GOODRIDGE v. DEPARTMENT OF PUBLIC HEALTH
Hillary GOODRIDGE & others v. DEPARTMENT OF PUBLIC HEALTH & another.
-- November 18, 2003

Present: MARSHALL, C.J., GREANEY, IRELAND, SPINA, COWIN, SOSMAN, & CORDY, JJ.

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

We are mindful that our decision marks a change in the history of our marriage law. Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors. Neither view answers the question before us. Our concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach. "Our obligation is to define the liberty of all, not to mandate our own moral code." Lawrence v. Texas, 539 U.S. 558, ----, 123 S.Ct. 2472, 2480, 156 L.Ed.2d 508 (2003) (Lawrence), quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).

Whether the Commonwealth may use its formidable regulatory authority to bar same-sex couples from civil marriage is a question not previously addressed by a Massachusetts appellate court.[3] It is a question the United States Supreme Court left open as a matter of Federal law in Lawrence, supra at 2484, where it was not an issue. There, the Court affirmed that the core concept of common human dignity protected by the Fourteenth Amendment to the United States Constitution precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one's choice of an intimate partner. The Court also reaffirmed the central role that decisions whether to marry or have children bear in shaping one's identity. Id. at 2481. The Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution; it may demand broader protection for fundamental rights; and it is less tolerant of government intrusion into the protected spheres of private life.

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

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III. A

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

The plaintiffs' claim that the marriage restriction violates the Massachusetts Constitution can be analyzed in two ways. Does it offend the Constitution's guarantees of equality before the law? Or do the liberty and due process provisions of the Massachusetts Constitution secure the plaintiffs' right to marry their chosen partner? In matters implicating marriage, family life, and the upbringing of children, the two constitutional concepts frequently overlap, as they do here. See, e.g., M.L.B. v. S.L.J., 519 U.S. 102, 120, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996) (noting convergence of due process and equal protection principles in cases concerning parent-child relationships); Perez v. Sharp, 32 Cal.2d 711, 728, 198 P.2d 17 (1948) (analyzing statutory ban on interracial marriage as equal protection violation concerning regulation of fundamental right). See also Lawrence, supra at 2482 ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests"); Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954) (racial segregation in District of Columbia public schools violates the due process clause of Fifth Amendment to United States Constitution), decided the same day as Brown v. Board of Educ. of Topeka, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) (holding that segregation of public schools in States violates equal protection clause of Fourteenth Amendment). Much of what we say concerning one standard applies to the other.

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

In a real sense, there are three partners to every civil marriage: two willing spouses and an approving State. See DeMatteo v. DeMatteo, 436 Mass. 18, 31, 762 N.E.2d 797 (2002) ("Marriage is not a mere contract between two parties but a legal status from which certain rights and obligations arise"); Smith v. Smith, 171 Mass. 404, 409, 50 N.E. 933 (1898) (on marriage, the parties "assume[ ] new relations to each other and to the State"). See also French v. McAnarney, 290 Mass. 544, 546, 195 N.E. 714 (1935). While only the parties can mutually assent to marriage, the terms of the marriage-who may marry and what obligations, benefits, and liabilities attach to civil marriage-are set by the Commonwealth. Conversely, while only the parties can agree to end the marriage (absent the death of one of them or a marriage void ab initio), the Commonwealth defines the exit terms. See G.L. c. 208.

Civil marriage is created and regulated through exercise of the police power. See Commonwealth v. Stowell, 389 Mass. 171, 175, 449 N.E.2d 357 (1983) (regulation of marriage is properly within the scope of the police power). "Police power" (now more commonly termed the State's regulatory authority) is an old-fashioned term for the Commonwealth's lawmaking

authority, as bounded by the liberty and equality guarantees of the MassachusettsConstitution and its express delegation of power from the people to their government. In broad terms, it is the Legislature's power to enact rules to regulate conduct, to the extent that such laws are "necessary to secure the health, safety, good order, comfort, or general welfare of the community" (citations omitted). Opinion of the Justices, 341 Mass. 760, 785, 168 N.E.2d 858 (1960).[12] See Commonwealth v. Alger, 61 Mass. 53, 7 Cush. 53, 85 (1851).

Without question, civil marriage enhances the "welfare of the community." It is a "social institution of the highest importance." French v. McAnarney, supra. Civil marriage anchors an ordered society by encouraging stable relationships over transient ones. It is central to the way the Commonwealth identifies individuals, provides for the orderly distribution of property, ensures that children and adults are cared for and supported whenever possible from private rather than public funds, and tracks important epidemiological and demographic data. Marriage also bestows enormous private and social advantages on those who choose to marry. Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. "It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." Griswold v. Connecticut, 381 U.S. 479, 486, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). Because it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition.

Tangible as well as intangible benefits flow from marriage. The marriage license grants valuable property rights to those who meet the entry requirements, and who agree to what might otherwise be a burdensome degree of government regulation of their activities.[13] See Leduc v. Commonwealth, 421 Mass. 433, 435, 657 N.E.2d 755 (1995), cert. denied, 519 U.S. 827, 117 S.Ct. 91, 136 L.Ed.2d 47 (1996) ("The historical aim of licensure generally is preservation of public health, safety, and welfare by extending the public trust only to those with proven qualifications"). The Legislature has conferred on "each party [in a civil marriage] substantial rights concerning the assets of the other which unmarried cohabitants do not have." Wilcox v. Trautz, 427 Mass. 326, 334, 693 N.E.2d 141 (1998). See Collins v. Guggenheim, 417 Mass. 615, 618, 631 N.E.2d 1016 (1994) (rejecting claim for equitable distribution of property where plaintiff cohabited with but did not marry defendant); Feliciano v. Rosemar Silver Co., 401 Mass. 141, 142, 514 N.E.2d 1095 (1987) (government interest in promoting marriage would be "subverted" by recognition of "a right to recover for loss of consortium by a person who has not accepted the correlative responsibilities of marriage"); Davis v. Misiano, 373 Mass. 261, 263, 366 N.E.2d 752 (1977) (unmarried partners not entitled to rights of separate support or alimony). See generally Attorney Gen. v. Desilets, 418 Mass. 316, 327-328 & nn. 10, 11, 636 N.E.2d 233 (1994).

