

Optional Supplemental Readings for Jon and Jonathan's Wedding

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These readings are completely for your own interest and curiosity. They are much denser, more academic articles. We will be adding to them periodically, so check back if you're interested in reading more!

Legal Recognition of Same-Sex Relationships in the United States by Gregory M. Herek

This article is published in *American Psychologist*, the leading academic journal in the field of psychology. With a readership of 150,000+, papers published here have an enormous impact on the field. This article looks at the scientific evidence that pertains to the political debate over same-sex relationship recognition. Herek is one of the leading scholars in the area of sexual orientation research.

What Do We Know About Gay and Lesbian Couples? by Lawrence A. Kurdek

This article is published in *Current Directions in Psychological Science*, another of the premier academic journals in the field of psychology. This journal publishes short articles which attempt to summarize an entire body of research. In this piece, Kurdek gives an overview of the psychological literature on gay and lesbian couples, including how many there are and how they are similar and different from heterosexual couples, psychologically.

Selections from *Goodridge v. Department of Health*, Supreme Court of Massachusetts

Here are the first 20-or-so pages of the Majority Opinion in the case which legalized same-sex marriage in the Commonwealth of Massachusetts on November 17, 2003.

Selections from *Marriage Cases*, Supreme Court of California

Here are the first 10-or-so pages of the Majority Opinion in the case which will legalize same-sex marriage in the State of California. It was published on May 15, 2008 and will take effect on June 15, 2005, if the court does not stay the decision.

Legal Recognition of Same-Sex Relationships in the United States

A Social Science Perspective

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Whether and how civil society should recognize committed relationships between same-sex partners has become a prominent, often divisive, policy issue. The present article reviews relevant behavioral and social science research to assess the validity of key factual claims in this debate. The data indicate that same-sex and heterosexual relationships do not differ in their essential psychosocial dimensions; that a parent's sexual orientation is unrelated to her or his ability to provide a healthy and nurturing family environment; and that marriage bestows substantial psychological, social, and health benefits. It is concluded that same-sex couples and their children are likely to benefit in numerous ways from legal recognition of their families, and providing such recognition through marriage will bestow greater benefit than civil unions or domestic partnerships. Trends in public opinion toward greater support for legal recognition of same-sex couples are discussed.

Keywords: lesbian and gay relationships, lesbian and gay parents, marriage, public policy, sexual orientation

In the past decade, the question of whether and how civil society should recognize committed intimate relationships between two people of the same sex has become a prominent and often divisive policy issue. Supporters of legal recognition have typically framed their arguments in terms of human rights and justice, whereas opponents have usually invoked religious teachings and tradition to support their position (Price, Nir, & Cappella, 2005). In addition to this clash between deeply felt values, the debate has raised factual questions about the nature of same-sex couples, their families, and the institution of marriage in general. Indeed, advocates on both sides have invoked the scientific research literature to support many of their legal and policy arguments.

Although empirical research cannot reconcile disputes about core values implicated by the marriage controversy, it can address factual questions. Indeed, in 2004 and 2005 the American Psychological Association (APA) submitted amicus curiae briefs that reviewed the scientific evidence pertinent to cases addressing the constitutionality of state laws denying marriage rights to same-sex couples in Nebraska, New Jersey, New York, Oregon, and Washington.¹

In the present article, I summarize and extend the briefs' discussion of research findings relevant to the three factual questions that have featured most prominently in legal and policy debates about marriage equality: (a) Do the intimate relationships of same-sex and different-sex couples differ in ways that are relevant to legal recognition of the former? (b) Does having gay, lesbian, or bisexual parents disadvantage a child relative to comparable children of heterosexual parents, such that denying same-sex couples the right to marry is ultimately beneficial for children? (c) Does legal recognition of intimate relationships through the institution of marriage

This article is based on my work on amicus curiae briefs that the American Psychological Association submitted in 2004 and 2005 (see <http://www.apa.org/psychlaw/amicus.html>) in cases concerning the constitutionality of state laws denying marriage rights to same-sex couples in Oregon (*Li et al. v. Oregon*), New Jersey (*Lewis v. Harris*), Washington (*Anderson et al. v. Sims et al.*), New York (*Shields et al. v. Madigan et al.*), and Nebraska (*Citizens for Equal Protection v. Bruning*).

I wish to express my intellectual debt and great appreciation to the many individuals who contributed to the preparation of those briefs, especially Clinton Anderson, William Hohengarten, Nathalie Gilfoyle, Mark Small, Anne Peplau, Suzanne Ouellette, Larry Kurdek, Charlotte Patterson, Susan Folkman, Judith Stacey, Karen Franklin, Ross Thompson, Dan Perlman, and Eric Glunt. Special thanks are due Anne Peplau, Clinton Anderson, and Jack Dynis.

I take sole responsibility for the opinions expressed in this article.

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¹ The impetus for submitting these briefs was a series of APA policies enacted by the membership since 1975 that were based on the premise that psychologists and all mental health professionals should "take the lead in removing the stigma of mental illness that has long been associated with homosexual orientations" (Conger, 1975, p. 633). In 2004, the APA Council of Representatives voted to "take a leadership role in opposing all discrimination in legal benefits, rights, and privileges against same-sex couples" and to "provide scientific and educational resources that inform public discussion and public policy development regarding sexual orientation and marriage" (Paige, 2005, pp. 498-499). That same year, in a separate resolution, the Council also voted to "take a leadership role in opposing all discrimination based on sexual orientation in matters of adoption, child custody and visitation, foster care, and reproductive health services" and to "provide scientific and educational resources that inform public discussion and public policy development regarding discrimination based on sexual orientation in matters of adoption, child custody and visitation, foster care, and reproductive health services" (Paige, 2005, p. 500).

bestow unique psychosocial benefits on those who participate in it and, therefore, disadvantage those who cannot marry?

I begin with a brief discussion of the history of the marriage equality debate and its broader context in U.S. society. Next, I summarize the scientific literature pertinent to the factual questions noted above. Because extensive research has been conducted on each topic and a thorough review is beyond the scope of the present article, I cite key literature reviews and meta-analyses when they are available. Finally, I discuss the social and psychological impact of current laws against marriage between two people of the same sex and consider the prospects for changes in public opinion about marriage equality.

Background

By early 2006, same-sex couples² enjoyed at least some degree of official recognition in most European countries and full marriage rights in the Netherlands, Belgium, Spain, and Canada, with legislation pending in South Africa and elsewhere. In the United States, same-sex couples were legally allowed to marry only in Massachusetts. Six other states had enacted legislation granting varying degrees of limited legal protections and benefits under the rubrics of civil unions (Vermont, Connecticut), domestic partnerships (California, New Jersey, Maine), and reciprocal beneficiary relationships (Hawaii). In addition, some state and local governmental entities offered limited benefits for the same-sex partners of their employees (e.g., access to group health insurance plans), as did many private employers. Same-sex couples' parental rights had statutory protection through second parent adoptions (whereby a parent consents to a partner's adopting her or his child while retaining parental rights) in a handful of states, including California, Connecticut, Massachusetts, New Jersey, New York, and Vermont, as well as the District of Columbia. Joint adoption rights had been granted by trial courts in other jurisdictions.³

Political opposition to government recognition of same-sex couples has been intense. When a Hawaii court decision (*Baehr v. Lewin*, 1993) raised the prospect that marriage rights might be granted to same-sex partners in the Aloha State, Congress passed the 1996 Defense of Marriage Act (DOMA). DOMA defines marriage as the union of one man and one woman and exempts states from recognizing marriages performed in another state between two people of the same sex (Defense of Marriage Act, 1996). Most states subsequently passed their own versions of DOMA (Peterson, 2004). Even some states that now accord legal status to same-sex partners (i.e., Hawaii and Vermont) originally did so mainly to avoid granting full marriage rights to such couples as a consequence of court decisions.

Late in 2003, the Massachusetts Supreme Court ordered that state to begin recognizing same-sex unions within 6 months (*Goodridge v. Dept. of Public Health*, 2003). The following May, during the first two days when marriages between same-sex partners were legal, approximately 1,700 couples filed their intentions to marry (Shartin, 2004). In the interim, local government officials in

several other jurisdictions around the country briefly issued marriage licenses to same-sex partners until they were stopped by state courts or officials. Licenses were issued to 4,037 couples in San Francisco in February and March 2004 (Murphy, 2004), to 3,022 couples in Multnomah County, Oregon, in March and April 2004 ("Gay Weddings Halted, but Marriages Stand," 2004), and to 68 couples in Sandoval County, New Mexico, in February 2004 (Akers, 2004). Smaller numbers sought marriage licenses in New York and New Jersey (Cullinane, 2004; Precious, 2004).

In response, religious conservatives intensified their state-level campaigns across the country to pass statutes and constitutional amendments banning same-sex marriage. They also called for a federal Constitutional amendment and received support from President George W. Bush, who used the marriage issue to galvanize supporters in his 2004 presidential campaign (Lochhead, 2004). Eleven states approved bans on same-sex marriage in the 2004 November election, most with support from more than 60% of voters (Peterson, 2004). Since the 2004 elections, still more states have enacted prohibitions on legal recognition of same-sex relationships, and others are in the process of doing so as this article goes to press. (For more historical background, see Chauncey, 2004, Lewin, 1998, and Nardi, 1997.)

Proponents of marriage equality have battled these measures in the courts and legislatures. As this article goes to press, cases contesting the constitutionality of laws against marriage and civil unions are being litigated in several states, including California and Maryland. In 2005, the California state legislature passed a statute granting marriage equality to same-sex couples, the first such U.S. law to be passed at the state level. However, the bill was vetoed by Governor Arnold Schwarzenegger.

The national debate about marriage equality must be understood in its broader historical context (Cherlin, 2004; Coontz, 2005). For most of Western history, marriage was an institution for securing wealth, property rights, and power. Only in the 19th century did it come to be defined as an institution based mainly on romantic love. In the mid-20th century, the dominant model of marriage in the United States centered on emotional intimacy (husbands and wives were lovers, friends, and companions to each other) and clear gender roles (with a male breadwinner father and a female homemaker mother). By the 1960s,

² Throughout this article, the term *same-sex couple*—rather than, for example, *gay male couple* or *lesbian couple*—is used to refer to intimate partnerships consisting of two men or two women. This descriptor avoids the problem of making unnecessary presumptions about the sexual orientation of the partners. In descriptions of data from public opinion surveys, however, the original question wordings have been preserved.

³ As this article goes to press, legislation and litigation regarding same-sex couples and parenting are pending in many states and countries. For current information, readers are advised to consult the Web sites of organizations that monitor relevant laws and policies. Examples include the National Adoption Information Clearinghouse (<http://naic.acf.hhs.gov/index.cfm>), Lambda Legal Defense and Education Fund (<http://www.lambdalegal.org>), and the National Gay and Lesbian Task Force (<http://www.thetaskforce.org/>).

however, cultural shifts threw this “Ozzie and Harriet” model into upheaval. Increasing labor force participation by women and the rise of a feminist movement led to challenges to longstanding gender roles, including those at the core of traditional marriage. Improved birth control technologies and a revolution in sexual mores facilitated the separation of sexual behavior from reproduction along with more widespread acceptance of nonmarital sex. With the rise of the human potential movement, self-fulfillment and the development of personal identity were accorded greater importance in making life decisions, including whether to marry or remain married. In the face of these changes, many people increasingly came to understand and evaluate marriage according to individualistic criteria, with marital satisfaction defined more in terms of self-fulfillment and self-expression than by the performance of culturally prescribed spousal roles (see Cherlin, 2004; Coontz, 2005).

Around the same time, gay and lesbian (and, later, bisexual) people began to publicly affirm their sexual orientation, forming visible communities and working to end discrimination based on sexuality (D’Emilio, 1983). As early as the 1970s, significant numbers began to recognize that their intimate relationships manifested the characteristics that had increasingly come to be viewed as central to marriage (Nardi, 1997). In the 1990s, sexual minority individuals asserted that their unions met contemporary criteria for civil marriage and argued with growing insistence that the institution’s social and legal benefits should be extended to them (Chauncey, 2004; Lewin, 1998). Meanwhile, political and religious conservatives called for the restoration of marriage as an institution for defining the boundaries for acceptable sexuality, child rearing, and gender roles. Many of those same conservatives had consistently fought the gay community’s efforts to eliminate inequalities between heterosexuals and sexual minorities in other areas, such as employment and housing, and the marriage issue provided yet another arena for battle (Chauncey, 2004; Herman, 1997). While a majority of the public opposes many forms of discrimination based on sexual orientation (Yang, 1997), the fight against marriage equality has proved to be a winning issue for conservatives in most of the electoral and legislative arenas in which it has been contested, as noted above.

Consistent with ballot outcomes, public opinion research shows that most U.S. adults currently oppose marriage rights for same-sex couples. Nevertheless, attitudes in this arena are becoming increasingly nuanced, with support now widespread for other types of limited recognition. In 2004, on the same day when voters in 11 states overwhelmingly enacted bans on marriage, national exit polls revealed that 60% of voters supported some form of legal recognition for same-sex couples—either marriage or civil unions (Kohut, 2004). Similarly, a July 2005 Pew Research Center national survey of U.S. adults found that 53% favored allowing gay and lesbian couples to enter into legal agreements with each other that would give them many of the same rights as married couples (Pew Research Center for the People and the Press, 2005).

This majority support contrasts sharply with public reactions to same-sex couples only a few decades earlier. In 1982, when the San Francisco Board of Supervisors passed the nation’s first domestic partners statute, the measure was highly controversial and was vetoed by then-mayor Dianne Feinstein with strong support from the city’s major newspapers and its Catholic archbishop (Rannells, 1982). A few years later, only 23% of respondents to a 1989 Gallup national survey believed homosexual couples should have “the same legal rights as if they were husband and wife when it comes to things like inheritance, the right to adopt a child and hospital visits.”⁴ As recently as 2000, 16 members of the Vermont House of Representatives who supported that state’s civil unions law were turned out of office in the first statewide election after their votes (Moats, 2004).

Although civil unions and domestic partnerships are now favored by most of the public, opposition to marriage equality remains strong. In the 2005 Pew survey cited above, only 36% of respondents supported allowing gay men and lesbians to marry legally. Similarly, a Gallup survey conducted the following month found that only 37% of respondents felt that “marriages between homosexuals should be recognized by the law as valid, with the same rights as traditional marriages” (Gallup Poll, 2005). Yet even these figures represent an increase over recent decades in public support for marriage. In the 1988 General Social Survey, for example, only 12% of respondents agreed that “Homosexual couples should have the right to marry one another.”

In summary, polling data show increasing public support for recognition of same-sex couples. Most U.S. adults now favor giving those couples many of the rights and privileges bestowed by marriage. Most of the public remains opposed to granting legal marriage to same-sex couples, but that majority has shrunk in recent years. With the foregoing discussion as context, I address the factual questions that have been central to the marriage equality debate in the next sections of the article.

Same-Sex Committed Relationships

I noted previously that as cultural definitions of marriage have evolved in the United States and other Western countries, relationship quality and its constituent components have become increasingly central to the meaning of that institution. In this section, I consider empirical research comparing the psychological and social dimensions of same-sex and heterosexual intimate partnerships. Before doing so, it is important to note two caveats on the interpretation and use of this research.

First, there is an important methodological constraint on empirical comparisons between same-sex and heterosexual couples. Among the latter, important differences have been observed between those who choose to marry

⁴ Throughout this article, polling data described without an accompanying bibliographic citation were obtained from the Roper Center for Public Opinion Research database, accessed via LexisNexis.

and those who do not, with the former generally manifesting greater commitment, higher levels of relationship satisfaction, greater happiness, and better mental health (Brown, 2000; Gove, Style, & Hughes, 1990; Nock, 1995; Stack & Eshleman, 1998). In recognition of this pattern, research on different-sex couples routinely controls for self-selection into marriage by differentiating those who are married from, for example, unmarried cohabiting couples. Because the vast majority of U.S. same-sex couples lack legal marriage as an option, a comparable distinction cannot be made when studying them. As a result, many research samples of same-sex couples have been more heterogeneous than samples of heterosexual couples in terms of relationship duration, degree of perceived commitment, and even cohabiting status. This greater heterogeneity might be expected to produce findings that overstate the extent of dissimilarities between same-sex and different-sex couples because observed differences might be attributed to sexual orientation when in fact they are due to other factors, such as marital status.

