").

[102]See also id. at 15-23, 53-57, 76-77, 99-105, 114-15, 133, 180-90 (discussing mothers' and fathers' unique contributions to daughters' and sons' infant and toddler development; gender identity, self-acceptance, and personal competence; intelligence and creativity; academic achievement; assertiveness and independence; and social and sexual adjustment); Lynne M. Kohm, The Homosexual "Union": Should Gay & Lesbian Partnerships Be Granted the Same Status as Marriage?, 22 J. Contem. L. 51, 61, & nn. 53, 54 ("Statistics continue to show that the most stable family for children to grow up in is that consisting of a father and a mother.").

undoubtedly are excellent parents, see, e.g., Tammy, 416 Mass. 220 (allowing same-sex couple to adopt where in best interest of child to do so),[103] the scientific evidence in this area remains inconclusive. While many past studies reported no differences between children raised by same-sex and opposite-sex couples, Judith Stacey & Timothy J. Biblarz, (How) Does the Sexual Orientation of Parents Matter, 66 Am. Soc. Rev. 159, 162-63 (April 2001)(cited in Mass. Psych. Soc'y Br. at passim)(reviewing previous studies), two sociologists who recently examined the underlying data from 21 of those previous studies (including many of the studies cited by amici, Mass. Psych. Soc'y Br. at 21-39) reported that the data do show statistically significant differences between the two groups. Id. at 168-71.

Because these differences are empirically based, they cannot be dismissed as mere stereotypes. As recognized by the Supreme Court in upholding a statute

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[103]Contrary to plaintiffs' suggestion, Pls. Br. at 86-87, and the Superior Court's comment, A. 134, declining to permit marriage for all same-sex couples is in no way inconsistent or "paradoxical" with the public policy of permitting same-sex couples to adopt or obtain custody of children on a case-by-case basis, where warranted by the best interests of the children involved. The American Pediatric Association's support of adoption by same-sex parents, cited in Mass. Psych. Soc'y Br. at passim, is therefore immaterial here.

that treats mothers differently from fathers for immigration purposes, "Mechanistic classification of all our differences as stereotypes . . . operate[s] to obscure those misconceptions and prejudices that are real." Nguyen, 553 U.S. at 73; see also Blixt, 437 Mass. at 662-63 (rejecting argument that treating single-parent families differently from two-parent families "constituted 'an outmoded notion of their capabilities as parents'"). Moreover, even if these statutes were based, in part, on outmoded views of the respective roles of husbands and wives, that is immaterial if the statutes continue to serve legitimate public purposes. See West v. First Agric. Bank, 382 Mass. 534, 544-45 (1981)(tenancy by entirety, although originally based on "discredited stereotypes" nevertheless continued to serve legitimate state interests). The existence of empirical differences between same- and opposite-sex couples also readily distinguishes this case from the MIAA case, on which plaintiffs heavily rely. Pls. Br. passim.

Furthermore, although research, to date, indicates that in most (but not all) ways, children of same-sex couples reportedly develop no "worse," and, in some respects arguably "better," than those of opposite-sex couples, Stacey & Biblarz, supra, at 168-70, 171-72,

experts have questioned the validity of such findings--because the samples were small, the same-sex parents studied tended to be disproportionately white and middle class, and the children studied tended to be the products of failed opposite-sex marriages, who had not yet reached adulthood. For these reasons, experts agree that more research is needed. Id. at 166.[104]

Because the relative benefits of same-sex versus opposite-sex parenting have not "been resolved . . . beyond reasonable scientific dispute," Marcoux, 375 Mass. at 63, judicial restraint is called for. Under the rational basis standard, "[w]here the question is debatable[,] [judicial] inquiry is not with the accuracy of the legislative determination but only with the question whether it so lacks any reasonable basis as to be arbitrary." Henry's Drywall, 366 Mass. at 545; see also Baker v. State, 744 A.2d at 884 (finding it "conceivable that the Legislature could conclude that opposite-sex partners offer advantages in th[e]

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[104]See also Maddox, supra, at 114; G. D. Green & Frederick W. Bozett, Lesbian Mothers & Gay Fathers, in Homosexuality: Research Implications for Public Policy 198 (John C. Gonsiorek & James D. Weinrich eds., 1991); Charlotte J. Patterson & Raymond W. Chan, Gay Fathers, in The Role of the Father, supra, at 245; Ellin C. Perrin, Amer. Acad. of Pediatrics, Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents, 109 Pediatrics 341, 343 (2002).

area [of child-rearing], although experts disagree and the answer is decidedly uncertain").