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

creditors) to one's spouse and children (G.L. c. 188, § 1); automatic rights to inherit the property of a deceased spouse who does not leave a will (G.L. c. 190, § 1); the rights of elective share and of dower (which allow surviving spouses certain property rights where the decedent spouse has not made adequate provision for the survivor in a will) (G.L. c. 191, § 15, and G.L. c. 189); entitlement to wages owed to a deceased employee (G.L. c. 149, § 178A [general] and G.L. c. 149, § 178C [public employees]); eligibility to continue certain businesses of a deceased spouse (e.g., G.L. c. 112, § 53 [dentist]); the right to share the medical policy of one's spouse (e.g., G.L. c. 175, § 108, Second [a] [3] [defining insured's "dependent" to include one's spouse]), (see Connors v. Boston, 430 Mass. 31, 43, 714 N.E.2d 335 (1999) [domestic partners of city employees not included within term "dependent" as used in G.L. c. 32B, § 2]); thirty-nine week continuation of health coverage for the spouse of a person who is laid off or dies (e.g., G.L. c. 175, § 110G); preferential options under the Commonwealth's pension system (see G.L. c. 32, § 12[2] ["Joint and Last Survivor Allowance"]); preferential benefits in the Commonwealth's medical program, MassHealth (e.g., 130 Code Mass. Regs. § 515.012[A], prohibiting placing lien on long-term care patient's former home if spouse still lives there); access to veterans' spousal benefits and preferences (e.g., G.L. c. 115, § 1 [defining "dependents"] and G.L. c. 31, § 26 [State employment] and § 28 [municipal employees]); financial protections for spouses of certain Commonwealth employees (fire fighters, police officers, and prosecutors, among others) killed in the performance of duty (e.g., G.L. c. 32, §§ 100-103); the equitable division of marital property on divorce (G.L. c. 208, § 34); temporary and permanent alimony rights (G.L. c. 208, §§ 17 and 34); the right to separate support on separation of the parties that does not result in divorce (G.L. c. 209, § 32); and the right to bring claims for wrongful death and loss of consortium, and for funeral and burial expenses and punitive damages resulting from tort actions (G.L. c. 229, §§ 1 and 2; G.L. c. 228, § 1. See Feliciano v. Rosemar Silver Co., supra).

Exclusive marital benefits that are not directly tied to property rights include the presumptions of legitimacy and parentage of children born to a married couple (G.L. c. 209C, § 6, and G.L. c. 46, § 4B); and evidentiary rights, such as the prohibition against spouses testifying against one another about their private conversations, applicable in both civil and criminal cases (G.L. c. 233, § 20). Other statutory benefits of a personal nature available only to married individuals include qualification for bereavement or medical leave to care for individuals related by blood or marriage (G.L. c. 149, § 52D); an automatic "family member" preference to make medical decisions for an incompetent or disabled spouse who does not have a contrary health care proxy, see Shine v. Vega, 429 Mass. 456, 466, 709 N.E.2d 58 (1999); the application of predictable rules of child custody, visitation, support, and removal out-of-State when married parents divorce (e.g., G.L. c. 208, § 19 [temporary custody], § 20 [temporary support], § 28 [custody and support on judgment of divorce], § 30 [removal from Commonwealth], and § 31 [shared custody plan]); priority rights to administer the estate of a deceased spouse who dies without a will, and the requirement that a surviving spouse must consent to the appointment of any other person as administrator (G.L. c. 38, § 13 [disposition of body], and G.L. c. 113, § 8 [anatomical gifts]); and the right to interment in the lot or tomb owned by one's deceased spouse (G.L. c. 114, §§ 29-33).

Where a married couple has children, their children are also directly or indirectly, but no less auspiciously, the recipients of the special legal and economic protections obtained by civil marriage. Notwithstanding the Commonwealth's strong public policy to abolish legal distinctions between marital and nonmarital children in providing for the support and care of

minors, see Department of Revenue v. Mason M., 439 Mass. 665, 790 N.E.2d 671 (2003); Woodward v. Commissioner of Social Sec., 435 Mass. 536, 546, 760 N.E.2d 257 (2002), the fact remains that marital children reap a measure of family stability and economic security based on their parents' legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children. Some of these benefits are social, such as the enhanced approval that still attends the status of being a marital child. Others are material, such as the greater ease of access to family-based State and Federal benefits that attend the presumptions of one's parentage.