A second caveat concerns the nature of scientific research. The null hypothesis (in this case, that same-sex and heterosexual couples do not differ) cannot be proved. A more realistic standard is the one generally adopted in behavioral and social research, namely, that repeated failures to disprove the null hypothesis are accepted provisionally as a basis for concluding that the groups, in fact, do not differ. Moreover, it is important to recognize that some heterogeneity of findings across studies is to be expected simply because of random variations in sampling. For example, even if same-sex and heterosexual couples in the general population truly do not differ in their psychological dynamics, it is to be expected that a small number of studies (roughly 5% if probability sampling methods are employed and conventional levels of statistical significance are used) will report significant differences. This fact highlights the importance of examining the entire body of research rather than drawing conclusions from one or a few studies.

In light of these caveats, the observed similarities between same-sex and different-sex couples are striking. Like heterosexuals, a large number of gay men and lesbians want to form stable, long-lasting, committed relationships (Kurdek, 1995; Peplau & Spalding, 2000), and many successfully do so. Data from convenience samples of gay men and lesbians reveal that (a) the vast majority have been involved in at least one committed relationship, (b) large proportions currently are in such a relationship (across studies, roughly 40%–70% of gay men and 45%–80% of lesbians), and (c) a substantial number of those couples have been together for a decade or longer (Kurdek, 1995, 2004; Nardi, 1997; Peplau & Spalding, 2000). A comparable research literature based on probability samples does not yet exist, but the available survey data (Cochran, Sullivan, & Mays, 2003; Kaiser Family Foundation, 2001; Mills et al., 2001) and the 2000 Census (Simmons & O'Connell, 2003) corroborate these findings and show that many same-sex couples are cohabiting.

In their psychological and social dynamics, committed relationships between same-sex partners closely resemble those of different-sex married couples. Like heterosexual couples, same-sex couples form deep emotional attachments and commitments. They face similar challenges concerning intimacy, love, equity, loyalty, and stability and go through similar processes to address those challenges (Kurdek, 2001, 2005; Mackey, Diemer, & O'Brien, 2000; Peplau & Fingerhut, in press; Peplau & Spalding, 2000). In research examining the quality of intimate relationships, same-sex couples have not been found to differ from heterosexual couples in their satisfaction with their relationships or the social psychological processes that predict relationship quality (Gottman, Levenson, Gross, et al., 2003; Kurdek, 2001, 2004, 2005; Mackey et al., 2000; Peplau & Beals, 2004; Peplau & Fingerhut, in press). Research on the stability and duration of same-sex relationships is limited, but data from convenience samples show that long-lasting relationships are common (Blumstein & Schwartz, 1983; Kurdek, 2004). Moreover, the one published study in this area that examined factors leading to relationship dissolution found that a decline in relationship quality predicted dissolution of same-sex and heterosexual relationships alike (Kurdek, 2004).

Although same-sex and different-sex couples are psychologically similar in many respects, some differences between the groups have been observed across studies. First, cohabiting same-sex couples are less likely than heterosexual couples to divide household labor according to culturally defined gender roles. Instead, each partner often takes on both traditionally masculine and feminine tasks (Peplau & Beals, 2004). More broadly, same-sex couples appear to have a greater commitment to equality between the partners than is the case for heterosexual couples (Gottman, Levenson, Gross, et al., 2003; Gottman, Levenson, Swanson, et al., 2003; Kurdek, 2004), although the extent to which that commitment translates into behavior may be affected by factors such as the partners' employment situations and social class (Carrington, 1999; Peplau & Fingerhut, in press).

A second difference observed between heterosexual and same-sex couples concerns external social relationships and sources of support. Whereas heterosexual couples typically receive considerable social support from each partner's biological family, same-sex couples generally get less support from relatives and instead rely mainly on friends (Kurdek, 2004). In light of the extensive body of research documenting the hostility to a family member's homosexuality frequently displayed by parents and other relatives (e.g., D'Augelli, Hershberger, & Pilkington, 1998; Herek, 1996), this difference is not surprising. For example, 34% of the respondents to a 2000 survey with a probability sample of 405 lesbians, gay men, and bisexuals from 15 major U.S. metropolitan areas stated that at least one family member had refused to accept them because of their sexual orientation (Kaiser Family Foundation, 2001). Indeed, many gay, lesbian, and bisexual individuals feel compelled to conceal their sexual orientation from relatives (Herek, 1996; Savin-Williams, 1998), which precludes re-

cept of social support from those individuals for a same-sex committed relationship. This aspect of the experiences of same-sex couples is a consequence of sexual stigma and sexual prejudice, phenomena that I discuss later in this article.

A third difference among couples is associated with gender. It is reasonable to hypothesize that couples consisting of two women differ in at least some respects from male–male couples and that male–female couples differ from same-sex couples by virtue of their gender composition. To the extent that gender-linked differences have been observed among committed couples, they appear mainly to revolve around sex. As Peplau (1991) noted, although a couple's sexual frequency declines over time in heterosexual and homosexual relationships alike, the frequency of sex with the primary partner (controlling for relationship duration) appears to be highest in male couples, lowest in female couples, and intermediate in heterosexual couples. Moreover, male couples appear more likely than heterosexual or female couples to openly discuss whether or not their relationship will be sexually exclusive and to explicitly agree to allow sex outside the relationship under certain conditions (Peplau & Spalding, 2000). These gender-linked patterns were summarized by Peplau (1991), who observed that the data “support the view that men want sex more often than women do and men more highly value sexual novelty” (Peplau, 1991, p. 194; see also Blumstein & Schwartz, 1983; Peplau & Fingerhut, in press).

The relevance for public policy of these few documented differences between heterosexual and same-sex couples is arguably small. Indeed, the differences in division of labor and social support have not been widely mentioned by opponents of marriage equality. However, the greater prevalence of sexual nonexclusivity among male couples has frequently been cited as a reason for denying legal recognition of marriage to all same-sex couples (e.g., Knight, 1997; Women's Prayer and Action Group, 2004). This argument is flawed in important respects, two of which are noted here.

First, whereas the marriage contract is widely understood to include a commitment to sexual exclusivity, the relationship forms currently available to same-sex couples do not. Thus, extraregulation sexuality has a different meaning for most unmarried same-sex couples compared with married heterosexual couples. Heterosexual couples who do not wish to commit to sexual exclusivity often choose to cohabit rather than marry (Blumstein & Schwartz, 1983), and cohabiting heterosexual couples are less likely to be sexually exclusive than are their married counterparts (Forste & Tanfer, 1996; Laumann, Gagnon, Michael, & Michaels, 1994). A similar self-selection process would probably occur among same-sex couples if they were given the choice, with those opting to marry being more likely to desire a sexually exclusive relationship than their counterparts who choose to cohabit or otherwise remain legally single. In support of this hypothesis, Solomon, Rothblum, and Balsam (2005) found that gay men who entered into civil unions in Vermont were more likely to have agreed with their partners *not* to have sexual partners

outside the relationship than were gay men not in civil unions. Thus, it is problematic to extrapolate from existing data to make predictions about how married same-sex couples might compare with their heterosexual counterparts in this regard.

Second, even if married men in male–male couples should prove to be more likely than others to have sexually nonexclusive relationships, this would not justify denying marriage equality to the entire class of same-sex couples. In recent national surveys, approximately 21%–25% of men who were ever (heterosexually) married reported having extramarital sex, as did 10%–15% of ever-married women (Laumann et al., 1994; Smith, 2003). This lack of sexual exclusivity in a significant number of heterosexual marriages is hardly considered a valid reason for denying marriage to all male–female couples. Moreover, among the heterosexually married, the same data show that the prevalence of extramarital relations varies according to race, religiosity, and prior marital status, among other factors (Smith, 2003). However, these empirical patterns do not legitimize restricting marriage rights to certain racial or religious groups or the never-married. Neither can comparable data about unmarried male–male couples be considered a valid basis for denying marriage rights to all same-sex couples.

In summary, the conclusion to be drawn from behavioral science research is that the psychosocial qualities of intimate relationships do not reliably differ in key respects according to whether the couple consists of two men, two women, or a man and woman. Whereas some differences have been documented between same-sex and heterosexual couples, their relevance to public policy governing state recognition of relationships is arguably small or nonexistent.

Are Children Disadvantaged by Being Raised by a Same-Sex Couple?

Cultural, legal, and technological changes during the 20th century have fostered a greater diversity of family forms in U.S. society today compared with even a half-century ago. For example, changes in divorce laws have resulted in more single-parent households and blended families which include children from previous marriages. Never-married individuals increasingly are becoming parents through artificial insemination and adoption. Some of these individuals coparent with a cohabiting partner, whereas others raise their children alone. In addition, more married couples than in the past are remaining childless (e.g., Bumpass, 1990; Coontz, 2005).

Against this cultural backdrop, same-sex couples increasingly form the core of families in which children are conceived, born, and raised (e.g., Patterson, 2000; Perrin, 2002). This pattern is especially common among women. The 2000 Census revealed that 34% of cohabiting female couples had children under 18 living in the home, as did 22% of male cohabiting couples. By comparison, approximately 46% of heterosexual married couples were raising children (Bennett & Gates, 2004). Sexual minority men and

women face somewhat different issues in becoming parents and raising their children (for reviews, see Patterson, 2004; Perrin, 2002), and as noted below, empirical research on lesbian mothers is more extensive than that on gay fathers. Policy debates about marriage and parenting, however, have generally not differentiated between female and male couples.

In debates about marriage equality, questions have often been raised about the welfare of the children of same-sex couples. Proponents of marriage equality contend that gay and lesbian parents are as capable as their heterosexual counterparts and that the well-being of children is not contingent on the parents' sexual orientation. For example, the Web page of the National Center for Lesbian Rights includes the assertion that "Social science research has shown that children raised by lesbian and gay parents are just as healthy and well-adjusted as those raised by heterosexual parents" (National Center for Lesbian Rights, 2000, ¶3). Opponents of marriage rights for same-sex partners also invoke scientific research, but they claim that the children of lesbian and gay parents fare worse than children raised by heterosexual parents. For example, according to the Web site of one conservative Christian organization, there is "overwhelming scientific evidence" that

gay marriage presents a grave threat to children—study after study has found that boys and girls not raised by both of their biological parents are much more likely to, among other things, suffer abuse, perform poorly in school, abuse drugs and alcohol and wind up in trouble with the law. (Focus on the Family, 2004, ¶5)

A similar, albeit more nuanced, statement of this argument was made by another opponent of marriage equality:

While scholars continue to disagree about the size of the marital advantage and the mechanisms by which it is conferred, the weight of social science evidence strongly supports the idea that family structure matters and that children do best when raised by their own mother and father in a decent, loving marriage. (Gallagher, 2004, p. 51, footnote omitted)

Before considering the research evidence relevant to these competing claims, it is important to critically examine the underlying premise of the debate about children, same-sex couples, and marriage. As exemplified in the assertions quoted above, the widespread assumption appears to be that same-sex couples should not be allowed to marry unless it can be proved that their children are socially and psychologically indistinguishable from children raised continuously from birth by their (heterosexual) married parents. However, framing the debate in this way is problematic for at least two reasons.

First, advocates on both sides of the marriage debate appear to be demanding, in effect, that researchers conclusively demonstrate that no differences exist between the children of sexual minority parents and those of heterosexual parents. As noted previously, however, the null hypothesis cannot be proved. Here again, the more realistic standard is that repeated findings of no significant differences should be accepted provisionally as a basis for concluding that the groups, in fact, do not differ. And, as with empir-

ical studies of couples, it is important to examine the entire body of research rather than to draw conclusions from one or a few studies because random variations in sampling can be expected to produce some heterogeneity of findings. In the long term, for example, even if no differences in psychological adjustment exist between the children of heterosexual parents and the children of sexual minority parents in the general population, a small number of studies will inevitably find superior functioning among children in one group or the other.

Second, one can only speculate whether and to what extent changes in marriage policy will affect the proportion of sexual minority adults who parent or the number of children raised by same-sex couples. It is indisputable, however, that many gay men, lesbians, and bisexuals already are parents, and there is no reason to doubt that still more will conceive and adopt children in the future whether or not they gain the right to marry. Thus, it is not credible to argue that marriage equality should be denied in order to prevent sexual minority adults from becoming or remaining parents. Rather, the question should be reframed in terms of whether the children of same-sex couples are benefited or harmed by laws that prevent their parents from marrying.

Mindful of these limitations in how the argument has been framed, it is possible to evaluate the relevant scientific evidence. An examination of the conflicting claims in the marriage debate reveals that the two sides have based their arguments on different bodies of research. Focus on the Family (2004), Gallagher (2004), and other marriage equality opponents cite studies comparing the children of intact heterosexual families with children being raised by a single parent as a consequence of divorce, separation, or the death of a spouse. Such studies generally show that, all else being equal, having two parents is more beneficial for a child than having a single parent (McLanahan & Sandefur, 1994). However, this research literature does not include studies comparing children raised by two-parent same-sex couples with children raised by two-parent heterosexual couples. Consequently, drawing conclusions about the children of gay, lesbian, and bisexual parents from those studies inappropriately attributes differences resulting from the number of parents in a household to the parents' gender or sexual orientation (e.g., Stacey, 2004).

By contrast, the arguments made by the National Center for Lesbian Rights (2000) and other supporters of marriage equality refer to empirical research that has directly examined gay, lesbian, and bisexual parents—both single and in same-sex couples—and their children. Over the past three decades, more than two dozen such studies have been published (for reviews, see Anderssen, Amlie, & Ytteroy, 2002; Fulcher, Sutfin, Chan, Scheib, & Patterson, 2006; Patterson, 2000, 2004; Perrin, 2002; Stacey & Biblarz, 2001). This body of research is more directly relevant to the marriage debate because it explicitly compares children according to the sexual orientation of their parents, but it is not without flaws. Studies published in the 1970s and 1980s often utilized small, select convenience samples and often employed unstandardized measures. Published reports did not always include adequate descriptions of

research methodology. Sometimes key variables (e.g., whether or not an ostensibly single parent was in a cohabiting relationship) were not controlled. However, the overall methodological sophistication and quality of studies in this domain have increased over the years, as would be expected for any new area of empirical inquiry. More recent research has reported data from probability and community-based convenience samples that were not originally recruited on the basis of sexual orientation (Golombok et al., 2003; Wainright, Russell, & Patterson, 2004), has used more rigorous assessment techniques, and has been published in highly respected and widely cited developmental psychology journals, including *Child Development* and *Developmental Psychology*. Data are increasingly available from prospective studies (e.g., Gartrell, Deck, Rodas, Peyser, & Banks, 2005; MacCallum & Golombok, 2004). In addition, whereas early study samples consisted mainly of children originally born into heterosexual relationships that subsequently dissolved when one parent came out as gay or lesbian, recent samples are more likely to include children conceived within a same-sex relationship (e.g., by donor insemination) or adopted in infancy by a same-sex couple. Thus, they are less likely to confound the effects of having a sexual minority parent with the consequences of divorce (Amato, 2001; Amato & Keith, 1991).⁵

Despite considerable variation in the quality of their samples, research design, measurement methods, and data analysis techniques, the findings to date have been remarkably consistent. Empirical studies comparing children raised by sexual minority parents with those raised by otherwise comparable heterosexual parents have not found reliable disparities in mental health or social adjustment (Patterson, 1992, 2000; Perrin, 2002; Stacey & Biblarz, 2001; see also Wainright et al., 2004). Differences have not been found in parenting ability between lesbian mothers and heterosexual mothers (Golombok et al., 2003; Parks, 1998; Perrin, 2002). Studies examining gay fathers are fewer in number (e.g., Bigner & Jacobsen, 1989, 1992; Miller, 1979) but do not show that gay men are any less fit or able as parents than heterosexual men (for reviews, see Patterson, 2004; Perrin & Committee on Psychosocial Aspects of Child and Family Health, 2002).

Questions are sometimes raised about the gender and sexual development of children raised by lesbian, gay, or bisexual parents. Relevant data have not been reported on the children of gay fathers, but empirical studies have failed to find reliable differences between the children of lesbian and heterosexual mothers in their patterns of gender identity (Perrin & Committee on Psychosocial Aspects of Child and Family Health, 2002) or gender role conformity (Patterson, 2000).⁶ In terms of sexual development, discussions sometimes focus on whether the children of lesbian, gay, or bisexual parents are disproportionately likely to experience same-sex erotic attractions or to identify as gay. The relevance of this question to policy is dubious because homosexuality is neither an illness nor a disability, and the mental health professions do not regard a homosexual or bisexual orientation as harmful, undesirable, or requiring

intervention or prevention. More than 30 years ago, the American Psychiatric Association removed homosexuality from the *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association, 1980), a decision that has been strongly supported by the American Psychological Association (2004). Some theorists have suggested that it would be surprising if no association existed between the sexual orientation of parents and that of their children (e.g., Baumrind, 1995; Stacey & Biblarz, 2001), but empirical data addressing this question are limited. Although much research has examined the possible influences of genetic, hormonal, developmental, social, and cultural variables on sexual orientation, no findings have emerged that permit scientists to conclude that sexual orientation is determined by any particular factor or set of factors. To the extent that data are available, however, they show that the vast majority of children raised by lesbian and gay parents eventually grow up to be heterosexual (e.g., Bailey, Bobrow, Wolfe, & Mikach, 1995; Patterson, 2000, 2004; Tasker & Golombok, 1997).