As this Court recognized in upholding the Legislature's disparate treatment of single parents in Blixt, 437 Mass. at 664, deferring to the Legislature's policy choice to limit marriage to opposite-sex couples is not to say that every child will benefit from opposite-sex parenting. Rather, upholding the Legislature's line-drawing in this area is simply acknowledging the appropriate allocation of responsibility between the judicial and legislative branches in making difficult policy choices in the face of conflicting and, as yet, incomplete information.

c. The Legislature could rationally believe that limiting marriage to opposite-sex couples serves the Commonwealth's legitimate interest in conserving limited financial resources.

A further legitimate purpose conceivably served by the challenged statutes, particularly those affording various economic benefits to married people, is that limiting such benefits to opposite-sex couples conserves the Commonwealth's scarce resources, undoubtedly a legitimate state interest,[105] Kraft v.

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[105]Contrary to plaintiffs' contention, Pls. Br. at 94, Romer did not reject conservation of resources as a legitimate rationale but simply found it "impossible to credit" that a provision excluding gays and lesbians from any legal protections was justified by a desire to

Comm'r of Pub. Welf., 398 Mass. 357, 370-71 (1986); Opinion of the Justices, 368 Mass. 831, 848 (1975), particularly now, when adverse economic conditions are forcing the Legislature to reduce spending in many areas. Indeed one federal appellate court found the government's "valid interest[] . . . in conserving public and private financial resources . . . [to be] standing alone, of sufficient weight to justify" a provision removing certain protections for gay people. Equal. Found. II, 128 F.3d at 301.

Such cost concerns reportedly led one state's governor to veto domestic partnership legislation and another state's voters to repeal such a measure enacted by the state legislature, William N. Eskridge, Jr., The Case for Same Sex Marriage: From Sexual Liberty to Civilized Commitment 115-16 (1996), and were also among Congress's reasons for enacting the federal Defense of Marriage Act. See H.R. Rep. No. 104-664, at 18. As recognized by this Court the last time the Commonwealth faced a major fiscal crisis, "Allocation of taxpayer dollars, especially in times of limited fiscal resources, is the quintessential responsibility of the

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conserve resources to fight discrimination against other groups, 517 U.S. at 635, which is not the argument made here. See Equal. Found. II, 128 F.3d at 301 (distinguishing Romer on this ground).

popularly-elected Legislature, not the courts." County of Barnstable v. Commonwealth, 410 Mass. 326, 329 (1991).

Providing various government financial benefits--such as tax, retirement, disability, healthcare, health insurance, etc.--to married opposite-sex couples is also consistent with the Legislature's purpose in providing such spousal benefits--i.e., to assist those with dependents or the dependents themselves. See Connors, 430 Mass. at 38, 41-42; Jobst, 434 U.S. at 50; Cott, supra, at 158, 191, 193, 222. Although not all spouses are financially dependent on one another, such dependency is a rational assumption that the Legislature was entitled to make.[106] The Legislature could also rationally believe that members of same-sex relationships tend to be less financially dependent on one another and therefore in less need of such dependency-based benefits. Letitia A. Peplau, Lesbian & Gay Relationships, in Homosexuality, supra, at 183-

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[106]See Jobst, 434 U.S. at 55 (upholding rationality of legislative assumption that married people are likely to be less dependent on their parents than unmarried people); Kahn v. Shevin, 416 U.S. 351, 354-55 (1974) (upholding rationality of legislative assumption that widows are likely to be more needy than widowers); see generally Kienzler, 426 Mass at 92 (upholding rationality of statute even though "some of the assumptions made by the Legislature could be debatable" or even "wrong").

84, Based on this assumption, the Legislature could rationally decline to enlarge the population that is eligible for marriage related benefits, see Dowell v. Comm'r of Trans. Assist., 424 Mass. 610, 615-16 (1997)(rational to allocate limited resources to those who need them most), even though some individuals in each group may actually fall on the opposite side of the line in terms of their actual need, see Opinion of the Justices, 368 Mass. at 846, and even though the result, in some cases, "may be extremely harsh." Id. at 848.

For much the same reasons, it is not irrational for the Legislature to decline to require private employers and insurance companies to assume the additional costs of providing various benefits to the partners of their employees or insureds (particularly in the present troubled economy). Tobin's Case, 424 Mass. at 252 (reducing costs for employers is legitimate state interest). The Legislature could also be concerned with the public and private costs associated with the increased use of reproductive technologies that could result from permitting same-sex marriage. See section II(E)(2)(a), supra. Although the incremental cost of extending such benefits to

same-sex partners may be relatively small,[107] it is for the Legislature, not the courts, to make such cost-benefit determinations. Harlfinger v. Martin, 435 Mass. 38, 44 (2001). For the same reason, the Court should decline plaintiffs' invitation to consider the potential cost-savings of permitting same-sex marriage. See Pls. Br. at 39, 94.

