IN THE SUPREME COURT
OF THE
STATE OF VERMONT

STAN BAKER and PETER HARRIGAN

vs.

STATE OF VERMONT and
TOWN OF SHELBURNE

NINA BECK and STACY JOLLES

vs.

STATE OF VERMONT and
CITY OF SOUTH BURLINGTON

LOIS FARNAHM and HOLLY PUTERBAUGH

vs.

STATE OF VERMONT and
TOWN OF MILTON

Supreme Court Docket No. 98-32

Appeal from
Chittenden Superior Court
Docket No. S1009-97CnC

BRIEF OF APPELLEE
STATE OF VERMONT

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

Eve Jacobs-Carnahan
Timothy Tomasi
Assistant Attorneys General
109 State Street
Montpelier, VT 05609-1001
802-828-3176

TABLE OF CONTENTS

TABLE OF AUTHORITIES

VERMONT CONSTITUTION

VERMONT CASES

ATTORNEY GENERAL OPINION

VERMONT STATUTES AND LEGISLATIVE MATERIALS

FEDERAL CASES

CASES FROM OTHER JURISDICTIONS

STATUTES AND CONSTITUTIONS FROM OTHER JURISDICTIONS

JOURNALS, BOOKS AND OTHER PUBLICATIONS

INTRODUCTION

Through mischaracterization and exaggeration of the State of Vermont's arguments, the Appellants' Brief (the "Brief") contends that Vermont's refusal to permit same-sex "marriages" places it alongside the Virginia of 1967, whose laws still reflected the vestiges of slavery, Jim Crow and racial bigotry. In fact, the Vermont of 1997 is one of the most tolerant states with regard to the rights of homosexuals. In the wake of the decision Baehr v. Lewin, 852 P.2d 44 (Haw. 1993),[1] Vermont, unlike the federal government and numerous other states, did not pass a so-called "Defense of Marriage" law denying the validity of same-sex "marriages" performed in other states. See, e.g., 28 U.S.C. §1738C; 13 Del. Code §101 (1996); Alaska Stat. Ann. §25.05.013 (1996); Utah Code Ann. §30-1-4 (1995). Vermont has passed a number of laws expressly prohibiting discrimination on the basis of sexual orientation. Vermont has no sodomy statute or other law regulating the intimate associations of consenting adults. Vermont does not prohibit homosexuals from adopting children. Despite this evidence, Appellants have used the Legislature's decision not to afford marital status to unions of the same sex to claim that Vermont's laws show contempt for the gay population and merely codify societal prejudices. To Appellants, extending marriage laws to cover same-sex unions would not even constitute a dramatic development. Brief at 6, 48-49. The State cannot agree.

Whether one is in favor of Appellants' position or that of the Appellees, it would be impossible to characterize permitting same-sex "marriages" as anything other than a

[1] This ruling remanded the case to the trial court where a trial was held on whether any of the state's interests were compelling. The trial court's ruling in favor of the plaintiffs is currently on appeal.

watershed change in the law. First, no country in the world currently permits marriages between members of the same sex. Wardle, International Marriage and Divorce Regulation and Recognition: A Survey, 29 Fam. L.Q. 497, 500 (1995); see Posner, Should There be Homosexual Marriage? And if so, Who Should Decide?, 95 Mich. L. Rev. 1578, 1585 (1997). Second, every court that has considered the issue in this country has rejected the claim that the refusal to permit members of the same sex to "marry" burdens a suspect class. See infra at Section IV(B). Third, nearly every court that has considered the issue in this country has concluded that refusing to extend marital status to same-sex unions does not constitute sex discrimination and does not violate the fundamental right to marry. See infra at Sections IV(A & C).

With those points in mind, it is important to note what this case is not about.

1. Vermont's statutes present no restrictions on family formation, no interference with family or commitment choices, and contain no prohibitions against sexual relations between consenting adults. The three pairs of Appellants in this case are free to live together, have consensual sexual relations, and raise children with each other. Under the rules of certain religions, they may even have their relationship sanctified in a religious ceremony. What Vermont law does not allow them to do is obtain a marriage license from the State. This is not a prohibition of any conduct of the Appellants.

2. This lawsuit is not a benefits case. While the Legislature has crafted laws granting benefits to married couples, Appellants have not sued under any of those statutes. Instead, Appellants seek the State-conferred title of marriage. Rather than proceeding under a particular statute that grants certain benefits and claiming to be similarly situated to married couples, Appellants here challenge the status of marriage and contend that they meet all the

qualifications to be married. An example illustrates this point: In In re B.L.V.B., 160 Vt. 368 (1993), one member of the lesbian couple claimed she should be treated as if she were a step-parent and should come within the statute allowing adoption by step-parents, without terminating the parental rights of the natural parent. In essence, she claimed to be similarly situated to the married partner of a biological mother, even though she was not married. The Court agreed, but in doing so it did not rename the couple's relationship "marriage;" nor did it give the adopting woman the name "spouse." Instead, it gave the adopting woman the rights and responsibilities under that statute regarding step-parent adoptions. What Appellants ask the Court to do here is change the name of their relationship in order to use it as a mechanism for obtaining rights and obligations under hundreds of other statutes. Appellants cannot rely upon statutes that are not contested in this case as a basis to claim the right to marriage.[2]

STATEMENT OF THE CASE

In July, 1997, Plaintiffs-Appellants filed this action against the State of Vermont and three municipalities after they applied for and were denied marriage licenses on the ground that they were members of the same sex. The plaintiffs-Appellants' bare-bones Complaint contained no allegations concerning the Plaintiffs' family arrangements, personal history, or financial circumstances. Printed Case ("P.C.") 1-4. It did not even assert their sexual orientation. It simply claimed that they wished to marry, and that Vermont's marriage statutes should be interpreted to permit same-sex marriages. P.C. 2-3. If not so interpreted, they asserted, the statutes must be deemed unconstitutional under the Vermont Constitution.

---

[2] Moreover, by using this approach the Appellants skirt the question of whether they are similarly situated to a married husband and wife under each of those other statutes. This avoids the difficult question of whether the purposes of each of those statutes apply with equal force to same-sex couples. The Court should not be misled into taking this short-cut; it may not lead to the same place for each of the hundreds of statutes relating to marriage.

On November 10, 1997, the State filed a motion to dismiss arguing that Vermont's marriage statutes authorized only marriages that were comprised of one man and one woman. P.C. 7-98. The State contended that those statutes did not burden a suspect class or impact a fundamental right. Under rational basis review, the statutes served a number of valid purposes. The Town of Shelburne and the City of South Burlington joined the State's motion. P.C. 99-102. The plaintiffs opposed the State's motion and filed a motion for judgment on the pleadings against the Town of Milton, which was the only party to have filed an answer. P.C. 103.

On December 19, 1997, the Superior Court, per Judge Leavitt, granted the State's motion to dismiss and denied the plaintiffs' motion for judgment on the pleadings. P.C. 254-70. The Court concluded that the statutes could not be construed to permit the issuance of marriage licenses to same-sex couples. Under rational basis review, the Court found that the statutes were constitutional on the ground that they furthered the State's interest in promoting the link between procreation and child rearing. The Town of Milton subsequently moved for judgment on the pleadings, which was granted. P.C. 271, 275. This appeal ensued.

Because this appeal arises on the granting of the Defendants-Appellees' motion to dismiss and motion for judgment on the pleadings, the only facts deemed established are those in the Complaint. The gratuitous "facts" provided by Appellants in their Statement of the Case and throughout the Brief are not part of the Complaint, not in evidence, and not facts permitted to be relied upon in this appeal.

ISSUES PRESENTED ON APPEAL

1. Whether the Superior Court correctly ruled that under Vermont's marriage laws, marriage license may only be issued to a man and a woman.

2. Whether the Superior Court correctly ruled that Vermont's marriage laws are constitutional under rational basis review.

3. Whether the Superior Court correctly ruled that Vermont's marriage laws are not subject to heightened constitutional scrutiny because they do not impact a fundamental right and do not burden a suspect class.

ARGUMENT

I. UNDER VERMONT STATUTES, MARRIAGE LICENSES MAY ONLY BE ISSUED TO A MAN AND A WOMAN

Contrary to Appellants' novel approach, virtually all accepted canons of statutory interpretation support the conclusion that marriage licenses may only be issued to a man and a woman. The plain meaning of the language in the marriage statutes, 18 V.S.A. §§5131 and 5137, conclusively establishes that marriages have always meant a union of a man and a woman. The many related statutes which stand in pari materia with §§5131 and 5137, give further confirmation that the legislative intent was to encompass only opposite-sex couples within marriage. The legislative history of Vermont's marriage laws reveals the same intent. Lastly, as properly understood there is no constitutional conflict with the State's construction of the statute. Therefore, the Superior Court correctly dismissed the Appellants' cause of action under Count I because it fails to state a claim on statutory grounds.

A. Appellants Advocate A Novel Theory Of Statutory Construction Without Any Support In Vermont Law.

Ignoring the plain wording of the marriage statutes, the related statutes which stand in pari materia with them, and the legislative history, Appellants contend that Vermont's marriage laws permit town clerks to issue marriage licenses to two people of the same sex. The premise of their argument is that this Court should eschew the express language of Vermont's marriage laws and virtually every rule of statutory construction in favor of the

"underlying purpose" of those laws, as divined by the Appellants. Appellants employ a nascent theory of statutory construction to advance their claim. This theory rejects the use of the canons of construction in favor of a "purposive" approach. Such analysis appears to have two steps: (1) determine (from what, it is unclear) the legislative purpose, and (2) construe the statutory words to conform to the purpose. The Appellants' approach is antithetical to this Court's accustomed and settled process of statutory interpretation.

Intimating that the Court already employs this theory, Appellants do not disclose the novel nature of their approach. Instead, they selectively quote from Lubinsky v. Fair Haven Zoning Bd., 148 Vt. 47 (1986), for the proposition that it is only the legislative purpose, and not the Legislature's intent, that matters. They leave out the portion of the same case, which held as follows:

> The first recourse in applying a statute is to examine the plain meaning of the language in light of the statute's legislative purpose and in terms of its impact on the factual circumstances under consideration. If that plain language resolves the conflict without doing violence to the legislative scheme, there is no need to go further, always bearing in mind that the paramount function of the court is to give effect to the legislative intent. Thus it is apparent that all rules of construction rely on a determination of legislative intent or purpose. That intent is most truly derived from a consideration of not only the particular statutory language, but from the entire enactment, its reason, purpose and consequences.

Lubinsky, 148 Vt. at 49-50. Although the Court speaks of both legislative intent and purpose, Appellants choose only to focus on purpose. "Intent" refers to the legislative intentions at the time the statute was enacted. "Purpose" is a more malleable concept. It might encompass whatever the Appellants suggest—unconfined by the expressions of legislative intent revealed through the words of the statute and other interpretive tools.

But this Court has not rejected examinations of statutory language; nor has it rejected examination of statutes in pari materia. Lubinsky points to both of these as tools for use in

determining the legislative intent. Recent cases of this Court have reiterated the Court's continued adherence to the accepted canons of statutory construction. See Merkel v. Nationwide Insur. Co., 693 A.2d 706 (Vt. 1997) ("Our goal in interpreting a statute is to discern and implement the intent of the Legislature."); Secretary, Agency of Natural Resources v. Upper Valley Landfill Corp., 705 A.2d 1001, 1009 (Vt. 1997) ("Our primary task in construing a statute is to give effect to the intent of the Legislature. To determine legislative intent, we review the history and the entire framework of the statute."). Indeed, this Court has held that where a statute's meaning is clear, that legislative choice controls—even where sound policy might dictate a contrary interpretation. Vermont State Colleges Faculty Federation v. Vermont State Colleges, 138 Vt. 451, 456 (1980).

Reliance on Lubinsky is also misplaced where, as here, there is disagreement on the purpose of the statute. In Lubinsky, the Court specifically noted that there was no disagreement on the basic purpose of the law. 148 Vt. at 50. Since the State disagrees with the Appellants' postulation of the purpose of the marriage licensing statutes, the Court must look to the language of the statute and legislative history to determine its purpose. Appellants' approach ignores these sources in order to give them the freedom to interpret the law in light of the purpose they choose. They cannot, however, stake any claim to unique knowledge of the legislative purposes behind the marriage laws. Indeed, the rules of statutory construction were devised, in part, to help determine the legislative purposes behind statutes.

No one would debate that one of the purposes behind marriage laws is the recognition of committed relationships. Appellants' conclusion that this is the only intent that may be accorded to the Legislature conflicts with the tenets of statutory construction and amounts to conjecture. Writers have pointed to numerous purposes behind marriage laws. See, e.g.,

Schneider, The Channelling Function in Family Law, 20 Hofstra L. Rev. 495, 521 (1992) [hereinafter "Schneider, Channelling"]. One of the principal historical purposes behind marriage laws has been the regulation of sexual and procreative relations. Because the pairing of a man and a woman is the only union that has the capability to produce in offspring, the legal system surrounds it with protections and strictures that encourage stability and provision for the children.

Appellants contest this, since they point out that same-sex couples can have children too. They go so far as to suggest that the word "procreation," does not mean to beget or bring forth offspring. Instead they contend it means child rearing. Brief at 12 n.13. Appellants dismiss the biological union of the sexes as a type of primitive and technical precursor to raising children. Their protestations to the contrary, it is still necessary to have an ovum and a sperm in order to create a child. Same-sex couples simply cannot procreate on their own. They need to obtain the missing gamete from someone of the opposite sex.

Marriage laws have always been society's way of regulating sexual and procreative relations. In choosing among societal units, the Legislature could rightly see the opposite-sex couple as the only one capable of procreation on its own and thus the one most likely to result in offspring.[3] As such it is the societal group best-suited to receiving the status of marriage

[3] Appellants attempt to show that American married couples are more and more often childless. Their interpretation of their own exhibit is incorrect. Compare Brief at 32 n.27, with Appellants' Appendix 23; see also U.S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States (117th ed. 1997) Table 68. The census material they cite for figures on "married couples with children" refers to couples who were living with children under the age of 18 at the time of the census. It did not include couples who were parents but whose children were grown and living out of the house. Thus, couples with grown children living elsewhere were included in the category "married couples without children."

with the benefits and rules that accompany it.[4] It is that purpose, among other things, that is ignored by Appellants' approach.

B. The Meaning Of The Term Marriage And The Legislature's Use Of Gender-Based Language In The Marriage Statutes Shows That The Legislature Contemplated Marriage Only Between A Man And A Woman.

The first principle of statutory construction is to look at the plain meaning of the words chosen by the Legislature. Smith v. Town of St. Johnsbury, 150 Vt. 351, 355 (1988). As this Court noted just months ago, "we presume the Legislature intended language to carry its plain, ordinary meaning." Upper Valley Landfill Corp., 705 A.2d at 1009. The Court takes this position "because [it] presume[s] the Legislature used the language advisedly." State v. DeRosa, 161 Vt. 78, 80 (1993). The Court is, thus, not at liberty to make law by finding a meaning not reflected in the plain language of the statute. Each of the courts that has been faced with a challenge by same-sex couples to its marriage statutes has uniformly held that "marriage," as that term is used in marital statutes, is now, and has traditionally been, defined as a union between the sexes. Dean v. District of Columbia, 653 A.2d 307, 312-16 (D.C. App. 1995); Baehr v. Lewin, 852 P.2d at 56-57; Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973); Baker v. Nelson, 191 N.W.2d 185, 185-86 (Minn. 1971), appeal dismissed for lack of substantial federal question, 409 U.S. 810 (1972); De Santo v. Barnsley, 328 Pa. Super. 181, 476 A.2d 952, 953 (1984); Singer v. Hara, 11 Wash. App. 2d 247, 522

---

[4] Likewise, the Legislature has not granted the status of marriage to other people who live together. When Appellants claim that the exclusion of same-sex couples from marriage is equivalent to an exclusion of homosexual couples, they are adding a gloss to the statutes that is not there. See Brief at 2 n.1. Importantly, the statute also prohibits marriages between heterosexuals of the same-sex who may choose to live together in a non-sexual relationship for mutual support, both emotional and financial.

P.2d 1187, 1191 (1974); Storrs v. Holcomb, 645 N.Y.S.2d 286, 287-88 (N.Y. Sup. Ct. 1996); see also Adams v. Howerton, 486 F. Supp. 1119, 1122-23 (C.D. Cal. 1980), aff'd, 673 F.2d 1036 (9th Cir. 1982) (denying immigration to foreign man who purportedly married an American man), cert. denied, 458 U.S. 1111 (1982); Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI (Alaska Super. Ct. Feb. 27, 1998) (statutory construction not necessary since statute explicitly excludes same-sex couples); Rutgers Council v. Rutgers, 689 A.2d 828, 834-35 (N.J. Super. Ct. App. Div. 1997), appeal dismissed, 1998 N.J. Lexis 202 (N.J. 1998); Anonymous v. Anonymous, 168 Misc. 2d 898, 325 N.Y.S.2d 499, 500 (N.Y. Sup. Ct. 1971) (holding there was never a marriage between man and a person who he thought was a woman but was actually a man undergoing transsexual change).

Courts in other countries have come to the same conclusion. Quilter v. Attorney-General, Case No. CA 200/96, slip op. at 29 (Thomas, J.), 85-92[5] (Tipping, J.) (New Zealand Ct. App. Dec. 17, 1997) (Attachment 7 in Appendix); Grant v. South-West Trains, Ltd., Case No. C-249/96, slip op., ¶¶32 (Ct. of Justice Eur. Comm. Feb. 17, 1998) (Attachment 6 in Appendix). Even in Europe, the fact that some Member States of the European Community have adopted legislation recognizing same-sex cohabitants has not changed the society's common understanding of marriage. Grant, ¶¶32-35.

Our society's customary understanding[6] of marriage as requiring both a man and a woman is reflected in both common and legal dictionary definitions. Webster's Third New International Dictionary (1961) defines marriage as follows:

---

[5] To avoid confusion, page references in Quilter are to those shown at the bottom of the page, since they are consecutive through all of the Justices' opinions. In contrast, the numbers at the tops of the pages start over at 1 in each Justice's opinion.

[6] In support of their assertion that society has altered its meaning of marriage to apply the same term to opposite-sex and same-sex unions, Appellants and some Amici submit copies of

> 1a: the state of being united to a person of the opposite sex as husband or wife
> b: the mutual relation of husband and wife
> c: 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

Black's Law Dictionary (6th ed. 1990) offers the following definition:

> Legal union of one man and one woman as husband and wife. Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187, 1193. Marriage . . . is the legal status, condition, or relation of one man and one woman united in law for life, or until divorced, 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.

These definitions are firmly rooted in the canon law from which our State's common law of marriage derived.[7] Adams, 486 F. Supp. at 1123 (English civil law of marriage took its basic principles from canon law; and that law did not sanction marriage between persons of same sex); Le Barron v. Le Barron, 35 Vt. 365, 366-67 (1862) (common law adopted by Vermont includes principles of law of the ecclesiastical courts on issues of marriage); 1 V.S.A. §271 (adopting common law). Indeed, to the extent that this Court has addressed the elements of marriage it has required consummation and the intent to cohabit as husband and wife to create a marriage. Le Barron, 35 Vt. at 369; Clark v. Field, 13 Vt. 460 (1841).

The statutes regulating the issuance of marriage licenses in Title 18, Chapter 105, and those governing the marriage relationship in Title 15, also support this definition of marriage.

---

newspaper articles concerning this case. Such post hoc evidence could not be accepted by a court to prove the meaning of a statutory term. It is even more suspect when the articles were reporting the Appellants' own claims as made in furtherance of this litigation. Moreover, the simple fact that the adjective "same-sex" is employed to modify "marriage" shows that same-sex marriage is different from marriage as commonly understood.

[7] Since marriage was not a civil contract in England until the mid-nineteenth century, it was the ecclesiastical courts that had jurisdiction over the institution before that time. That is the reason for the common law's reliance on canon law for marriage issues. M. Glendon, The Transformation of Family Law 33 (1989).

For example, in the statute enabling town clerks to issue marriage licenses, there are immediate references to "bride" and "groom:"

> The license shall be issued by the clerk of the town where either the bride or groom resides or, if neither is a resident of the state, by a town clerk in the county where the marriage is to be solemnized.