The studies cited above demonstrate that sexual minority parents are not inherently less capable of raising well-adjusted children than are heterosexual parents. Because these studies used convenience samples (as have the vast majority of empirical studies of child development in general), they do not provide a basis for estimating population parameters for all children of sexual minority parents relative to those with heterosexual parents. One recent study, however, used a probability sample and thus provides a valid basis for generalization to the population. Wainright et al. (2004) analyzed data from the National Longitudinal Study of Adolescent Health, which drew its participants from a stratified random sample of all U.S. high schools with at least 30 students (AddHealth, 2004). The researchers compared 44 adolescents parented by female couples and 44 adolescents parented by heterosexual couples, matched on relevant demographic characteristics, and found no significant differences in psychological well-being or family and relationship processes (e.g., parental

⁵ Nevertheless, same-sex couples often find they are restricted to adopting children or infants from troubled backgrounds (e.g., children with HIV or other diseases, offspring of mothers with drug abuse histories) or from other countries (who often have histories of poor nutrition or other health challenges). Researchers must be careful to control for these factors when making comparisons to adoptive children raised by heterosexual couples.

⁶ On the basis of their review of the literature, Stacey and Biblarz (2001) asserted that six empirical studies have indicated that children of lesbian mothers display less gender role conformity than children of heterosexual mothers. However, only two of the cited sources reported statistically significant differences in this regard (Green, Mandel, Hotvedt, Gray, & Smith, 1986; Hotvedt & Mandel, 1982), and both of those reports appear to have been derived from the same ongoing study. Moreover, many of the differences reported in that study (e.g., that daughters of lesbian mothers were more likely than daughters of heterosexual mothers to aspire to nontraditional occupations for women, such as doctor, astronaut, lawyer, or engineer) can be considered healthy in a world in which gender-based discrimination persists. Indeed, empirical research suggests that psychological androgyny tends to be associated with mental health, especially compared with psychological femininity (e.g., Barrett & White, 2002).

warmth, integration into one's neighborhood). Adolescents with parents in female couples felt significantly more integrated into their schools than did those with parents in male-female couples (Wainright et al., 2004).

More studies based on probability samples are needed on the children of sexual minority parents, especially the children of gay and bisexual fathers. Yet empirical research to date has consistently failed to find linkages between children's well-being and the sexual orientation of their parents. If gay, lesbian, or bisexual parents were *inherently* less capable than otherwise comparable heterosexual parents, their children would evidence problems regardless of the type of sample. This pattern clearly has not been observed. Given the consistent failures in this research literature to disprove the null hypothesis, the burden of empirical proof is on those who argue that the children of sexual minority parents fare worse than the children of heterosexual parents.

Benefits of Marriage

The belief that being married bestows benefits on wedded couples is widespread among the public (Thornton & Young-Demarco, 2001) and scholars (e.g., Coalition for Marriage, Family and Couples Education, Institute for American Values, & Center of the American Experiment, 2002; Waite, 1995). Although empirical data and common experience show that marriage is not a panacea, and that life circumstances and personality characteristics make it a better option for some than for others (e.g., Huston & Melz, 2004), its positive consequences are nevertheless well documented. Married men and women who are satisfied with their relationships generally experience better physical and mental health than their unmarried counterparts (Diener, Suh, Lucas, & Smith, 1999; Gove et al., 1990; Johnson, Backlund, Sorlie, & Loveless, 2000; Ross, Mirowsky, & Goldsteen, 1990; Simon, 2002; Stack & Eshleman, 1998). This outcome does not result simply from being in an intimate relationship; otherwise comparable heterosexuals who are in cohabiting couples generally do not manifest the same levels of health and well-being as married individuals (Brown, 2000; Nock, 1995; Stack & Eshleman, 1998; but see Ross, 1995). Nor does it appear to be simply a product of self-selection by healthy and happy individuals into marital relationships (Gove et al., 1990; but see Huston & Melz, 2004). Of course, marital status alone does not guarantee greater health or happiness: People who are unhappy with their marriages often manifest lower levels of well-being than their unmarried counterparts, and experiencing marital discord and dissatisfaction is often associated with negative health effects (Gove, Hughes, & Style, 1983; Kiecolt-Glaser & Newton, 2001; Williams, 2003). Nevertheless, happily married couples are generally better off than the unmarried.

The positive health effects of marriage result in part from the tangible resources and protections accorded to spouses by society. The U.S. General Accounting Office (2004) has identified 1,138 statutory provisions in which marital status is a factor in determining or receiving federal benefits, rights, and privileges ranging from Social Security

survivors' benefits to affordable housing programs. State governments grant still more benefits. Many of the statutory advantages enjoyed by married partners are financial, including those deriving from tax laws, employee benefits, death benefits, and entitlement programs. These special considerations provide married couples with greater economic and financial security than unmarried individuals. Such security is an important predictor of mental and physical health (Brown, 2000; Ross et al., 1990; Stack & Eshleman, 1998; for a general discussion, see Pearlin, Menaghan, Lieberman, & Mullan, 1981).

Another factor contributing to the well-being of married individuals is the greater support they receive from others, compared with the unmarried. Marital relationships differ from nonmarital intimate relationships, in part, by requiring a lifelong commitment that is publicly affirmed, typically in the presence of family members, friends, and civil or religious authorities. Thus, social support and integration are central to the institution of marriage, and the various rituals associated with marriage can be understood as cementing the couple's ties to the larger community (e.g., Slater, 1963). This public aspect of marriage increases each relationship partner's sense of security that the relationship will endure (Cherlin, 2000, 2004). Consistent with these observations, empirical research shows that married adults tend to receive more social support than unmarried adults, especially from parents (Cooney & Uhlenberg, 1992; Nock, 1995; Sprecher, 1988; Umberson, 1992).

In addition to their greater financial stability and social support, spouses have special rights and privileges not accorded to those in other adult, nonbiological relationships. In this way, marriage provides buffers against the psychological stress associated with extremely traumatic life events. For example, a spouse can make health decisions for an incapacitated partner, including decisions involving the continuation or cessation of heroic measures to prolong the partner's life. Such capabilities can contribute to a sense of mastery or personal control (Pearlin et al., 1981), which is associated with better health among spousal caregivers (Burton, Newsom, Schulz, Hirsch, & German, 1997; Miller, Campbell, Farran, & Kaufman, 1995). Similarly, although the death of a partner is highly stressful (Gove et al., 1990; Holmes & Rahe, 1967) and often has negative consequences for the surviving partner's psychological and physical health (Stroebe & Stroebe, 1987), these deleterious effects can be offset to some extent by the legal benefits marriage bestows. A surviving spouse typically receives social support and sympathy from others, can make decisions about funeral and burial arrangements, and has automatic rights to inheritance, death benefits, and bereavement leave. These factors can somewhat mitigate the considerable stress of bereavement (e.g., Norris & Murrell, 1990).

Married couples' legal status also enables them to exercise control over other types of stressful situations or to avoid them entirely. For example, a married person facing litigation can nonetheless communicate freely with her or his spouse because the law creates marital privileges against being compelled to testify against one's wife or husband. Under normal circumstances, a noncitizen spouse will not be deported or forced to leave the country, and

special considerations accorded to some noncitizens (e.g., employment status, asylum) may extend to their spouses (U.S. General Accounting Office, 2004). Because marriage is recognized across state and national borders, husbands and wives know that their relationship and, when applicable, their parental status, will be considered valid outside their home state.

In addition to these benefits, the institution of marriage also creates deterrents to relationship dissolution. Social scientists have long recognized that marital commitment is a function not only of attractive forces (i.e., features of the partner or the relationship that are rewarding) but also of external forces that serve as constraints on dissolving the relationship. Barriers to terminating a marriage include feelings of obligation to one's spouse, children, and other family members; moral and religious values about divorce; legal restrictions; financial concerns; and the expected disapproval of friends and the community (Adams & Jones, 1997; Levinger, 1965). By creating barriers and constraints on dissolving the relationship, marriage can be a source of relationship stability and commitment (Adams & Jones, 1997; Cherlin, 2004; Nock, 1995). It must be noted that in the absence of adequate rewards, the existence of barriers alone is not sufficient to sustain a marriage in the long term. Not surprisingly, perceiving one's intimate relationship primarily in terms of rewards, rather than barriers to dissolution, is associated with greater relationship satisfaction (Previti & Amato, 2003). The presence of barriers, however, may encourage partners to seek solutions for their problems rather than prematurely dissolving a potentially salvageable relationship. Indeed, the presence of barriers is negatively correlated with divorce, which suggests that they contribute to staying together for some couples in some circumstances (Heaton & Albrecht, 1991; White & Booth, 1991).

Finally, although they are not well documented empirically, marriage offers intangible benefits. Durkheim (1951) observed that it helps to protect the individual from anomie. Expanding on this notion, 20th-century sociologists characterized marriage as "a social arrangement that creates for the individual the sort of order in which he can experience his life as making sense" (Berger & Kellner, 1964, p. 1) and suggested that "in our society the role that most frequently provides a strong positive sense of identity, self-worth, and mastery is marriage" (Gove et al., 1990, p. 16; see also Cherlin, 2004). Although it is difficult to quantify how the meaning of life changes for individuals once they marry, empirical research clearly demonstrates that marriage has distinct benefits that extend beyond the material necessities of life (e.g., R. P. D. Burton, 1998).

Consequences of Nonrecognition for Same-Sex Couples and Their Children

Although the psychosocial benefits of marriage are well documented, empirical data are not available to directly assess the effects on same-sex couples of governmental nonrecognition for their relationships. Nevertheless, it is

reasonable to conclude that the differential treatment of those couples, vis-à-vis married heterosexuals, creates special challenges and obstacles for them with ultimately negative consequences for their well-being. Without legal recognition, partners in same-sex couples lack both the practical benefits of marriage and the buffers that marriage provides against the psychosocial consequences of traumatic events. The financial situation of same-sex couples is likely to be less stable than that of married couples, for example, because they do not enjoy the many economic protections of marriage in areas such as taxation and property rights. Indeed, only one fourth of the states have laws that explicitly prohibit workplace or housing discrimination on the basis of sexual orientation. Fearing discrimination, many members of same-sex couples feel compelled to conceal not only their relationships but also their sexual orientation (Badgett, 2001; Schneider, 1986; Woods & Lucas, 1993). Even when gay and lesbian employees do not fear dismissal or harassment because of their sexual orientation, they nevertheless receive fewer job-related benefits than their married coworkers. Family leave policies, health insurance, and pension plans, for example, typically include an employee's spouse but not a same-sex partner. Even when benefits such as health insurance coverage are extended to a same-sex partner, they are taxed as income; this is typically not the case for benefits to heterosexual spouses.

Because same-sex couples lack the protections that marriage provides when a spouse dies, they must incur the considerable expense of creating legal protections for the surviving partner through wills, trusts, and contracts for joint ownership of property. Even these measures do not always protect the partners. A will can be contested by the decedent's biological relatives, for example, and unlike a spouse, the surviving partner is likely to incur a substantial tax burden when taking sole legal possession of a home that the couple jointly owned (e.g., Badgett, 2001).

The consequences of having one's intimate relationship unacknowledged by the law are not only financial. For example, a member of a same-sex couple may be excluded from her or his partner's medical care. She or he may be denied as basic a right as access to the partner in a hospital setting restricted to "immediate family" members, such as an emergency room or intensive care unit. The case of Sharon Kowalski and Karen Thompson offers a dramatic example in this regard. They had been committed partners for 4 years and were living together in a house they had jointly purchased when a 1983 automobile accident left Kowalski severely brain damaged, unable to speak or walk, and temporarily comatose. Lacking a legal relationship to Kowalski, Thompson was blocked from even getting information about her partner's condition immediately after the accident. When Thompson disclosed the nature of their relationship to her partner's parents, Kowalski's father refused to acknowledge his daughter's lesbian orientation. He gained legal guardianship and barred Thompson from having any contact with his daughter, even by mail. It was not until 1991, after an extensive legal battle, that Thomp-

son was named Sharon Kowalski's sole legal guardian (Hunter, 1995; Thompson & Andrzejewski, 1988).

When a member of a same-sex couple dies, the surviving partner may experience a similar negation of their relationship. She or he may not even be able to make funeral arrangements. Instead, the decedent's biological relatives may take control of the decedent's estate, completely excluding the surviving partner (e.g., Richards, Wrubel, & Folkman, 1999–2000). Such experiences of *disenfranchised grief* (Doka, 1989) may compound the considerable psychological distress experienced by the surviving partner, with potentially long-term mental health consequences. For example, one longitudinal study of 30 HIV-negative men whose partners died from AIDS found that the quality of their psychological functioning one year after the partners' deaths was predicted by their sense that ceremonies of leave taking (e.g., funerals) were appropriate and satisfactory (Weiss & Richards, 1997). The experience of being partly or completely excluded from such ceremonies thus appears to contribute to poorer psychological functioning. Examples of other areas in which same-sex couples are disadvantaged relative to married couples include immigration (foreign nationals cannot secure U.S. residence or citizenship through their relationship to a same-sex partner) and private communication (members of same-sex couples can be called to testify against their partners in legal proceedings).

As a consequence of these and the many other forms of differential treatment to which they are subjected, same-sex couples are exposed to more stress than married couples, especially when they encounter life's inevitable difficulties and challenges. Because experiencing stress increases one's risk for mental and physical illness (e.g., Dohrenwend, 2000; Kiecolt-Glaser, McGuire, Robles, & Glaser, 2002), their lack of legal protection places members of same-sex couples at greater risk for health problems than married couples.

It may have consequences as well for the duration and stability of their relationships. Although homosexual and heterosexual relationships share many of the same attracting forces, same-sex couples do not have the barriers to relationship dissolution that the institution of marriage provides heterosexual couples. Consequently, gay men and lesbians probably experience fewer institutional barriers to ending their relationships, compared with married heterosexuals (Kurdek, 1998). Although this relative lack of barriers probably means that fewer gay men and lesbians find themselves trapped in unhappy relationships, it may also promote the breakup of couples facing problems that could be resolved. Given the lack of institutional barriers, along with the legal and prejudicial obstacles that same-sex partners face, the prevalence and durability of gay and lesbian relationships are striking. Nevertheless, the stability and longevity of those relationships would most likely be enhanced if the partners received the same levels of social support and public recognition of their relationships that partners in heterosexual couples enjoy.

I noted earlier that questions about parenting in the marriage equality debate should be reframed to consider

whether the children of same-sex couples are helped or harmed by laws that bar their parents from marrying. To the extent that government recognition of same-sex relationships facilitates well-being for parents, it will enhance the well-being of their children because children benefit when their parents (regardless of the latter's sexual orientation) are financially secure, physically and psychologically healthy, and not subjected to high levels of stress (Chan, Raboy, & Patterson, 1998; Patterson, 2001). Another negative consequence of the absence of legal recognition is that children born to same-sex couples do not automatically enjoy a legally defined relationship with both parents. Such legal clarity is especially important during times of crisis, ranging from school and medical emergencies involving the child to the incapacity or death of a parent (e.g., Amato & Keith, 1991). In those situations, a stable legal bond with the surviving parent gives a child much needed security and continuity and minimizes the likelihood of conflicting or competing claims by nonparents for the child's custody.

Moreover, in the absence of legal recognition for same-sex couples, the children born to such couples are accorded a status historically stigmatized as "illegitimacy" and "bastardy" (Witte, 2003). Although the social stigma attached to illegitimacy has declined in recent decades, being born to unmarried parents is still widely considered undesirable. Indeed, opponents of marriage equality have argued that the stigma attached to unwed parentage serves a valuable social function and should be perpetuated (Gallagher, 2004). This stigma is likely to be extended to the children of unmarried same-sex couples.