It is undoubtedly for these concrete reasons, as well as for its intimately personal significance, that civil marriage has long been termed a "civil right." See, e.g., Loving v. Virginia, 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival"), quoting Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); Milford v. Worcester, 7 Mass. 48, 56 (1810) (referring to "civil rights incident to marriages"). See also Baehr v. Lewin, 74 Haw. 530, 561, 852 P.2d 44 (1993) (identifying marriage as "civil right[ ]"); Baker v. State, 170 Vt. 194, 242, 744 A.2d 864 (1999) (Johnson, J., concurring in part and dissenting in part) (same). The United States Supreme Court has described the right to marry as "of fundamental importance for all individuals" and as "part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause." Zablocki v. Redhail, 434 U.S. 374, 384, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978). See Loving v. Virginia, supra ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men").[14]

Without the right to marry-or more properly, the right to choose to marry-one is excluded from the full range of human experience and denied full protection of the laws for one's "avowed commitment to an intimate and lasting human relationship." Baker v. State, supra at 229, 744 A.2d 864. Because civil marriage is central to the lives of individuals and the welfare of the community, our laws assiduously protect the individual's right to marry against undue government incursion. Laws may not "interfere directly and substantially with the right to marry." Zablocki v. Redhail, supra at 387, 98 S.Ct. 673. See Perez v. Sharp, 32 Cal.2d 711, 714 (1948) ("There can be no prohibition of marriage except for an important social objective and reasonable means").[15]

Unquestionably, the regulatory power of the Commonwealth over civil marriage is broad, as is the Commonwealth's discretion to award public benefits. See Commonwealth v. Stowell, 389 Mass. 171, 175, 449 N.E.2d 357 (1983) (marriage); Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 652, 417 N.E.2d 387 (1981) (Medicaid benefits). Individuals who have the choice to marry each other and nevertheless choose not to may properly be denied the legal benefits of marriage. See Wilcox v. Trautz, 427 Mass. 326, 334, 693 N.E.2d 141 (1998); Collins v. Guggenheim, 417 Mass. 615, 618, 631 N.E.2d 1016 (1994); Feliciano v. Rosemar Silver Co., 401 Mass. 141, 142, 514 N.E.2d 1095 (1987). But that same logic cannot hold for a qualified individual who would marry if she or he only could.

III. B

For decades, indeed centuries, in much of this country (including Massachusetts) no lawful marriage was possible between white and black Americans. That long history availed not when the Supreme Court of California held in 1948 that a legislative prohibition against interracial marriage violated the due process and equality guarantees of the Fourteenth Amendment, Perez v. Sharp, 32 Cal.2d 711, 728, 198 P.2d 17 (1948), or when, nineteen years later, the United States Supreme Court also held that a statutory bar to interracial marriage violated the Fourteenth Amendment, Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967).[16] As both Perez and Loving make clear, the right to marry means little if it does not include the right to marry the person of one's choice, subject to appropriate government restrictions in the interests of public health, safety, and welfare. See Perez v. Sharp, supra at 717, 198 P.2d 17 ("the essence of the right to marry is freedom to join in marriage with the person of one's choice"). See also Loving v. Virginia, supra at 12, 87 S.Ct. 1817. In this case, as in Perez and Loving, a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance-the institution of marriage-because of a single trait: skin color in Perez and Loving, sexual orientation here. As it did in Perez and Loving, history must yield to a more fully developed understanding of the invidious quality of the discrimination.[17]

The Massachusetts Constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution, even where both Constitutions employ essentially the same language. See Planned Parenthood League of Mass., Inc. v. Attorney Gen., 424 Mass. 586, 590, 677 N.E.2d 101 (1997); Corning Glass Works v. Ann & Hope, Inc. of Danvers, 363 Mass. 409, 416, 294 N.E.2d 354 (1973). That the Massachusetts Constitution is in some instances more protective of individual liberty interests than is the Federal Constitution is not surprising. Fundamental to the vigor of our Federal system of government is that "state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." Arizona v. Evans, 514 U.S. 1, 8, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995).[18]

The individual liberty and equality safeguards of the Massachusetts Constitution protect both "freedom from" unwarranted government intrusion into protected spheres of life and "freedom to" partake in benefits created by the State for the common good. See Bachrach v. Secretary of the Commonwealth, 382 Mass. 268, 273, 415 N.E.2d 832 (1981); Dalli v. Board of Educ., 358 Mass. 753, 759, 267 N.E.2d 219 (1971). Both freedoms are involved here. Whether and whom to marry, how to express sexual intimacy, and whether and how to establish a family-these are among the most basic of every individual's liberty and due process rights. See, e.g., Lawrence, supra at 2481; Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992); Zablocki v. Redhail, 434 U.S. 374, 384, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978); Roe v. Wade, 410 U.S. 113, 152-153, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Eisenstadt v. Baird, 405 U.S. 438, 453, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); Loving v. Virginia, supra. And central to personal freedom and security is the assurance that the laws will apply equally to persons in similar situations. "Absolute equality before the law is a fundamental principle of our own Constitution." Opinion of the Justices, 211 Mass. 618, 619, 98 N.E. 337 (1912). The liberty interest in choosing whether and whom to marry would be hollow if the Commonwealth could, without sufficient justification, foreclose an individual from freely choosing the person with whom to share an exclusive commitment in the unique institution of civil marriage.

The Massachusetts Constitution requires, at a minimum, that the exercise of the State's regulatory authority not be "arbitrary or capricious." Commonwealth v. Henry's Drywall Co., 366 Mass. 539, 542, 320 N.E.2d 911 (1974).[19] Under both the equality and liberty guarantees, regulatory authority must, at very least, serve "a legitimate purpose in a rational way"; a statute must "bear a reasonable relation to a permissible legislative objective." Rushworth v. Registrar of Motor Vehicles, 413 Mass. 265, 270, 596 N.E.2d 340 (1992). See, e.g., Massachusetts Fed'n of Teachers v. Board of Educ., 436 Mass. 763, 778, 767 N.E.2d 549 (2002) (equal protection); Coffee-Rich, Inc. v. Commissioner of Pub. Health, 348 Mass. 414, 422, 204 N.E.2d 281 (1965) (due process). Any law failing to satisfy the basic standards of rationality is void.