18 V.S.A. §5131(a) (emphasis added). "Bride" and "groom" are gender-based terms. Webster's Third International Dictionary defines "bride" as "a woman newly married or about to be married." It defines "groom" as "bridegroom," which in turn is defined as "a man newly married or about to be married."[8]

Scattered throughout other titles of the Vermont statutes are numerous other references to marriage. Taken together, it is inescapable that these statutes describe marriage as a union of one man and one woman. That conclusion is "so strongly and firmly implied from a full reading of the statutes that a different legislative intent, one which would sanction a marriage between persons of the same sex, cannot be fathomed." Rutgers Council, 689 A.2d at 834-35 (citations omitted).

---

[8] Appellants and amicus curiae Professors of Legislation and Statutory Interpretation look to 1 V.S.A. § 175's direction that statutory language be read to be gender-inclusive. Brief at 9 n.9; amicus brief at 12. They gloss over the fact that § 175 applies only to masculine words, as it says, "words importing the masculine may extend and be applied to persons of the feminine gender." This provision is not meant to change the meaning of any statutes. Its purpose is to take words such as "he," "him," and "man," which were written to refer to all people, and removes the ambiguity (and any offensiveness) by specifically stating that they do include both men and women. The very fact that the provision does not apply to feminine words establishes that it does not make all language gender neutral. Moreover, it provides that words "may" be extended in application. This leaves room for the situations, such as these, where there is a reason behind the gender-based word chosen by the Legislature.

C. Statutes In Pari Materia With The Marriage Licensing Statutes Divulge The Same Legislative Intent To Encompass Only Opposite-Sex Unions In Marriage.

Where statutes are closely related, concern the same purpose or subject matter, and are part of one statutory scheme, they are to be construed in pari materia. Board of Trustees of Kellogg-Hubbard Library, Inc. v. Labor Rel. Bd., 162 Vt. 571, 574-75 (1994). Under this principle, the meaning of words in one statute can inform the meaning of the same words in other statutes because they are part of the same scheme. See Lubinsky, 148 Vt. at 50 (noting same).

In Vermont, the statutes in Title 15, Ch. 1 all relate to the eligibility to enter into marriage. The first two sections read:

> §1. Man forbidden to marry relatives
>
> A man shall not marry his mother, grandmother, daughter, granddaughter, sister, brother's daughter, sister's daughter, father's sister or mother's sister.
>
> §2. Woman forbidden to marry relatives
>
> A woman shall not marry her father, grandfather, son, grandson, brother, brother's son, sister's son, father's brother or mother's brother.

These lists show that the Legislature only contemplated marriage between a man and a woman. If the Legislature had thought that two women could marry each other, the lists would have included "a woman shall not marry her mother, grandmother, daughter, granddaughter, sister, etc." There would have been no reason to use two separate sections; instead one provision combining them could have read, "An individual shall not marry his or her father, mother, grandfather, grandmother, son, daughter," and so forth. The Legislature last amended these two sections in 1975, yet it did not make such changes. This indicates a legislative understanding of marriage as a status available only to a couple comprised of both sexes.

These statutes are not only aimed at prohibiting marriages that could result in genetic defects. If the only consideration were genetics, then there would be an exception for adopted children, since they are not biologically related to their parents, siblings, aunts and uncles, or grandparents.

Likewise, 15 V.S.A. §3 states that:

> If the relationship in those cases mentioned in sections 1 and 2 of this title is founded on a marriage, the prohibition shall continue in force notwithstanding the dissolution of such marriage by death or divorce . . . .

So, for example, a woman A would be barred from marrying her sister's husband B, since he would be her brother-in-law. This is called a relationship of "affinity."[9] Section 3 states that this bar continues even if the sister is later divorced from B. The prohibition on A and B marrying will remain. And, in case someone fails to heed sections 1 through 3, the statutes provide for automatic annulment stating:

> Marriage prohibited by law on account of consanguinity or affinity between the parties . . . shall be void without decree of divorce or other legal process.

15 V.S.A. §511(a) (emphasis added).

Appellants acknowledge that these prohibitions on marriage to relatives are inconsistent with their interpretation of the marriage licensing statutes. Brief at 8 n.7. They suggest the solution is for the Legislature to amend the consanguinity and affinity statutes. This suggestion unmasks the flaw of their argument. If the Legislature must amend these statutes to be consistent with same-sex "marriage," it makes plain that the marriage licensing statutes do not presently encompass same-sex unions. This is but another indication that the

---

[9] Black's Law Dictionary defines "affinity" as "[r]elation which one spouse because of marriage has to blood relatives of the other." It goes on to explain that "[t]he doctrine of affinity grew out of the canonical maxim that marriage makes husband and wife one. The husband has the same relation, by affinity, to his wife's blood relatives as she has to them by consanguinity and vice versa."

Appellants seek legislation in the form of a judicial opinion. The judiciary's role is to interpret and apply the statutes, not to formulate or enact them. In re D.L., 164 Vt. 223, 228 (1995).

Chapter 11 of Title 15 is closely related to Chapter 1. Whereas Chapter 1 concerns creation of the marriage relationship, Chapter 11 addresses its termination. To accomplish their goals these two chapters must both describe marriage on the same terms. 15 V.S.A. §513 reads in part:

> A complaint to annul a marriage on the ground that one of the parties was under the age of sixteen years may be brought by the parent or guardian entitled to the custody of such minor . . . . However, such marriage shall not be annulled on the complaint of a party of legal age at the time it was contracted nor when the parties, after they attained the age of consent, freely cohabited as husband and wife.

(Emphasis added). If the Legislature intended that its statutes authorize marriages between two individuals of the same sex, it would not have used the gender-based words "husband and wife" in this section. This reveals its intent that the marriages referred to in §5137 must be limited to opposite-sex couples.

When the General Assembly passed Act 135—"An Act Relating to Discrimination on the Basis of Sexual Orientation" in 1992—it found it necessary to amend 15 V.S.A. § 1101 relating to domestic abuse. P.A. No. 135, §14 (1991 Adj. Sess.). One of the definitions it changed was that for "family or household members." Whereas this term formerly included "spouses or former spouses [or] persons of the opposite sex living as spouses now or in the past," the Legislature determined that this would not encompass same-sex couples. That is to say, the Legislature did not believe that same-sex couples could be married under Vermont law and obtain the title "spouse." In order to extend protection to such couples under this provision, it rewrote the definition to read: "'Household members' means persons living

together or sharing occupancy and persons who have lived together in a sexual relationship." Id. (codified at 15 V.S.A. § 1101(2)). The new words, "persons living together" covers married couples, and opposite-sex and same-sex couples currently living together. The new words, "persons who have lived together in a sexual relationship" covers formerly married couples, and opposite-sex and same-sex couples who formerly lived together.

This same legislation added sexual orientation to the prohibited categories of unlawful employment practices. However, the General Assembly expressed the limits of its intent by adding the following language:

> The provisions of this section prohibiting discrimination on the basis of sexual orientation shall not be construed to change the definition of family or dependent in an employee benefit plan.

P.A. No. 135, §15, adding 21 V.S.A. § 495(f). Through this amendment the Legislature again expressed its understanding that the terms "family" and "dependent" as used in the statutes do not include same-sex partners in same-sex unions. If the term "marriage" already had the meaning that Appellants ascribe to it, then it would conflict with these provisions. The sensible reading is that the marriage statutes do not include same-sex unions.

Moreover, the many changes made in Act 135 disclose that the Legislature certainly knew how to make changes in the law if it wanted. See Vermont State Colleges Faculty Federation. v. Vermont State Colleges, 138 Vt. at 455. Since it chose not to change the definition of marriage it must have intended that the institution remain one reserved for opposite-sex couples.

There are dozens of other statutes that use the words husband and wife when specifying rights and duties that attach to marriage. Every time these statutes employ gender-based words they demonstrate the legislative intent to treat marriage as a state into which only opposite-sex couples are eligible to enter. See, e.g., 18 V.S.A. §531(b) ("husband" and "wife"

may be interred together); 9A V.S.A. §§9-403, 9-405, 9-406, 9-407 (U.C.C. treats "husband" and "wife" as one name for purpose of paying certain fees); 12 V.S.A. §1605 ("husband" and "wife" shall be competent witnesses but may not testify about communications to each other); 14 V.S.A. §10 (requirements for attesting wills when "his wife or her husband" is a beneficiary); 14 V.S.A. §§461, 462, 465, 470 (widow's interest in estate of "her husband"); 14 V.S.A. §§474, 475 (widower's interest in estate of "his wife"); 15 V.S.A. Ch. 3 ("Rights of Married Women," uses "wife" and "husband" throughout).

Another indication of the legislative intent that marriage includes only opposite-sex couples is the provisions regarding physical capacity to marry. 15 V.S.A. §§512, 515 (marriage may be annulled at the request of the injured party within 2 years of marriage if the other party is "physically incapable of entering into the marriage state"). The existence of these statutes demonstrates that there is a physical element to marriage. The case law discussed below elaborates: the requirement is the ability, actual or assumed, to have sexual intercourse leading to procreation.[10]

In Ryder v. Ryder, the Court invalidated a marriage at the request of a husband. The man's wife had incurable syphilis which "render[ed] copulation and procreation on the part of the petitioner impracticable, because the act endangered both his health and life." 66 Vt. 158, 162 (1894). The Court further stated that:

> It is an accepted rule that, if from some incurable physical or psychic defect of one party to the marriage, sexual intercourse with the other party is impossible in a complete and natural manner, or impracticable, without the use of violence or danger to health . . . the marriage will be declared void ab initio . . . .

[10]Although not all opposite-sex couples actually are able to conceive children, the Legislature makes a rational general assumption and does not require testing to determine fertility before marriage. This assumption is not warranted in same-sex couples which will always need the assistance of a third person to conceive children.

Id. at 161 (emphasis in original). Likewise, the Court has held that impotence is grounds for annulment under our statutes and even ordered a medical examination of a husband to determine his physical capacity to marry; that is, his physical capacity to have sexual intercourse. Le Barron, 35 Vt. at 369-70.

The numerous statutes described in this section illustrate that there is an intricate web of laws concerning marriage. The Appellants ask the Court to perform the deceptively simple task of interpreting one or two statutes. This could, however, wreak havoc on the complex, interwoven statutory scheme of marriage and family statutes established by the Legislature.

D. Courts Must Interpret Statutes To Avoid Unreasonable Results.

Related to the canon of interpreting statutes based on the plain meaning of their language is the principle that courts "assume that the Legislature did not intend an unreasonable result." Smith v. St. Johnsbury, 150 Vt. at 355. Were the Appellants to prevail in their argument that the marriage statutes permit marriages between two individuals of the same sex, many other statutes relating to marriage, divorce, and the marital relationship would no longer make sense. The State has already alluded to the fact that, under Appellant's' construction, the consanguinity statutes would not prohibit marriages between a father and son or a grandmother and granddaughter. See supra Section I(C). A few additional examples will further illustrate the situation.

Requiring the issuance of marriage licenses to people of the same sex would lead to the inconsistent result of allowing same-sex "marriages" between adopted siblings when opposite-sex marriages are prohibited. 15 V.S.A. §§1, 2. In the case of adopted siblings who are not genetically related to each other, there would be no health reason to prohibit their marriage. But since the statute was written with opposite-sex couples in mind, it makes no

provision for same-sex unions. Reading the marriage statutes to encompass same-sex unions would lead to the incongruent result of allowing adoptive sisters to marry but prohibiting male and female adopted siblings from marrying.

Another example of an unreasonable result that would come from an interpretation of 18 V.S.A. §§5131 and 5137 that authorizes same-sex "marriages" is found in 14 V.S.A. §10. This statute provides that when a person "attests the execution of a will whereby he or his wife or her husband" is a beneficiary of the will there must be three other competent witnesses to the will. Under Appellants' theory, a man married to a man could attest to the execution of a will in which his male "spouse" was a beneficiary with less witnesses than a man whose wife was a beneficiary. Had the Legislature intended to encompass same-sex unions in its view of marriage, it would not have written 14 V.S.A. §10 to create this anomalous result.

One more example, of the many that could be given, of an irrational result comes in the application of 15 V.S.A. §102. This statute provides protections to married women who are deserted by their husbands.

> When a married man is incapacitated for supporting his family, or deserts, neglects or abandons his wife . . . a presiding judge of the superior court . . . may authorize such wife to sell and convey her real estate, or personal property which came to the husband by reason of the marriage and which remains in the state indisposed of by him. (Emphasis added.)

Because there is no reference to a same-sex spouse, there is an incomplete set of protections here.

Appellants would have the Court believe that the legislative intent behind the statutes authorizing the issuance of marriage licenses is to permit same-sex "marriages." If this were so, then judicially changing 18 V.S.A. §§5131 and 5137 to reflect their "true" intent would supposedly bring the statutes into conformity with the rest of the legislative scheme. But that is not what happens when such a change is made. Instead of making the statutory scheme

more logical, it would add confusion and inconsistency by providing protections for one type of marriage and not another. The fact that the Appellants' reading of 18 V.S.A. §§5131 and 5137 creates conflict with related statutes, confirms that the intent of the Legislature was to issue marriage licenses only to opposite-sex couples.

Nothing in the second-parent adoption case of In re B.L.V.B., 160 Vt. 368 (1993), suggests a different conclusion. Although the Court in that case read an exception to the adoption statute more broadly than its literal words, the result was a reading more consistent with the legislative intent than the literal words themselves provided. Indeed, a literal construction would have led to an impermissibly absurd result. The woman who sought to adopt her female partner's children met the qualifications for adoption. Id. at 371. The issue was whether that adoption should terminate the natural mother's parental rights, or whether the step-parent exception should apply. The Court held that the step-parent exception should be read to include same-sex partners.

In contrast, the Appellants here do not meet the qualifications for marriage because the union for which they seek legal recognition does not have a bride and a groom as required by the definition of marriage and 18 V.S.A. §5131. Moreover, unlike the statute in In re B.L.V.B., which had been amended only once since 1947, see 160 Vt. at 372 n.2, the marriage statutes at issue here have been amended several times in the last twenty years. 18 V.S.A. §5137 amended by P.A. No. 114 (1985 Vt., Adj. Sess.); 18 V.S.A. §5131 amended by P.A. No. 142 (1979 Vt., Adj. Sess.) and P.A. No. 204 (1985 Vt., Adj. Sess.). Most importantly, the literal reading of §§5131 and 5137 is consistent with the rest of the statutory scheme regarding marriage. It is the non-literal interpretation offered by Appellants that is

inconsistent. This is the opposite of the situation in B.L.V.B. where only the revised reading by the Court rationalized the law with the legislative intent.

In the instant case, the legislative intent is reflected in the plain meaning of the words "bride" and "groom." Removing those words creates inconsistencies and discord in an otherwise harmonious statutory scheme devised by the Legislature for marriages between one man and one woman.

E. The Legislature Has Accepted The 1975 Attorney General's Opinion Construing The Marriage Statutes.

This Court has held that where "[t]he legislature has not seen fit to change the law since [an Attorney General's] opinion was issued . . . [it] tends to confirm the propriety of the attorney general's opinion." In re Dixon, 123 Vt. 111, 115 (1962). In 1975, the Attorney General issued Opinion No. 90-75 stating that town clerks do not have the authority to issue marriage licenses to two people of the same sex. (Attachment 13 in Appendix). In the 22 years since this Opinion was issued, the Legislature has not amended the statutes to discredit the interpretation of the Attorney General. The Legislature has made some changes in the marriage statues in the intervening years, but these have not indicated any disagreement with the Opinion. See P.A. No. 142 (1979 Vt., Adj. Sess.); P.A. No. 204 (1985 Vt., Adj. Sess.); P.A. No. 114 (1985 Vt., Adj. Sess.). This is significant. It shows the Legislature had both interest in the subject matter and the opportunity to change the statute, if it had wanted. Moreover, from legislative hearings conducted in 1996, it is clear that the Legislature was fully aware of the Opinion. See Hearings on H. 26 Before the Senate Gov't Operations Comm., (Apr. 5, 1996, Vt., Adj. Sess., p.4), (Attachment 4 in Appendix).

F. The Statutes Must Be Interpreted Consistently With The Common Law.

The statutes of this State are written against the backdrop of the English common law. In areas where the Legislature has not written statutes, the common law remains the governing body of law. 1 V.S.A. §271; E.B. & A.C. Whiting Co. v. City of Burlington, 106 Vt. 446, 464 (1934). "[T]he rules of the common law are not to be changed by doubtful implication, nor overturned except by clear and unambiguous language." Id. The common law adopted in Vermont includes the principles of law administered by the ecclesiastical courts, which were charged with authority over marriages. Le Barron, 35 Vt. at 366-67. Homosexuality was prohibited at common law, 9 Halsbury's Laws of England 397 n.h (2d ed. 1933), and the common law did not permit marriages between persons of the same sex. Adams, 486 F. Supp. at 1123. Since the undefined words of the statute must be interpreted consistently with the common law at the time of the statute's enactment, the word "marriage" only applies to opposite-sex unions. See State v. Oliver, 151 Vt. 626, 627 (1989). Any ambiguity that Appellants might conjure up in the statutes regarding marriage certainly is not the "clear and unambiguous language" that is necessary to overturn the common law. Indeed, the repeated use of gender-based language to describe the parties to marriage in Vermont confirms that the Vermont statutes retain the common-law principle of marriage as a union of a man and a woman.

G. Legislative Intent Not To Encompass Same-Sex Unions Under The Definition Of Marriage Is Revealed By Legislative Discussion On The Equal Rights Amendment To The Vermont Constitution.

The conclusion that the statutes regarding marriage do not encompass same-sex unions is confirmed by the debate over the proposed Equal Rights Amendment to the Vermont

Constitution.[11] If the present law permitted marriages between same-sex partners, then the General Assembly would not have been debating whether or not the proposed Vermont ERA would have made same-sex or homosexual marriages legal. Yet the legislature conducted just such discussions in 1985. During debate in the Senate, the remarks of Sen. Skinner were entered in the Journal as part of her report of the Committee on Judiciary. She said:

> Opponents argue that an Equal Rights Amendment will allow homosexuals to marry. That is simply not the case. The Supreme Court of Washington State, in 1974, threw out such a challenge.[12] An Equal Rights Amendment does not apply -- since both groups -- male and female homosexuals -- are treated equally; they may not marry. This view was affirmed in our committee by the Deputy Attorney General.

Sen. Jour. 74 (Jan. 30, 1985, Vt., Bien. Sess.).

During the debate in the House, Representative Nuovo stated:

> Many issues have come up concerning the ERA. Many horrendous predictions have been stated. Yet no one has shown that any of these predictions have come true in any other state and, as a matter of fact, they have not come true in any other state. . . . Mr. Speaker, I will mention just a few states with an ERA and what has not happened there. . . . New Hampshire does not allow homosexuals to be married.

House Jour. 195 (Feb. 28, 1985, Vt., Bien. Sess.).

From these remarks it is obvious that the Legislature did not believe its existing statutes permitted same-sex "marriages." The debates reflected above demonstrate its understanding that, in Vermont, marriage may be entered into only by one man and one woman. Had the Legislature interpreted its statutes to permit the marriages of the Appellants,

---

[11]The proposed Equal Rights Amendment to the Vermont Constitution was submitted to the voters of this State on November 4, 1986. The voters failed to ratify it.

[12]Although not cited in the Journal, the case referred to here is undoubtedly Singer v. Hara, 522 P.2d 1187 (Wash. App. 1974).

there would have been no debate in 1985 over the possible creation of same-sex "marriages" through an Equal Rights Amendment to the Vermont Constitution.

H. The Legislative History Of A Proposed Amendment To 18 V.S.A. §5131 Reveals Marriage As Limited To A Man And A Woman.

During the 1995-1996 legislative session, a bill was offered in the House to amend the very statute that authorizes town clerks to issue marriage licenses—18 V.S.A. §5131. Although the bill was not enacted, the discussion on this bill illuminates the meaning of the statute. Had the bill passed, it would have amended the statute to make it possible for residents of this State to obtain marriage licenses from any town clerk, not just "the clerk of the town where either the bride or groom resides," as the statute now reads. The wording of the bill would have removed the words "bride" and "groom" from §5131. See H. 26 (1995 Vt., Bien. Sess.) (Attachment 3 in Appendix).