Marriage Versus Civil Unions and Domestic Partnerships

In summary, marriage bestows many psychosocial benefits and protections. As a consequence of being denied the right to marry, same-sex couples are more likely than different-sex couples to experience a variety of stressors and thus are at greater risk for psychological and physical illness. Although direct empirical tests are not available to experimentally assess the effects on same-sex couples of governmental nonrecognition for their relationships, it is reasonable to conclude that being denied the right to marry has negative consequences for their well-being and ultimately creates challenges and obstacles to the success of their relationships that are not faced by heterosexual couples. The logical conclusion to be drawn from this discussion is that same-sex couples and their children will benefit from legal recognition of their relationships. In making this prediction, it is important to reiterate that self-selection will play a role in legal unions between same-sex partners just as it currently does with different-sex partners. Given the opportunity to marry, not all same-sex couples will choose to do so, any more than is now the case for heterosexuals. For example, roughly one fifth of the sexual minority respondents in the previously cited Kaiser survey said they would *not* want to get married, even if marriage to a same-sex partner were legal (Kaiser Family Foundation,

2001; see also Rothblum, 2005). However, those who choose marriage can be reasonably expected to benefit from it, like their heterosexual counterparts.

But is complete marriage equality necessary to afford same-sex couples and their families access to the benefits, resources, and privileges currently enjoyed by heterosexual married couples? It might be argued that the problems and inequities experienced by same-sex couples can be adequately addressed through arrangements such as civil unions and second-parent adoptions, which could conceivably grant all of the rights and privileges now conferred through civil marriage without actually designating the couple as "married." This argument is problematic on at least three grounds.

First, marriage is recognized across state and national borders, but civil unions and domestic partnerships are not. Consequently, same-sex couples in civil unions do not have legal grounds to demand that their relationship be recognized outside the state. Today same-sex couples traveling beyond the borders of their home states cannot be certain they will be treated as a couple or a family, for example, in the event of a medical emergency involving one of the partners or a child. As a result, their mobility may be limited or, if they travel across state borders, they are subject to heightened levels of uncertainty, anxiety, and stress compared with heterosexual married couples.

Second, whereas marriage as a social institution has a profound effect on the lives of those who inhabit it, the extent to which civil unions and domestic partnerships have comparable effects is unclear. As noted above, heterosexual cohabiting couples do not derive the same health advantages as married couples from their relationships. Indeed, the level of public debate and controversy surrounding the question of whether marriage rights should be granted to same-sex couples is an indication of the special status accorded to marriage as a social institution. Although forming a domestic partnership or civil union may increase a couple's feelings of love and commitment (Solomon et al., 2005), it seems unlikely that those institutions will be found to confer the same social and psychological benefits as marriage.

The transformative power of marriage and the special meaning associated with marital status are attested to by the widespread desire among lesbians, gay men, and bisexuals to marry a same-sex partner. This desire was evidenced in the previously cited Kaiser poll, in which 74% responded affirmatively to the question "If you could get legally married to someone of the same sex, would you like to do that someday or not?" (Kaiser Family Foundation, 2001, p. 31). It is further evidenced by the fact that many same-sex couples travel long distances across state and national borders to marry. For example, the same-sex couples married in San Francisco in 2004 came from 46 states (including California) and 8 foreign countries (Herel, Marech, & Lelchuk, 2004). Many same-sex couples from the United States have traveled to Canada to be married (e.g., Marech, 2004).

Finally, creating a separate, quasi-marital status for same-sex couples perpetuates and may even compound the

stigma historically associated with homosexuality. A status or characteristic is stigmatized when it is negatively valued by society and is consequently a basis for disadvantaging and disempowering those who have it (e.g., Herek, 2002; Link & Phelan, 2001). Once it is acknowledged that same-sex committed relationships do not differ from heterosexual committed relationships in their essential psychosocial qualities, their capacity for long-term commitment, and the context they provide for rearing healthy and well-adjusted children, the rationale for according them a legal status different from that of heterosexual relationships must ultimately focus on the sexual orientation of the partners. Indeed, although it has usually been conceptualized in individualistic terms, sexual orientation is not simply a personal characteristic that can be defined in isolation. Because individuals express their heterosexuality, homosexuality, or bisexuality only by acting (or desiring to act) with another person, sexual orientation is inherently about relationships, whether they are enduring, transient, or merely desired. The intimate personal connections that people form to meet their deeply felt needs for love, family, and intimacy lie at the core of sexual orientation.

Denying same-sex couples the label of marriage—even if they receive all other rights and privileges conferred by marriage—arguably devalues and delegitimizes these relationships. It conveys a societal judgment that committed intimate relationships with people of the same sex are inferior to heterosexual relationships and that the participants in a same-sex relationship are less deserving of society's recognition than are heterosexual couples. It perpetuates power differentials whereby heterosexuals have greater access than nonheterosexuals to the many resources and benefits bestowed by the institution of marriage. These elements are the crux of stigma. Such stigma affects all homosexual and bisexual persons, not only the members of same-sex couples who seek to be married.

Sexual stigma has a variety of negative consequences for sexual minorities, including social ostracism, discrimination, and violence (e.g., Badgett, 2001; Herek, Gillis, & Cogan, 1999; Meyer, 2003). It creates a felt need among lesbians, gay men, and bisexuals to conceal their sexual orientation, which can have negative effects on their psychological and physical health (Cole, Kemeny, Taylor, & Visscher, 1996; Herek, 1996). To the extent that stigma motivates lesbians, gay men, and bisexuals to remain hidden, it further reinforces sexual prejudices among heterosexuals. Prejudice generally decreases when members of the majority group knowingly have contact with minority group members (Pettigrew & Tropp, 2000), and, consistent with this pattern, antigay attitudes are significantly less common among heterosexuals who report having a close friend or family member who is gay or lesbian (Herek & Capitanio, 1996). Thus, by denying same-sex couples the right to marry legally, the state compounds and perpetuates the stigma historically attached to homosexuality. This stigma has negative consequences for all gay, lesbian, and bisexual people, regardless of their relationship status or desire to marry.

The foregoing discussion should not be read as completely dismissing the value of institutions such as civil unions and domestic partnerships. To the extent that these forms of legal recognition address some of the current inequities between same-sex and heterosexual committed relationships, they are a desirable alternative to nonrecognition. However, they cannot be equated with marriage.

Conclusion

Whether and how to legally recognize same-sex couples will ultimately be decided through society's political and legal institutions. One way the social and behavioral sciences can contribute to the resolution of this question is by testing the validity of assumptions that underlie policy positions. In the present article, I have demonstrated the lack of an empirical basis for assertions that same-sex and heterosexual relationships differ fundamentally in their psychosocial qualities and dynamics and that people in same-sex relationships are deficient in parenting abilities. Moreover, I have shown that same-sex couples and their children are disadvantaged by their lack of legal recognition, that they would benefit in numerous ways from such recognition, and that quasi-marital institutions do not afford the same protections and benefits as marriage. Finally, I have explained how restricting same-sex couples to a separate and inherently unequal status perpetuates antigay stigma.

There is an ongoing need for more empirical study of same-sex intimate relationships and sexual minority families, especially research that uses probability samples. Several understudied areas have already been discussed (e.g., comparisons of the children of male couples with children of heterosexual and female couples). In addition, the advent of marriage equality in some jurisdictions (e.g., Massachusetts, Canada, the Netherlands) now permits comparisons between married same-sex couples and their unmarried counterparts, including sexual minority couples in civil unions or domestic partnerships. Such comparisons will allow researchers to address a variety of questions, including whether differences previously observed between married and cohabiting heterosexual couples can be generalized to male and female couples; whether and how marriage exerts a psychologically transformative effect on partners; and whether the benefits of other legal relationship forms, such as civil unions, are comparable to those of marriage. Comparisons of heterosexual and same-sex married couples will also afford exciting opportunities for researchers to better understand the role played by gender-linked variables in marital relationship dynamics (Peplau & Fingerhut, in press). At the same time, research is needed on the unique challenges and stressors faced by sexual minority individuals and their families as a result of differences across state and international borders in the extent to which same-sex relationships are currently recognized.

Some might argue that despite its inherent value, such research is largely irrelevant to the current national debate about marriage equality because, as noted at the outset of the present article, that debate involves a fundamental clash of values. Motivated by deeply felt political and religious

beliefs, it might be claimed, advocates on both sides of the debate are resistant to considering scientific data that contradict their preexisting opinions. This viewpoint, however, fails to recognize important features of the current debate. Heterosexuals' attitudes toward sexual minorities are changing rapidly. In the last two decades, public sentiment has dramatically shifted toward greater tolerance and less condemnation of sexual minorities, with opposition to discrimination on the basis of sexual orientation now widespread (e.g., Sherrill & Yang, 2000; Yang, 1997). As noted above, civil unions were highly controversial only a few years ago but now are supported by a majority of the U.S. public. Although marriage equality is opposed today by most adults, the size of that majority has eroded over the past decade. In addition, many Americans probably hold conflicting values in this area, adhering to traditional beliefs about the nature of marriage while simultaneously valuing fairness and opposing discrimination on the basis of sexual orientation. For those individuals, accurate information about the factual questions raised by the marriage debate may be highly influential and may lead them to adopt more nuanced opinions, such as supporting civil marriage equality while leaving the issue of religious marriage to individual denominations.

Thus, although the U.S. debate about marriage equality involves strongly held views on both sides, many Americans hold opinions and beliefs between the extremes. That middle ground has shifted in recent years to encompass support for civil unions and domestic partnerships. Given other trends toward greater support for sexual minority rights (Sherrill & Yang, 2000), coupled with the continuing evolution of the institution of marriage (Coontz, 2005), it is reasonable to hypothesize that the opinions of Americans in this middle ground will continue to shift and that support for marriage equality will become a majority position in the foreseeable future. This scenario is speculative but is intended to highlight the importance of continuing scientific study of the issues relevant to the current policy debate. Although empirical research may not affect the opinions of advocates strongly committed to either side, it may well be influential in shaping the actions of legislators, judges, and policymakers and the opinions and voting behavior of the movable middle segment of the U.S. population.

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What Do We Know About Gay and Lesbian Couples?

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ABSTRACT—*Research on gay and lesbian couples is highlighted with regard to household labor, conflict, satisfaction, perceived social support, stability, and the variables that predict relationship quality. Relative to partners from married heterosexual couples, partners from gay and lesbian couples tend to assign household labor more fairly, resolve conflict more constructively, experience similar levels of satisfaction, and perceive less support from family members but more support from friends. The limited data available indicate that gay and lesbian couples may be less stable than married heterosexual couples. The factors that predict relationship quality tend to be the same for gay, lesbian, and heterosexual married couples. Overall, research paints a positive picture of gay and lesbian couples and indicates that they tend to be more similar to than different from heterosexual couples.*

KEYWORDS—*gay couples; lesbian couples; relationship quality; relationship stability*

In November 2004, Americans in 11 states voted on whether marriage should be legal for only heterosexual couples. The resounding message from the voters in each of these states was that marriage as a legal institution should, indeed, be reserved only for couples consisting of a man and a woman. One interpretation of voters' response to the gay-marriage issue is that most Americans regard gay and lesbian couples as being different from heterosexual couples. But what does research on gay and lesbian couples say on this matter? Does evidence support the view that gay and lesbian couples work in ways that are different from the way that heterosexual couples work? Before I examine aspects of these questions, I will address the question of the number of gay and lesbian couples in America.

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HOW MANY AMERICAN GAY AND LESBIAN COUPLES ARE THERE?

Because of the stigma associated with homosexuality, many gay and lesbian persons are reluctant to disclose their sexual orientation. Consequently, there are no definitive data on the number of gay and lesbian Americans. Perhaps the best available estimates were derived by Laumann, Gagnon, Michael, and Michaels (1994), who interviewed a national sample of 1,511 men and 1,921 women. Of this sample, 4.9% of the men and 4.1% of the women reported having engaged in sexual behavior with a person of their own sex since the age of 18, 6.2% of the men and 4.4% of the women reported having been attracted to a person of their own sex, and 2.8% of the men and 1.4% of the women identified themselves with a label denoting same-sex sexuality (e.g., homosexual).

Given the difficulty in estimating the number of gay and lesbian Americans, it is not surprising that there are also no definitive data on the number of gay and lesbian American couples. However, changes in the way information about households is collected in the United States Census have allowed estimates of the number of households headed by a person with a same-sex partner to be obtained. Data from the Census of 2000 (Simons & O'Connell, 2003) indicate that of the 5.5 million couples who were living together but not married, about 1 in 9 were same-sex couples. Of these couples, 301,026 involved male partners and 293,365 involved female partners. Children under the age of 18 resided with 22% of the male couples and with 33% of the female couples.

Because presenting oneself publicly as gay or lesbian opens the door to discrimination and even violence, estimates of the number of gay and lesbian individuals and couples are most assuredly underestimates. Nonetheless, it is clear that, despite a generally inhospitable social climate, being part of a couple is integral to the lives of many gay men and lesbians. Next, topics of particular relevance to gay and lesbian couples are reviewed.

TOPICS RELEVANT TO GAY AND LESBIAN COUPLES

Household Labor

One perception of partners from happy couples is that each partner does something to contribute to the overall well-being of

the couple. When members of a couple live together, the extent to which they depend on each other increases, making it likely that the general issue of “Who does what?” has to be confronted. For many heterosexual couples, biological sex is one major factor that determines which roles partners assume. For example, despite major changes in the number of American women who work outside the home, wives still do the majority of household tasks (Artis & Pavalko, 2003). Given the persistence with which biological sex is used to assign roles relevant to household labor in heterosexual couples, the division of household labor for gay and lesbian couples provides one way to examine how roles in relationships get assigned independently of biological sex.

Three conclusions emerge from studies of how members of gay and lesbian couples divide household labor (e.g., Carrington, 1999). First, members of gay and lesbian couples do not assign roles for household labor such that one partner is the “husband” and the other partner is the “wife.” Second, although members of gay and lesbian couples do not divide household labor in a perfectly equal manner, they are more likely than members of heterosexual couples to negotiate a balance between achieving a fair distribution of household labor and accommodating the different interests, skills, and work schedules of particular partners. This pattern of negotiation holds true even when couples have children living with them (Patterson, 2000). Third, as couples become more established, partners are likely to specialize in the household tasks they do, perhaps as one way of getting household tasks done efficiently.

Conflict

Conflict is inevitable in any relationship. In heterosexual couples, conflict is often thought to occur because of systematic differences in how men and women perceive their worlds. If this view of relationship conflict is valid, then one might expect that partners from same-sex couples would resolve conflict better than partners from heterosexual couples do because they perceive their worlds through similar lenses. Research supports this expectation.

Gottman et al. (2003) videotaped partners from gay, lesbian, and married heterosexual couples discussing problems in their relationships and then coded the emotions expressed by the partners in the course of the discussions. The researchers found that, relative to heterosexual partners, gay and lesbian partners began their discussions more positively and were more likely to maintain a positive tone throughout the course of the discussion. Findings from survey data also indicate that partners from gay and lesbian couples resolve conflict more positively than spouses from married couples do: They argue more effectively, are less likely to use a style of conflict resolution in which one partner demands and the other partner withdraws, and are more likely to suggest possible solutions and compromises (Kurdek, 2004a). Gottman et al. speculated that partners from gay and

lesbian couples handle conflict more positively than spouses from heterosexual couples do because they value equality more and have fewer differences in power and status between them.

It is of note that, although partners from gay and lesbian couples tend to resolve conflict more positively than spouses from married couples do, partners from gay, lesbian, and heterosexual couples are likely to disagree over the same issues. In a study in which partners rated how frequently they fought over 20 specific issues (Kurdek, 2004b), differences between gay, lesbian, and heterosexual couples were largely nonexistent. Equally striking was the finding that partners from gay, lesbian, and heterosexual couples identified the same areas as sources of the most conflict: finances, affection, sex, being overly critical, driving style, and household tasks. Thus, differences in conflict resolution appear to be due to how conflict is handled rather than to what the conflict is about.

Perceived Support for the Relationship

Based on evidence that the level of support from members of one’s social network affects the health of one’s relationship, current theories about relationships (e.g., Huston, 2000) recognize that relationships develop within social contexts. Several studies have examined the extent to which members of gay and lesbian couples perceive support for their relationships (e.g., Kurdek, 2004a). Relative to spouses from heterosexual couples, partners from gay and lesbian couples are less likely to name family members as support providers and are more likely to name friends as support providers. These differences are notable because they are among the largest differences found in comparisons between heterosexual and gay or lesbian couples. The lack of family support for one’s primary close relationship is often viewed as a unique stressor for gay men and lesbians and perhaps represents the overall lack of legal, social, political, economic, and religious support that gay and lesbian partners experience for their relationships. On the other hand, the high level of support that gay and lesbian partners enjoy from friends has been viewed as one way in which they compensate for the absence of institutionalized support.

Satisfaction

Nearly all available evidence indicates not only that gay men and lesbians are, on average, satisfied with their relationships, but that their level of satisfaction is at least equal to that reported by spouses from married heterosexual couples (Blumstein & Schwartz, 1983; Kurdek, 2001). Further, longitudinal data from partners from gay, lesbian, and heterosexual couples indicate that, for each type of couple, self-reported relationship quality is relatively high at the start of the relationship but decreases over time (Kurdek, 1998).