The plaintiffs challenge the marriage statute on both equal protection and due process grounds. With respect to each such claim, we must first determine the appropriate standard of review. Where a statute implicates a fundamental right or uses a suspect classification, we employ "strict judicial scrutiny." Lowell v. Kowalski, 380 Mass. 663, 666, 405 N.E.2d 135 (1980). For all other statutes, we employ the " 'rational basis' test." English v. New England Med. Ctr., 405 Mass. 423, 428, 541 N.E.2d 329 (1989). For due process claims, rational basis analysis requires that statutes "bear[ ] a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare." Coffee-Rich, Inc. v. Commissioner of Pub. Health, supra, quoting Sperry & Hutchinson Co. v. Director of the Div. on the Necessaries of Life, 307 Mass. 408, 418, 30 N.E.2d 269 (1940). For equal protection challenges, the rational basis test requires that "an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class." English v. New England Med. Ctr., supra at 429, 541 N.E.2d 329, quoting Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 452, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (Stevens, J., concurring).[20]

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

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

The judge in the Superior Court endorsed the first rationale, holding that "the state's interest in regulating marriage is based on the traditional concept that marriage's primary purpose is procreation." This is incorrect. Our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family. General Laws c. 207 contains no requirement that the applicants for a marriage license attest to their ability or intention to conceive children by coitus. Fertility is not a condition of marriage, nor is it grounds for divorce. People who have never consummated their marriage, and never plan to, may be and stay married. See Franklin v. Franklin, 154 Mass. 515, 516, 28 N.E. 681 (1891) ("The consummation of a marriage by coition is not necessary to its validity").[22] People who cannot stir from their deathbed may marry. See G.L. c. 207, § 28A. While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the

marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.[23]

Moreover, the Commonwealth affirmatively facilitates bringing children into a family regardless of whether the intended parent is married or unmarried, whether the child is adopted or born into a family, whether assistive technology was used to conceive the child, and whether the parent or her partner is heterosexual, homosexual, or bisexual.[24] If procreation were a necessary component of civil marriage, our statutes would draw a tighter circle around the permissible bounds of nonmarital child bearing and the creation of families by noncoital means. The attempt to isolate procreation as "the source of a fundamental right to marry," 440 Mass. at 370 (Cordy, J., dissenting), overlooks the integrated way in which courts have examined the complex and overlapping realms of personal autonomy, marriage, family life, and child rearing. Our jurisprudence recognizes that, in these nuanced and fundamentally private areas of life, such a narrow focus is inappropriate.

The "marriage is procreation" argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage. Like "Amendment 2" to the Constitution of Colorado, which effectively denied homosexual persons equality under the law and full access to the political process, the marriage restriction impermissibly "identifies persons by a single trait and then denies them protection across the board." Romer v. Evans, 517 U.S. 620, 633, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). In so doing, the State's action confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect.[25]

The department's first stated rationale, equating marriage with unassisted heterosexual procreation, shades imperceptibly into its second: that confining marriage to opposite-sex couples ensures that children are raised in the "optimal" setting. Protecting the welfare of children is a paramount State policy. Restricting marriage to opposite-sex couples, however, cannot plausibly further this policy. "The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household." Troxel v. Granville, 530 U.S. 57, 63, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). Massachusetts has responded supportively to "the changing realities of the American family," id. at 64, 120 S.Ct. 2054, and has moved vigorously to strengthen the modern family in its many variations. See, e.g., G.L. c. 209C (paternity statute); G.L. c. 119, § 39D (grandparent visitation statute); Blixt v. Blixt, 437 Mass. 649, 774 N.E.2d 1052 (2002), cert. denied, 537 U.S. 1189, 123 S.Ct. 1259, 154 L.Ed.2d 1022 (2003) (same); E.N.O. v. L.M.M., 429 Mass. 824, 711 N.E.2d 886, cert. denied, 528 U.S. 1005, 120 S.Ct. 500, 145 L.Ed.2d 386 (1999) (de facto parent); Youmans v. Ramos, 429 Mass. 774, 782, 711 N.E.2d 165 (1999) (same); and Adoption of Tammy, 416 Mass. 205, 619 N.E.2d 315 (1993) (coparent adoption). Moreover, we have repudiated the common-law power of the State to provide varying levels of protection to children based on the circumstances of birth. See G.L. c. 209C (paternity statute); Powers v. Wilkinson, 399 Mass. 650, 661, 506 N.E.2d 842 (1987) ("Ours is an era in which logic and compassion have impelled the law toward unburdening children from the stigma and the disadvantages heretofore attendant upon the status of illegitimacy"). The "best interests of the child" standard does not turn on a parent's sexual orientation or marital status. See e.g., Doe v. Doe, 16 Mass.App.Ct. 499, 503, 452 N.E.2d 293 (1983) (parent's sexual orientation insufficient ground to deny custody of child in divorce action). See also E.N.O. v. L.M.M., supra at 829-830, 711 N.E.2d 886 (best interests of child determined by considering child's relationship with

biological and de facto same-sex parents); Silvia v. Silvia, 9 Mass.App.Ct. 339, 341 & n. 3, 400 N.E.2d 1330 (1980) (collecting support and custody statutes containing no gender distinction).