There was legislative discussion and testimony on the impact of removing or retaining the words "bride" and "groom" in the statute. This discussion shows that the Legislature ascribed meaning to those words and did not take an alteration of them lightly. The legislative history instructs that those words cannot be glossed over: they have real significance.

When the bill reached the Senate, an amendment was offered to reinsert the words "bride" and "groom." Sen. Jour. 532-33 (Apr. 3, 1996, Vt., Adj. Sess.) (Attachment 5 in Appendix). The bill and the proposed amendment were sent to the Senate Government Operations Committee for consideration. The Committee then took testimony on the amendment. Hearings on H. 26 Before the Senate Gov't Operations Comm., (Apr. 5, 1996, Vt., Adj. Sess.) (Attachment 4 in Appendix). The Legislative Counsel advised the Committee

that the Attorney General's Opinion (No. 90-75) (Attachment 13 in Appendix) found those words to be significant indicators of the legislative intent to encompass only opposite-sex unions within the meaning of marriage. Id. at 4. Even Susan Murray, one of the Appellants' attorneys in the present action, testified before the Committee that the fact that they were discussing the effect of retaining or removing the words "bride" and "groom" had an impact on the legislative history of 18 V.S.A. §5131. Id. at 5-6.[13]

These events in the Legislature confirm that the words "bride" and "groom" mean something in the statute. They are not mere surplusage. They cannot be trivialized as simply some old-fashioned turn of phrase. If those two words had no particular significance, if the marriage statute already encompassed same-sex unions, then there would have been no discussion over the effect of removing them.

I. The Principle Of Interpreting The Statute So As To Avoid Constitutional Issues Does Not Apply Here.

As discussed in Sections III and IV below, the marriage statutes do not run afoul of the Vermont Constitution. As properly interpreted under the rational basis standard, the statutes are valid. Thus, it is unnecessary to reach Appellants' argument that this Court should interpret the laws so as to avoid reaching an important constitutional issue. In any event, that doctrine could not be applied in this case. First, as argued above, a principled interpretation of the marriage laws would not allow for Appellants' construction. Second, applying the doctrine in this case has the effect of presuming a constitutional right never before articulated by this Court and then letting it in through the back door of statutory interpretation. Justice

[13]Although Attorney Murray gave the Committee her opinion that recommitting the bill for further study would have no effect, the very fact that the Committee struggled with the decision indicates that the words "bride" and "groom" have real meaning in the present statute.

White criticized the doctrine of constitutional avoidance in situations, like this one, where it results in the construction of a statute contrary to the statute's language and legislative history. Lowe v. Securities and Exchange Comm'n, 472 U.S. 181, 224 (1985) (White, J., concurring). He called it a "thinly disguised" ruling that the statute is unconstitutional, but a ruling that fails to include the constitutional reasoning. Id. at 226. One of the more fantastical features of the doctrine is that it attributes to the Legislature knowledge of a constitutional interpretation not yet articulated by the Court. Id. Since this Court has never addressed the constitutional issues presented by this case it is preposterous to assume that the Legislature intended to incorporate the Court's ruling on those issues in the marriage licensing statutes when it adopted them years ago. Fortunately, the Court need not engage in this exercise since the proper interpretation of the statutes raises no constitutional issues at all under the rational basis test.

J. Conclusion: Appellants' Construction Of The Marriage Laws Must Be Rejected Because It Fails To Honor The Language Of The Statutes, Their Historical Foundations And The Rules Of Statutory Construction.

Appellants assert that "the primary purposes of Vermont's marriage laws are to protect, encourage, and support the unions of committed couples, and thereby also provide a stable environment for those couples to raise children, if they have them." Brief at 6. This formulation of the purpose of marriage ignores the gender-specific words "bride" and "groom" in 18 V.S.A.§5131(a), the use of the words "husband" and "wife" in related statutes, and the common and historical definitions of marriage. Appellants' construction also ignores the rules that courts must seek to give effect to all words of a statute, if possible, and that words in statutes should be given their ordinary meaning. See, e.g., Lewis v. Holden, 118 Vt. 59, 62 (1953); Upper Valley Landfill Corp., 705 A.2d at 1009.

Appellants further argue that all references to gender in these statutes regarding marriage are contrary to the underlying purpose of the statute and, therefore, should be ignored. This argument proves too much. To accept the Appellants' contention, the Court must reject not only all other accepted means of statutory interpretation but also the historical purposes underlying the marriage law – the regulation of reproductive activity and child rearing.

By thus separating the statutes from their language and their historical foundations, the groundwork will be laid for other groups to claim the right to marry. The most obvious are polygamists and proponents of group marriage. Following the arguments of Appellants, such persons would have strong claims to fit within the "purposes" of the marriage statutes.[14] Not only can they claim to be committed to their mates, but they fit within the biological component of marriage. Indeed, the term marriage has long been applied to their relationships. Cleveland v. United States, 329 U.S. 14, 25-26 (1946)(Murphy, J., dissenting).[15] Lest one respond that polygamy or group marriage is not seriously practiced in Vermont or the United States, one need only recall the communes of the 1960s and, in the 1830s, John Humphrey Noyes and the Perfectionists in Putney, Vermont.[16] The latter

---

[14] Indeed, David Chambers, one of the authors of the amicus curiae brief for Parents and Friends of Lesbian and Gay Men of the Champlain Valley, etc. ("PFLAG"), wrote in 1996: "If the law of marriage can be seen as facilitating the opportunity of two people to live an emotional life that they find satisfying . . . the law ought to be able to achieve the same for units of more than two." Chambers, What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples, 95 Mich. L. Rev. 447, 490 (1996).

[15] Justice Murphy noted in his dissent that of the four fundamental forms of marriage (monogamy, polygyny, polyandry, and group marriage), polygamy (usually in the form of polygyny) has exceeded all other forms historically and even in modern non-Western societies. 329 U.S. at 25-26.

[16] The Perfectionists later moved to Oneida, New York, where they became known as the Oneida Community.

practiced what they called "complex marriage" in which all members of the community were considered married to one another and all adults were responsible for all children.[17]

The Appellants' theory under Count I of the Complaint has no basis in law. Their contention that Vermont's marriage statutes should be read to permit issuance of licenses to same-sex couples is not correct. The language and history of Vermont's marriage laws and the canons of statutory interpretation all point inexorably to the same conclusion: Vermont law does not permit "marriages" between persons of the same sex.

II. BECAUSE THE RATIONAL BASIS TEST APPLIES, APPELLANTS BEAR A HEAVY BURDEN OF OVERCOMING THE PRESUMPTIVE CONSTITUTIONALITY OF THE STATUTE

The Superior Court correctly concluded that Appellants' challenge to the marriage statutes must be examined under the rational basis test.[18] The Superior Court found the marriage statutes do not implicate any fundamental rights or burden a suspect class, which might trigger heightened scrutiny. Under rational basis review, the statute must be upheld if there is any conceivable justification for it. The touchstone of this test can be summarized by the following statement of this Court:

> We need not conclude that as legislators we would adopt this statutory distinction in order to determine that, as jurists, we must sustain it.

State v. Carpenter, 138 Vt. 140, 144 (1980). Under this standard, Vermont's marriage statutes are unquestionably constitutional.

---

[17] 20 Encyclopedia Americana at 511f, 734 (1989).

[18] Appellants' Complaint alleges a claim under Article 1 of the Vermont Constitution. This claim, not discussed in Appellants' Brief, must be dismissed on that basis and because Article 1 is not self-executing. It provides no enforceable rights. Shields v. Gerhart, 163 Vt. 219, 223-26 (1995). "Alone, it does not provide rights to individuals that may be vindicated in a judicial action." Id. at 226.

A. The Historical Record Does Not Support Appellants' Radical Reading of the Vermont Constitution's Common Benefits Clause.

Appellants contend that the Vermont Constitution's Common Benefits Clause is unique and confers a guarantee of "an equal share in the fruits of the common enterprise." Brief at 18 and 29. They misread Vermont history. The Common Benefits Clause in Vermont is but one of several found in early state constitutions.[19] The Constitutions of Virginia and Pennsylvania had almost identical language. Massachusetts and Connecticut later adopted much of the same phrasing. Willi Paul Adams, The First American Constitutions 175 (1980); Conn. Const., Art. First, Sec. 1; [20] Mass. Const., Art. VI and VII;[21] Va. Const., Art. I, Sec. 4;[22] Pa. Const., Declaration of Rights, Clause 5 (1776).[23]

---

[19] Vermont's Constit. Art. 7 reads: "That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal."

[20] "All men when they form a social compact, are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community."

[21] Mass. Const., Art. VI, reads: "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."

Art. VII reads: "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."

[22] "No exclusive emoluments or privileges; offices not to be hereditary. That no man, or set of men, is entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which not being descendible, neither ought the offices of magistrate, legislator, or judge to be hereditary."

be a valid enactment under the state's police powers." Choquette, 153 Vt. at 52; accord In re Quechee, 690 A.2d at 366; Colchester Fire Dist. No. 2, 145 Vt. at 199.

The burden of overcoming the presumption of constitutionality is a significant one for Appellants in this case. Andrews v. Lathrop, 132 Vt. 256, 260, 263 (1974). The Superior Court properly held that they failed to negate every conceivable justification for the statute. Federal Communications Comm'n v. Beach Communications, 508 U.S. 307, 315 (1993). This postulation of conceivable purposes for the statute is an intrinsic part of rational basis review. There is no violation of either the Equal Protection Clause or the Common Benefits Clause if the statute "serves any legitimate purpose that is conceivably behind the statute." Quesnel v. Town of Middlebury, 706 A.2d at 439; accord Smith v. St. Johnsbury, 150 Vt. at 357; Colchester Fire Dist. No. 2, 145 Vt. at 199; Andrews, 132 Vt. at 259. Indeed, even if not offered by the parties, the Court is required to uphold the statute if it develops its own justification for the law. Quesnel, 706 A.2d at 439; Heller, 509 U.S. at 320-21.

Under rational basis review, determining the purpose and justification of a statute is a question of law. Andrews, 132 Vt. at 259. It is not fact-based. The Court is not even permitted to take evidence on the matter. Andrews, 132 Vt. at 259-60 (legislative purpose "not subject to proof"). If some rational basis for the law exists, the State is entitled to dismissal—even with no evidence at all. Id. at 258 ("State rested without introducing evidence in the lower court, relying on the presumption of constitutionality"). The United States Supreme Court has definitively held that under rational basis review the Court will not subject legislative choices to courtroom fact-finding. Beach Communications, 508 U.S. at 315.

Appellants assert that the Common Benefits Clause embodied a "radical" version of the "social contract" theory. Brief at 18. This is not the case. Indeed, the Appellants' source for this claim makes just the opposite point. State constitutions historian, Willi Paul Adams, distinctly contrasts the constitutional framers' notion of equality with later radical interpretations. Id. at 186-88. Contrary to Appellants' claims, the equality espoused in the Common Benefits Clause is equality as between common people and aristocrats. It is a sentiment of anti-monarchy and anti-oligarchy. Id. at 161- 74. When the framers of the Vermont Constitution wrote that language in 1777, Vermont was struggling to break free of the competing claims on its land by its New York and New Hampshire neighbors. Id. at 65-66, 93-94. The common benefits language was part of the framers' argument in favor of equal rights vis-à-vis the colonial rulers in England and the wealthy landowners in New York and New Hampshire who had laid claims to the Vermont territory. It was not the embodiment of pure socialism that the Appellants describe.

An examination of the practices of the early Vermonters confirms this reading. To use Appellants' phrases, Brief at 18, 29, not only did Vermont fail to give everyone an "equal share in the fruits of the common enterprise," it did not even provide everyone with "an equal voice in government." Civil rights were guaranteed only to Protestants and the right to vote as a freeman at town meeting was dependent on the town's opinion of a person's character. Shaeffer, A Comparison of the First Constitutions of Vermont and Pennsylvania, 43 Proceedings of the Vermont Historical Society 33, 36 (1975). There were various ways in

---

[23] "Government is or ought to be instituted for the common benefit, protection and security of the people, nation or community and not for the particular emolument or advantage of any single man, family or set of men or who are a part only of the community and that the community has a right to alter, reform or abolish government in such manner as shall be by that community judged most conductive to the public weal." This was changed in 1838. See Pa. Const. Art. 1, sec. 2.

which legislators in those early years failed to provide equal opportunities for all members of the public. Their practice of making land grants included sudden and unannounced opening and closing of times for reception of land grant petitions, thus favoring the legislators present at the session to the disadvantage of the general public. Id. at 43. Indeed, the entire institutional structure created by the Vermont constitution (including the absence of limits on re-election and holding other offices), favored the entrenched oligarchy and diminished the possibility of intrusions into government office by the general populace. Id. passim.

Through some of the cases interpreting Connecticut's common benefits provision, one can see that the equality it contemplates is not absolute egalitarian treatment. Rather, it is directed at the use of government power to favor a select few individuals at the expense of the general populace. In Tough v. Ives, 162 Conn. 274, 294 A.2d 67, 77 (1972), the Connecticut Supreme Court invalidated a statute which conferred a benefit on two individuals by name, and not on anyone else. While such specific favoring of one or two people was not allowed, the Court contrasted this sort of personal legislation with other legislation that draws permissible distinctions among citizens. It, thus, upheld a statute that required cities to accord preference to members of their local fire departments when choosing a fire marshal. Beccia v. City of Waterbury, 192 Conn. 127, 470 A.2d 1202, 1207-08 (1984).

There is nothing in Vermont case law that indicates a broader interpretation of the Common Benefits Clause. There appear to be no reported cases in Vermont interpreting the Common Benefits Clause prior to 1900.[24] Vermont's earliest reported cases interpreting the

[24] Earlier cases, such as Thorpe v. Rutland and Burlington R.R. Co., 27 Vt. 140 (1854), were analyzed in terms of whether a statute served a public or private purpose. In Thorpe, the Court held that legislation is constitutional "if it professes to regulate a matter of public concern, and is in its terms general, applying equally to all persons or property coming within its provisions,"

clause apply the same analysis used under the United States Constitution. See, e.g., State v. Cadigan, 73 Vt. 245 (1901). In Cadigan, the Court based its holding on the analogous provision of the Equal Protection Clause of the Fourteenth Amendment; the sole case it cited was from the United States Supreme Court. The Vermont Supreme Court went on to emphasize the connection between Vermont's Constitution and our Anglo-Saxon legal tradition, stating that the Common Benefits Clause and several other clauses of Vermont's Declaration of Rights,

> are the fundamental principles, not of our state only, but of Anglo-Saxon government itself, enlarging the axiom that when the facts are the same the law is the same, and inspired by the ideal of justice, that the law is no respecter of persons.

State v. Cadigan, 73 Vt. at 252. The Court did not say that distinctions among citizens were impermissible. In fact, most legislation does make distinctions among individuals and groups in society. When distinctions are drawn in legislation, however, they must be applied to all who qualify. There cannot be favoritism toward an aristocracy or select group of individually named beneficiaries.

Recent cases reiterate that the analysis under the Common Benefits Clause is analogous to that under the federal Equal Protection Clause. L'Esperance v. Town of Charlotte, 704 A.2d 760, 762 (Vt. 1997) ("The rights guaranteed by the Common Benefits Clause are generally coextensive with those protected under the Equal Protection Clause."); Brigham v. State, 692 A.2d 384, 395 (Vt. 1997)(same); Smith v. St. Johnsbury, 150 Vt. at 359 (holding that Article 7 is like the Equal Protection Clause of the Fourteenth Amendment).

---

regardless of whether it affects a small or great number of people in the community. Id. at 152-53.

B. The Operation Of The Rational Basis Test Presumes Constitutionality, Admits No Evidence From Legislators, And Does Not Require A Tight Means-Ends Relationship Between Statute And Purpose.

Under the rational basis test, the Court's starting point is clear: "[a]bsent the involvement of a fundamental right or a suspect class, a legislative enactment is presumed to be constitutional." Choquette v. Perrault, 153 Vt. 45, 51 (1989); accord In re Quechee Serv. Co., 690 A.2d 354, 366 (Vt. 1996); see also Town of Bennington v. Park, 50 Vt. 178, 191-92 (1877)("Plenary power in the legislature is the rule—restricted power the exception;" upholding power to create public debt to finance railroads; quoting from other state supreme courts on the powers of legislatures). Because of this presumption, "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." Heller v. Doe, 509 U.S. 312, 320 (1993); see Quesnel v. Town of Middlebury, 706 A.2d 436, 439 (1997); Smith v. St. Johnsbury, 150 Vt. at 357; State v. Stewart, 140 Vt. 389, 402 (1981). A statute "will not be declared unconstitutional without clear and irrefragable proof that it infringes the paramount law." Heaton Hosp., Inc. v. Emrick, 128 Vt. 405, 408-09 (1970); accord State v. Auclair, 110 Vt. 147, 156, 160 (1939); Bennington v. Park, 50 Vt. at 191. To prevail, those attacking a statute must establish that "similar persons are treated differently on 'wholly arbitrary and capricious grounds.'" Brigham, 692 A.2d at 395-96 (citations omitted); Smith v. St. Johnsbury, 150 Vt. at 357; Colchester Fire Dist. No. 2 v. Sharrow, 145 Vt. 195, 199 (1984).

Contrary to Appellants' claims, this Court has declared that the rational basis standard of review "is not stringent," In re Mullestein, 148 Vt. 170, 176 (1987) and involves only "minimum scrutiny." Colchester Fire Dist. No. 2, 145 Vt. at 198. The Court has held that to meet this test, "state law need only reasonably relate to a legitimate public purpose in order to

> [T]he absence of 'legislative facts' explaining the distinction on the record has no significance in rational-basis analysis . . . a legislative choice . . . may be based on rational speculation unsupported by evidence or empirical data.

Id. (internal quotations and citations omitted). Applying this precept again in the same term, the Court held that "[a] State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification." Heller, 509 U.S. at 320. Appellants are simply wrong when they assert, Brief at 28 n.23, that the State is not entitled to dismissal on the bare record.

The last part of the rational basis analysis asks whether the statute is a rational means of accomplishing the legislative purpose. Only very tenuous connections between statutes and their purposes, such as those requiring "a Rube Goldberg structure of causal connections," are rejected. Andrews, 132 Vt. at 262. Those are the sort of arbitrary and capricious enactments that the rational basis test weeds out. If the connection is not arbitrary, it survives. Even if the connection between the means and ends of the law is not tight, it survives.

> In conducting an equal protection analysis, the court need not determine whether the state has superior means available to accomplish its objective, but whether the method it has chosen is a reasonable one.

In re Mullestein, 148 Vt. at 177.

This standard assumes that the Legislature is not required to address all phases of a social issue at the same time; it is permitted to act step-by-step. City of New Orleans v. Dukes, 427 U.S. 297, 304-05 (1976); Williamson v. Lee Optical, 348 U.S. 483, 489 (1955); see also Leigh v. Board of Registration in Nursing, 399 Mass. 558, 506 N.E.2d 91, 94 (Mass. 1987); Opinion of the Justices, 408 Mass. 1215, 563 N.E.2d 203, 210 (Mass. 1990) (fact that bill is limited in operation to land titles in Nantucket only does not render it invalid). Thus, a statute which is over-inclusive or under-inclusive is not necessarily invalid, since "rational

distinctions may be made with substantially less than mathematical exactitude." City of New Orleans v. Dukes, 427 U.S. at 303. This Court has recognized that the benefits and burdens of regulation rarely fall equally on all people. Indeed, "it is axiomatic that statutes in furtherance of the public welfare generally must simultaneously confer varying benefits upon individuals." Vermont Woolen Corp. v. Wackerman, 122 Vt. 222, 226 (1961). So here, the legislature has chosen to license one type of couple—the type most likely to bear and raise children. It is not required to license all types.