Stability

Perhaps the most important “bottom-line” question asked about gay and lesbian couples is whether their relationships last. Be-

cause survey data (see Kurdek, 2004b) indicate that between 8% and 21% of lesbian couples and between 18% and 28% of gay couples have lived together 10 or more years, it is clear that gay men and lesbians can and do build durable relationships. More detailed information on the stability of gay and lesbian relationships is limited because few studies have followed the same samples of gay and lesbian couples over time. Nonetheless, findings from three studies are relevant.

Kurdek (2004a) reported that for 126 gay couples and 101 lesbian couples assessed annually up to 12 times, 24 of the gay couples (19%) and 24 of the lesbian couples (24%) dissolved their relationships. With controls for demographic variables (e.g., length of cohabitation), the difference in the rate of dissolution for gay and lesbian couples was not significant. Over a comparable period of 11 annual assessments, 70 of 483 heterosexual married couples (15%) ended their relationships. With controls for demographic variables, the dissolution rate for heterosexual couples was significantly lower than that for either gay or lesbian couples.

In their 18-month follow-up survey of partners from 1,021 married heterosexual couples, 233 cohabiting heterosexual couples, 493 cohabiting gay couples, and 335 cohabiting lesbian couples, Blumstein and Schwartz (1983) found that 4% of the married couples, 14% of the cohabiting heterosexual couples, 13% of the cohabiting gay couples, and 18% of the cohabiting lesbian couples had dissolved their relationships. Although these authors reported no statistical comparisons, my analyses of their data indicated that, although rates of dissolution did not differ for either gay couples versus lesbian couples or for gay and lesbian couples versus cohabiting heterosexual couples, both gay and lesbian couples were more likely to dissolve their relationships than married heterosexual couples were.

Andersson, Noack, Seierstad, and Weedon-Fekjaer (2004) examined differences in the dissolution rates of gay and lesbian registered partnerships in Norway and in Sweden. Because registered partnerships were first made available in Norway in 1993 and in Sweden in 1995, dissolution rates are necessarily based on couples with legal unions of relatively short duration. For both countries, dissolution rates were significantly higher for lesbian couples than they were for gay couples. In Norway, 56 out of 497 lesbian partnerships were dissolved (11.26%) as compared to 62 out of 796 gay partnerships (7.78%). In Sweden, 117 out of 584 lesbian partnerships were dissolved (20.03%) as compared to 135 out of 942 gay partnerships (14.33%). In comparison, the percentage of dissolved heterosexual marriages in Sweden was 8%. For both countries, the higher rate of dissolution for lesbian couples than for gay couples persisted even when statistical analyses controlled for length of the partnership (which, if different between the two groups, can produce illusory differences in gay and lesbian couples' stability).

In sum, the data are too scant to warrant any conclusions about the relative stability of gay and lesbian couples. However, it is of note that Blumstein and Schwartz's (1983) data indicated that

the dissolution rate for cohabiting heterosexual couples was similar to that for both cohabiting gay couples and cohabiting lesbian couples. Unlike spouses from married heterosexual couples who experience social, religious, and legal barriers to leaving their relationships, cohabiting couples—whether gay, lesbian, or heterosexual—have no such institutionalized barriers. Further, although some gay and lesbian couples raise children, the majority do not (Simons & O'Connell, 2003), thereby removing another significant barrier to dissolution. Thus, perhaps what is most impressive about gay and lesbian couples is not that they may be less stable than heterosexual married couples, but rather that they manage to endure without the benefits of institutionalized supports.

Factors Predicting Relationship Quality

One way of determining whether the relationships of gay men and lesbians work the same way the relationships of heterosexual persons do is to see if the links between variables known to be relevant to relationship functioning and relationship quality are as strong for gay and lesbian partners as they are for heterosexual married partners. The predictors of relationship quality that have been examined usually come from four classes of variables commonly used in research on relationships (e.g., Huston, 2000). These include characteristics each partner brings to the relationship (such as personality traits), how each partner views the relationship (such as level of trust), how partners behave toward each other (such as communication and conflict-resolution styles), and perceived level of support for the relationship (such as that from family members and friends).

The relevant findings are easily summarized. Nearly all studies (e.g., Kurdek, 2004a) find that the links between variables from the four classes just listed and relationship quality for gay and lesbian couples do not differ from the parallel links for heterosexual married couples. That is, the extent to which relationship quality is predicted by these four kinds of variables tends to be as strong for gay and lesbian couples as it is for heterosexual couples. Thus, despite external differences in how gay, lesbian, and heterosexual couples are constituted, the relationships of gay and lesbian partners appear to work in much the same way as the relationships of heterosexual partners do.

Based on evidence that gay and lesbian relationships are influenced by the same set of factors that influence heterosexual marriages, institutionalized support for gay and lesbian relationships might be expected to enhance the stability of these relationships just as it does for heterosexual marriages. In fact, this reasoning formed one of the bases for the American Psychological Association's passing a resolution declaring it unfair and discriminatory to deny same-sex couples legal access to civil marriage and all its attendant benefits, rights, and privileges (American Psychological Association, 2004).

ISSUES FOR FUTURE RESEARCH

Future research on gay and lesbian couples needs to address several key issues. One is sampling: Because most studies have used convenience samples of mostly white and well-educated partners, the extent to which findings generalize to the larger population of gay and lesbian couples is unknown. Problems with regard to sampling may be eased as specialized populations—such as couples with civil unions from states with open records—become identified. Another issue is research methods: Most studies on gay and lesbian couples have used self-report surveys. Future work could address some of the biases associated with self-report data by employing behavioral observations as well as peer or partner ratings.

The life course of gay and lesbian relationships is another area requiring further research. Because gay and lesbian courtship is a fairly hidden process, little is known about how gay and lesbian relationships develop from courtship to cohabitation to marriage-like unions with high commitment. Recruiting dating couples for longitudinal research, however, remains a challenge. It is also necessary to establish what variables are unique to gay and lesbian persons. Most research has used theories and methods derived from work with heterosexual couples, so little is known about how variables unique to gay and lesbian persons—such as negotiating a private and public identity as a gay or lesbian person—affect the quality of their relationships. Finally, it is necessary to learn more about the forces that help stabilize relationships. Because it is unlikely that all American gay and lesbian couples will soon have the option to marry, they will need to continue to rely on less institutionalized forces to maintain the stability of their relationships. These include psychological processes such as commitment and social processes such as level of integration into the support systems of family, friends, and coworkers.

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Unofficial Synopsis Prepared by the Reporter of Decisions

The Supreme Judicial Court held today that "barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution." The court stayed the entry of judgment for 180 days "to permit the Legislature to take such action as it may deem appropriate in light of this opinion."

"Marriage is a vital social institution," wrote Chief Justice Margaret H. Marshall for the majority of the Justices. "The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society. For those who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits. In turn it imposes weighty legal, financial, and social obligations." The question before the court was "whether, consistent with the Massachusetts Constitution," the Commonwealth could deny those protections, benefits, and obligations to two individuals of the same sex who wish to marry.

In ruling that the Commonwealth could not do so, the court observed that the Massachusetts Constitution "affirms the dignity and equality of all individuals," and "forbids the creation of second-class citizens." It reaches its conclusion, the court said, giving "full deference to the arguments made by the Commonwealth." The Commonwealth, the court ruled, "has failed to identify any constitutionality adequate reason for denying civil marriage to same-sex couples."

The court affirmed that it owes "great deference to the Legislature to decide social and policy issues." Where, as here, the constitutionality of a law is challenged, it is the "traditional and settled role" of courts to decide the constitutional question. The "marriage ban" the court held, "works a deep and scarring hardship" on same-sex families "for no rational reason." It prevents children of same-sex couples "from enjoying the immeasurable advantages that flow from the assurance of 'a stable family structure in which children will be reared, educated, and socialized.'" "It cannot be rational under our laws," the court held, "to penalize children by depriving them of State benefits" because of their parents' sexual orientation.

The court rejected the Commonwealth's claim that the primary purpose of marriage was procreation. Rather, the history of the marriage laws in the Commonwealth demonstrates that "it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of marriage."

The court remarked that its decision "does not disturb the fundamental value of marriage in our society." "That same-sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit," the court stated.

The opinion reformulates the common-law definition of civil marriage to mean "the voluntary union of two persons as spouses, to the exclusion of all others. Nothing that "civil marriage has long been termed a 'civil right,'" the court concluded that "the right to marry means little if it does not include the right to marry the person of one's choice, subject to appropriate government restrictions in the interests of public health, safety, and welfare."

Justices John M. Greaney, Roderick L. Ireland, and Judith A. Cowin joined in the court's opinion. Justice Greaney also filed a separate concurring opinion.

Justices Francis X. Spina, Martha B. Sosman, and Robert J. Cordy each filed separate dissenting opinions.

Justice Greaney concurred "with the result reached by the court, the remedy ordered, and much of the reasoning in the court's opinion," but expressed the view that "the case is more directly resolved using traditional equal protection analysis." He stated that to withhold "relief from the plaintiffs, who wish to marry, and are otherwise eligible to marry, on the ground that the couples are of the same gender, constitutes a categorical restriction of a fundamental right." Moreover, Justice Greaney concluded that such a restriction is impermissible under art. 1 of the Massachusetts Declaration of Rights. In so doing, Justice Greaney did not rely on art. 1, as amended in 1976, because the voters' intent in passing the amendment was clearly not to approve gay marriage, but he relied on well-established principles of equal protection that antedated the amendment.

Justice Cordy, with whom Justice Spina and Justice Sosman joined, dissented on the ground that the marriage statute, as historically interpreted to mean the union of one man and one woman, does not violate the Massachusetts Constitution because "the Legislature could rationally conclude that it furthers the legitimate State purpose of ensuring, promoting, and supporting an optimal social structure for the bearing and raising of children." Justice Cordy stated that the court's conclusions to the contrary are unsupportable in light of "the presumption of constitutional validity and significant deference afforded to legislative enactments, and the 'undesirability of the judiciary substituting its notion of correct policy for that of a popularly elected legislature' responsible for making it." Further, Justice Cordy stated that "[w]hile 'the Massachusetts Constitution protects matters of personal liberty against government intrusion at least as zealously and often more so than does the Federal Constitution,' this case is not about government intrusions into matters of personal liberty," but "about whether the State must endorse and support [the choices of same-sex couples] by changing the institution of civil marriage to make its benefits, obligations, and responsibilities applicable to them." Justice Cordy concluded that, although the plaintiffs had made a powerful case for the extension of the benefits and burdens of civil marriage to same-sex couples, the issue "is one deeply rooted in social policy" and "that decision must be made by the Legislature, not the court."

Justice Spina, in a separately filed dissenting opinion, stated that "[W]hat is at stake in this case is not the unequal treatment of individuals or whether individuals rights have been impermissibly burdened, but the power of the Legislature to effectuate social change without interference from the courts, pursuant to art. 30 of the Massachusetts Declaration of Rights." He emphasized that the "power to regulate marriage lies with the Legislature, not with the judiciary."

Justice Sosman, in a separately filed dissenting opinion, stated that "the issue is not whether the Legislature's rationale behind [the statutory scheme being challenged] is persuasive to [the court]," but whether it is "rational" for the Legislature to "reserve judgment" on whether changing the definition of marriage "can be made at this time without damaging the institution of marriage or adversely affecting the critical role it has played in our society." She concluded that, "[a]bsent consensus on the issue (which obviously does not exist), or unanimity amongst scientists studying the issue (which also does not exist), or a more prolonged period of observation of this new family structure (which has not yet been possible), it is rational for the Legislature to postpone any redefinition of marriage that would include same-sex couples until such time as it is certain that redefinition will not have unintended and undesirable social consequences."

Hillary GOODRIDGE & others [FN1] vs. DEPARTMENT OF PUBLIC HEALTH &
another. [FN2]
SJC-08860

March 4, 2003. - November 18, 2003.

Present: Marshall, C.J., Greaney, Ireland, Spina, Cowin, Sosman, & Cordy, JJ.

License. Marriage. Statute, Construction. Constitutional Law, Police power, Equal protection of laws. Due Process of Law, Marriage. Words, "Marriage."

Civil action commenced in the Superior Court Department on April 11, 2001.

The case was heard by *Thomas E. Connolly, J.*, on motions for summary judgment.

The Supreme Judicial Court granted an application for direct appellate review.

Mary Lisa Bonauto (*Gary D. Buseck* with her) for Hillary Goodridge.

Judith S. Yogman, Assistant Attorney General, for Department of Public Health.

The following submitted briefs for amici curiae:

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Columbia, & John Reinstein, Sarah R. Wunsch, Paul Holtzman, & Hugh Dun Rappaport for Urban League of Eastern Massachusetts & others.

Paul Benjamin Linton, of Illinois, & *Thomas M. Harvey* for Robert J. Araujo & others.

Dwight G. Duncan for Massachusetts Family Institute, Inc., & others.

Glen Lavy, of Arizona, *Stephen W. Reed*, of California, & *Bertin C. Emmons* for National Association for Research and Therapy of Homosexuality, Inc., & others.

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Chester Darling & Michael Williams for Massachusetts Citizens Alliance & another.

Daniel Avila for The Catholic Action League of Massachusetts.

Joshua K. Baker, of California, & *Robert G. Caprera* for José Martín de Agar & others.

Wendy J. Herdlein, of California, & *James R. Knudsen* for the Honorable Philip Travis & others.

Steven W. Fitschen, of Virginia, for The National Legal Foundation.

Jeffrey A. Shafer & David R. Langdon, of Ohio, *William C. Duncan*, of Utah, & *Wendy J. Herdlein*, of California, for Marriage Law Project.

Lisa Rae, Kenneth Elmore, Arthur Berney, & Josephine Ross for The Religious Coalition for the Freedom to Marry & others.

Ann DiMaria for The Ethics & Religious Liberty Commission & others.

Anthony Mirenda, Vickie L. Henry, Lucy Fowler, John M. Granberry, Rachel N. Lessem, & Gabriel M. Helmer for Robert F. Williams & others.

Kenneth J. Parsigian for Peter W. Bardaglio & others. *David Cruz*, of New York, *John Taylor Williams, Carol V. Rose, Debra Squires-Lee, Christopher Morrison, & Marni Goldstein Caputo* for William E. Adams & others.

Martin J. Newhouse & Katharine Bolland for Coalition gaie et lesbienne du Québec & others.

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Teresa S. Collett, of Texas, & Luke Stanton for Free Market Foundation.

Peter F. Zupcofska, L. Tracee Whitley, Heidi A. Nadel, & Corin R. Swift for Boston Bar Association & another.

Mary Jo Johnson, Jonathan A. Shapiro, & Amy L. Nash for The Massachusetts Psychiatric Society & others.

Tony R. Maida, Nina Joan Kimball, & Justine H. Brousseau for Libby Adler & others.

Daryl J. Lapp, Kevin D. Batt, & Katharine Silbaugh for Monroe Inker & another.

David Zwiebel, Mordechai Biser, & Nathan J. Diament, of New York, & Abba Cohen, of the District of Columbia, for Agudath Israel of America & others.

MARSHALL, C.J.

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

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

Whether the Commonwealth may use its formidable regulatory authority to bar same-sex couples from civil marriage is a question not previously addressed by a Massachusetts appellate court. [FN3] It is a question the United States Supreme Court left open as a matter of Federal law in *Lawrence, supra* at 2484, where it was not an issue. There, the Court affirmed that the core concept of common human dignity protected by the Fourteenth Amendment to the United States Constitution precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one's choice of an intimate partner. The Court also reaffirmed the central role that decisions whether to marry or have children bear in shaping one's identity. *Id.* at 2481. The Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution; it may demand broader protection for fundamental rights; and it is less tolerant of government intrusion into the protected spheres of private life.

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

I

The plaintiffs are fourteen individuals from five Massachusetts counties. As of April 11, 2001, the date they filed their complaint, the plaintiffs Gloria Bailey, sixty years old, and Linda Davies, fifty-five years old, had been in a committed relationship for thirty years; the plaintiffs Maureen Brodoff, forty-nine years old, and Ellen Wade, fifty-two years old, had been in a committed relationship for twenty years and lived with their twelve year old daughter; the plaintiffs Hillary Goodridge, forty-four years old, and Julie Goodridge, forty-three years old, had been in a committed relationship for thirteen years and lived with their five year old daughter; the plaintiffs Gary Chalmers, thirty-five years old, and Richard Linnell, thirtyseven years old, had been in a committed relationship for thirteen years and lived with their eight year old daughter and Richard's mother; the plaintiffs Heidi Norton, thirty-six years old, and Gina Smith, thirty-six years old, had been in a committed relationship for eleven years and lived with their two sons, ages five years and one year; the plaintiffs Michael Horgan, forty-one years old, and David Balmelli, forty-one years old, had been in a committed relationship for seven years; and the plaintiffs David Wilson, fifty-seven years old, and Robert Compton, fifty-one years old, had been in a committed relationship for four years and had cared for David's mother in their home after a serious illness until she died.