The department has offered no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children. There is thus no rational relationship between the marriage statute and the Commonwealth's proffered goal of protecting the "optimal" child rearing unit. Moreover, the department readily concedes that people in same-sex couples may be "excellent" parents. These couples (including four of the plaintiff couples) have children for the reasons others do-to love them, to care for them, to nurture them. But the task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws. While establishing the parentage of children as soon as possible is crucial to the safety and welfare of children, see Culliton v. Beth Israel Deaconess Med. Ctr., 435 Mass. 285, 292, 756 N.E.2d 1133 (2001), same-sex couples must undergo the sometimes lengthy and intrusive process of second-parent adoption to establish their joint parentage. While the enhanced income provided by marital benefits is an important source of security and stability for married couples and their children, those benefits are denied to families headed by same-sex couples. See, e.g., note 6, supra. While the laws of divorce provide clear and reasonably predictable guidelines for child support, child custody, and property division on dissolution of a marriage, same-sex couples who dissolve their relationships find themselves and their children in the highly unpredictable terrain of equity jurisdiction. See E.N.O. v. L.M.M., supra. Given the wide range of public benefits reserved only for married couples, we do not credit the department's contention that the absence of access to civil marriage amounts to little more than an inconvenience to same-sex couples and their children. Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of "a stable family structure in which children will be reared, educated, and socialized." 440 Mass. at 381 (Cordy, J., dissenting).[26]

No one disputes that the plaintiff couples are families, that many are parents, and that the children they are raising, like all children, need and should have the fullest opportunity to grow up in a secure, protected family unit. Similarly, no one disputes that, under the rubric of marriage, the State provides a cornucopia of substantial benefits to married parents and their children. The preferential treatment of civil marriage reflects the Legislature's conclusion that marriage "is the foremost setting for the education and socialization of children" precisely because it "encourages parents to remain committed to each other and to their children as they grow." 440 Mass. at 383, 798 N.E.2d at 996 (Cordy, J., dissenting).

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

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

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

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

Here, the plaintiffs seek only to be married, not to undermine the institution of civil marriage. They do not want marriage abolished. They do not attack the binary nature of marriage, the consanguinity provisions, or any of the other gate-keeping provisions of the marriage licensing law. Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race.[28] If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. That same-sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.[29]

It has been argued that, due to the State's strong interest in the institution of marriage as a stabilizing social structure, only the Legislature can control and define its boundaries. Accordingly, our elected representatives legitimately may choose to exclude same-sex couples from civil marriage in order to assure all citizens of the Commonwealth that (1) the benefits of our marriage laws are available explicitly to create and support a family setting that is, in the Legislature's view, optimal for child rearing, and (2) the State does not endorse gay and lesbian parenthood as the equivalent of being raised by one's married biological parents.[30] These arguments miss the point. The Massachusetts Constitution requires that legislation meet certain criteria and not extend beyond certain limits. It is the function of courts to determine whether these criteria are met and whether these limits are exceeded. In most instances, these limits are defined by whether a rational basis exists to conclude that legislation will bring about a rational result. The Legislature in the first instance, and the courts in the last instance, must ascertain whether such a rational basis exists. To label the court's role as usurping that of the Legislature, see, e.g., post at 394-395 (Cordy, J., dissenting), is to misunderstand the nature and purpose of judicial review. We owe great deference to the Legislature to decide social and policy issues, but it is the traditional and settled role of courts to decide constitutional issues.[31]

The history of constitutional law "is the story of the extension of constitutional rights and protections to people once ignored or excluded." United States v. Virginia, 518 U.S. 515, 557, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (construing equal protection clause of Fourteenth Amendment to prohibit categorical exclusion of women from public military institute). This

statement is as true in the area of civil marriage as in any other area of civil rights. See, e.g., Turner v. Safley, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987); Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); Perez v. Sharp, 32 Cal.2d 711, 198 P.2d 17 (1948). As a public institution and a right of fundamental importance, civil marriage is an evolving paradigm. The common law was exceptionally harsh toward women who became wives: a woman's legal identity all but evaporated into that of her husband. See generally C.P. Kindregan, Jr., & M.L. Inker, Family Law and Practice §§ 1.9 and 1.10 (3d ed.2002). Thus, one early Nineteenth Century jurist could observe matter of factly that, prior to the abolition of slavery in Massachusetts, "the condition of a slave resembled the connection of a wife with her husband, and of infant children with their father. He is obliged to maintain them, and they cannot be separated from him." Winchendon v. Hatfield, 4 Mass. 123, 129 (1808). But since at least the middle of the Nineteenth Century, both the courts and the Legislature have acted to ameliorate the harshness of the common-law regime. In Bradford v. Worcester, 184 Mass. 557, 562, 69 N.E. 310 (1904), we refused to apply the common-law rule that the wife's legal residence was that of her husband to defeat her claim to a municipal "settlement of paupers." In Lewis v. Lewis, 370 Mass. 619, 629, 351 N.E.2d 526 (1976), we abrogated the common-law doctrine immunizing a husband against certain suits because the common-law rule was predicated on "antediluvian assumptions concerning the role and status of women in marriage and in society." Id. at 621, 351 N.E.2d 526. Alarms about the imminent erosion of the "natural" order of marriage were sounded over the demise of antimiscegenation laws, the expansion of the rights of married women, and the introduction of "no-fault" divorce.[32] Marriage has survived all of these transformations, and we have no doubt that marriage will continue to be a vibrant and revered institution.