Even if the Court would have chosen different legislation, it must defer to the Legislature if the statute reasonably meets its purposes. Quesnel, 706 A.2d at 439 (changes in wrongful death statute best directed to Legislature); State v. Carpenter, 138 Vt. at 144; Andrews v. Lathrop, 132 Vt. at 262; Benning, 161 Vt. at 481 ("Plaintiffs are not entitled to have the courts act as a super-legislature and retry legislative judgments based on evidence presented to the court."); see also L'Esperance, 704 A.2d at 762 ("we will not substitute our judgment for that of the municipal corporation"); Vermont State Colleges Faculty Fed. v. Vermont State Colleges, 138 Vt. at 456 (court will not interpret legislation differently from plain meaning because sound policy suggests change).

In sum, it is not enough for Appellants to raise questions about the rationality of the Legislature's reasoning or its choice of means to promote its purpose. "The strong presumption of the act's constitutionality will not be overcome simply because the plaintiffs' economic [or social] forecasts differ from those of the legislature." Wilson v. Connecticut Product Dev. Corp., 167 Conn. 111, 355 A.2d 72, 76 (Conn. 1974). The existence of a debate on issues underlying the statute is reason enough to uphold the legislative choice under rational basis review. Beach Communications, 508 U.S. at 320. Nor is the State obliged to

prove the connections between the statute and the legislative purpose with any sort of quantifiable certainty. The connection (and the statute) will be upheld where the assumptions are unprovable and subjective. To do otherwise would be to allow the judiciary to usurp the legislative function—an impermissible intrusion when the legislation implicates no fundamental right or suspect class. As the U.S. Supreme Court held:

> It is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional case where the legislation plainly impinges upon rights protected by the Constitution itself .... From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs .... Likewise, when legislatures and administrators act to protect the physical environment from pollution and to preserve our resources of forests, streams, and parks, they must act on such imponderables as the impact of a new highway near or through an existing park or wilderness .... The fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find the statute unconstitutional.

Paris Adult Theater I v. Slaton, 413 U.S. 49, 60-63 (1973).

C. The Principle Of Separation Of Powers Lies At The Heart Of The Rational Basis Test.

Appellants' argument that this Court should engage in a more vigorous review than that described above ignores the vital separation-of-powers principles that underlie the rational basis standard. Rational basis review acknowledges the importance of the separation of powers between the legislative and judicial branches of government. Andrews, 132 Vt. at 264 (relying on Carmichael v. Southern Coal Co., 301 U.S. 495, 510 (1937)). It speaks to the distinct constitutional roles of those two branches. The separation-of-powers principle is explicitly stated in the Constitution in Chapter II, §5.[25] As this Court has said, "the legislative

[25] "The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others."

power is the power that formulates and enacts the laws; ... the judicial power interprets and applies them." In re D.L., 164 Vt. at 228. This fundamental proposition has been stated often in this Court's opinions. See State v. Racine, 133 Vt. 111, 114 (1974) and cases cited there. Indeed, it is a democratic principle recognized throughout the modern world. See Quilter v. Attorney-General, Case No. CA 200/96, slip op. at 29 (Thomas, J.), 77 (Tipping, J.) (N.Z. C.A. Dec. 17, 1997) (The question of whether same-sex "marriages" should be allowed is one "weighted with policy considerations of the kind Parliament is both constitutionally and practically equipped to decide.") (Attachment 7 in Appendix); Grant v. South-West Trains, Ltd., Case No. C-249/96, slip op. at ¶36 (C.J. Eur. Comm. Feb. 17, 1998) (despite modern evolution of attitudes toward homosexuality, the fact that some European Member States' treatment of same-sex cohabitation as partially equivalent to heterosexual cohabitation, and the European Parliament's declaration that it deplores discrimination on the basis of sexual orientation, it is for the legislature to adopt laws affecting the position of same-sex couples) (Attachment 6 in Appendix).

As eight Justices of the United States Supreme Court held in a leading case on rational basis review:

> Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. Where there are "plausible reasons" for Congress' action, "our inquiry is at an end." This standard of review is a paradigm of judicial restraint. "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."

Beach Communications, 508 U.S. at 313-14 (citations omitted); United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 174-79 (1980); Vance v. Bradley, 440 U.S. 93, 97 (1979); Dandridge v. Williams, 397 U.S. 471, 484-85 (1970).

If rational basis review were not so deferential, as Appellants suggest, there would be no safe harbor for the General Assembly. At present, the Legislature can comfortably operate, without looking over its shoulder at the judiciary, if it stays outside the areas protected by suspect class status and fundamental rights. Though it is not a perfectly bright line, the delineation of these categories is sufficiently clear to permit the people's elected representatives the freedom necessary to design and experiment with social policy. This liberty to legislate without judicial interference is vital to maintaining the separation of powers. If every statute were subject to heightened judicial inspection, the Legislature would be brought to a standstill.

Justice Oliver Wendell Holmes recognized this problem and railed against it in many of his writings during the Lochner era, so-called because of a string of United States Supreme Court decisions striking down regulatory legislation as unconstitutional. In his dissent in the case that gave the era its name, Justice Holmes commented on the Court's rejection of a statute based on a particular economic theory. He said that his "agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law." Lochner v. New York, 198 U.S. 45, 75 (1905)(Holmes, J., dissenting), overruled, in part, on other grds, 342 U.S. 1153 (1952). As he so colorfully put it: "the 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." Id. Nor does it enact contemporary theories of social relations.

Appellants quote Holmes in their Brief at 45, but misleadingly suggest that he believed the courts should be the principal makers of change in the law. This would have been anathema to Holmes. He insistently spoke out against the judiciary's insertion of its opinions in the face of legislative policy-making. He was not opposed to law that followed the traditions of our nation. He foreshadowed today's rational basis test in this passage:

> I think that the word "liberty," in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.

Id. at 547. Holmes also stated that: "a state Legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State." Tyson & Bro.-United Theatre Ticket Offices v. Banton, 273 U.S. 418, 446 (1927)(Holmes, J., dissenting), overruled, in part, 313 U.S. 236 (1941).

The Court later saw the folly of the Lochner-era decisions, and retreated from the idea that it could invalidate legislation whenever it disagreed with the social policy choice of elected representatives. See L. Tribe, American Constitutional Law, §§8-5, 8-7 (2d ed. 1988). The rational basis review doctrine can be seen as a reaction against the decisions of that time. Appellants in this case seek a return to the Lochner era and the unbridled use of judicial power to invalidate legislation. The rational basis test does not reach so far. It addresses only those statutes that treat people differently on "wholly arbitrary and capricious grounds." Smith v. St. Johnsbury, 150 Vt. at 351; see Brigham, 692 A.2d at 396 (system of funding education is found to be capricious). That cannot be said here.

III. VERMONT'S MARRIAGE STATUTES ARE JUSTIFIED BY LEGITIMATE STATE INTERESTS

The Court must uphold 18 V.S.A. §§5131 and 5137 if there is any conceivable justification for their failure to treat same-sex unions as marriages. There need not have been agreement by every legislator on any one justification. It is sufficient under rational basis review for a court to conceive of plausible rationales for the statutes. Many such reasons for the marriage statutes can be found in the academic literature on the subject. See, infra section III (A), In order to prevail, the Appellants must succeed in showing that every one of these justifications, and any other that the Court itself may posit, bears no rational relationship to those statutes.[26] They cannot carry that burden in this case. Moreover, altering 18 V.S.A. §§5131 and 5137 to encompass same-sex unions would open a Pandora's box of issues that should not be dealt with by the courts. The complexity and interrelation of the issues surrounding marriage reinforces the principle of deference to the Legislature on this social policy question.

A. Plausible Justifications Underlie The Marriage Statutes.

The Legislature's statutory exclusion of same-sex couples from marriage is justified by any one or more of the following policy bases. [27]

---

[26]The State offers these justifications under the rational-basis review standard. If heightened scrutiny were to be imposed the State might offer additional arguments and justifications in order to demonstrate a compelling state interest in the statutes, and evidence may be required.

[27] While the Superior Court relied upon only the State's first interest, this Court may affirm the ruling of the lower court on any legal basis. See Curran v. Marcille, 152 Vt. 247, 249 (1989); Braune v. Town of Rochester, 126 Vt. 527, 533 (1967) (court may affirm on any ground even if not raised or briefed by parties).

1. The State has an interest in furthering the link between procreation and child rearing. The Superior Court correctly found that the State's interest in furthering the link between procreation and child rearing justified Vermont's marriage laws. One of the principal historical purposes behind marriage laws has been the regulation of sexual and procreative relations. One reason for this is that the State wanted to ensure that couples who engaged in sexual intercourse accepted responsibility for the potential children they might create. So the law imposed on those couples the requirements that the relationship be permanent and committed. The reason for this overlay of permanence and commitment was to protect the children that might be produced from that union. It was the law seeking to enforce the parental obligation to care for the offspring of the sexual union.

This objective is most obvious in the statute imposing a presumption that a child born during a marriage is the child of the husband of the woman who gave birth. 15 V.S.A §308; see Michael H. v. Gerald D., 491 U.S. 110 (1989) (permissible for legislature to make such a presumption conclusive). This protects the child from illegitimacy and gives that child two parents right from the start.[28] Laws regarding inheritance, spousal and family support, and divorce[29] were also developed to ensure that the offspring of the sexual union did not become wards of the State. Appellants ignore this objective of the marriage statutes when they argue

---

[28] It also serves to protect the marital relationship itself.

[29] The goal of marital permanence may seem out-of-step with much of today's society. It is historically present, inter alia, because the State wanted to ensure that spouses and parents took financial responsibility for their families forever. That is why one cannot terminate a marriage without the involvement of the State—through a court-authorized divorce. The requirements of maintenance, support, alimony, and property division, which are all part of divorce, merely continue through other means the "permanent" protection that the marriage would have provided those family members.

that marriage is essentially about commitment and not at all about the biological possibility of creating children.

In recent years, society has seen a growth in the number of single-parent families. Many of these result from one parent (often the father) failing to take his parental responsibilities seriously. Though certainly many such families are headed by loving, caring individuals, they do not have all the benefits of families with two parents. The Legislature has engaged in efforts to lessen the economic hardships faced by single-parent families. See, e.g., 15 V.S.A. §780, et seq. (recent laws on child support enforcement). The Legislature might reasonably believe that providing legal sanction to same-sex unions through marriage licenses would diminish society's perception of the link between procreation and child rearing. By encouraging the formation of same-sex unions, such a policy could be seen to advance the notion that fathers or mothers, as the case may be, are mere surplusage to the functions of procreation and child rearing. While this is a subjective judgment, it is one the legislature could rationally make.

Moreover, same-sex couples, by their physiologic nature, cannot conceive a child on their own.[30] Increased creation of children through technologically or third-party assisted reproduction could be seen by the Legislature to separate further the connection between procreation and parental responsibilities for raising children. It could lead to men perceiving of themselves as sperm donors without responsibilities, for example. Although these methods of family formation are not forbidden in Vermont, nor are they protected by regulation.[31] In

---

[30] Among their options for having children are the use of a known or anonymous sperm donor for lesbian couples, or a gestational surrogate for gay male couples.

[31] Contrary to Appellants' contention, Brief at 34-35, the Legislature has never addressed the parental rights or lack of parental rights accruing to a sperm donor or gestational surrogate. As this Court has noted, such third parties' claims to parental rights present very difficult cases for

part, contracts for gestational surrogates are unenforceable in all states. Field, Reproductive Technologies and Surrogacy: Legal Issues, 25 Creighton L. Rev. 1589, 1590 (1992). The Legislature is justified in using the marriage statutes to send a public message that procreation and child rearing are intertwined.

Below, Appellants conceded that furthering the link between procreation and child rearing is a valid public purpose. P.C. at 166. They asserted, however, that this purpose is not served by the statute's failure to recognize same-sex unions as marriages. Their contention below and on appeal is, in effect, that the marriage statutes are under-inclusive. While this question might be proper under compelling interest review, it has no place in the rational basis test.

An example from the United States Supreme Court's application of the test illustrates this point. In City of Dallas v. Stranglin, 490 U.S. 19 (1989), the Court upheld a city ordinance that restricted admission to certain dance halls to 14- to 18-year olds. Rejecting a claim that adults were being denied a fundamental right of association with teenagers at the dance halls, the Court held the city had a rational basis for its restriction. The Court addressed claims that the ordinance had no real connection to the city's interests, that it allowed teens and adults to associate in other contexts (such as skating rinks), and that the city could achieve its objective in other ways as follows:

> We think respondent's arguments misapprehend the nature of rational-basis scrutiny, which is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause.

---

the courts to resolve. See Titchenal v. Dexter, 693 A.2d 682, 689 (Vt. 1997) ("Given the complex social and practical ramifications of expanding the classes of persons entitled to assert parental rights by seeking custody or visitation, the Legislature is better equipped to deal with the problem.").

Id. at 26. The Court held that the city "could reasonably conclude" there was a connection between association with adults at dance halls and corrupting influences. The differences between (regulated) dance halls and (unregulated) skating rinks "may not be striking, but differentiation need not be striking to survive rational-basis scrutiny." Id. at 28.

As this Court stated in Quesnel, "[u]nder this rational-basis test, we will uphold the statute if it serves any legitimate purpose that is conceivably behind the statute." Quesnel, slip op. at 5. There is nothing further to ask. "Where there are 'plausible reasons' for Congress' action, 'our inquiry is at an end.' This standard of review is a paradigm of judicial restraint." Beach Communications., 508 U.S. at 314 (quoting United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980)).

2. The State has an interest in supporting marriage and protecting it from potentially destabilizing changes. The State has a vital interest in preserving the institutional stability of marriage, especially considering the critical role that the institution has played in the formation of our society. As the United States Supreme Court has noted, the "integrity of . . . the marital relationship" is a "legitimate" congressional concern. Weinberger, 422 U.S. at 780. Dean, 653 A.2d at 363-64 (the very reasons why opposite-sex marriage is afforded fundamental right status justify a statute designed to recognize and promote that relationship) (Steadman, J., concurring). Our Legislature conceivably could have concluded that expanding marriage to include same-sex unions would destabilize the institution of marriage.

By redefining marriage, as the Appellants ask this Court to do, the institution of marriage would be fundamentally changed. Parties to a same-sex marriage could be heterosexual or homosexual. If same-sex "marriages" are allowed, two elderly women

sharing housing and mutual support in a non-sexual friendship might marry each other to obtain certain benefits. Two male college students may choose to marry to obtain housing or other preferences.[32] Professor Chambers, attorney for the amicus PFLAG, has written that it is likely:

> the effect of permitting same-sex marriage will be to make society more receptive to the further evolution of the law. . . . [T]he state may become more receptive to units of three or more . . . and to units composed of two people of the same sex who are bound by friendship alone.

Chambers, What If?, 95 Mich. L. Rev. at 490-91. The unique and special status of marriage as a precursor to raising a family and as a fundamental building block of society could, thus, be diminished. In its place could come marriage as a means to attain a tax status, certain benefits, or to qualify for government assistance programs. Although DOMA currently blocks federal assistance programs to same-sex couples, Vermont has its own programs of tax assistance and support. Weinberger v. Salfi, 422 U.S. 749, 777 (1975) (statute reflects Congressional concern with possibility that marriages will be entered into in order to claim social security benefits).

Even Professor Eskridge, who Appellants cite with regularity, explains that same-sex unions are different from traditional marriages. He sees this pattern continuing if same-sex marriages are allowed:

> [G]ay people are more prone to rely on current as well as former lovers, close friends, and neighbors as their social and emotional support system. . . . Gay and lesbian couples are pioneering novel family configurations, and gay marriage would not seriously obstruct the creation of the larger families we choose.

W. Eskridge, Jr., The Case for Same-Sex Marriage 81 (1996).

---

[32] While similar events could happen under present marriage laws, the Legislature could well conclude that a more free and open definition of marriage would lead to a greater incidence of such conduct.

One can debate whether this change would make marriage stronger or weaker. The Legislature could rationally determined that the change would make the institution weaker. That is Judge Richard Posner's conclusion in Sex and Reason (1992) (Attachment O in Appendix), where he stated at page 312:

> it can be argued that as heterosexual marriage becomes ever more unstable, temporary, and childless, the suggestion that it differs fundamentally from what homosexual marriages could be expected to be like becomes ever more implausible. And this is true. But it is a point in favor not of homosexual marriage but of chucking the whole institution of marriage in favor of an explicitly contractual approach that would make the current realities of marriage transparent. (Emphasis added).

The General Assembly might even believe that once the opposite-sex component of marriage is removed, marriage could be affected in unpredictable and significant ways.[33]

> It is always hard to separate out either the law's effect on an institution from other effects on it or an institution's effects on behavior from all the other influences people respond to. Nor is it easy to say what aspects of an institution have precisely what effects, so that a defective institution can be rescued by judicious changes without junking its desirable aspects.

Schneider, Channelling, 20 Hofstra L. Rev. at 521. The Legislature could rationally conclude that "junking" the opposite-sex feature of marriage would have negative effects on the entire institution, and reject it on that basis. Professor Chambers has argued exactly that:

> By ceasing to conceive or marriage as a partnership composed of one person of each sex, the state may become more receptive to units of three or more (all of which, of course, include at least two persons of the same sex) and to units composed of two people of the same sex but who are bound by friendship alone. All desirable changes in family law need not be made at once.

Chambers, What If?, 95 Mich. L. Rev. at 490-91.

---

[33] Appellants' citation of United States v. Virginia, 116 S. Ct. 2264, 2276 (1996)[hereinafter "VMI"], Brief at 48 n.42, for the proposition that such a change will not affect the institution of marriage is unavailing. The underlying premise of the VMI decision was that women were "capable of all the activities required of [VMI] cadets." VMI, 116 S. Ct. at 2287. The elemental fact that same-sex couples are not biologically able to procreate without the assistance of another, distinguishes this situation from that in VMI.

Appellants cite increased divorce rates and the lack of stability of today's marriages to refute the interest the Legislature might have in preserving the existing marital structure. Just the opposite is true. This same deterioration and erosion of marriage could be the impetus for the Legislature's choice to maintain laws that tend to stabilize the marital relationship.[34] See Schneider, Channelling, 20 Hofstra L. Rev. at 502-04 (law shapes society by rewarding participation in the institution, disfavoring competing institutions, and penalizing the non-use of the institution).[35]

Indeed, Vermont has enacted divorce laws to make certain that divorces are not entered into lightly. See 15 V.S.A. § 551(7) (essentially requiring six-month waiting period prior to divorce). Other legislatures have protected the marital relationship by creating a conclusive presumption that children born during a marriage are the children of the mother's husband. Michael H. v. Gerald D., 491 U.S. at 119-22. Such laws exist despite medical science's ability to determine the actual father of the children. Legislatures also protect the institution of marriage when they favor marriage over other relationships in the payment of social security benefits, Califano v. Boles, 443 U.S. 282 (1979) (mother of illegitimate child of wage earner not entitled to benefits that widow or divorced widow receives), and when

---

[34] Whether the institution of marriage is truly deteriorating is subject to debate. Professor Carl Schneider suggests that there is no accurate, reliable measure of social change. He cites studies shedding doubt on the existence of a "sexual revolution." He points out that short term trends can be confused with long term change; moreover, there are indications that the change may be reversing itself. Schneider, Channelling, 20 Hofstra L. Rev. at 516-19.

[35] The channelling function is not restricted to areas of family law. It plays an important role in business law, for example, by supporting and encouraging the use of the corporate form of ownership. See Schneider, Channelling, 20 Hofstra L. Rev. at 499, 505-06. It is also at work in education. The State establishes standards and requirements for public schools, requires that children attend school, and provides the money to run those schools through either state or local tax revenues. In contrast, private schools are put in the less preferential category of having to support themselves with non-public funds.

they penalize adultery, see, e.g., Oliverson v. West Valley City, 875 F. Supp. 1465, 1484 (D. Utah 1995); Commonwealth v. Stowell, 389 Mass. 171, 449 N.E.2d 357, 360 (Mass. 1983).