In sum, because of these rational bases for differentiating between same- and opposite-sex couples in this context, limiting marriage to opposite-sex couples shows no "disrespect for either class." Nguyen, 533 U.S. at 73. Unlike, for example, the racial classification at issue in Loving, which could be justified only by "invidious racial discrimination," 388 U.S. at 11, or the provision at issue in Romer, which, the Court "inevitabl[y]" inferred to be motivated solely by a desire to harm gay people,[108] 517 U.S. at 621, limiting marriage to opposite-sex couples

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[107]But see 2,000 gay couples wed within 6 months of law, Boston Globe, Dec. 13, 2001, at A4 (reporting that 2,000 couples took advantage of the Netherlands same-sex marriage statute in the first six months after enactment); Rick Klein, The Issues: Rights for same-sex couples, Boston Sunday Globe, Sept. 15, 2002 (in the first two years after enactment of Vermont's civil union statute, 4,122 same-sex couples entered civil unions); BBA Br. at 13-37 (cataloging public and private financial benefits associated with marriage).

[108]See Equal. Found. II, 128 F.3d at 300 (distinguishing Romer on this ground).

may, at least arguably, serve the independent and legitimate purposes discussed above. Whether permitting same-sex marriage would nevertheless be good public policy is a decision to be made by the Legislature--which can study this important and controversial matter "with an intensity and a breadth no court can readily approximate." Marcoux, 375 Mass. at 72.

Indeed, even if the Court were to find any of plaintiffs' statutory or constitutional claims meritorious, it should nevertheless decline to accept plaintiffs' invitation to "declare that the plaintiffs are entitled to marriage licenses," Pls. Br. at 96, and thereby effectively rewrite the hundreds of statutes governing marriage and marriage-related rights and responsibilities. Instead, the appropriate remedy for any such legal infirmity should be determined by the Legislature, which is best able to consider the practical and policy implications of such a basic and far-reaching change and to craft a workable solution within whatever legal parameters the Court defines.[109]

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[109]The Court should also reject amici's suggestion that the Court "sever" the purportedly unconstitutional portion of the marriage statutes. Profs. of Remed. Br. at 14-20. As discussed in section I, supra, the limitation of marriage to one man and one woman is central to the entire statutory scheme, not merely a

See Baker v. State, 744 A.2d at 886-88 (finding marriage statutes unconstitutional but leaving remedy to legislature). In the words of the Superior Court, plaintiffs "should pursue their quest on Beacon Hill." A. 134.

CONCLUSION

For all of the reasons discussed above, this Court should affirm the judgment of the Superior Court.

Respectfully submitted,

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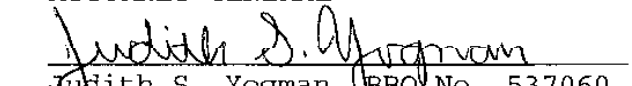

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discrete provision (like the abortion funding proviso to the annual Medicaid appropriation in Moe, 382 Mass. at 659-60) that can be judicially excised "without sacrificing the integrity and purpose of the statute," Chou, 433 Mass. at 238. Instead, leaving the remedy for any constitutional defect in the marriage statutes to the Legislature would not make the legal status of existing opposite-sex marriages "gravely uncertain." Profs. of Remed. Br. at 17. No one has challenged the constitutionality of existing or future opposite-sex marriages or suggested invalidating all of the Commonwealth's marriage laws.

Nor is this a case where injunctive relief against state officials (which plaintiffs themselves do not seek, A. 49) is necessary to address officials' "intransigen[t]" noncompliance with prior court orders. Cf. Blaney v. Comm'r of Corr., 374 Mass. 337, 340-41 (1978); Profs. of Remed. Br. at 21-22.

A D D E N D U M

Mass. Const., pt. 1, art. 1

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

Mass. Const., pt. 1, art. 6

No man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public; and this title being in nature neither hereditary, nor transmissible to children, or descendants, or relations by blood, the idea of a man born a magistrate, lawgiver, or judge, is absurd and unnatural.

Mass. Const., pt. 1, art. 7

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

Mass. Const., pt. 1, art. 10

Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

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