We also reject the argument suggested by the department, and elaborated by some amici, that expanding the institution of civil marriage in Massachusetts to include same-sex couples will lead to interstate conflict. We would not presume to dictate how another State should respond to today's decision. But neither should considerations of comity prevent us from according Massachusetts residents the full measure of protection available under the Massachusetts Constitution. The genius of our Federal system is that each State's Constitution has vitality specific to its own traditions, and that, subject to the minimum requirements of the Fourteenth Amendment, each State is free to address difficult issues of individual liberty in the manner its own Constitution demands.

Several amici suggest that prohibiting marriage by same-sex couples reflects community consensus that homosexual conduct is immoral. Yet Massachusetts has a strong affirmative policy of preventing discrimination on the basis of sexual orientation. See G.L. c. 151B (employment, housing, credit, services); G.L. c. 265, § 39 (hate crimes); G.L. c. 272, § 98 (public accommodation); G.L. c. 76, § 5 (public education). See also, e.g., Commonwealth v. Balthazar, 366 Mass. 298, 318 N.E.2d 478 (1974) (decriminalization of private consensual adult conduct); Doe v. Doe, 16 Mass.App.Ct. 499, 503, 452 N.E.2d 293 (1983) (custody to homosexual parent not per se prohibited).

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

justify shutting the door to civil marriage to a person who wishes to marry someone of the same sex.

The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason. The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual.[33] "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." Palmore v. Sidoti, 466 U.S. 429, 433, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984) (construing Fourteenth Amendment). Limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.

IV

We consider next the plaintiffs' request for relief. We preserve as much of the statute as may be preserved in the face of the successful constitutional challenge. See Mayor of Boston v. Treasurer & Receiver Gen., 384 Mass. 718, 725, 429 N.E.2d 691 (1981); Dalli v. Board of Educ., 358 Mass. 753, 759, 267 N.E.2d 219 (1971). See also G.L. c. 4, § 6, Eleventh.

Here, no one argues that striking down the marriage laws is an appropriate form of relief. Eliminating civil marriage would be wholly inconsistent with the Legislature's deep commitment to fostering stable families and would dismantle a vital organizing principle of our society.[34] We face a problem similar to one that recently confronted the Court of Appeal for Ontario, the highest court of that Canadian province, when it considered the constitutionality of the same-sex marriage ban under the Canadian Charter of Rights and Freedoms (Charter), part of Canada's Federal Constitution. See Halpern v. Toronto (City), 172 O.A.C. 276 (2003) Canada, like the United States, adopted the common law of England. that civil marriage is "the voluntary union for life of one man and one woman, to the exclusion of all others." Id. at par. (36), quoting Hyde v. Hyde, [1861-1873] All E.R. 175 (1866). In holding that the limitation of civil marriage to opposite-sex couples violated the Charter, the Court of Appeal refined the common-law meaning of marriage. We concur with this remedy, which is entirely consonant with established principles of jurisprudence empowering a court to refine a common-law principle in light of evolving constitutional standards. See Powers v. Wilkinson, 399 Mass. 650, 661-662, 506 N.E.2d 842 (1987) (reforming common-law rule of construction of "issue"); Lewis v. Lewis, 370 Mass. 619, 629, 351 N.E.2d 526 (1976) (abolishing common-law rule of certain interspousal immunity).

We construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others. This reformulation redresses the plaintiffs' constitutional injury and furthers the aim of marriage to promote stable, exclusive relationships. It advances the two legitimate State interests the department has identified: providing a stable setting for child rearing and conserving State resources. It leaves intact the Legislature's broad discretion to regulate marriage. See Commonwealth v. Stowell, 389 Mass. 171, 175, 449 N.E.2d 357 (1983).

In their complaint the plaintiffs request only a declaration that their exclusion and the exclusion of other qualified same-sex couples from access to civil marriage violates Massachusetts law. We declare that barring an individual from the protections, benefits, and

obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution. We vacate the summary judgment for the department. We remand this case to the Superior Court for entry of judgment consistent with this opinion. Entry of judgment shall be stayed for 180 days to permit the Legislature to take such action as it may deem appropriate in light of this opinion. See, e.g., Michaud v. Sheriff of Essex County, 390 Mass. 523, 535-536, 458 N.E.2d 702 (1983).
So ordered.
. . . .

Justice Spina, dissenting:

What is at stake in this case is not the unequal treatment of individuals or whether individual rights have been impermissibly burdened, but the power of the Legislature to effectuate social change without interference from the courts, pursuant to art. 30 of the Massachusetts Declaration of Rights.[1] The power to regulate marriage lies with the Legislature, not with the judiciary. See Commonwealth v. Stowell, 389 Mass. 171, 175, 449 N.E.2d 357 (1983). Today, the court has transformed its role as protector of individual rights into the role of creator of rights, and I respectfully dissent.

1. Equal protection. Although the court did not address the plaintiffs' gender discrimination claim, G.L. c. 207 does not unconstitutionally discriminate on the basis of gender.[2] A claim of gender discrimination will lie where it is shown that differential treatment disadvantages one sex over the other. See Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, 378 Mass. 342, 349-352, 393 N.E.2d 284 (1979). See also United States v. Virginia, 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996). General Laws c. 207 enumerates certain qualifications for obtaining a marriage license. It creates no distinction between the sexes, but applies to men and women in precisely the same way. It does not create any disadvantage identified with gender, as both men and women are similarly limited to marrying a person of the opposite sex. See Commonwealth v. King, 374 Mass. 5, 15-22, 372 N.E.2d 196 (1977) (law prohibiting prostitution not discriminatory based on gender because of equal application to men and women).