It is within the province of our elected representatives in the General Assembly to conclude that marriage is an institution that should continue to serve the stabilizing role in society so often described by the Justices of the United States Supreme Court. See Loving v. Virginia, 388 U.S. 1, 12 (1967) (marriage is "fundamental to our very existence and survival"); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)(same); Maynard v. Hill, 125 U.S. 190, 8 S. Ct. 723, 730, 731 (1888) (marriage is "the first step from barbarism to incipient civilization, the purest tie of social life, and the true basis of human progress;" marriage is "pre-eminently the basis of civil institutions, and thus an object of the deepest public concern"). The lawmakers are entitled to determine that marriage will best serve that institutional role by retaining the opposite-sex feature along with commitment, permanence, and monogamy. See State ex rel. Cooper v. French, 460 N.W.2d 2, 11 (Minn. 1990)(holding that there is no prohibition on treating cohabiting couples differently from married couples). The Legislature may choose to differentiate marriage from other perfectly valid relationships such as "friendships, family relationships, and religious fellowships." Duncan, The Narrow and Shallow Bite of *Romer* and the Eminent Rationality of Dual-Gender Marriage: A (Partial) Response to Professor Koppleman, 6 Wm. & Mary Bill Rts. J. 147, 157 n.63 (1997) [hereinafter "Duncan, Marriage"] (Attachment 9 in Appendix).

Appellants contend that preserving the institution of marriage cannot be a public purpose simply because it is the status quo. Brief at 45. They argue that the State must justify

the status quo before it can preserve it.[36] Under rational basis review this is not necessary. Certainly historic preservation laws preserving the past serve public purposes. Additionally, legislative appropriations for museums and organizations dedicated to preserving our heritage are all valid uses of public funds. Though subjective judgments or aesthetics may be involved, such judgments by legislatures are permissible. See Sandgate v. Colehammer, 156 Vt. 77, 88 (1990) (zoning ordinance prohibiting storage of junk on property serves public interest based on aesthetics). Indeed, there are many laws that are enacted to preserve the status quo, not because it is the status quo but because the Legislature recognizes that there is value in a tried and true system and great risk in pursuing an entirely new system.

The very fact that one cannot measure or predict the effect of the changes on marriage that would be wrought by its extension to same-sex couples is what puts its preservation in the realm of permissible legislative choice. As a social institution of fundamental significance in American history, marriage may be maintained in its current form by the Legislature. While many, no doubt, believe marriage should be discarded or fundamentally changed, the Legislature is free to disagree.

3. The State has an interest in promoting the institution of marriage because it unites men and women. Commentators have noted that marriage is an institution that uniquely celebrates the complementarity of the sexes. See, e.g., Wardle, A Critical Analysis of Constitutional Claims for Same Sex Marriage 1996 B.Y.U. L. Rev. 1, 39 (1996) [hereinafter "Wardle, Constitutional Analysis"]; Duncan, Marriage, 6 Wm. & Mary Bill Rts. J. at 161 (Attachment 9 in Appendix). A marriage is only complete when it includes both a

[36]Appellants misleadingly quote Professor Sunstein for support. The discussion they quote, however, is an analysis under the heightened scrutiny imposed where a statute burdens a suspect class. Such review is decidedly different from rational basis.

man and a woman. Through this special inclusion of both human sexes, marriage is a union of differences (biological, cultural, and psychological). As such it symbolizes to all society the value of bridging differences and working together. It instructs the young of the value of uniting male and female qualities and contributions in the same institution. In that sense, it is the best example of the principle voiced by Justice Ginsburg in United States v. Virginia, when she wrote that "a community made up exclusively of one [sex] is different from a community composed of both." 116 S. Ct. 2264, 2276 (1996) (citation omitted) [hereinafter "VMI"]. By authorizing only marriages of opposite-sex couples, the Legislature could have concluded that it would promote marriage as a way to unite men and women.

Contrary to Appellants' arguments, this interest is not based upon out-moded views of men and women. See MacCallum v. Seymour's Adm'r, 686 A.2d 935, 939-40 (Vt. 1996); Choquette, 153 Vt. at 53-54. Rather, it is grounded upon the rich physical and psychological differences between the sexes that exist to this very day. Similarly, the amicus brief filed by the National Organization for Women, et al., claims that there are no real differences between men and women. It points out that certain traits commonly associated with women can be found in men and vice versa, and suggests it is the State's burden to prove otherwise. This misstates the law.

Under rational basis review, any plausible theory can support legislative choice. Amici and Appellants incorrectly seek to require the State to produce unequivocal proof of sex differences to justify the marriage laws. As in Vance, they "seem to believe that the [defendant] had to have current empirical proof" of the differences they assert. 440 U.S. at 110. But such proof from the State is not necessary. The burden of proof here is on the Appellants: it is they who are "required to demonstrate that [the Legislature] has no

reasonable basis for believing" there are even slight differences between the sexes. Id. at 111. If that fact is even debatable, the Appellants fail in their proof. It "is the very admission that the facts are arguable that immunizes from constitutional attack the congressional judgment represented by this statute." Id. at 112; see also Beach Communications, 508 U.S. at 320; Washington v. Glucksberg, 117 S. Ct. 2258, 2292 (1997). Where there is plausible argument on both sides, the Legislature is entitled to make a choice. Its decision is, thus, rational and protected from review.

In this instance, there is a wealth of literature in the social sciences demonstrating the existence of sex differences. Such materials add strength to the Legislature's belief in such differences. One starting point for contemporary psychological research on sex differences is Carol Gilligan's groundbreaking volume, In a Different Voice: Psychological Theory and Women's Development (1982). In this work, she fills a gap in prior psychological literature, which only studied young boys and simply assumed that girls were the same.[37] Gilligan studied girls and discovered a different structure to their thinking, a structure with its own legitimate value. Rather than conclude that girls were inferior because they did not measure up to boys on the male model, she derived a powerful model of female development. Whether these differences stem from biology or socialization is an issue of much discussion, but seems currently unresolvable. Its answer does not diminish the observable differences between the sexes. See also D. Tannen, Talking From 9 to 5: Women and Men in the

[37] Gilligan went against the established research by suggesting the existence of sex differences. She chose to listen to girls when they had previously been ignored. "Within an educational system committed to the goals of equal opportunity and individual freedom, ideals of no difference are often sustained by practices of not listening and not seeing." C. Gilligan, J. Ward & J. Taylor, Mapping the Moral Domain 291 (1988).

Workplace: Language, Sex and Power (1994) (observations of sex differences in linguistic patterns).

Such sex differences could well add strength and stability to institutions (such as marriage) when combined. This conceivably underlies the Legislature's choice with regard to it marriage laws. This conclusion is further supported by recent evidence of the changes brought about by women's participation in the law. One scholar has summarized the changes brought about in law school education and lawyering by the increased presence and participation of women lawyers as follows:

> The early years of women's participation in the legal profession were characterized by the claim, in legal language, of equality and sameness—in learning, practice, competence, contribution, rights, and abilities. . . . Beginning in the late 1970s, however, a "second" wave of feminism in the larger society affected legal culture as well. More radical law students, practitioners, and legal theorists recognized that many legal concepts were defined by men, based on "male" conceptions of reality, and excluded the experience of women.

Menkel-Meadow, *Women's Ways of "Knowing" Law; Feminist Legal Epistemology, Pedagogy, and Jurisprudence* in Knowledge, Difference, and Power, 57-58 (N. Goldberger, J. Tarule, B. Clinchy, M. Belenky, eds., 1996) (Attachment 11 in Appendix).[38] To say that women do not have different contributions to make to an institution from those of men is to ignore women's voice. It is to deny validity to the idea that an institution, or a relationship, comprised of only one sex is fundamentally different from one that contains both sexes. VMI, 116 S. Ct. at 2276. Indeed, Appellants' and Amici's dismissal of sex differences as mere products of stereotypes denies validity to much of the women's movement. It is the

[38] Some of the changes cited by Menkel-Meadow resulting from the participation of women in the legal profession include a movement away from adversarial teaching methods, an increase in clinical education, a greater sensitivity to the relationship between lawyer and client, and a re-examination of legal rules through the eyes of feminist jurisprudence.

psychological and cultural differences between men and women which lies at the core of the creation of women's studies programs at our universities.

4. The State has an interest in promoting child rearing in a setting that provides both male and female role models. As commentators have noted, because marriages are built on male and female inclusion, they provide special advantages to raising children.[39] Duncan, Marriage, 6 Wm. & Mary Bill Rts. J. at 161 (Attachment 9 in Appendix). The difference between opposite-sex and same-sex couples in child rearing need not be very great to satisfy rational basis review. See City of Dallas v. Stranglin, 490 U.S. 28. It is enough that the Legislature may have concluded that each gender contributes differently to the family unit and to society. See Gilligan, In a Different Voice.

Not only is marriage a union of differences, it is a union in which children are commonly raised. It plays a particular role in teaching children. In a marriage, children see and experience the innate and unique abilities and characteristics that each sex possesses and contributes to their combined endeavor. Children learn lessons for later life by seeing both parents working together in child rearing and other pursuits. Marriage, thus, reflects society as a whole where both sexes work together in numerous ways.

Marriage also teaches children about themselves. Every child is conceived by a man and a woman; this is part of every child's own personal history. In this way, marriage is unlike any other difference that one could describe. For example, even though, as Appellants point out, Brief at 43 n.39, there are differences between people of different socio-economic

[39]Although child-rearing skills will vary among all couples, and same-sex couples can certainly be effective parents, there are unique strengths that come from the combination of male and female parents. Even same-sex couples who have had children realize this. In C.O. v. W.S., 64 Ohio Misc. 2d 9, 639 N.E.2d 523, 524 (Ohio Com. Pl. 1994), for example, a gay male sperm donor was asked to serve as male role model for a child created by his sperm but being raised by

groups, all children are not born of this difference. It is the very fact that all children are conceived by a man and a woman that the State has an interest in teaching the young about both sexes.[40]

Appellants mischaracterize the nature of the State's justification in this regard. They contend it is the same as that offered by the State of Hawaii in Baehr, i.e., that children reared in a marital setting turn out "better" than a child raised in a different setting. By setting up this straw they find an easy target to shoot down. Unlike Hawaii, the State is not asserting that children raised by same-sex couples will develop differently in any measurable psychological way. Rather, the State's interest goes to the intangible benefit of teaching children that both men and women share responsibilities in child rearing and participate together in any number of endeavors. The State furthers this interest through its treatment of marriage.

5. The State has an interest in adopting marriage statutes that are aligned with the uniform policies of its sister states. Vermont is not an island unto itself. Many of its citizens move here from elsewhere or leave to take up residence in other states. The Legislature has recognized this and expressed its rational preference for legal uniformity with other states by adopting many uniform acts. These cover areas as wide-ranging as commerce, business partnerships, child custody, adoption, arbitration, fresh pursuit of criminal suspects, and extradition. Title 9A; 11 V.S.A. §§1121, 1391, et seq.; 15 V.S.A. §1031, et seq.; 15A V.S.A. §1-101, et seq.; 12 V.S.A. §5651, et seq.; 13 V.S.A. §5041, et seq.; 18 V.S.A. §9101, et seq.

---

two lesbian women.

[40] The fact that unmarried couples and single persons can and do raise children in loving and caring environments does not negate this interest.

In the same way that the Legislature views coordination and cooperation with other states as an advantage in adoption or child custody, it can also view it as an advantage in its marriage statutes. Though some small differences between Vermont's laws and those of other states might exist, the principle of uniformity is served where those differences are minor. The fundamental change in marriage laws advocated by Appellants here is not an insignificant difference. Indeed, the desire for uniformity does not arise out of purely hypothetical concerns; Vermont's history has numerous examples of interstate conflicts over marriage.[41] The State has an interest in reducing these conflicts and in not expending scarce judicial resources on deciding the myriad questions of whether certain marriages, divorces, or related family orders are valid.[42]

While as Appellants state, Vermont is one of a minority of states that permits first-cousin marriages, that was a legislative choice. If the Legislature later chooses to join the majority of states, it could make that choice on the basis of desire to increase uniformity of laws.[43]

---

[41] See State v. Spencer, 111 Vt. 308, 312 (1940) (no marriage exists where parties went to another state to avoid prohibitions of Vermont's marriage laws); State v. Woods, 107 Vt. 354 (1935)(divorce in Nevada to avoid Vermont law not valid, so second marriage invalid because individual was already married); Wheelock v. Wheelock, 103 Vt. 417 (1931)(marriage not valid because parties went out of state to avoid Vermont's 3-year bar on remarriage after divorce); State v. Bentley, 75 Vt. 163 (1903)(shows how arguments can turn on which state's marriage and divorce laws are applied to determine whether alleged bigamist had wife still living from prior valid marriage).

[42] Equality Found'n of Greater Cincinnati, 128 F.3d 289, 300 (6th Cir. 1997) (court upheld validity of ordinance that prohibited the creation of class status based upon sexual orientation; court held city has legitimate government interest in "reducing the exposure of the City's residents to protracted and costly litigation by eliminating a municipally-created class of legal claims and charges").

[43] Appellants' contention that this state interest does not protect their rights under the Vermont Constitution is meritless. This interest does not define Appellants' rights. Their rights are fixed

6. The State has an interest in minimizing the use of surrogacy contracts[44] and sperm donors to avoid, inter alia, the impact and cost of increased child custody and visitation disputes. Same-sex couples biologically require a third person's assistance or contribution to conceive a child. The Legislature could reasonably conclude that the increased financial stability and access to legal benefits that accompany marital status would lead to an increase in technologically-assisted conception. It might determine that the use of sperm donors by lesbian couples and gestational surrogacy by gay male couples could increase significantly.

At present, there is a substantial ethical debate over the use of surrogacy contracts and sperm donors.[45] In some countries the issue has been resolved to restrict technologically-assisted conception to married couples. For example, in Sweden, where certain benefits are now available to registered same-sex domestic partners,[46] the law prohibits them from using

---

by the Vermont Constitution itself. This interest is, however, a rational justification for the exercise of legislative power. Where the Vermont Constitution does guarantee greater rights than those afforded in other states, our Constitution will control. That is not the situation presented in this case.

[44]Surrogacy contracts are those in which a woman agrees to be artificially inseminated and bear a child for someone else. In the context of this case, it is gay male couples who would most likely use the services of a surrogate to bear a child with the sperm of one of the gay partners. The donor egg could come from either the woman serving as the surrogate or from a third person, in which case the surrogate will have no genetic relationship to the child.

[45]See, e.g., Surrogacy: a Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?, 12 Wisc. Women's L.J. 113 (1997); Radin, What, if Anything, is Wrong With Baby Selling?, 26 Pac. L.J. 135 (1995); Posamentier and Welsh, The Commerce of Surrogate Motherhood: A Selected Interdisciplinary Bibliography, 26 Pac. L.J. 147 (1995). The United Kingdom, Netherlands, Germany, Israel and two Australian states have taken the position that surrogacy contracts are unenforceable generally. Field, Reproductive Technologies and Surrogacy: Legal Issues, 25 Creighton L. Rev. 1589, 1590 (1992).

[46]This is the phrase used in Sweden for the system of allowing same-sex couples to register their relationship with the government and obtain certain rights and responsibilities. The government then also regulates the termination of the relationship.

the legal protections surrounding assisted conception.[47] Here in the United States, there is no state that will enforce surrogacy contracts. Field, Reproductive Technologies, 25 Creighton L. Rev. at 1590. In fact, such contracts are illegal in some states.[48] Id. Vermont has no current law specifically dealing with the matter.

For both sperm donors and surrogate mothers, the custody issues that can arise are significant, and the State has an interest in keeping the number of those disputes within reasonable bounds. This is especially likely given the fact that same-sex couples often purposely incorporate such third-parties into their families. Eskridge, The Case for Same-Sex Marriage, 81; C.O. v. W.S., 639 N.E.2d at 524. The sperm donor[49] or the surrogate mother[50]

---

[47]Nygh, Homosexual Partnerships in Sweden, 11 Australian J. Fam. L. 11 (1997)(Swedish domestic partners are prohibited from adopting children or using the legal provisions relating to artificial insemination or in vitro fertilization) (Attachment 12 in Appendix). In Norway and Denmark the provisions on adoption effectively limit the choices of same-sex couples to custody of children born of a previous heterosexual relationship. See also Roth, The Norwegian Act on Registered Partnership for Homosexual Couples, 35 J. Fam. L. 467, 469-70 (1996-97)(Norwegian domestic partners are not entitled to adopt children or to have joint custody of a child); Pederson, Denmark: Homosexual Marriages and New Rules Regarding Separation and Divorce, 30 J. Fam. L. 289, 290 (1991-92) (registered domestic partners in Denmark are prohibited from adopting children or having joint custody of a child; one or the other can have custody individually).

[48]One reason for nonenforcement or criminalization of surrogacy contracts is the concern over possible exploitation of women. If surrogacy becomes more widespread one could envision "frozen sperm . . . implanted in third-world women at bargain rates." Field, Reproductive Technologies, 25 Creighton L. Rev. at 1590. Another concern is that couples who spend a lot of money to acquire children in this way might choose to reject those born with certain handicaps or undesirable features. Id. at 1591-92.

[49]In the cases that follow the arrangements made prior to the child's birth broke down. Either there was a misunderstanding or a change of heart on the part of either the sperm donor or the recipient woman. The results were competing claims for parental status. C.O. v. W.S., 639 N.E.2d at 524 (paternity established by sperm donor known to woman where donor was gay male and woman was lesbian living with another woman); Jhordan C. v. Mary K., 179 Cal. App. 3d 386, 224 Cal. Rptr. 530 (1986)(known sperm donor granted paternity rights, including visitation, where recipient and her female "friend" permitted contacts between child and donor, donor started trust fund for child, and donor's name was listed on birth certificate; in same suit the female "friend" sought status as de facto parent and was denied, despite mutual agreement

could claim parental rights over the child. Indeed, 15 V.S.A. §302 would appear to give them the right to petition to establish parentage and obtain visitation or custody rights. Even if they did not initiate such action, a child could petition to obtain support from this natural parent under 15 V.S.A. §302. As a public policy matter, this Court has already recognized the "potential dangers of forcing parents to defend third-party visitation claims," and extending visitation rights to additional people thereby dividing a child's time among several adults. Such a situation could create "psychological stresses on children and heavy financial burdens on custodians who often do not have adequate financial resources to defend against suits." Titchenal v. Dexter, 693 A.2d 682, 687 (Vt. 1997).

The concomitant impact on the resources of the court system from increased litigation of this sort is obvious. See Equality Found'n of Greater Cincinnati, 128 F.3d at 300 (reducing exposure of citizens to costly litigation is permissible basis for ordinance). The Legislature

---

with the "friend" who bore child that she jointly raise child); McIntyre v. Crouch, 780 P.2d 239, 244 (Or. App. 1989)(sperm donor statute that precludes donor's claim of filiation is unconstitutional as applied to known donor who gave sperm in reliance on woman's agreement that he should have rights and responsibilities of fatherhood), cert. denied, 495 U.S. 905 (1990); In re R.C., 775 P.2d 27 (Colo. 1989)(known sperm donor entitled to pursue claim of paternity where recipient was unmarried woman who assisted delivery of child, assisted in care of child and mother in first week after birth, and provided some material support).

[50]Compare Johnson v. Calvert, 5 Cal.4th 84, 851 P.2d 776 (Cal. 1993)(pursuant to gestational surrogacy contract sperm and egg from Calverts were implanted in Johnson; court did not decide enforceability of contract; held natural parents are Calverts, who are genetically related to child, and intended its birth; surrogate Johnson has no parental rights even though she carried child through pregnancy and gave birth), cert. denied, 510 U.S. 874 (1993) with In re Baby M, 537 A.2d 1227 (N.J. 1988) (Mr. and Mrs. Stern entered into contract with Mrs. Whitehead in which she was to be artificially inseminated with Mr. Stern's sperm and then turn child over to Sterns upon birth; years of dispute and baby-snatching culminated in court's decision that surrogacy contract was unenforceable and illegal; held legal parents were Mr. Stern and Mrs. Whitehead; based on best interests of child, Mr. Stern was granted custody and Mrs. Whitehead was granted visitation rights). See also Rothman, Reproductive Technologies and Surrogacy: A Feminist Perspective, 25 Creighton L. Rev. 1599 (1992)(arguing view that because "pregnancy is an intimate social relationship" there are particular parental rights associated with bearing a child, even if there is no genetic connection to mother).

could rationally decide to avoid these issues and costs by denying marriage to same-sex couples. The statutes at 18 V.S.A. §§5131 and 5137 are reasonably related to these purposes.[51]

Appellants suggest that if the Legislature had wished to regulate this conduct it could have done so directly. On rational basis review, such questions are inappropriate. Whether there may be better, different or more effective ways of legislating in a certain area is not for this Court to decide. So long as the State interest is valid and the law is rationally related to that interest, the statute must be sustained. The General Assembly is free to legislate directly or indirectly, with a heavy hand or a light touch. The decision is the Legislature's.