The plaintiffs include business executives, lawyers, an investment banker, educators, therapists, and a computer engineer. Many are active in church, community, and school groups. They have employed such legal means as are available to them--for example, joint adoption, powers of attorney, and joint

ownership of real property--to secure aspects of their relationships. Each plaintiff attests a desire to marry his or her partner in order to affirm publicly their commitment to each other and to secure the legal protections and benefits afforded to married couples and their children. The Department of Public Health (department) is charged by statute with safeguarding public health. See G.L. c. 17. Among its responsibilities, the department oversees the registry of vital records and statistics (registry), which "enforce[s] all laws" relative to the issuance of marriage licenses and the keeping of marriage records, see G.L. c. 17, § 4, and which promulgates policies and procedures for the issuance of marriage licenses by city and town clerks and registers. See, e.g., G.L. c. 207, §§ 20, 28A, and 37. The registry is headed by a registrar of vital records and statistics (registrar), appointed by the Commissioner of Public Health (commissioner) with the approval of the public health council and supervised by the commissioner. See G.L. c. 17, § 4.

In March and April, 2001, each of the plaintiff couples attempted to obtain a marriage license from a city or town clerk's office. As required under G.L. c. 207, they completed notices of intention to marry on forms provided by the registry, see G.L. c. 207, § 20, and presented these forms to a Massachusetts town or city clerk, together with the required health forms and marriage license fees. See G.L. c. 207, § 19. In each case, the clerk either refused to accept the notice of intention to marry or denied a marriage license to the couple on the ground that Massachusetts does not recognize same- sex marriage. [FN4], [FN5] Because obtaining a marriage license is a necessary prerequisite to civil marriage in Massachusetts, denying marriage licenses to the plaintiffs was tantamount to denying them access to civil marriage itself, with its appurtenant social and legal protections, benefits, and obligations. [FN6]

On April 11, 2001, the plaintiffs filed suit in the Superior Court against the department and the commissioner seeking a judgment that "the exclusion of the [p]laintiff couples and other qualified same-sex couples from access to marriage licenses, and the legal and social status of civil marriage, as well as the protections, benefits and obligations of marriage, violates Massachusetts law." See G.L. c. 231A. The plaintiffs alleged violation of the laws of the Commonwealth, including but not limited to their rights under arts. 1, 6, 7, 10, 12, and 16, and Part II, c. 1, § 1, art. 4, of the Massachusetts Constitution. [FN7], [FN8]

The department, represented by the Attorney General, admitted to a policy and practice of denying marriage licenses to same-sex couples. It denied that its actions violated any law or that the plaintiffs were entitled to relief. The parties filed cross motions for summary judgment.

A Superior Court judge ruled for the department. In a memorandum of decision and order dated May 7, 2002, he dismissed the plaintiffs' claim that the marriage statutes should be construed to permit marriage between persons of the same sex, holding that the plain wording of G.L. c. 207, as well as the wording of other

marriage statutes, precluded that interpretation. Turning to the constitutional claims, he held that the marriage exclusion does not offend the liberty, freedom, equality, or due process provisions of the Massachusetts Constitution, and that the Massachusetts Declaration of Rights does not guarantee "the fundamental right to marry a person of the same sex." He concluded that prohibiting same-sex marriage rationally furthers the Legislature's legitimate interest in safeguarding the "primary purpose" of marriage, "procreation." The Legislature may rationally limit marriage to opposite-sex couples, he concluded, because those couples are "theoretically ... capable of procreation," they do not rely on "inherently more cumbersome" noncoital means of reproduction, and they are more likely than same-sex couples to have children, or more children.

After the complaint was dismissed and summary judgment entered for the defendants, the plaintiffs appealed. Both parties requested direct appellate review, which we granted.

II

Although the plaintiffs refer in passing to "the marriage statutes," they focus, quite properly, on G.L. c. 207, the marriage licensing statute, which controls entry into civil marriage. As a preliminary matter, we summarize the provisions of that law.

General Laws c. 207 is both a gatekeeping and a public records statute. It sets minimum qualifications for obtaining a marriage license and directs city and town clerks, the registrar, and the department to keep and maintain certain "vital records" of civil marriages. The gatekeeping provisions of G.L. c. 207 are minimal. They forbid marriage of individuals within certain degrees of consanguinity, §§ 1 and 2, and polygamous marriages. See G.L. c. 207, § 4. See also G.L. c. 207, § 8 (marriages solemnized in violation of §§ 1, 2, and 4, are void ab initio). They prohibit marriage if one of the parties has communicable syphilis, see G.L. c. 207, § 28A, and restrict the circumstances in which a person under eighteen years of age may marry. See G.L. c. 207, §§ 7, 25, and 27. The statute requires that civil marriage be solemnized only by those so authorized. See G.L. c. 207, §§ 38-40.

The record-keeping provisions of G.L. c. 207 are more extensive. Marriage applicants file standard information forms and a medical certificate in any Massachusetts city or town clerk's office and tender a filing fee. G.L. c. 207, §§ 19-20, 28A. The clerk issues the marriage license, and when the marriage is solemnized, the individual authorized to solemnize the marriage adds additional information to the form and returns it (or a copy) to the clerk's office. G.L. c. 207, §§ 28, 30, 38-40 (this completed form is commonly known as the "marriage certificate"). The clerk sends a copy of the information to the registrar, and that information becomes a public record. See G.L. c. 17, § 4; G.L. c. 66, § 10. [FN9], [FN10]

In short, for all the joy and solemnity that normally attend a marriage, G.L. c. 207, governing entrance to marriage, is a licensing law. The plaintiffs argue that because nothing in that licensing law specifically prohibits marriages between persons of the same sex, we may interpret the statute to permit "qualified same sex couples" to obtain marriage licenses, thereby avoiding the question whether the law is constitutional. See *School Comm. of Greenfield v. Greenfield Educ. Ass'n*, 385 Mass. 70, 79 (1982), and cases cited. This claim lacks merit.

We interpret statutes to carry out the Legislature's intent, determined by the words of a statute interpreted according to "the ordinary and approved usage of the language." *Hanlon v. Rollins*, 286 Mass. 444, 447 (1934). The everyday meaning of "marriage" is "[t]he legal union of a man and woman as husband and wife," Black's Law Dictionary 986 (7th ed.1999), and the plaintiffs do not argue that the term "marriage" has ever had a different meaning under Massachusetts law. See, e.g., *Milford v. Worcester*, 7 Mass. 48, 52 (1810) (marriage "is an engagement, by which a single man and a single woman, of sufficient discretion, take each other for husband and wife"). This definition of marriage, as both the department and the Superior Court judge point out, derives from the common law. See *Commonwealth v. Knowlton*, 2 Mass. 530, 535 (1807) (Massachusetts common law derives from English common law except as otherwise altered by Massachusetts statutes and Constitution). See also *Commonwealth v. Lane*, 113 Mass. 458, 462- 463 (1873) ("when the statutes are silent, questions of the validity of marriages are to be determined by the jus gentium, the common law of nations"); C.P. Kindregan, Jr., & M.L. Inker, *Family Law and Practice* § 1.2 (3d ed.2002). Far from being ambiguous, the undefined word "marriage," as used in G.L. c. 207, confirms the General Court's intent to hew to the term's common-law and quotidian meaning concerning the genders of the marriage partners.

The intended scope of G.L. c. 207 is also evident in its consanguinity provisions. See *Chandler v. County Comm'rs of Nantucket County*, 437 Mass. 430, 435 (2002) (statute's various provisions may offer insight into legislative intent). Sections 1 and 2 of G.L. c. 207 prohibit marriages between a man and certain female relatives and a woman and certain male relatives, but are silent as to the consanguinity of male-male or female-female marriage applicants. See G.L. c. 207, §§ 1-2. The only reasonable explanation is that the Legislature did not intend that same-sex couples be licensed to marry. We conclude, as did the judge, that G.L. c. 207 may not be construed to permit same-sex couples to marry. [FN11]

III

A

The larger question is whether, as the department claims, government action that bars same-sex couples from civil marriage constitutes a legitimate exercise of the State's authority to regulate conduct, or whether, as the plaintiffs claim, this

categorical marriage exclusion violates the Massachusetts Constitution. We have recognized the long-standing statutory understanding, derived from the common law, that "marriage" means the lawful union of a woman and a man. But that history cannot and does not foreclose the constitutional question.

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

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

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

Civil marriage is created and regulated through exercise of the police power. See *Commonwealth v. Stowell*, 389 Mass. 171, 175 (1983) (regulation of marriage is properly within the scope of the police power). "Police power" (now more commonly termed the State's regulatory authority) is an old-fashioned term for the Commonwealth's lawmaking authority, as bounded by the liberty and equality guarantees of the Massachusetts Constitution and its express delegation of power from the people to their government. In broad terms, it is the Legislature's power to enact rules to regulate conduct, to the extent that such laws are "necessary to secure the health, safety, good order, comfort, or general welfare of the community" (citations omitted). *Opinion of the Justices*, 341 Mass. 760, 785 (1960). [FN12] See *Commonwealth v. Alger*, 7 Cush. 53, 85 (1851).

Without question, civil marriage enhances the "welfare of the community." It is a "social institution of the highest importance." *French v. McAnarney, supra*. Civil marriage anchors an ordered society by encouraging stable relationships over transient ones. It is central to the way the Commonwealth identifies individuals, provides for the orderly distribution of property, ensures that children and adults are cared for and supported whenever possible from private rather than public funds, and tracks important epidemiological and demographic data.

Marriage also bestows enormous private and social advantages on those who choose to marry. Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. "It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). Because it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition.

Tangible as well as intangible benefits flow from marriage. The marriage license grants valuable property rights to those who meet the entry requirements, and who agree to what might otherwise be a burdensome degree of government regulation of their activities. [FN13] See *Leduc v. Commonwealth*, 421 Mass. 433, 435 (1995), cert. denied, 519 U.S. 827 (1996) ("The historical aim of licensure generally is preservation of public health, safety, and welfare by extending the public trust only to those with proven qualifications"). The Legislature has conferred on "each party [in a civil marriage] substantial rights concerning the assets of the other which unmarried cohabitants do not have." *Wilcox v. Trautz*, 427 Mass. 326, 334 (1998). See *Collins v. Guggenheim*, 417 Mass. 615, 618 (1994) (rejecting claim for equitable distribution of property where plaintiff cohabited with but did not marry defendant); *Feliciano v. Rosemar Silver Co.*, 401 Mass. 141, 142 (1987) (government interest in promoting marriage would be "subverted" by recognition of "a right to recover for loss of consortium by a person who has not accepted the correlative responsibilities of marriage"); *Davis v. Misiano*, 373 Mass. 261, 263 (1977)

(unmarried partners not entitled to rights of separate support or alimony). See generally *Attorney Gen. v. Desilets*, 418 Mass. 316, 327-328 & nn. 10, 11 (1994).

The benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death. The department states that "hundreds of statutes" are related to marriage and to marital benefits. With no attempt to be comprehensive, we note that some of the statutory benefits conferred by the Legislature on those who enter into civil marriage include, as to property: joint Massachusetts income tax filing (G.L. c. 62C, § 6); tenancy by the entirety (a form of ownership that provides certain protections against creditors and allows for the automatic descent of property to the surviving spouse without probate) (G.L. c. 184, § 7); extension of the benefit of the homestead protection (securing up to \$300,000 in equity from creditors) to one's spouse and children (G.L. c. 188, § 1); automatic rights to inherit the property of a deceased spouse who does not leave a will (G.L. c. 190, § 1); the rights of elective share and of dower (which allow surviving spouses certain property rights where the decedent spouse has not made adequate provision for the survivor in a will) (G.L. c. 191, § 15, and G.L. c. 189); entitlement to wages owed to a deceased employee (G.L. c. 149, § 178A [general] and G.L. c. 149, § 178C [public employees]); eligibility to continue certain businesses of a deceased spouse (e.g., G.L. c. 112, § 53 [dentist]); the right to share the medical policy of one's spouse (e.g., G.L. c. 175, § 108, Second [a] [3] [defining an insured's "dependent" to include one's spouse), see *Connors v. Boston*, 430 Mass. 31, 43 (1999) [domestic partners of city employees not included within the term "dependent" as used in G.L. c. 32B, § 2]); thirty-nine week continuation of health coverage for the spouse of a person who is laid off or dies (e.g., G.L. c. 175, § 110G); preferential options under the Commonwealth's pension system (see G.L. c. 32, § 12[2] ["Joint and Last Survivor Allowance"]); preferential benefits in the Commonwealth's medical program, MassHealth (e.g., 130 Code Mass. Regs. § 515.012[A] prohibiting placing a lien on long-term care patient's former home if spouse still lives there); access to veterans' spousal benefits and preferences (e.g., G.L. c. 115, § 1 [defining "dependents"] and G.L. c. 31, § 26 [State employment] and § 28 [municipal employees]); financial protections for spouses of certain Commonwealth employees (fire fighters, police officers, prosecutors, among others) killed in the performance of duty (e.g., G.L. c. 32, §§ 100-103); the equitable division of marital property on divorce (G.L. c. 208, § 34); temporary and permanent alimony rights (G.L. c. 208, §§ 17 and 34); the right to separate support on separation of the parties that does not result in divorce (G.L. c. 209, § 32); and the right to bring claims for wrongful death and loss of consortium, and for funeral and burial expenses and punitive damages resulting from tort actions (G.L. c. 229, §§ 1 and 2; G.L. c. 228, § 1. See *Feliciano v. Rosemar Silver Co.*, *supra*).

Exclusive marital benefits that are not directly tied to property rights include the presumptions of legitimacy and parentage of children born to a married couple (G.L. c. 209C, § 6, and G.L. c. 46, § 4B); and evidentiary rights, such as the prohibition against spouses testifying against one another about their private conversations,

applicable in both civil and criminal cases (G.L. c. 233, § 20). Other statutory benefits of a personal nature available only to married individuals include qualification for bereavement or medical leave to care for individuals related by blood or marriage (G.L. c. 149, § 52D); an automatic "family member" preference to make medical decisions for an incompetent or disabled spouse who does not have a contrary health care proxy, see *Shine v. Vega*, 429 Mass. 456, 466 (1999); the application of predictable rules of child custody, visitation, support, and removal out-of-State when married parents divorce (e.g., G.L. c. 208, § 19 [temporary custody], § 20 [temporary support], § 28 [custody and support on judgment of divorce], § 30 [removal from Commonwealth], and § 31 [shared custody plan]; priority rights to administer the estate of a deceased spouse who dies without a will, and requirement that surviving spouse must consent to the appointment of any other person as administrator (G.L. c. 38, § 13 [disposition of body], and G.L. c. 113, § 8 [anatomical gifts]); and the right to interment in the lot or tomb owned by one's deceased spouse (G.L. c. 114, §§ 29-33).

Where a married couple has children, their children are also directly or indirectly, but no less auspiciously, the recipients of the special legal and economic protections obtained by civil marriage. Notwithstanding the Commonwealth's strong public policy to abolish legal distinctions between marital and nonmarital children in providing for the support and care of minors, see *Department of Revenue v. Mason M.*, 439 Mass. 665 (2003); *Woodward v. Commissioner of Social Sec.*, 435 Mass. 536, 546 (2002), the fact remains that marital children reap a measure of family stability and economic security based on their parents' legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children. Some of these benefits are social, such as the enhanced approval that still attends the status of being a marital child. Others are material, such as the greater ease of access to family-based State and Federal benefits that attend the presumptions of one's parentage.