Similarly, the marriage statutes do not discriminate on the basis of sexual orientation. As the court correctly recognizes, constitutional protections are extended to individuals, not couples. Ante at 326 n. 15, 798 N.E.2d at 957. The marriage statutes do not disqualify individuals on the basis of sexual orientation from entering into marriage. All individuals, with certain exceptions not relevant here, are free to marry. Whether an individual chooses not to marry because of sexual orientation or any other reason should be of no concern to the court.

The court concludes, however, that G.L. c. 207 unconstitutionally discriminates against the individual plaintiffs because it denies them the "right to marry the person of one's choice" where that person is of the same sex. Ante at 328, 798 N.E.2d at 958. To reach this result the court relies on Loving v. Virginia, 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), and transforms "choice" into the essential element of the institution of marriage. The Loving case did not use the word "choice" in this manner, and it did not point to the result that the court reaches today. In Loving, the Supreme Court struck down as unconstitutional a statute that prohibited Caucasians from marrying non-Caucasians. It concluded that the statute was intended to preserve white supremacy and invidiously discriminated against non-Caucasians because of their race. See id. at 11-12, 87 S.Ct. 1817. The "choice" to which the Supreme

Court referred was the "choice to marry," and it concluded that with respect to the institution of marriage, the State had no compelling interest in limiting the choice to marry along racial lines. Id. The Supreme Court did not imply the existence of a right to marry a person of the same sex. To the same effect is Perez v. Sharp, 32 Cal.2d 711, 198 P.2d 17 (1948), on which the court also relies.

Unlike the Loving and Sharp cases, the Massachusetts Legislature has erected no barrier to marriage that intentionally discriminates against anyone. Within the institution of marriage,[3] anyone is free to marry, with certain exceptions that are not challenged. In the absence of any discriminatory purpose, the State's marriage statutes do not violate principles of equal protection. See Washington v. Davis, 426 U.S. 229, 240, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) ("invidious quality of a law claimed to be . discriminatory must ultimately be traced to a . discriminatory purpose"); Dickerson v. Attorney Gen., 396 Mass. 740, 743, 488 N.E.2d 757 (1986) (for purpose of equal protection analysis, standard of review under State and Federal Constitutions is identical). See also Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, supra. This court should not have invoked even the most deferential standard of review within equal protection analysis because no individual was denied access to the institution of marriage.

2. Due process. The marriage statutes do not impermissibly burden a right protected by our constitutional guarantee of due process implicit in art. 10 of our Declaration of Rights. There is no restriction on the right of any plaintiff to enter into marriage. Each is free to marry a willing person of the opposite sex. Cf. Zablocki v. Redhail, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978) (fundamental right to marry impermissibly burdened by statute requiring court approval when subject to child support order).

Substantive due process protects individual rights against unwarranted government intrusion. See Aime v. Commonwealth, 414 Mass. 667, 673, 611 N.E.2d 204 (1993). The court states, as we have said on many occasions, that the Massachusetts Declaration of Rights may protect a right in ways that exceed the protection afforded by the Federal Constitution. Ante at 328, 798 N.E.2d at 958. See Arizona v. Evans, 514 U.S. 1, 8, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995) (State courts afforded broader protection of rights than granted by United States Constitution). However, today the court does not fashion a remedy that affords greater protection of a right. Instead, using the rubric of due process, it has redefined marriage.

Although art. 10 may afford greater protection of rights than the due process clause of the Fourteenth Amendment, our treatment of due process challenges adheres to the same standards followed in Federal due process analysis. See Commonwealth v. Ellis, 429 Mass. 362, 371, 708 N.E.2d 644 (1999). When analyzing a claim that the State has impermissibly burdened an individual's fundamental or other right or liberty interest, "[w]e begin by sketching the contours of the right asserted. We then inquire whether the challenged restriction burdens that right." Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 646, 417 N.E.2d 387 (1981). Where a right deemed "fundamental" is implicated, the challenged restriction will be upheld only if it is "narrowly tailored to further a legitimate and compelling governmental interest." Aime v. Commonwealth, supra at 673, 611 N.E.2d 204. To qualify as "fundamental" the asserted right must be "objectively, 'deeply rooted in this Nation's history and tradition,' [Moore v. East Cleveland, 431 U.S. 494, 503, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (plurality opinion)] . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.' " Washington v. Glucksberg, 521 U.S. 702, 720-721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997), quoting Palko v. Connecticut, 302 U.S. 319, 325, 326, 58 S.Ct. 149, 82

L.Ed. 288 (1937) (right to assisted suicide does not fall within fundamental right to refuse medical treatment because novel and unsupported by tradition) (citations omitted). See Three Juveniles v. Commonwealth, 390 Mass. 357, 367, 455 N.E.2d 1203 (1983) (O'Connor, J., dissenting), cert. denied sub nom. Keefe v. Massachusetts, 465 U.S. 1068, 104 S.Ct. 1421, 79 L.Ed.2d 746 (1984). Rights that are not considered fundamental merit due process protection if they have been irrationally burdened. See Massachusetts Fed'n of Teachers v. Board of Educ., 436 Mass. 763, 777-779 & n. 14, 767 N.E.2d 549 (2002).