B. Vermont's Marriage Statutes Withstand Rational Basis Review Even Under Romer v. Evans.

Drawing an analogy to Amendment 2 to the Colorado Constitution, Appellants and amicus curiae Vermont Coalition for Lesbian and Gay Rights, et al., contend that Vermont's marriage statutes (as interpreted by the Superior Court) have no other purpose than a bare desire to harm a disadvantaged group. Brief at 50; amicus brief at 26. In this statement they employ language from the United States Supreme Court's decision Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620 (1996). However, their analogy is faulty. Romer is a unique case. Duncan, The Narrow and Shallow Bite of *Romer* and the Eminent Rationality of Dual-

[51]No Vermont court has ever recognized a fundamental constitutional right to technologically-assisted conception. Nor has the Vermont Legislature affirmatively extended legal protections to the practices of donor insemination or gestational surrogacy. Vermont's statutes are silent on the rights of the respective parties to a contract for sperm donation or gestational surrogacy. It has never been decided whether such a contract is even enforceable in this State. The parental status of a donor or surrogate has never been determined in Vermont. In re B.L.V.B. indicates that the courts will decide an adoption or custody issue according to the child's best interest, 160 Vt. at 373. It does not say anything about the merits, legality, or enforcability of contracts for sperm donors or gestational surrogates. Through the new adoption statute, the only thing the Legislature has done is allow same-sex partners to

Gender Marriage, 6 Wm. & Mary Bill Rts. J. at 149 (Attachment 9 in Appendix); see also Sunstein, Foreward: Leaving Things Undecided, 110 Harv. L. Rev. 4, 57 (1996). The constitutional amendment at issue in Colorado was entitled "No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation." It was expressly directed to one group of people, declaring them ineligible for any government protection whatsoever. Id. at 1626-27. Because of this, the Court invalidated Amendment 2 under the rational basis test holding it was "at once too narrow and too broad." Id. at 1628.

Amendment 2 served no valid public purpose because it "identifies persons by a single trait and then denies them protection across the board." Id. at 1627, 1628. In contrast, Vermont's marriage statutes serve a number of legitimate interests. Moreover, Vermont laws concern only the legal status of marriage—they do not regulate behavior. Nor do they prevent homosexuals from enjoying the protection of the law generally.

The uniqueness of Romer is made even more apparent by the Sixth Circuit Court of Appeals' subsequent 1997 decision in Equality Foundation of Greater Cincinnati, 128 F.3d 289. Upholding a city charter amendment that "prevented homosexuals, as homosexuals, from obtaining special privileges and preferences," the Court explained the narrowness of Romer's holding. Id. at 296. It emphasized the unusually far-reaching character of the Colorado Amendment. Id.; see also Duncan, Marriage, 6 Wm. & Mary Bill Rts. J. at 149-51. Unlike the Colorado enactment, the Cincinnati charter amendment "eliminated only 'special class status' and 'preferential treatment' for gays as gays under Cincinnati ordinances, and policies, leaving untouched the application, to gay citizens, of any and all legal rights

---

adopt their partner's child in appropriate circumstances.

generally accorded by the municipal government to all persons as persons." 128 F.3d at 296. On this basis, the Court upheld the Cincinnati provision.

The marriage statutes in Vermont are even more narrow in scope than the Cincinnati charter amendment. Unlike Colorado Amendment 2, Vermont's marriage statutes should be upheld under rational basis review.

IV. THE COURT IS NOT REQUIRED TO REVIEW VERMONT'S MARRIAGE STATUTES UNDER HEIGHTENED SCRUTINY ANALYSIS

Appellants cannot establish that Vermont's marriage laws burden a fundamental right or that Appellants are members of a suspect class, either of which might trigger heightened scrutiny of those statutes by this Court. In the absence of one of those circumstances, the Court must apply rational basis review when examining the marriage statutes. See, e.g., Brigham, 692 A.2d at 395-96. Nearly every case from other jurisdictions that has examined the issue, has concluded that fundamental rights and suspect class analyses are not implicated in connection with claims for same-sex marriage. Consistent with those rulings, the Superior Court examined Vermont's marriage laws under rational basis review. Nothing in Appellants' Brief establishes that those laws should be subjected to heightened scrutiny in this case.

A. The Vermont Marriage Statutes Do Not Violate Appellants' Fundamental Rights.

The Superior Court correctly found that Vermont's marriage laws do not impact Appellants' fundamental rights under the Vermont Constitution.[52] That conclusion is amply

[52]Litigants and commentators have sought to establish a fundamental right to same-sex marriage under myriad theories: the right to marry, intimate association, privacy, due process, liberty, association, to name but a few. Appellants here have mentioned Vt. Const. Ch. I, Arts. 1 and 7, among other rights. See Complaint ¶15, P.C. at 3. Whatever the underlying source, Appellants

supported by the text, history and prior judicial interpretations of the Vermont Constitution. In Vermont, plenary regulation of marriage has been vested historically with the Legislature. Courts in this country and elsewhere have almost unanimously rejected the contention that marriage statutes violate same-sex couples' fundamental rights.

This Court has been chary of finding fundamental rights under our State Constitution. See e.g., Brigham, 692 A.2d at 395-96. It has deemed very few rights to be "fundamental" under state law, see Veilleux v. Springer, 131 Vt. 33, 40 (1973) (right to plead not guilty in criminal proceeding is fundamental), and has often rejected claims that rights be declared as such, see Sienkiewycz v. Dressell, 151 Vt. 421, 424 (1989) (right to full legal redress not fundamental); Benning v. State, 161 Vt. 472, 486 (1994) (freedom to travel without motorcycle helmet not fundamental); Levinsky v. Diamond, 151 Vt. 178, 197 (1989) (Vt. Const. Ch. I, Art. 4 (due process) does not create a fundamental privacy right), overruled, in part, on other grds, 155 Vt. 279 (1990).

While not adopting a definitive test for determining whether a right is fundamental, the Court has indicated that such rights are those that are: "'so rooted in the traditions and conscience of our people to be ranked as fundamental,' Snyder v. Massachusetts, 291 U.S. 97, 105 (1934), and [are] 'implicit in the concept of ordered liberty.' Palko v. Connecticut, 302 U.S. 319, 325 (1937)." Veilleux, 131 Vt. at 40.

This approach is in full harmony with the fundamental rights jurisprudence of the United States Supreme Court. In Washington v. Glucksberg, 117 S. Ct. 2258 (1997), the Supreme Court held there was no fundamental right to assisted suicide for terminally ill

---

cannot establish that Vermont's marriage laws affect the fundamental rights of same-sex couples.

patients. It initially explained that courts must be extremely cautious in recognizing fundamental rights.

> 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," lest the liberty protected by the Due Process clause be subtly transformed into the policy preferences of the members of this Court.

Id. at 2267-68 (internal citations omitted).

The Court then described the test it follows to determine which rights are fundamental.

> Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," id., at 503 (plurality opinion); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937). Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decision making."

Id. at 2268 (internal citations omitted); see Michael H. v. Gerald D., 491 U.S. at 122-23. The Court rejected the fundamental rights claim in Glucksberg, noting that to hold in favor of such a right, it would have "to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every other State." 117 S. Ct. at 2269.

Veilleux and Glucksberg both embrace the importance of history and tradition in determining fundamental rights. See State v. Delabruere, 154 Vt. 237, 262-63 (1990) (constitutional interpretation involves examination of "historical analysis, examination of the text, constructions of identical or similar provisions in other state constitutions, and use of sociological materials"); Kohm, Liberty and Marriage Baehr and Beyond: Due Process in 1998, 11 B.Y.U. J. Pub. L. 1, 10-13 (1998) (forthcoming) (noting importance of grounding

fundamental right in deeply-rooted traditions and history) (Attachment 10 in Appendix). Without such limitations, courts would have scant little to guide them in determining what rights are fundamental in our society. As Judge Mahady has written:

> A holding predicated upon a state constitution must clearly be traced to the text of the constitution, its history, and prior case law. Exclusive or great reliance upon the merely prudential and the ethical will be correctly perceived as being "result oriented," and "more pragmatic than principled."

Mahady, Toward a Theory of State Constitutional Jurisprudence: A Judge's Thoughts, 13 Vt. L. Rev. 145, 153 (1988). As such, a result-oriented opinion puts the very legitimacy of the state judiciary at risk. Id. The "efficacy of the judicial branch of government in America has depended almost exclusively upon the perception of its legitimacy by the American people." Id.

Here, neither the text of the Vermont Constitution, nor Vermont history support finding a fundamental right in this case. First, no express language in the Constitution affords same-sex unions any special status. In Veilleux, the Court noted that the Constitution expressly guaranteed a criminal defendant the rights to confront witnesses, to present evidence and to have an impartial jury, among other rights. 131 Vt. at 28 (citing Vt. Const. Ch. I, Art. 10). The right to enter a "not guilty" plea was not specifically mentioned in the Constitution. In holding that the right to plead "not guilty" was fundamental, the Court found such a right to be a necessary corollary to the exercise of the express rights contained in Article 10. Id. The Court, thus, attempted to link this fundamental right directly to the language of the Constitution. Cf. Brigham, 692 A.2d at 391-92 (noting importance of textual reference to constitutional right asserted). No similar claim can be made with regard to the "marriage" of same-sex couples.

Second, Vermont history reveals that same-sex relationships have not been given governmental approval in our State's past. At the time the Vermont Constitution was adopted, sodomy, an act commonly associated with homosexuality, was proscribed both by the common law and Vermont statutory provisions. The ancient common law prohibited such practices as did the ecclesiastical law on which it was based. See 9 Halsbury's Laws of England 397 n.h (2d ed. 1933); Adams, 486 F. Supp. at 1123. In 1779 and in 1787, the Vermont Legislature passed "An Act for the Punishment of Divers Capital and Other Felonies," which outlawed sodomy. (Attachments 1 and 2 in Appendix). The 1787 law deemed it an "abomination." In fact, sodomy was considered a crime in Vermont through much of its history. See State v. LaForrest, 71 Vt. 311, 312 (1899). It was not until 1977 that the last law criminalizing such relations was repealed. See former 13 V.S.A. §2603.

In light of the above, it is plain that State recognition of same-sex "marriages" is not "so rooted in the traditions and conscience of our people to be ranked as fundamental." Veilleux, 131 Vt. at 40 (quotations and citations omitted). As noted by the United States Supreme Court, the right of intimate association, of which the marriage right is a part, applies to "the sorts of traditional personal bonds . . . that have 'played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs.'" FW/PBS, Inc. v. Dallas, 493 U.S. 215, 237 (1990) (quoting Roberts v. Jaycees, 468 U.S. 609, 618-19 (1984)). Same-sex unions have not played this "critical role" in American or Vermont society.

Nor can Vermont's traditional reverence for marriage itself be used to create a fundamental right regarding the Appellants' unions. While this Court has noted the

importance of marriage in Vermont society,[53] it has consistently found that marriage is a creature of legislation and that, within constitutional bounds, the Legislature retains control over its regulation. In Morrill v. Palmer, 68 Vt. 1, 6-7 (1895), for example, the Court ruled that there is no common-law marriage in Vermont. To marry, parties must follow the rules set forth in the State's marriage statutes. Similarly, in Place v. Place, 129 Vt. 326 (1971) the Court stated:

> We are here dealing with the marriage relationship. In Pennoyer v. Neff, 95 U.S. 714, 24 L. Ed. 565, 573 (1877), it is determined that a state has the absolute right to prescribe the condition upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.

Id. at 329; see Cook v. Cook, 116 Vt. 374, 380 (1950) ("marriage relationship is of such public concern as to require the Courts to scrutinize [annulments] to discover their probable effect on the public as well as on the individual parties"), rev'd on other grds, 342 U.S. 126 (1951).

As the Superior Court pointed out, in every case in which it has discussed marriage, the Vermont Supreme Court has been speaking of opposite-sex relationships.[54] This Court's rulings have noted the direct links between marriage, sexual intercourse and procreation. See, e.g., Ryder, 66 Vt. at 161-62 (woman "incapable of entering into the marriage state" where she could not have sex or bear children); Le Barron, 35 Vt. 364, 369 (1862) (male impotence

---

[53]Appellants and various Amici cite language from Overseers of the Poor of Newbury v. Overseers of the Poor of Brunswick, 2 Vt. 51 (1829), in describing the essential nature of marriage. The words quoted come from a case where the Court determined that two persons who were not officially married under statutory law were deemed married as common-law husband and wife. As described in Morrill v. Palmer, 68 Vt. at 5-7, however, that portion of Overseers of the Poor of Newbury incorrectly stated the law of Vermont: common law marriages were and are not valid in this State. Accord Town of Northfield v. Town of Plymouth, 20 Vt. 582, 591 (1848). In Vermont, marriages are preeminently creatures of legislative control.

grounds for annulment). Even today, physical incapacity remains a ground upon which a marriage may be annulled. 15 V.S.A. §515. As New York's highest Court has held:

> The mere fact that the law provides that physical incapacity for sexual relations shall be ground for annulling a marriage is of itself sufficient indication of the public policy that such relationship shall exist with the result and for the purpose of begetting offspring.

Mirizio v. Mirizio, 242 N.Y. 74, 81, 150 N.E. 605 (1926).[55]

In discussing the fundamental right to marry at the federal level, the United States Supreme Court has consistently linked marriage to procreation. In Skinner v. Oklahoma, 316 U.S. 535 (1942), the first case to recognize marriage's fundamental status, the connection to procreation was express: "marriage and procreation are fundamental to the very existence and survival of the race." Id. at 541; see Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) ("institution of the family deeply rooted in the Nation's history and tradition") (plurality opinion); Maynard v. Hill, 125 U.S. 190, 211 (1888) (marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress"). Contrary to Appellants' implications, Loving v. Virginia also made this connection by describing the right to marry as being "fundamental to our very existence," 388 U.S. at 12, a clear reference to the procreative function of marriage. Even Turner v. Safely, 482 U.S. 78

---

[54]Even polygamous marriages have as an irreducible minimum the union of the two sexes.

[55]While many married couples do not choose to have children, may not be able to have children and may not be able to have sexual relations, a class designated by the Legislature need not be precisely drawn. It may be over or under-inclusive without violating equal protection guarantees. See Weinberger v. Salfi, 422 U.S. at 781-83; Baker, 191 N.W.2d at 187. The fact that the State does not make individual inquires of each pair of marital applicants to determine their procreative intent and ability speaks more to notions of privacy than to qualifications to marry. The Legislature painted with a broad brush in its statutes by assuming that most men and most women could cohabit and conceive children. The Legislature is similarly justified in presuming that no person can physically unite with another of the same sex and produce offspring.

(1987), upon which Appellants place heavy reliance, speaks of the expectation that a marriage to a prison inmate will be consummated. Id. at 95.[56] Appellants are wrong to suggest that consummation was removed as an incident of marriage by that case.

In Zablocki v. Redhail, 434 U.S. 374 (1978), the Court further underscored this connection:

> It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society. The woman whom appellee desired to marry had a fundamental right to seek an abortion of their expected child, see Roe v. Wade, supra, or to bring the child into life to suffer the myriad social, if not economic, disabilities that the status of illegitimacy brings. Surely, a decision to marry and raise the child in a traditional family setting must receive equivalent protection. And, if appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place.

Id. at 385-86 (emphasis added).

---

[56] Appellants' claim that the State has defined the fundamental right to marriage too narrowly is incorrect. Appellants assert that the Loving v. Virginia Court never asked whether there is a fundamental right to interracial marriage. Likewise, the Turner v. Safely Court never asked whether there is a fundamental right for a prisoner to be married. That is not the point. In both of those cases, applying the fundamental right to marriage was fully consistent with the deeply-rooted concept of marriage in our society. Both of those unions retained the traditional hallmarks of marriage – commitment, support and consummation. Turner, 482 U.S. at 95 ("most inmate marriages are formed in the expectation that they ultimately will be fully consummated"). (Appellants conspicuously omit the Court's words on the element of consummation from the list of the incidents of marriage that they quote. See Brief at 13, 66.) Extending the fundamental right to marry to same-sex unions, on the other hand, is expressly in contradiction to this State's, and every other state's, deeply-rooted view of marriage. See Michael H., 491 U.S. at 124 (no fundamental right where claimed right conflicts with deeply-rooted traditions). Moreover, if the State's description of the right is too narrow, so is that of the Appellants. Indeed, Appellants are hard-pressed to explain why their decision to limit marriage to two persons is any different than the State's limitation to members of the opposite sex. "Marriage," whether polygamous or not, has traditionally involved at least one member of each sex. It has not been comprised of members of the same sex.

There can be little doubt that the right to marry under the federal Constitution does not encompass same-sex unions. As the Hawaii Supreme Court held in interpreting Zablocki: "Implicit in the Zablocki court's link between the right to marry, on the one hand, and the fundamental rights of procreation, childbirth, abortion, and child rearing, on the other, is the assumption that the one is simply the logical predicate of the others."[57] Baehr, 852 P.2d at see FW/PBS, Inc., 493 U.S. at 237 (to rise to the level of a protected right, the relationship must have been an important part of the country's history and traditions). Any remaining question on this point is removed by Bowers v. Hardwick, 478 U.S. 186 (1986), in which the United States Supreme Court held that there was no fundamental right to engage in homosexual sodomy. Id. at 192-95 (fundamental liberties are "those liberties that are deeply rooted in this Nation's history and tradition").[58] If there is no fundamental right to engage in such homosexual conduct, a fortiori, there can be no right to compel legal recognition of homosexual unions by the state.

Indeed, the United States Supreme Court has held that fundamental rights are not implicated when same-sex couples seek to marry. In Baker v. Nelson, 191 N.W.2d at 186-87, the Minnesota Supreme Court concluded that Minnesota's failure to give legal recognition to same-sex joinings did not violate fundamental constitutional rights. The decision was

---

[57]As discussed supra at Section I(B), the definition of "marriage" itself lends considerable support to this argument.

[58]Some have questioned the wisdom of Bowers. Even the dissent in Bowers, however, would not support Appellants' claims in this case. The four-member dissent would only have held that the right to privacy protects consensual, sexual practices conducted in the privacy of one's bedroom. The dissent noted such conduct "involves no real interference with the rights of others." Bowers, 478 U.S. at 213 & 206 (Blackmun, J., dissenting). Appellants here do not seek the right to associate or engage in sexual activity in private. Instead, they seek to require the State to give full and public recognition to same-sex unions. Such a result would certainly impact the rights and interests of others. See id. at 206.

appealed to the United States Supreme Court, which examined the constitutional issues presented. The Court dismissed the appeal because no substantial federal question was found. 409 U.S. 810 (1972). As this Court has held, such a disposition constitutes a ruling on the merits as to the federal issues presented and should be accorded precedential value. Benning, 161 Vt. at 479 n.6 (citing Hicks v. Miranda, 422 U.S. 332, 344-45 (1975)); see McConnell v. Veterans' Admin., 547 F.2d 54, 55 (8th Cir. 1976) (giving Baker full precedential effect regarding whether same-sex unions implicate fundamental rights); Adams, 486 F. Supp. at 1124 (same).