It is undoubtedly for these concrete reasons, as well as for its intimately personal significance, that civil marriage has long been termed a "civil right." See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival"), quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Milford v. Worcester*, 7 Mass. 48, 56 (1810) (referring to "civil rights incident to marriages"). See also *Baehr v. Lewin*, 74 Haw. 530, 561 (1993) (identifying marriage as a "civil right[]"); *Baker v. State*, 170 Vt. 194, 242 (1999) (Johnson, J., concurring in part and dissenting in part) (same). The United States Supreme Court has described the right to marry as "of fundamental importance for all individuals" and as "part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978). See *Loving v. Virginia*, *supra* ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men"). [FN14]

Without the right to marry--or more properly, the right to choose to marry--one is excluded from the full range of human experience and denied full protection of the laws for one's "avowed commitment to an intimate and lasting human relationship." *Baker v. State*, *supra* at 229. Because civil marriage is central to the lives of individuals and the welfare of the community, our laws assiduously protect the individual's right to marry against undue government incursion. Laws may not "interfere directly and substantially with the right to marry." *Zablocki v. Redhail*, *supra* at 387. See *Perez v. Sharp*, 32 Cal.2d 711, 714 (1948) ("There can be no prohibition of marriage except for an important social objective and reasonable means"). [FN15]

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

B

For decades, indeed centuries, in much of this country (including Massachusetts) no lawful marriage was possible between white and black Americans. That long history availed not when the Supreme Court of California held in 1948 that a legislative prohibition against interracial marriage violated the due process and equality guarantees of the Fourteenth Amendment, *Perez v. Sharp*, 32 Cal.2d 711, 728 (1948), or when, nineteen years later, the United States Supreme Court also held that a statutory bar to interracial marriage violated the Fourteenth Amendment, *Loving v. Virginia*, 388 U.S. 1 (1967). [FN16] As both *Perez* and *Loving* make clear, the right to marry means little if it does not include the right to marry the person of one's choice, subject to appropriate government restrictions in the interests of public health, safety, and welfare. See *Perez v. Sharp*, *supra* at 717 ("the essence of the right to marry is freedom to join in marriage with the person of one's choice"). See also *Loving v. Virginia*, *supra* at 12. In this case, as in *Perez* and *Loving*, a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance--the institution of marriage--because of a single trait: skin color in *Perez* and *Loving*, sexual orientation here. As it did in *Perez* and *Loving*, history must yield to a more fully developed understanding of the invidious quality of the discrimination. [FN17]

The Massachusetts Constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution, even where both Constitutions employ essentially the same language.

See *Planned Parenthood League of Mass., Inc. v. Attorney Gen.*, 424 Mass. 586, 590 (1997); *Corning Glass Works v. Ann & Hope, Inc. of Danvers*, 363 Mass. 409, 416 (1973). That the Massachusetts Constitution is in some instances more protective of individual liberty interests than is the Federal Constitution is not surprising. Fundamental to the vigor of our Federal system of government is that "state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." *Arizona v. Evans*, 514 U.S. 1, 8 (1995). [FN18]

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

The Massachusetts Constitution requires, at a minimum, that the exercise of the State's regulatory authority not be "arbitrary or capricious." *Commonwealth v. Henry's Drywall Co.*, 366 Mass. 539, 542 (1974). [FN19] Under both the equality and liberty guarantees, regulatory authority must, at very least, serve "a legitimate purpose in a rational way"; a statute must "bear a reasonable relation to a permissible legislative objective." *Rushworth v. Registrar of Motor Vehicles*, 413 Mass. 265, 270 (1992). See, e.g., *Massachusetts Fed'n of Teachers v. Board of Educ.*, 436 Mass. 763, 778 (2002) (equal protection); *Coffee-Rich, Inc. v. Commissioner of Pub. Health*, 348 Mass. 414, 422 (1965) (due process). Any law failing to satisfy the basic standards of rationality is void.

The plaintiffs challenge the marriage statute on both equal protection and due process grounds. With respect to each such claim, we must first determine the appropriate standard of review. Where a statute implicates a fundamental right or uses a suspect classification, we employ "strict judicial scrutiny." *Lowell v. Kowalski*, 380 Mass. 663, 666 (1980). For all other statutes, we employ the " 'rational basis' test." *English v. New England Med. Ctr.*, 405 Mass. 423, 428 (1989).

For due process claims, rational basis analysis requires that statutes "bear[] a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare." *Coffee-Rich, Inc. v. Commissioner of Pub. Health, supra*, quoting *Sperry & Hutchinson Co. v. Director of the Div. on the Necessaries of Life*, 307 Mass. 408, 418 (1940). For equal protection challenges, the rational basis test requires that "an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class." *English v. New England Med. Ctr., supra* at 429, quoting *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 452 (1985) (Stevens, J., concurring). [FN20]

The department argues that no fundamental right or "suspect" class is at issue here, [FN21] and rational basis is the appropriate standard of review. For the reasons we explain below, we conclude that the marriage ban does not meet the rational basis test for either due process or equal protection. Because the statute does not survive rational basis review, we do not consider the plaintiffs' arguments that this case merits strict judicial scrutiny.

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

The judge in the Superior Court endorsed the first rationale, holding that "the state's interest in regulating marriage is based on the traditional concept that marriage's primary purpose is procreation." This is incorrect. Our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family. General Laws c. 207 contains no requirement that the applicants for a marriage license attest to their ability or intention to conceive children by coitus. Fertility is not a condition of marriage, nor is it grounds for divorce. People who have never consummated their marriage, and never plan to, may be and stay married. See *Franklin v. Franklin*, 154 Mass. 515, 516 (1891) ("The consummation of a marriage by coition is not necessary to its validity"). [FN22] People who cannot stir from their deathbed may marry. See G.L. c. 207, § 28A. While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage. [FN23]

Moreover, the Commonwealth affirmatively facilitates bringing children into a family regardless of whether the intended parent is married or unmarried, whether the child is adopted or born into a family, whether assistive technology was used to conceive the child, and whether the parent or her partner is heterosexual,

homosexual, or bisexual. [FN24] If procreation were a necessary component of civil marriage, our statutes would draw a tighter circle around the permissible bounds of nonmarital child bearing and the creation of families by noncoital means. The attempt to isolate procreation as "the source of a fundamental right to marry," *post* at (Cordy, J., dissenting), overlooks the integrated way in which courts have examined the complex and overlapping realms of personal autonomy, marriage, family life, and child rearing. Our jurisprudence recognizes that, in these nuanced and fundamentally private areas of life, such a narrow focus is inappropriate.

The "marriage is procreation" argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage. Like "Amendment 2" to the Constitution of Colorado, which effectively denied homosexual persons equality under the law and full access to the political process, the marriage restriction impermissibly "identifies persons by a single trait and then denies them protection across the board." *Romer v. Evans*, 517 U.S. 620, 633 (1996). In so doing, the State's action confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect. [FN25]

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

Silvia v. Silvia, 9 Mass.App.Ct. 339, 341 & n. 3 (1980) (collecting support and custody statutes containing no gender distinction).

The department has offered no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children. There is thus no rational relationship between the marriage statute and the Commonwealth's proffered goal of protecting the "optimal" child rearing unit. Moreover, the department readily concedes that people in same-sex couples may be "excellent" parents. These couples (including four of the plaintiff couples) have children for the reasons others do--to love them, to care for them, to nurture them. But the task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws. While establishing the parentage of children as soon as possible is crucial to the safety and welfare of children, see *Culliton v. Beth Israel Deaconness Med. Ctr.*, 435 Mass. 285, 292 (2001), same-sex couples must undergo the sometimes lengthy and intrusive process of second-parent adoption to establish their joint parentage. While the enhanced income provided by marital benefits is an important source of security and stability for married couples and their children, those benefits are denied to families headed by same-sex couples. See, e.g., note 6, *supra*. While the laws of divorce provide clear and reasonably predictable guidelines for child support, child custody, and property division on dissolution of a marriage, same-sex couples who dissolve their relationships find themselves and their children in the highly unpredictable terrain of equity jurisdiction. See *E.N.O. v. L.M.M.*, *supra*. Given the wide range of public benefits reserved only for married couples, we do not credit the department's contention that the absence of access to civil marriage amounts to little more than an inconvenience to same-sex couples and their children. Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of "a stable family structure in which children will be reared, educated, and socialized." *Post* at (Cordy, J., dissenting). [FN26]

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

In this case, we are confronted with an entire, sizeable class of parents raising children who have absolutely no access to civil marriage and its protections because they are forbidden from procuring a marriage license. It cannot be rational under

our laws, and indeed it is not permitted, to penalize children by depriving them of State benefits because the State disapproves of their parents' sexual orientation.

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

An absolute statutory ban on same-sex marriage bears no rational relationship to the goal of economy. First, the department's conclusory generalization-- that same-sex couples are less financially dependent on each other than opposite-sex couples-- ignores that many same-sex couples, such as many of the plaintiffs in this case, have children and other dependents (here, aged parents) in their care. [FN27] The department does not contend, nor could it, that these dependents are less needy or deserving than the dependents of married couples. Second, Massachusetts marriage laws do not condition receipt of public and private financial benefits to married individuals on a demonstration of financial dependence on each other; the benefits are available to married couples regardless of whether they mingle their finances or actually depend on each other for support.

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

Here, the plaintiffs seek only to be married, not to undermine the institution of civil marriage. They do not want marriage abolished. They do not attack the binary nature of marriage, the consanguinity provisions, or any of the other gate-keeping provisions of the marriage licensing law. Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race. [FN28] If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. That same-sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit. [FN29]

It has been argued that, due to the State's strong interest in the institution of marriage as a stabilizing social structure, only the Legislature can control and define its boundaries. Accordingly, our elected representatives legitimately may choose to exclude same-sex couples from civil marriage in order to assure all citizens of the Commonwealth that (1) the benefits of our marriage laws are available explicitly to create and support a family setting that is, in the Legislature's view, optimal for child rearing, and (2) the State does not endorse gay and lesbian parenthood as the equivalent of being raised by one's married biological parents. [FN30] These arguments miss the point. The Massachusetts Constitution requires that legislation meet certain criteria and not extend beyond certain limits. It is the function of courts to determine whether these criteria are met and whether these limits are exceeded. In most instances, these limits are defined by whether a rational basis exists to conclude that legislation will bring about a rational result. The Legislature in the first instance, and the courts in the last instance, must ascertain whether such a rational basis exists. To label the court's role as usurping that of the Legislature, see, e.g., *post* at (Cordy, J., dissenting), is to misunderstand the nature and purpose of judicial review. We owe great deference to the Legislature to decide social and policy issues, but it is the traditional and settled role of courts to decide constitutional issues. [FN31]

The history of constitutional law "is the story of the extension of constitutional rights and protections to people once ignored or excluded." *United States v. Virginia*, 518 U.S. 515, 557 (1996) (construing equal protection clause of the Fourteenth Amendment to prohibit categorical exclusion of women from public military institute). This statement is as true in the area of civil marriage as in any other area of civil rights. See, e.g., *Turner v. Safley*, 482 U.S. 78 (1987); *Loving v. Virginia*, 388 U.S. 1 (1967); *Perez v. Sharp*, 32 Cal.2d 711 (1948). As a public institution and a right of fundamental importance, civil marriage is an evolving paradigm. The common law was exceptionally harsh toward women who became wives: a woman's legal identity all but evaporated into that of her husband. See generally C.P. Kindregan, Jr., & M.L. Inker, *Family Law and Practice* §§ 1.9 and 1.10 (3d ed.2002). Thus, one early Nineteenth Century jurist could observe matter of factly that, prior to the abolition of slavery in Massachusetts, "the condition of a slave resembled the connection of a wife with her husband, and of infant children with their father. He is obliged to maintain them, and they cannot be separated from him." *Winchendon v. Hatfield*, 4 Mass. 123, 129 (1808). But since at least the middle of the Nineteenth Century, both the courts and the Legislature have acted to ameliorate the harshness of the common-law regime. In *Bradford v. Worcester*, 184 Mass. 557, 562 (1904), we refused to apply the common-law rule that the wife's legal residence was that of her husband to defeat her claim to a municipal "settlement of paupers." In *Lewis v. Lewis*, 370 Mass. 619, 629 (1976), we abrogated the common-law doctrine immunizing a husband against certain suits because the common-law rule was predicated on "antediluvian assumptions concerning the role and status of women in marriage and in society." *Id.* at 621. Alarms about the imminent erosion

of the "natural" order of marriage were sounded over the demise of antimiscegenation laws, the expansion of the rights of married women, and the introduction of "no-fault" divorce. [FN32] Marriage has survived all of these transformations, and we have no doubt that marriage will continue to be a vibrant and revered institution.

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

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

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

The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason. The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual. [FN33] "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (construing Fourteenth Amendment). Limiting the protections, benefits, and

obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.

IV

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

Here, no one argues that striking down the marriage laws is an appropriate form of relief. Eliminating civil marriage would be wholly inconsistent with the Legislature's deep commitment to fostering stable families and would dismantle a vital organizing principle of our society. [FN34] We face a problem similar to one that recently confronted the Court of Appeal for Ontario, the highest court of that Canadian province, when it considered the constitutionality of the same-sex marriage ban under Canada's Federal Constitution, the Charter of Rights and Freedoms (Charter). See *Halpern v. Toronto (City)*, 172 O.A.C. 276 (2003). Canada, like the United States, adopted the common law of England that civil marriage is "the voluntary union for life of one man and one woman, to the exclusion of all others." *Id.* at, quoting *Hyde v. Hyde*, [1861-1873] All E.R. 175 (1866). In holding that the limitation of civil marriage to opposite-sex couples violated the Charter, the Court of Appeal refined the common-law meaning of marriage. We concur with this remedy, which is entirely consonant with established principles of jurisprudence empowering a court to refine a common-law principle in light of evolving constitutional standards. See *Powers v. Wilkinson*, 399 Mass. 650, 661-662 (1987) (reforming the common-law rule of construction of "issue"); *Lewis v. Lewis*, 370 Mass. 619, 629 (1976) (abolishing common-law rule of certain interspousal immunity).

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

In their complaint the plaintiffs request only a declaration that their exclusion and the exclusion of other qualified same-sex couples from access to civil marriage violates Massachusetts law. We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution. We vacate the summary judgment for the department. We remand this case to the

Superior Court for entry of judgment consistent with this opinion. Entry of judgment shall be stayed for 180 days to permit the Legislature to take such action as it may deem appropriate in light of this opinion. See, e.g., *Michaud v. Sheriff of Essex County*, 390 Mass. 523, 535-536 (1983).

So ordered.

IN THE SUPREME COURT OF CALIFORNIA

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| In re MARRIAGE CASES. |) | Ct.App. 1/3 Nos. A110449, |
| |) | A110450, A110451, A110463, |
| [Six consolidated appeals.] ¹ |) | A110651, A110652 |
| |) | |
| |) | San Francisco County |
| |) | JCCP No. 4365 |
| _____ |) | |

In *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055 (*Lockyer*), this court concluded that public officials of the City and County of San Francisco acted unlawfully by issuing marriage licenses to same-sex couples in the absence of a judicial determination that the California statutes limiting marriage to a union between a man and a woman are unconstitutional. Our decision in *Lockyer* emphasized, however, that the substantive question of the constitutional

¹ *City and County of San Francisco v. State of California* (A110449 [Super. Ct. S.F. City & County, No. CGC-04-429539]); *Tyler v. State of California* (A110450 [Super. Ct. L.A. County, No. BS-088506]); *Woo v. Lockyer* (A110451 [Super. Ct. S.F. City & County, No. CPF-04-504038]); *Clinton v. State of California* (A110463 [Super. Ct. S.F. City & County, No. CGC-04-429548]); *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco* (A110651 [Super. Ct. S.F. City & County, No. CPF-04-503943]); *Campaign for California Families v. Newsom* (A110652 [Super. Ct. S.F. City & County, No. CGC-04-428794]).

validity of the California marriage statutes was not before this court in that proceeding, and that our decision was not intended to reflect any view on that issue. (*Id.* at p. 1069; see also *id.* at p. 1125 (conc. opn. of Moreno, J.); *id.* at pp. 1132-1133 (conc. & dis. opn. of Kennard, J.); *id.* at p. 1133 (conc. & dis. opn. of Werdegar, J.)) The present proceeding, involving the consolidated appeal of six cases that were litigated in the superior court and the Court of Appeal in the wake of this court's decision in *Lockyer*, squarely presents the substantive constitutional question that was not addressed in *Lockyer*.