Although this court did not state that same-sex marriage is a fundamental right worthy of strict scrutiny protection, it nonetheless deemed it a constitutionally protected right by applying rational basis review. Before applying any level of constitutional analysis there must be a recognized right at stake. Same-sex marriage, or the "right to marry the person of one's choice" as the court today defines that right, does not fall within the fundamental right to marry. Same-sex marriage is not "deeply rooted in this Nation's history," and the court does not suggest that it is. Except for the occasional isolated decision in recent years, see, e.g., Baker v. State, 170 Vt. 194, 744 A.2d 864 (1999), same-sex marriage is not a right, fundamental or otherwise, recognized in this country. Just one example of the Legislature's refusal to recognize same-sex marriage can be found in a section of the legislation amending G.L. c. 151B to prohibit discrimination in the workplace on the basis of sexual orientation, which states: "Nothing in this act shall be construed so as to legitimize or validate a 'homosexual marriage'." St.1989, c. 516, § 19. In this Commonwealth and in this country, the roots of the institution of marriage are deeply set in history as a civil union between a single man and a single woman. There is no basis for the court to recognize same-sex marriage as a constitutionally protected right.

3. Remedy. The remedy that the court has fashioned both in the name of equal protection and due process exceeds the bounds of judicial restraint mandated by art. 30. The remedy that construes gender-specific language as gender-neutral amounts to a statutory revision that replaces the intent of the Legislature with that of the court. Article 30 permits the court to apply principles of equal protection and to modify statutory language only if legislative intent is preserved. See, e.g., Commonwealth v. Chou, 433 Mass. 229, 238-239, 741 N.E.2d 17 (2001) (judicial rewriting of gender language permissible only when Legislature intended to include both men and women). See also Lowell v. Kowalski, 380 Mass. 663, 670, 405 N.E.2d 135 (1980). Here, the alteration of the gender-specific language alters precisely what the Legislature unambiguously intended to preserve, the marital rights of single men and women. Such a dramatic change in social institutions must remain at the behest of the people through the democratic process.

Where the application of equal protection principles do not permit rewriting a statute in a manner that preserves the intent of the Legislature, we do not rewrite the statute. In Dalli v. Board of Educ., 358 Mass. 753, 267 N.E.2d 219 (1971), the court refused to rewrite a statute in a manner that would include unintended individuals. "To attempt to interpret this [statute] as including those in the category of the plaintiff would be to engage in a judicial enlargement of the clear statutory language beyond the limit of our judicial function. We have traditionally and consistently declined to trespass on legislative territory in deference to the time tested wisdom of the separation of powers as expressed in art. [30] of the Declaration of Rights of the Constitution of Massachusetts even when it appeared that a highly desirable and just result might thus be achieved." Id. at 759, 267 N.E.2d 219. Recently, in Connors v. Boston, 430 Mass. 31, 714 N.E.2d 335 (1999), we refused to expand health insurance coverage to include domestic partners because such an expansion was within the province of the Legislature, where policy affecting

family relationships is most appropriate and frequently considered. Id. at 42-43, 714 N.E.2d 335. Principles of equal protection do not permit the marriage statutes to be changed in the manner that we have seen today.

This court has previously exercised the judicial restraint mandated by art. 30 and declined to extend due process protection to rights not traditionally coveted, despite recognition of their social importance. See Tobin's Case, 424 Mass. 250, 252-253, 675 N.E.2d 781 (1997) (receiving workers' compensation benefits not fundamental right); Doe v. Superintendent of Schs. of Worcester, 421 Mass. 117, 129, 653 N.E.2d 1088 (1995) (declaring education not fundamental right); Williams v. Secretary of the Executive Office of Human Servs., 414 Mass. 551, 565, 609 N.E.2d 447 (1993) (no fundamental right to receive mental health services); Matter of Tocci, 413 Mass. 542, 548 n. 4, 600 N.E.2d 577 (1992) (no fundamental right to practice law); Commonwealth v. Henry's Drywall Co., 366 Mass. 539, 542, 320 N.E.2d 911 (1974) (no fundamental right to pursue one's business). Courts have authority to recognize rights that are supported by the Constitution and history, but the power to create novel rights is reserved for the people through the democratic and legislative processes.

Likewise, the Supreme Court exercises restraint in the application of substantive due process " 'because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.' [Collins v. Harker Heights, 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992).] By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field,' [id.], lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court, Moore [v. East Cleveland, 431 U.S. 494, 502, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977)] (plurality opinion)." Washington v. Glucksberg, supra at 720, 117 S.Ct. 2258.

The court has extruded a new right from principles of substantive due process, and in doing so it has distorted the meaning and purpose of due process. The purpose of substantive due process is to protect existing rights, not to create new rights. Its aim is to thwart government intrusion, not invite it. The court asserts that the Massachusetts Declaration of Rights serves to guard against government intrusion into each individual's sphere of privacy. Ante at 329, 798 N.E.2d at 959. Similarly, the Supreme Court has called for increased due process protection when individual privacy and intimacy are threatened by unnecessary government imposition. See, e.g., Lawrence v. Texas, 539U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (private nature of sexual behavior implicates increased due process protection); Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) (privacy protection extended to procreation decisions within nonmarital context); Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (due process invoked because of intimate nature of procreation decisions). These cases, along with the Moe case, focus on the threat to privacy when government seeks to regulate the most intimate activity behind bedroom doors. The statute in question does not seek to regulate intimate activity within an intimate relationship, but merely gives formal recognition to a particular marriage. The State has respected the private lives of the plaintiffs, and has done nothing to intrude in the relationships that each of the plaintiff couples enjoy. Cf. Lawrence v. Texas, supra at 2484 (case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter"). Ironically, by extending the marriage laws to same-sex couples the court has turned substantive due process on its head and used it to interject government into the plaintiffs' lives.