Courts across the United States have almost uniformly denied the contention that same-sex relationships should fall within the fundamental right to marry. In Dean v. District of Columbia, for example, the court found that the United States Supreme Court had deemed marriage a fundamental right, in part, because of its connection with procreation of the species and, in part, because of its deep connection with our societal traditions. 653 A.2d at 321-33. It flatly rejected the claim that the fundamental right to marry should be extended to same-sex couples. Id. With the exception of a single lower court opinion from Alaska,[59] all other courts considering the issue have come to like conclusions. Baehr, 852 P.2d at 57; Jones, 501 S.W.2d at 580-90; Adams, 486 F. Supp. at 1124-25; Singer, 522 P. 2d at 1195-96; In re Estate of Cooper, 149 Misc.2d 282, 564 N.Y.S.2d 684, 688 (N.Y. Sup. Ct. 1990), aff'd, 187 A.D.2d 128, appeal dismissed, 82 N.Y.2d 801 (1993). The Baehr court stated that such a

[59] The Alaska Superior Court's ruling was based upon the fundamental right to privacy. Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI (Alaska Super. Ct. Feb. 27, 1998). In contrast to Vermont, privacy is a right guaranteed by the express language of the Alaska Constitution. That provision has been interpreted to prohibit criminalization of possession of marijuana in one's own home. In the due process context, this Court has specifically refused to follow the Alaska Supreme Court's interpretation of its constitution when interpreting the Vermont Constitution. See State v. Gorton, 149 Vt. 602, 605-06 (1988).

right could not even be seen as an extension of the right to marry. Rather, it would call for the creation of a new fundamental right. 852 P.2d at 57; see Storrs, 645 N.Y.S.2d at 287-88 (declining to create such a new fundamental right).

Internationally, courts have rejected contentions that denying same-sex couples the right to marry violates individual rights. Just this year, in Grant v. South-West Trains, Ltd., the European Court of Justice examined the policies of the European Member States and a number of international treaties. It concluded that a regulation that granted certain benefits to opposite-sex spouses did not violate the rights of same-sex couples. Grant, slip op. at ¶¶ 27-28 (Attachment 6 in Appendix). Likewise, in Quilter, the Court of Appeals of New Zealand held that denying the right to marry to same-sex couples did not violate the New Zealand Bill of Rights Act. Quilter, slip op. at 2 (Richardson, J.), 68 (Keith, J.) and 90-92 (Tipping, J.) (Attachment G in Appendix).[60]

Finally, when anointing a right as "fundamental," it is incumbent upon any court to look to future applications of that right. While Appellants might have the Court ignore this point, there is no legislative action that can change this Court's ruling. Absent a constitutional change, this Court's decision on the fundament right issue will be binding precedent for generations to come. If the fundamental right to marry were expanded as Appellants suggest here, it might also have to encompass polygamy, group marriage and, perhaps, other forms of marriage presently deemed unlawful. See Cleveland v. United States, 329 U.S. at 25-26 (Murphy, J., dissenting); Quilter, slip op. at 70-72 (Keith, J.) & 80 (Tipping, J.) (both

[60] New Zealand's rejection of the same-sex marriage claim is especially significant. One gay rights activist has described New Zealand as having the most progressive anti-discrimination laws regarding sexual orientation of any country in the world. Stoddard, Bleeding Heart: Reflections on Using the Law to make Social Change, 72 N.Y.U. L. Rev. 967, 968-69 (1997). He predicted it would be in the vanguard of countries approving same-sex "marriages."

analogizing the right to same-sex marriage with polygamous marriage). If the fundamental right to marry covers same-sex unions, it is certainly more than arguable that it could be applied to those who prefer multiple partners, for instance. Indeed, one of the amici professors of statutory interpretation and the author of one of the other amicus briefs in support of Appellants have noted as much. See Chambers, What If?, 95 Mich. L. Rev. at 490-91; W. Eskridge, Jr., The Case for Same-Sex Marriage 81 (1996). Once the right to marry is de-coupled from the longstanding, and biologically fixed, one man/one woman requirement, there is little to contain the scope of the right.

The Superior Court rightly determined that Appellants cannot carry their burden of showing why they should be afforded greater protections under the Vermont Constitution than exist under the federal Constitution. See State v. Gleason, 154 Vt. 205, 212 (1990). The text of the Vermont Constitution, the State's history, and prior opinions of this Court and courts outside the State, all indicate that there is no fundamental right that requires the State to give the legal status of marriage to same-sex unions. Appellants' claims in this case, therefore, must be judged upon rational basis review.

B. Homosexuals Are Not A Suspect Class.

This Court has indicated that it would apply "strict-scrutiny" review under the Common Benefits Clause to legislation that discriminates against a "suspect class." See Brigham, 692 A.2d at 396. This Court has, however, never fashioned a test for determining what constitutes a suspect class under the Vermont Constitution, nor has it ever found such a class in a case before it. See, e.g., State v. George, 157 Vt. 580, 588 (1991) (declining to decide whether gender is a suspect class). The United States Supreme Court, which

developed the doctrine, has granted suspect-class status to only a very few groups. There is no basis for declaring a suspect class in the case at bar.

While this Court has no developed suspect-class jurisprudence, numerous federal and state courts across the country have concluded that homosexuals do not constitute a suspect class.[61] Relying principally on the ruling in Bowers v. Hardwick, these courts have reasoned that:

> If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes. The Constitution, in light of Hardwick, cannot otherwise be rationally applied, lest an unjustified and indefensible inconsistency result.

Ben-Shalom v. Marsh, 881 F.2d 454, 464-65 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990). No less than nine United States Circuit Courts of Appeals and a number of states have rejected claims that homosexuals should be deemed a suspect class. Equality Found'n of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 292-93 & n.2 (6th Cir. 1997), reh'g en banc denied, 1998 U.S. App. Lexis 1765 (6th Cir. 1998); Thomasson v. Perry, 80 F.3d 915, 927-28 (4th Cir.), cert. denied, 117 S. Ct. 358 (1996); Richenberg v. Perry, 97 F.3d 256, 2608 n.5 (8th. Cir. 1996), cert. denied, 66 U.S.L.W. 3254 (1997); High Tech Gays v. Defense Industrial Security Clearance Office, 895 F.2d 563, 571-72 (9th Cir. 1990); Ben-Shalom, 881 F.2d at 464-65; Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); Padula v. Webster, 822 F.2d 97, 103-04 (D.C. Cir. 1987); Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985) (en banc), cert. denied, 478 U.S. 1035 (1986); Nation Gay Task Force v. Bd. of Educ., 729 F.2d 1270, 1273 (10th Cir. 1984),

aff'd by an equally divided Court, 470 U.S. 903 (1985); Rutgers Council, 689 A.2d at 833 (New Jersey courts "have not created suspect classifications when the federal courts have failed to do so"); Opinion of the Justices, 530 A.2d 21, 24-26 (N.H. 1987) (homosexuals not suspect class under federal or New Hampshire Constitutions); but see Able v. United States 968 F. Supp. 850, 861-64 (E.D.N.Y. 1997) (finding homosexuals are suspect class); see also Romer v. Evans, 116 S. Ct. 1620, 1627-28 (applying rational basis review to constitutional amendment prohibiting legislation that would provide protections to homosexuals); Rich v. Secretary of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984) (finding homosexuals are not suspect class).

These decisions have been informed by express guidance from the United States Supreme Court as to the proper delineation of suspect classes. The Court has rarely granted a group suspect-class status. See City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (mentally retarded not a suspect class); Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (per curiam) (aged not a suspect class); see also Hansen v. Rimel, 104 F.3d 189 (8th Cir. 1997) (disabled not a suspect class); Does 1-5 v. Chandler, 83 F.3d 1150 (9th Cir. 1996) (disabled not a suspect class); Hassan v. Wright, 45 F.3d 1063 (7th Cir.), cert. denied 116 S. Ct. 128 (1995) (indigents not a suspect class); Gazette v. City of Pontiac, 41 F.3d 1061 (6th Cir. 1994) (alcoholics not a suspect class); Welsh v. City of Tulsa, 977 F.2d 1415 (10th Cir. 1992) (disabled not a suspect class). The Court has also counseled against widespread designation of groups as suspect classes. As the Fourth Circuit has instructed:

> Only a few classifications trigger heightened scrutiny. See, e.g. Loving v. Virgina, 388 U.S. 1, 11, 87 S. Ct. 1817, 1823, 18 L.

---

[61] On this record, Appellants' standing to raise this is issue is in question. In their Complaint, Appellants do not claim that they are homosexuals or that they were denied marriage licenses because of such status. P.C. at 1-4.

> Ed. 2d 1010 (1967) (race subject to strict scrutiny); Korematsu v. United States, 323 U.S. 214, 216, 1, 11, 87 S. Ct. 1910, 1914, 100 L. Ed. 2d 465, 461, 108 S. Ct. 1910, 1914, 100 L. Ed. 2d 465 (1988) (illegitimacy subject to intermediate scrutiny); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-24, 102 S. Ct. 3331, 3335-36, 73 L. Ed. 2d 1090 (1982) (gender subject to intermediate scrutiny). And because heightened scrutiny requires an exacting investigation of legislative choices, the Supreme Court has made clear that "respect for the separation of powers" should make courts reluctant to establish new suspect classes. Cleburne, 473 U.S. at 441, 105 S. Ct. at 3255; see also Lyng v. Castillo, 477 U.S. 635, 638, 106 S. Ct. 2727, 2729, 91 L.Ed.2d 527 (1986) (declining to extend strict scrutiny to the elderly).

Thomasson, 80 F.3d at 928 (emphasis added).

Even without relying on Bowers v. Hardwick, federal courts have concluded that homosexuals do not satisfy the factors traditionally used to identify suspect classes. To qualify as a suspect class, homosexuals must: (1) have been historically discriminated against; (2) exhibit obvious, immutable, or distinguishing characteristics that define them as a unique group; and (3) demonstrate that they are a politically powerless minority. Lyng v. Castillo, 477 U.S. 635, 638 (1986). Under this standard, homosexuals are not a suspect class.

While the State concedes that homosexuals have been the subject of discrimination in the past, they cannot meet the remaining portions of the Lyng test. First, homosexual orientation is not a characteristic that is as readily determinable by third parties as race, gender or alienage. High Tech Gays, 895 F.2d at 573-74. There are conflicting scientific results as to whether sexual orientation is an immutable characteristic, has at least some genetic link, or is behavioral. See Wardle, Constitutional Analysis, 1996 B.Y.U. L. Rev. at 62-74; Note, The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification, 98 Harv. L. Rev. 1285, 1302 n.91 (1985). What is not debatable is the possible fluidity of any class premised upon sexual orientation. What would be the boundaries of such

a class? Would having homosexual thoughts make one a homosexual? Would one or two experiences? There is also no doubt that numerous people "experiment" with homosexuality, bisexuality and heterosexuality. Some people live for years as homosexuals and then for years as heterosexuals and vice versa. See, e.g., Rich, 735 F.2d at 1227-29 (plaintiff had been married, had a child, had some homosexual experiences and then determined that he was homosexual). Unlike other "suspect classes" there is, at the very least, a component of choice as regards some persons who engage in homosexual conduct. Since the outward manifestations of homosexuality are not always apparent and can be hidden, individuals could choose to identify themselves by class status depending upon the situation. Homosexuals simply do not possess the type of clear, immutable traits that limn other suspect classes.

This Court has acknowledged the importance of such limiting factors in the context of a criminal defendant who claimed that his jury did not represent a fair cross-section of the community because, inter alia, single persons were underrepresented. State v. Jenne, 156 Vt. 283, 289-91 (1991). The Court held that to support such a claim the group that is underrepresented must be "distinctive." A distinctive group is one that is "defined and limited by some clearly identifiable factor (such as race or sex)." Id. at 289. The Court found that single, as opposed to married, persons "are not defined by clearly identifiable factors equivalent to race or gender." Id. at 291. This applies to homosexuals as well.

Homosexuals also cannot meet the third prong of the Lyng test. In Vermont, gays have not been denied access to the political system, and they cannot be seen as politically powerless. Vermont has elected an openly gay Auditor of Accounts in a state-wide contest. One of the candidates for Secretary of State is gay. Numerous government officials across the State are homosexuals. Vermont has passed a number of anti-discrimination laws specifically

providing protections against discrimination on the basis of sexual orientation, inter alia, in housing, banking and employment. See 9 V.S.A. §4503 (housing); 8 V.S.A. §1302 (banking); 21 V.S.A. §495 (employment). The Legislature has also been responsive to homosexuals in other ways, including by permitting their adoption of children, not enacting a local Defense of Marriage Act and not regulating intimate sexual contact among adults.[62] While homosexuals may not have achieved all of their legislative goals, they cannot say that "they have no ability to attract the attention of law makers." City of Cleburne, 473 U.S. at 445; see High Tech Gays, 895 F.2d at 574; Ben-Shalom, 881 F.2d at 466 (both noting political power of homosexuals). As the Ben-Shalom Court noted, "[a] political approach is open" to homosexuals to seek legislative redress of their concerns. 881 F.2d at 466. The same is true of their complaints regarding Vermont's marriage laws.

Finally, declaring a group to be a suspect class is a rare and momentous event because it essentially concludes that one minority is being consistently disadvantaged by the coalition of groups comprising the political majority. Given that fact, unless the courts step in, the group can never expect to achieve its goals through the democratic process. Here, Appellants can make no showing that homosexuals should be afforded suspect-class status under the Vermont Constitution. Like the elderly, homosexuals are not a "'discreet and insular' group, United States v. Carolene Products Co., 304 U.S. 144, 152-53 (1938), in need of 'extraordinary protection from the majoritarian political process,'" Mass. Bd. of Retirement v. Murgia, 427 U.S. at 313. Since homosexuals are not a suspect class under the Vermont Constitution, judicial review of Vermont's marriage laws must be deferential. Accord Singer,

[62] The Legislature does not prohibit sexual relations between consenting adults of the same sex. Vermont's fellation statute, former 13 V.S.A. § 2603, was repealed in 1977.

522 P.2d at 1196 (denying heightened scrutiny review of marriage statutes based upon claim that homosexuals comprise a suspect class). Rational basis review applies.

C. The Vermont Marriage Statutes Do Not Unconstitutionally Discriminate Against Appellants On The Basis Of Gender.

Appellants' claim that Vermont's marriage statutes should receive strict scrutiny because they unconstitutionally discriminate on the basis of gender, also must be rejected. First, the Vermont marriage statutes do not constitute gender-based discrimination. They acknowledge that a marriage, by its very nature, cannot be comprised of members of the same sex. Second, the statutes do not discriminate on the basis of gender because they treat similarly situated males the same as similarly situated females. Finally, even if seen as a gender classification, the statutes are not discriminatory. Their limitation of marriage to opposite-sex couples is permissible based upon biological differences between the sexes, where the capacity issues are real not artificial.[63]

Vermont's marriage laws do not discriminate on the basis of gender. Rather, they simply accept the premise that a marriage is a unique institution in society that is comprised of one member from each sex.[64] Its composition was determined before statutes were ever enacted. Even in the State of Washington, which has an Equal Rights Amendment to its

---

[63]While the U.S. Supreme Court has found that legislation that classifies on the basis of gender is entitled to heightened, mid-level scrutiny, this Court has not made a similar holding. See State v. George, 157 Vt. at 588. Mid-level review requires the legislation to substantially further important governmental objectives. VMI, 116 S. Ct. at 2275. The State believes it is unnecessary to determine whether this Court would follow the federal standard of review because Vermont's marriage laws do not discriminate on the basis of gender by "creat[ing] or perpetuat[ing] the legal, social, and economic inferiority of women." Id. at 2276.

[64] Marriage is not simply a union of two people; it is a union of a husband and a wife. If Ricky is ineligible to marry Fred, it is because he cannot be Fred's wife.

Constitution,[65] courts have recognized this distinction. In Singer v. Hara, appellants argued that denying same-sex couples the right to marry constituted sex discrimination. The court held that the appellants had to demonstrate that the right to marry was denied them "solely because of th[e] individual's sex." Id. at 1196. They were unable to do so because it was the nature of marriage itself, not the sex of the parties, that prevented them from obtaining a marriage license. Id.[66] As the Singer court found, appellants:

> are not being denied entry into the marriage relationship because of their sex, rather they are being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex.

522 P.2d at 1192; see supra at Section I(B) (discussing importance of definition and common understanding of marriage); Jones, 501 S.W.2d at 590. Likewise, in this case, Appellants' true quarrel is with the definition[67] of marriage, not its fair application between the sexes.[68]

---

[65]Unlike Washington, Hawaii and Alaska, Vermont has not adopted an ERA, and its Constitution does not specifically address discrimination on the basis of gender.

[66]Analyzing the marriage statute under the Washington Equal Rights Amendment, the court held that the purpose of the ERA was to "insure that existing rights and responsibilities, or such rights and responsibilities as may be created in the future, which previously might have been wholly or partially denied to one sex or to the other, will be equally available to members of either sex." 522 P.2d at 1194. A corollary to this rule is that "laws which differentiate between the sexes are permissible so long as they are based upon the unique physical characteristics of a particular sex, rather than upon a person's membership in a particular sex per se." Id.

[67] This does not refer to the statutory "definition" of marriage. Rather, it is the community's elemental understanding of what the term marriage means.

[68] The Baehr court's rejection of this argument is puzzling. During its discussion of the fundamental right to marriage, the court described marriage as the union of one man and one woman. As such, it found no fundamental right to same-sex marriage. In discussing gender discrimination, however, the court defined marriage as a "state-conferred legal partnership status." 852 P.2d at 58. The reasoning for using two different definitions was unexplained. Indeed, by permitting same-sex marriage, the court endorsed a new definition of marriage that is totally at odds with the definition the court used in rejecting the plaintiffs' fundamental rights claim.

In Anonymous v. Anonymous, for example, a man married someone under the mistaken belief that the person was a woman. When he discovered that the person was, in fact, a man, he sought a divorce. The court concluded that since there had not been a man and a woman as parties to the nuptials, there had never been a legal marriage. See 325 N.Y.S.2d at 501. The court held that:

> The instant case is different from one in which a person seeks an annulment of a marriage or to declare the nullity of a void marriage because of fraud or incapacity to enter into a marriage contract or some other statutory reason. Those cases presuppose the existence of the two basic requirements for a marriage contract, i.e., a man and a woman. Here one of these basic requirements was missing. The marriage ceremony itself was a nullity. No legal relation could be created by it.

Id. "Basic" may be another way for the court to say the requirement prefigured the statutory language.

Vermont's laws also do not treat similarly situated males and females in a different manner. The marriage statutes apply even handedly to men and women. The laws require that a marriage be made up of one male and one female. Males are precluded from "marrying" males, just as females are precluded from "marrying" females.[69] No benefit is conferred nor burden imposed upon one sex and not the other. The laws do not discriminate on their face or in their effect between the sexes. See Singer, 522 P.2d at 1192-95; Phillips v. Wisconsin Personnel Comm'n, 482 N.W.2d 121, 129 (Wis. App. 1992) (granting of medical benefits only to legal "spouses" does not constitute gender discrimination with regard to

---

[69]Thus, the Court is not presented with the same situation as in Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982), where men were categorically denied admission to a nursing school, or in VMI, where women were categorically denied admission to a military school. Nor is it like Frontiero v. Richardson, 411 U.S. 677, 680 (1973), where female members of the military could only obtain an increased housing allocation if they demonstrated their spouse was dependent on them, while male members were automatically assumed to be providing more than half their spouse's support.

homosexual partner); Rutgers Council, 689 A.2d at 837-38 (denial of benefits to same-sex partner does not violate equal protection provision of New Jersey Constitution); Baehr, 852 P.2d at 71 (Heen & Hayashi, JJ., dissenting); Grant, slip op. at ¶¶ 27-28 (granting benefits to opposite-sex spouses does not constitute sex discrimination because males and females who choose same-sex partners are treated equally) (Attachment 6 in Appendix); Duncan, From Loving to Romer: Homosexual Marriage and Moral Discernment, 11 B.Y.U. J. Pub. L. 1, 3, 5 (1998) (forthcoming) (noting same) [hereinafter "Duncan, Moral Discernment"] (Attachment 8 in Appendix).