In considering this question, we note at the outset that the constitutional issue before us differs in a significant respect from the constitutional issue that has been addressed by a number of other state supreme courts and intermediate appellate courts that recently have had occasion, in interpreting the applicable provisions of their respective state constitutions, to determine the validity of statutory provisions or common law rules limiting marriage to a union of a man and a woman. (See, e.g., *Conaway v. Deane* (Md. 2007) 932 A.2d 571; *Goodridge v. Dept. of Pub. Health* (Mass. 2003) 798 N.E.2d 941; *Lewis v. Harris* (N.J. 2006) 908 A.2d 196; *Hernandez v. Robles* (N.Y. 2006) 855 N.E.2d 1; *Baker v. State* (Vt. 1999) 744 A.2d 864; *Andersen v. King County* (Wn. 2006) 138 P.3d 963; *Standhardt v. Superior Court* (Ariz.Ct.App. 2003) 77 P.3d 451; *Morrison v. Sadler* (Ind.Ct.App. 2005) 821 N.E.2d 15.) These courts, often by a one-vote margin (see, *post*, pp. 114-115, fn. 70), have ruled upon the validity of statutory schemes that contrast with that of California, which in recent years has enacted comprehensive domestic partnership legislation under which a same-sex couple may enter into a legal relationship that affords the couple virtually all of the same substantive legal benefits and privileges, and imposes upon the couple virtually all

of the same legal obligations and duties, that California law affords to and imposes upon a married couple.² Past California cases explain that the constitutional validity of a challenged statute or statutes must be evaluated by taking into consideration all of the relevant statutory provisions that bear upon how the state treats the affected persons with regard to the subject at issue. (See, e.g., *Brown v. Merlo* (1973) 8 Cal.3d 855, 862.) Accordingly, the legal issue we must resolve is not whether it would be constitutionally permissible under the California Constitution for the state to limit marriage only to opposite-sex couples while denying same-sex couples any opportunity to enter into an official relationship with all or virtually all of the same substantive attributes, but rather whether our

² We note that although much of the academic literature discussing the legal recognition of same-sex relationships frequently uses the term “domestic partnership” to describe a legal status that accords only comparatively few legal rights or obligations to same-sex couples, the current California statutes grant same-sex couples who choose to become domestic partners virtually all of the legal rights and responsibilities accorded married couples under California law. (The few relatively minor differences that remain are described below (*post*, pp. 42-44, fn. 24).) In light of the comprehensive nature of the rights afforded by California’s domestic partnership legislation, the status of such partnership in California is comparable to the status designated as a “civil union” in statutes enacted in recent years in Connecticut, New Hampshire, New Jersey, and Vermont. (See, e.g., Conn. Gen. Stat. § 46b-38nn (2006); N.H. Rev. Stat. Ann. § 457-A (2007); N.J. Stat. Ann. § 37:1-29 (2006); 15 Vt. Stat. Ann. § 1201 (1999).) We note that recently Oregon also enacted domestic partnership legislation under which same-sex couples may obtain rights comparable to those conferred upon married couples (2007 Or. Laws ch. 99.) The District of Columbia, Hawaii, Maine, and Washington have adopted domestic partnership or reciprocal beneficiaries legislation that affords same-sex couples the opportunity to obtain some of the benefits available to married opposite-sex couples. (See 2006 D.C. Law 16-79 (Act 16-265) [Domestic Partnership Equality Amendment Act of 2006]; Haw. Rev. Stat. § 572C-2; 2004 Me. Legis. Serv. ch. 672 (H.P. 1152; L.D. 1579) [financial security of families and children]; 2001 Me. Legis. Serv. ch. 347 (H.P. 1256; L.D. 1703) [access to health insurance]; Wash. Rev. Code ch. 26.60.)

state Constitution prohibits the state from establishing a statutory scheme in which both opposite-sex and same-sex couples are granted the right to enter into an officially recognized family relationship that affords all of the significant legal rights and obligations traditionally associated under state law with the institution of marriage, but under which the union of an opposite-sex couple is officially designated a “marriage” whereas the union of a same-sex couple is officially designated a “domestic partnership.” The question we must address is whether, under these circumstances, the failure to designate the official relationship of same-sex couples as marriage violates the California Constitution.³

It also is important to understand at the outset that our task in this proceeding is not to decide whether we believe, *as a matter of policy*, that the officially recognized relationship of a same-sex couple *should* be designated a

³ The only out-of-state high court decision to address a comparable issue is the decision in *Opinions of the Justices to the Senate* (Mass. 2004) 802 N.E.2d 565. In that proceeding, brought under a provision of the Massachusetts Constitution that permits a branch of the state legislature to seek an advisory opinion on an important question of law, the Massachusetts Senate asked that state’s high court to render an opinion as to the constitutionality of a then pending bill, introduced in response to the court’s earlier decision in *Goodridge v. Dept. of Pub. Health, supra*, 798 N.E.2d 941, that proposed to establish the institution of “civil union” under which “spouses in a civil union” would have all of the rights and responsibilities afforded by that state’s marriage laws. In its decision in *Opinions of the Justices to the Senate*, the Supreme Judicial Court of Massachusetts, by a closely divided (four-to-three) vote, declared that the proposed legislation would violate the equal protection and due process clauses of the Massachusetts Constitution. (802 N.E.2d at pp. 569-572.)

A similar issue also is currently pending before the Connecticut Supreme Court in *Kerrigan v. Comm’r of Public Health* (SC No. 17716, argued May 14, 2007). In *Kerrigan*, the court is expected to determine whether a Connecticut statute that limits marriage to opposite-sex couples is unconstitutional under the Connecticut Constitution, notwithstanding the existence of a recently enacted Connecticut statute that permits same-sex couples to enter into a civil union — a status that, under the applicable legislation, affords same-sex couples the same legal benefits and obligations possessed by married couples under Connecticut law.

marriage rather than a domestic partnership (or some other term), but instead only to determine whether the difference in the official names of the relationships *violates the California Constitution*. We are aware, of course, that very strongly held differences of opinion exist on the matter of policy, with those persons who support the inclusion of same-sex unions within the definition of marriage maintaining that it is unfair to same-sex couples and potentially detrimental to the fiscal interests of the state and its economic institutions to reserve the designation of marriage solely for opposite-sex couples, and others asserting that it is vitally important to preserve the long-standing and traditional definition of marriage as a union between a man and a woman, even as the state extends comparable rights and responsibilities to committed same-sex couples. Whatever our views as individuals with regard to this question as a matter of policy, we recognize as judges and as a court our responsibility to limit our consideration of the question to a determination of the constitutional validity of the current legislative provisions.

As explained hereafter, the determination whether the current California statutory scheme relating to marriage and to registered domestic partnership is constitutionally valid implicates a number of distinct and significant issues under the California Constitution.

First, we must determine the nature and scope of the “right to marry” — a right that past cases establish as one of the fundamental constitutional rights embodied in the California Constitution. Although, as an historical matter, civil marriage and the rights associated with it traditionally have been afforded only to opposite-sex couples, this court’s landmark decision 60 years ago in *Perez v.*

Sharp (1948) 32 Cal.2d 711⁴ — which found that California’s statutory provisions prohibiting interracial marriages were inconsistent with the fundamental constitutional right to marry, notwithstanding the circumstance that statutory prohibitions on interracial marriage had existed since the founding of the state — makes clear that history alone is not invariably an appropriate guide for determining the meaning and scope of this fundamental constitutional guarantee. The decision in *Perez*, although rendered by a deeply divided court, is a judicial opinion whose legitimacy and constitutional soundness are by now universally recognized.

As discussed below, upon review of the numerous California decisions that have examined the underlying bases and significance of the constitutional right to marry (and that illuminate *why* this right has been recognized as one of the basic, inalienable civil rights guaranteed to an individual by the California Constitution), we conclude that, under this state’s Constitution, the constitutionally based right to marry properly must be understood to encompass the core set of basic *substantive* legal rights and attributes traditionally associated with marriage that are so integral to an individual’s liberty and personal autonomy that they may not be eliminated or abrogated by the Legislature or by the electorate through the statutory initiative process. These core substantive rights include, most fundamentally, the opportunity of an individual to establish — with the person with whom the individual has chosen to share his or her life — an *officially recognized and protected family* possessing mutual rights and responsibilities and entitled to the

⁴ To avoid possible confusion, we note that the decision in *Perez v. Sharp* was reported in the unofficial regional reporter as *Perez v. Lippold* (1948) 198 P.2d 17, and judicial decisions in other states sometimes have referred to the decision by that title. We shall refer to the decision under its correct official title of *Perez v. Sharp*.

same respect and dignity accorded a union traditionally designated as marriage. As past cases establish, the substantive right of two adults who share a loving relationship to join together to establish an officially recognized family of their own — and, if the couple chooses, to raise children within that family — constitutes a vitally important attribute of the fundamental interest in liberty and personal autonomy that the California Constitution secures to all persons for the benefit of both the individual and society.

Furthermore, in contrast to earlier times, our state now recognizes that an individual’s capacity to establish a loving and long-term committed relationship with another person and responsibly to care for and raise children does not depend upon the individual’s sexual orientation, and, more generally, that an individual’s sexual orientation — like a person’s race or gender — does not constitute a legitimate basis upon which to deny or withhold legal rights. We therefore conclude that in view of the substance and significance of the fundamental constitutional right to form a family relationship, the California Constitution properly must be interpreted to guarantee this basic civil right to all Californians, whether gay or heterosexual, and to same-sex couples as well as to opposite-sex couples.⁵

In defending the constitutionality of the current statutory scheme, the Attorney General of California maintains that even if the constitutional right to marry under the California Constitution applies to same-sex couples as well as to opposite-sex couples, this right should not be understood as requiring the

⁵ For convenience and economy of language, in this opinion we shall use the term “gay,” with reference to an individual, to relate either to a lesbian or to a gay man, and the term “gay couple” to refer to a couple consisting of either two women or two men.

Legislature to designate a couple’s official family relationship by the term “marriage,” as opposed to some other nomenclature. The Attorney General, observing that fundamental constitutional rights generally are defined by *substance* rather than by *form*, reasons that so long as the state affords a couple all of the constitutionally protected *substantive* incidents of marriage, the state does not violate the couple’s constitutional right to marry simply by assigning their official relationship a *name* other than marriage. Because the Attorney General maintains that California’s current domestic partnership legislation affords same-sex couples all of the core substantive rights that plausibly may be guaranteed to an individual or couple as elements of the fundamental state constitutional right to marry, the Attorney General concludes that the current California statutory scheme relating to marriage and domestic partnership does not violate the fundamental constitutional right to marry embodied in the California Constitution.

We need not decide in this case whether the name “marriage” is *invariably* a core element of the state constitutional right to marry so that the state would violate a couple’s constitutional right even if — perhaps in order to emphasize and clarify that this civil institution is distinct from the religious institution of marriage — the state were to assign a name other than marriage as the official designation of the formal family relationship for *all* couples. Under the current statutes, the state has not revised the name of the official family relationship for *all* couples, but rather has drawn a distinction between the name for the official family relationship of opposite-sex couples (marriage) and that for same-sex couples (domestic partnership). One of the core elements of the right to establish an officially recognized family that is embodied in the California constitutional right to marry is a couple’s right to have their family relationship accorded dignity and respect equal to that accorded other officially recognized families, and assigning a different designation for the family relationship of same-sex couples

while reserving the historic designation of “marriage” exclusively for opposite-sex couples poses at least a serious risk of denying the family relationship of same-sex couples such equal dignity and respect. We therefore conclude that although the provisions of the current domestic partnership legislation afford same-sex couples most of the substantive elements embodied in the constitutional right to marry, the current California statutes nonetheless must be viewed as potentially impinging upon a same-sex couple’s constitutional right to marry under the California Constitution.

Furthermore, the circumstance that the current California statutes assign a different name for the official family relationship of same-sex couples as contrasted with the name for the official family relationship of opposite-sex couples raises constitutional concerns not only under the state constitutional right to marry, but also under the state constitutional equal protection clause. In analyzing the validity of this differential treatment under the latter clause, we first must determine which standard of review should be applied to the statutory classification here at issue. Although in most instances the deferential “rational basis” standard of review is applicable in determining whether different treatment accorded by a statutory provision violates the state equal protection clause, a more exacting and rigorous standard of review — “strict scrutiny” — is applied when the distinction drawn by a statute rests upon a so-called “suspect classification” or impinges upon a fundamental right. As we shall explain, although we do not agree with the claim advanced by the parties challenging the validity of the current statutory scheme⁶ that the applicable statutes properly should be viewed as an

⁶ As noted below (*post*, at pp. 12-14), four of the six actions in this coordination proceeding were filed by parties (the City and County of San Francisco and same-sex couples, and organizations supporting these parties) who

(footnote continued on next page)

instance of discrimination on the basis of the suspect characteristic of sex or gender and should be subjected to strict scrutiny on that ground, we conclude that strict scrutiny nonetheless is applicable here because (1) the statutes in question properly must be understood as classifying or discriminating on the basis of sexual orientation, a characteristic that we conclude represents — like gender, race, and religion — a constitutionally suspect basis upon which to impose differential treatment, and (2) the differential treatment at issue impinges upon a same-sex couple’s fundamental interest in having their family relationship accorded the same respect and dignity enjoyed by an opposite-sex couple.

Under the strict scrutiny standard, unlike the rational basis standard, in order to demonstrate the constitutional validity of a challenged statutory classification the state must establish (1) that the state interest intended to be served by the differential treatment not only is a constitutionally legitimate interest, but is a *compelling* state interest, and (2) that the differential treatment not only is reasonably related to but is *necessary* to serve that compelling state interest. Applying this standard to the statutory classification here at issue, we

(footnote continued from previous page)

challenge the constitutional validity of the current California marriage statutes, and two of the actions were filed by parties (the Proposition 22 Legal Defense and Education Fund (hereafter Fund or Proposition 22 Legal Defense Fund) and the Campaign for California Families (Campaign)) who maintain that the current statutes are constitutional. For convenience and ease of reference, in this opinion we shall refer collectively to the parties who are challenging the constitutionality of the marriage statutes as plaintiffs. Because the various parties defending the marriage statutes (the state, represented by the Attorney General, the Governor, the Fund, and the Campaign) have advanced differing legal arguments in support of the statutes, this opinion generally will refer to such parties individually. In those instances in which the opinion refers to the parties defending the marriage statutes collectively, those parties will be referred to as defendants.

conclude that the purpose underlying differential treatment of opposite-sex and same-sex couples embodied in California's current marriage statutes — the interest in retaining the traditional and well-established definition of marriage — cannot properly be viewed as a *compelling* state interest for purposes of the equal protection clause, or as *necessary* to serve such an interest.

A number of factors lead us to this conclusion. First, the exclusion of same-sex couples from the designation of marriage clearly is not *necessary* in order to afford full protection to all of the rights and benefits that currently are enjoyed by married opposite-sex couples; permitting same-sex couples access to the designation of marriage will not deprive opposite-sex couples of any rights and will not alter the legal framework of the institution of marriage, because same-sex couples who choose to marry will be subject to the same obligations and duties that currently are imposed on married opposite-sex couples. Second, retaining the traditional definition of marriage and affording same-sex couples only a separate and differently named family relationship will, as a realistic matter, impose appreciable harm on same-sex couples and their children, because denying such couples access to the familiar and highly favored designation of marriage is likely to cast doubt on whether the official family relationship of same-sex couples enjoys dignity equal to that of opposite-sex couples. Third, because of the widespread disparagement that gay individuals historically have faced, it is all the more probable that excluding same-sex couples from the legal institution of marriage is likely to be viewed as reflecting an official view that their committed relationships are of lesser stature than the comparable relationships of opposite-sex couples. Finally, retaining the designation of marriage exclusively for opposite-sex couples and providing only a separate and distinct designation for same-sex couples may well have the effect of perpetuating a more general premise — now emphatically rejected by this state — that gay individuals and same-sex couples

are in some respects “second-class citizens” who may, under the law, be treated differently from, and less favorably than, heterosexual individuals or opposite-sex couples. Under these circumstances, we cannot find that retention of the traditional definition of marriage constitutes a *compelling* state interest. Accordingly, we conclude that to the extent the current California statutory provisions limit marriage to opposite-sex couples, these statutes are unconstitutional.

I

On February 10, 2004, the Mayor of the City and County of San Francisco (City) sent a letter to the county clerk, directing that official to determine what changes should be made to the forms and documents used to apply for and issue marriage licenses, so that licenses could be provided to couples without regard to their gender or sexual orientation. In response, the county clerk designed revised forms for the marriage license application and for the license and certificate of marriage, and on February 12, 2004, the City began issuing marriage licenses to same-sex couples.

The following day, two separate actions were filed in San Francisco Superior Court seeking an immediate stay as well as writ relief, to prohibit the City’s issuance of marriage licenses to same-sex couples. (*Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco* (Super. Ct. S.F. City & County, No. CPF-04-503943) (hereafter *Proposition 22 Legal Defense Fund*); *Thomasson v. Newsom* (Super. Ct. S.F. City & County, No. CGC-04-428794) (subsequently retitled as *Campaign for California Families v. Newsom*, and hereafter referred to as *Campaign*.) As noted, the *Proposition 22 Legal Defense Fund* and the *Campaign* actions are two of the six cases whose consolidated appeals are before us in the present proceeding. (*Ante*, p. 1, fn. 1.)