Appellants' claim of sex discrimination might have merit if they could show that under Vermont's statutes one sex was systematically excluded from marriage, or that two men could marry but two women could not. It is that sort of scheme that triggers heightened scrutiny. As the Singer court stated:

> [W]e suggest two examples of a situation which, contrary to the situation presented in the case at bar, would raise questions of possible sexual discrimination prohibited by the ERA. First, if the anti-miscegenation statutes involved in Loving and Perez had permitted white males to marry black females but prohibited white females from marrying black males, then it is arguable that the statutes would be invalid not only because of an impermissible racial classification under the Fourteenth Amendment but also because of an impermissible sexual classification under the ERA. Second, if the state legislature were to change the definition of marriage to include the legal union of members of the same sex but also provide that marriage licenses and the accompanying protections of the marriage laws could only be extended to male couples, then it is likely that the state marriage laws would be in conflict with the ERA for failure to provide equal benefits to female couples.

Singer, 522 P.2d at 1194 n.8; see De Santis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 331 (9th Cir. 1979) (employer who refused to hire homosexuals may have been guilty of sexual orientation discrimination but treated the two sexes equally and did not discriminate on the

basis of gender). Likewise, the Vermont marriage statutes do not discriminate based upon gender.[70]

Even if viewed as gender based, the marriage laws create valid distinctions based upon the physiological differences between the sexes. The most significant difference is that the single-sex relationship cannot biologically produce a child without the involvement of a third person who might then have parental claims to the child. An opposite-sex relationship usually has the potential of producing children. Singer, 522 P.2d at 1194 (agreeing that the two parties are not similarly situated for equal protection purposes); Grant, slip op. at ¶¶ 29-35 (same).

Contrary to the opinion of the divided Hawaii Supreme Court in Baehr, recognizing that marriage is limited to opposite-sex unions does not constitute sex discrimination. The Baehr court relied upon Loving v. Virginia, 388 U.S. at 10-11, in finding that Hawaii's marriage statutes discriminated on the basis of gender in violation of that state's ERA. 852 P.2d at 59-63. Appellants advance identical arguments in this appeal. A close analysis shows that Loving does not support such a result.

The Loving Court held that Virginia's anti-miscegenation statute violated federal equal protection and due process guarantees on the ground that it denied men and women the right to enter marriage based upon an impermissible racial classification. Since the races of the man and woman seeking to be married bore no relationship to the marital union, the Court found the law constituted invidious discrimination.

---

[70]If Appellants' re-characterization of their sexual orientation argument as a sex discrimination claim prevails, numerous statutory inconsistencies would emerge. As noted above, Appellants concede if their argument is accepted, there is no legal reason why a mother and daughter, father and son, grandmother and granddaughter, all could not become married under Vermont law. Brief at 8 n.7.

It rejected Virginia's argument that the law should be upheld because there was "equal application" of the statute in that it punished both Blacks and Whites equally. 388 U.S. at 10. The Court held that it must review such racial classifications to determine whether they constitute "an arbitrary and invidious discrimination." 388 U.S. at 10. It found that Virginia's laws regulated inter-racial marriages only when a White person was a party to the proposed marriage. Id. at 11 n.11. A Black could marry any non-White person he or she chose, but a White could only marry a White. As such, the Court determined that the law actually discriminated against non-Whites and had a clearly discriminatory purpose—to maintain White Supremacy in the Commonwealth of Virginia. The Court concluded that there was "patently no legitimate overriding purpose independent of invidious racial discrimination that justified this classification."

It was the discriminatory purpose and effect of Virginia's miscegenation law that doomed the Commonwealth's claim that the law applied "equally" to Whites and Blacks. The assertion that the law punished Whites and Blacks equally could not save the law from its own underlying purpose. It is that point that the Hawaii Supreme Court failed to appreciate in Baehr. The Hawaii court opined that a law that applies equally to males and females can not meet the standard set down in Loving. The court, however, never asked the critical question of whether Hawaii's marriage laws had a discriminatory purpose or effect. The court, thus, divorced the issue of whether the marriage laws applied equally to both sexes from whether those laws discriminated against the sexes. This fact is key. See VMI, 116 S. Ct. at 2276-77, 2284-85 (were Virginia to have provided an educational institution for women truly equal to VMI that might have been an acceptable remedy, but it did not). By neglecting to ask whether the laws discriminated, the Baehr Court failed to understand the reason why the

United States Supreme Court rejected the "equal application" argument in Loving. That misinterpretation led the majority to conclude that Hawaii's marriage laws embodied sex discrimination despite their equal application between the sexes.

Unlike the statutes at issue in Loving, Vermont's laws do not constitute an "arbitrary and invidious discrimination," 388 U.S. at 10, against one sex or the other. They are not designed to promote females or males as a class. See VMI, 116 S. Ct. at 2276; Duncan, Moral Discernment, at 5 (Attachment 8 in Appendix). Also in contrast to Loving, there is a "legitimate overriding purpose" to the requirement that marital partners be different sexes. The physical and biological differences between men and women and their link to procreation form a principal basis why marriage laws extend only to opposite-sex couples. Such a distinction is plain and permissible. As the Supreme Court has noted, its precedents "do[] not make sex a proscribed classification." 116 S. Ct. at 2276. "Physical differences between men and women . . . are enduring." Id.; see Wardle, Constitutional Analysis, at 85 nn.381-82 (describing laws that have been upheld as making valid distinctions between the sexes).

Vermont's marital requirement of one man and one woman, thus, recognizes the bodily differences of the sexes and the biologic necessity of having opposite-gender couples to enable procreation.[71] This is not an "equal application" of a statute that invidiously discriminates, as in Loving, 388 US at 10-11. It is an equal application of a statute that creates a permissible and inclusive category containing both sexes, premised upon the

[71]Vermont's marriage laws prescribe various limitations that are inextricably intertwined with the marital union itself. Cf. Able, 968 F. Supp. at 863-64 (invalidating "Don't ask, Don't tell" policy because homosexual status bears no relationship to ability to serve in military). For example, Vermont prohibits marriages between family members of close consanguinity and affinity. It proscribes such unions in order to reduce abuse and to prevent birth defects that could result in the offspring of such couples. The marriage laws' connection to procreation may also be seen in its provision allowing annulment in case of physical incapacity. 15 V.S.A. §515.

physical differences between men and women that are necessary to propagate our species. Such an institution promotes gender equality. As noted by Professor Duncan:

> Anti-miscegenation laws separated the races; but conventional marriage laws integrate the genders. Anti-miscegenation laws endorsed the invidious doctrine of White Supremacy; but conventional marriage laws provide for the full and equal participation of one man and one woman in the institution of marriage. . . . [B]y requiring participation by one person of each gender, conventional marriage laws affirm the concept of gender equality and convey a critically important message about the equal indispensability of both men and women to the institution of marriage.

Duncan, Moral Discernment, at 5.

Although the United States Supreme Court's sex discrimination cases cited by Appellants do speak of the dangers of over-broad generalizations of the differences between men and women, none of them confronted a situation where a physical, biological sex difference was involved. The very fact that the Appellants are asking the Court to compare an inherently non-procreative union (same-sex), with a potentially procreative one (opposite-sex) puts this case on a different footing from other cases in the sex discrimination jurisprudence. The uniqueness of this case calls for a careful and critical examination of all cases offered by Appellants as analogies.

Indeed, sex discrimination cases reject laws that "generaliz[e] about 'the way women are,'" because such laws denied "opportunity to women whose talent and capacity place them outside the average description." VMI, at 116 S. Ct. at 2284. What is significant with marriage and the case at bar is that no two people of the same sex have the "capacity" to consummate a marriage and conceive children. Whereas legal rulings can provide members of both sexes with full educational and employment opportunities, they cannot change such biological facts.

In sum, Vermont's marriage laws do not classify based upon stereotypes or prejudices. Cf. Romer,116 S. Ct. at 1627; Able, 968 F. Supp. at 863-64; Rutgers Council, 689 A.2d at 837-38 (similar New Jersey statute not designed to discriminate). Nor do they seek to elevate one sex over the other. VMI, 116 S. Ct. at 2284. Vermont has apparently accepted that the "two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." VMI, 116 S. Ct. at 2276 (quoting Ballard v. United States, 329 U.S. 187, 193 (1946)). The "'[i]nherent differences' between men and women, we have come to appreciate, remain cause for celebration . . . ." Id.

As one leading commentator has opined:

> The concept of marriage is founded on the fact that the union of two persons of different genders creates a relationship of unique potential strength and inimitable potential value to society. The essence of marriage is the integration of a universe of gender differences (profound and subtle, biological and cultural, psychological and genetic) associated with sexual identity. In the same way that "separate but equal" was a false premise and that racial segregation is not equivalent to racial integration, same-sex marriage is not equivalent to heterosexual marriage.
>
> Thus, the definition of marriage as a cross-gender union is not merely a matter of arbitrary definition or semantic word-play; it is fundamental to the concept and nature of marriage itself. A same-sex relationship is something else; it may have many good partnership qualities, but it does not possess the unique nature of the cross-gender union that is marriage. In the history or traditions of the country, or in the structure of ordered liberty, or in the provisions or interpretations of our Constitution, nothing that has justified special protection for marriage compels a state to ignore the reality of those differences . . . .

Wardle, Constitutional Analysis, at 39.

Requiring a member of each sex to create a marriage venerates the diversity between men and women, does not favor one sex over the other, and does not constitute invidious discrimination based upon gender. Accord Singer, 522 P.2d at 1191-95; Phillips, 482 N.W.2d at 129; Jones, 501 S.W.2d at 589-90. Therefore, Vermont's marriage laws must be examined under rational basis review.

D. Vermont's Marriage Statutes Do Not Impermissibly Classify Among Citizens With Respect To An Important Right And On A Highly Questionable Basis.

Having failed to establish that Vermont's marriage laws implicate fundamental rights or burden a suspect class, Appellants attempt to obtain heightened scrutiny by arguing that the laws impermissibly classify among citizens with respect to an important right and on a highly questionable basis. This final contention is unavailing. This Court has stated that, under the Common Benefits Clause, it follows the analytical framework developed by the United States Supreme Court in its equal protection cases. That framework involves heightened scrutiny where fundamental rights or suspect classes are burdened. It is that standard that defines what rights are important and what classifications are impermissible under the Constitution. The past 26 pages of this brief have explained why Vermont's marriage laws are not subject to heightened scrutiny under that standard. Appellants' suggestion that this Court adopt a new framework, perhaps only for this case, is not supported by this Court's past precedents and would create a confusing mid-level tier of Common Benefits analysis. Such a test would lack the clean parameters that could guide future legislative decisions. It would be an invitation to disfavored groups to litigate every classification. Since, Appellants cannot meet the standard for heightened scrutiny review. They should not be permitted to obtain such review simply by changing the standard to meet the alleged facts of this case.

V. THE DEMOCRATICALLY ELECTED LEGISLATURE IS BEST-SUITED TO ENACT THE SOCIAL CHANGE THE APPELLANTS SEEK

Appellants' claims in this case involve complex and unresolved issues going to the core of human relationships, human nature and the structure of society. In seeking heightened scrutiny review, Appellants would have this Court remove those issues from legislative debate

and thereby subject them to decision-making by judicial ruling. Such a holding decision would not permit the Legislature to take public comment on these issues, adopt an incremental approach to dealing with them, or experiment with varying social policies to address some or all of Appellants' concerns.

This Court has been careful not to "legislate" in the area of family law, citing the following reasons:

> The public policy issues surrounding these circumstances are complex, and are best taken up by the Legislature .... The Legislature, not this Court, is better equipped to assemble the facts and determine the appropriate remedies in an arena fraught with social policy involving the law of property, the institution of marriage, and the distribution of the costs of health care expenses.

Medical Ctr. Hosp. of Vt. v. Lorrain, 165 Vt. 12, 16 (1996). Likewise, as this Court held in Titchenal v. Dexter, the Legislature has special expertise and authority in the areas of marriage and family law. 693 A.2d at 689. The Court explained:

> Given the complex social and practical ramifications of expanding the classes of persons entitled to assert parental rights by seeking custody or visitation, the legislature is better equipped to deal with the problem.

Id. The marriage licensing statutes are part of the complex network of laws regulating all sorts of family relationships. They are not a small distinct area of law that can be interpreted without impact on other statutes.

Only the Legislature can conduct the hearings necessary to obtain the information needed for policy formation of the scope called for by Appellants' plea for statutory reform. Public testimony before legislative committees is the proper avenue for the social scientists to present their materials, not through enormous appendices to amicus briefs before this Court.[72] The Court is in no position to evaluate the competing claims of the social theorists.

---

[72] The amicus brief of the Vermont Psychiatric Association and Vermont Chapter of the National Association of Social Workers, et al., is a case in point. Rather than arguing legal points, the

Justice Peck espoused the same view in his concurring opinion in Langle v. Kurkul:

> [T]he full bench of th[e Vermont Supreme] Court is far less qualified, if they are qualified at all, to determine what the public needs and demands, than is the full legislature, with its procedures for receiving public input, and its large number of representatives and senators who have widely varied occupations and backgrounds. Even if the passage of an act by the legislature is no necessary guarantee of wise law, it is, nevertheless, the legislature, not the courts, which has both the right and duty under our State Constitution to make the laws. . . . It is not "shirking" a duty when the Court recognizes and respects its constitutional limitations. The legislature is not a "safe haven" for timid judges; it is the law-making branch of state government under the Constitution.

146 Vt. 513, 529, 530 (1986) (Peck, J., concurring); see Bennington v. Park, 50 Vt. at 211 ("If the species of legislation under review is fraught with disastrous consequences, it is because the men of the state most noted for wisdom and virtue have misjudged").

Addressing an assisted suicide statute, another social policy issue imbued with moral overtones and questions of societal acceptance, Justice Souter only recently noted the respective roles of legislatures and courts:

> Legislatures . . . have superior opportunities to obtain the facts necessary for a judgment about the present controversy. Not only do they have more flexible mechanisms for fact-finding than the Judiciary, but their mechanisms include the power to experiment, moving forward and pulling back as facts emerge within their own jurisdictions. There is, indeed, good reason to suppose that in the absence of a judgment for respondents here, just such experimentation will be attempted in some of the States.

Glucksberg, 117 S. Ct. at 2293 (Souter, J., concurring). Justice Souter reaches this conclusion precisely because he sees a debate on the underlying issues. Because that debate is on-going and because there is no definitive evidence resolving the policy issues one way or another, he

---

brief and its six-volume appendix attempt to present the Court with a litany of social science materials aimed at influencing and shaping social policy. These are exactly the type of materials suited for legislative review. These materials cannot be considered part of the record below since no evidence was taken by the Superior Court in deciding the State's Motion to Dismiss. The testimonials and petitions of the clergy filed with the amicus brief of the Vermont Organization for Weddings of the Same-Gender, the Session of Christ Church Presbyterian of Burlington, et al., are also materials outside the record.

insists that the decisions must be legislative, not judicial. Id. at 2292-93. As the unanimous Court held in Dandridge v. Williams, "[c]onflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure." 397 U.S. at 487. The Dandridge Court's statement of the "intractable economic, social, and even philosophical problems" presented by welfare legislation applies equally well to the issue of same-sex marriage.

In the context of this case, it is precisely because a change in the definition of marriage would result in a social experiment never undertaken by any state or country in the world that the enterprise should be charged to the Legislature. Were the Court to remove the issue from legislative analysis by wrapping it with constitutional protections, only a constitutional amendment would enable future generations to reformulate social policy in this area.

Professor Sunstein has warned of the effects of removing major policy issues such as this from legislative debate:[73]

> As it operates in the courts, constitutional law is a peculiar mixture of substantive theory and institutional constraint . . . . Constitutional rights might therefore be systematically underenforced by the judiciary for good institutional reasons. Those reasons have to do with the courts' limited fact-finding capacity, their weak democratic pedigree, their limited legitimacy, and their likely futility as frequent instigators of social reform.

Sunstein, Homosexuality and the Constitution, 70 Ind. L. J. 1, 24 (1994). Professor Sunstein concludes that the very principle which a well-meaning, result-oriented court might be promoting could be jeopardized and hindered by the very act of the court in pronouncing it:

> Even if judges find the challenge to the ban on same-sex marriages plausible in substance, there is much reason for caution on their part. Immediate vindication of the principle could well jeopardize important interests. It could galvanize opposition and (predictably) lead to a strong movement for a

[73] Appellants cite an early article of Sunstein on this topic in their Brief. The State points out the changes in this author's views reflected by his later writings.

> constitutional amendment overturning the court's decision. It could weaken the anti-discrimination movement itself as that movement is operating in democratic arenas. It could provoke increased hostility and even violence against homosexuals. It could certainly jeopardize the authority of the judiciary.

Sunstein, Forward: Leaving Things Undecided, 110 Harv. L. Rev. at 97; see also Sunstein, Homosexuality and the Constitution, 70 Ind. L. J. at 25. Indeed, the counter-reaction to the Hawaii Supreme Court's decision in Baehr v. Lewin includes the submission of a constitutional amendment to the Hawaii Constitution, H.B. 117, 19th leg. (Haw. 1997),[74] the passage of the federal Defense of Marriage Act,[75] the enactment of mini-DOMAs in twenty-six states, and new proposals to limit gay rights in forty-four states. Arnett, Efforts Grow to Cap Gay-Rights Gains, Boston Globe, April 12, 1998, at 2, col. 1. The reaction to Baehr has been described as "a nationwide political riot against same-sex marriage." Stoddard, Bleeding Heart, 72 N.Y.U. L. Rev. at 988.

Certainly, at least with regard to unenumerated rights such as those claimed here, courts are hesitant to place issues beyond the scope of full and open public debate. For it is only through public debate that this social change will gain legitimacy. Glucksberg, 117 S. Ct. at 2267-68. Public acceptability of a decision must undergird the Court's constitutional pronouncements. Posner, Should There be Homosexual Marriage? And if so, Who Should Decide?, 95 Mich. L. Rev. at 1585-86 (reviewing W. Eskridge's book The Case for Same Sex Marriage) (no compelling reason to supercede the democratic process "merely because

---

[74] The proposed amendment was approved by the Legislature and is scheduled for public vote in November 1998.

[75] Pub. L. No. 104-199, 110 Stat. 2419 (1996)(codified at 28 U.S.C.A. §1738 and 1 U.S.C.A. §7 (1996)).

intellectually sophisticated people of secular inclination will find Eskridge's argument for same-sex marriage convincing. Sophisticates aren't always right").

One of the country's leading gay rights legal scholars made the same observation. In describing the changes wrought by the Civil Rights Act of 1964 he said as follows:

> If the new rules had come down from on high from the Supreme Court, many Americans would have probably considered the change of law illegitimate, high-handed, and undemocratic—another act of arrogance by the nine philosopher-kings sitting on the Court. Because the change emanated from Congress, however, such sentiments of distrust ... never came to affect the legitimacy of this stunning change in American law and mores.

Stoddard, Bleeding Heart, 72 N.Y.U. L. Rev. at 977. The reason legislative change is more generally accepted is that it gives those opposed to change the opportunity to participate in the debate. Id. at 985.

Despite what the Court may think about the sagacity of the Legislature's policy choice, that decision must be respected where, as here, it is not arbitrary, and does not infringe on a fundamental right or burden a suspect class. The Court must interpret and apply the law, but it has no role in reformulating public policy. If the Legislature's choice is rejected by the people, then the people will exercise their power to change it. As Justice Harlan counselled:

> Judicial self-restraint . . . will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.

Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring).

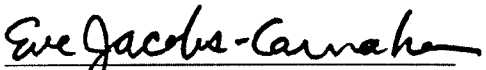
CONCLUSION

In light of the foregoing, the State respectfully requests that the judgment of the Superior Court be AFFIRMED.

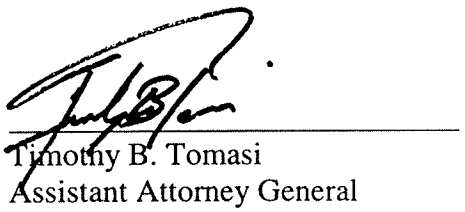
Dated at Montpelier, Vermont this 30th day of April, 1998.

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

by: 

Eve Jacobs-Carnahan
Assistant Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-3176

by: 

Timothy B. Tomasi
Assistant Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-3176