***Goodridge v. Department of Public Health* (Mass. 2003)**

798 N.E.2d 941

Several same-sex couples applied for marriage licenses and, when their applications were denied, filed action for declaratory judgment against the Massachusetts Department of Public Health, alleging that its policy and practice of denying marriage licenses to same-sex couples violated numerous provisions of the Massachusetts Constitution. The Superior Court of Suffolk County entered summary judgment for the Department, and the plaintiffs appealed. The Supreme Judicial Court of Massachusetts granted the parties' requests for direct appellate review.

Opinion of the Court: Marshall, Cowin, Greaney, Ireland.

Concurring opinion: Greaney.

Dissenting opinions: Cordy, Sosman, Spina; Sosman, Cordy, Spina; Spina, Cordy, Sosman.

THE CHIEF JUSTICE delivered the opinion of the Court.

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* (2003).

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. It is a question the United States Supreme Court left open as a matter of Federal law in *Lawrence* 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. 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.…

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. 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. In a real sense, there are three partners to every civil marriage: two willing spouses and an approving State. 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.

Civil marriage is created and regulated through exercise 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. Without question, civil marriage enhances the "welfare of the community." It is a "social institution of the highest importance." 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*

(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. 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; 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); extension of the benefit of the homestead protection (securing up to $300,000 in equity from creditors) to one's spouse and children; automatic rights to inherit the property of a deceased spouse who does not leave a will; 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); entitlement to wages owed to a deceased employee; eligibility to continue certain businesses of a deceased; thirty-nine week continuation of health coverage for the spouse of a person who is laid off or dies; preferential options under the Commonwealth's pension system; preferential benefits in the Commonwealth's medical program, MassHealth; access to veterans' spousal benefits and preferences; financial protections for spouses of certain Commonwealth employees (fire fighters, police officers, and prosecutors, among others) killed in the performance of duty; equitable division of marital property on divorce; temporary and permanent alimony rights; the right to separate support on separation of the parties that does not result in divorce; 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.

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; and evidentiary rights, such as the prohibition against spouses testifying against one another about their private conversations, applicable in both civil and criminal cases.

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, 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.

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* (1967). Unquestionably, the regulatory power of the Commonwealth over civil marriage is broad, as is the Commonwealth's discretion to award public benefits. Individuals who have the choice to marry each other and nevertheless choose not to may properly be denied the legal benefits of marriage. But that same logic cannot hold for a qualified individual who would marry if she or he only could.

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* (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*. 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. 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.

The Massachusetts Constitution requires, at a minimum, that the exercise of the State's regulatory authority not be "arbitrary or capricious. 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."

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." For all other statutes, we employ the " 'rational basis' test." 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."

The department argues that no fundamental right or "suspect" class is at issue here, 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. People who cannot stir from their deathbed may marry. 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.

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. 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," 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* (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.

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 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. 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."

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 plaintiff in this case, have children and other dependents (here, aged parents) in their care. 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. 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.

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. 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 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.

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* (1996). This statement is as true in the area of civil marriage as in any other area of civil rights. 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. 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. 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. Marriage has survived all of these transformations, and we have no doubt that marriage will continue to be a vibrant and revered institution.

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. "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* (1984). 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.

MR. JUSTICE GREANEY concurring.

I agree with the result reached by the court, the remedy ordered, and much of the reasoning in the court's opinion. In my view, however, the case is more directly resolved using traditional equal protection analysis.

Article 1 of the Declaration of Rights, as amended by art. 106 of the Amendments to the Massachusetts Constitution, provides:

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

This provision, even prior to its amendment, guaranteed to all people in the Commonwealth—equally— the enjoyment of rights that are deemed important or fundamental. The withholding of 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. The restriction creates a straightforward case of discrimination that disqualifies an entire group of our citizens and their families from participation in an institution of paramount legal and social importance. This is impermissible under art. 1.…

MR. JUSTICE SPINA, with whom MS. JUSTICE SOSMAN and MR. JUSTICE CORDY join, dissenting.

What is at stake in this case is not the unequal treatment of individuals or whether individual rights have been impermissibly burdened, but the power of the Legislature to effectuate social change without interference from the courts, pursuant to art. 30 of the Massachusetts Declaration of Rights. The power to regulate marriage lies with the Legislature, not with the judiciary.

Today, the court has transformed its role as protector of individual rights into the role of creator of rights, and I respectfully dissent.

Equal protection. Although the court did not address the plaintiffs' gender discrimination claim, G.L. c. 207 does not unconstitutionally discriminate on the basis of gender. A claim of gender discrimination will lie where it is shown that differential treatment disadvantages one sex over the other. General Laws c. 207 enumerates certain qualifications for obtaining a marriage license. It creates no distinction between the sexes, but applies to men and women in precisely the same way. It does not create any disadvantage identified with gender, as both men and women are similarly limited to marrying a person of the opposite sex. Similarly, the marriage statutes do not discriminate on the basis of sexual orientation. As the court correctly recognizes, constitutional protections are extended to individuals, not couples. The marriage statutes do not disqualify individuals on the basis of sexual orientation from entering into marriage. All individuals, with certain exceptions not relevant here, are free to marry. Whether an individual chooses not to marry because of sexual orientation or any other reason should be of no concern to the court.

Due process. The marriage statutes do not impermissibly burden a right protected by our constitutional guarantee of due process implicit in art. 10 of our Declaration of Rights. There is no restriction on the rights of any plaintiff to enter into marriage. Each is free to marry a willing person of the opposite sex.

Substantive due process protects individual rights against unwarranted government intrusion. The court states, as we have said on many occasions, that the Massachusetts Declaration of Rights may protect a right in ways that exceed the protection afforded by the Federal Constitution. However, today the court does not fashion a remedy that affords greater protection of a right. Instead, using the rubric of due process, it has redefined marriage.

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

MS. JUSTICE SOSMAN, with whom MR. JUSTICE SPINA and MR. JUSTICE CORDY join, dissenting.

In applying the rational basis test to any challenged statutory scheme, the issue is not whether the Legislature's rationale behind that scheme is persuasive to us, but only whether it satisfies a minimal threshold of rationality. Today, rather than apply that test, the court announces that, because it is persuaded that there are no differences between same-sex and opposite-sex

couples, the Legislature has no rational basis for treating them differently with respect to the granting of marriage licenses. Reduced to its essence, the court's opinion concludes that, because same-sex couples are now raising children, and withholding the benefits of civil marriage from their union makes it harder for them to raise those children, the State must therefore provide the benefits of civil marriage to same-sex couples just as it does to opposite-sex couples. Of course, many people are raising children outside the confines of traditional marriage, and, by definition, those children are being deprived of the various benefits that would flow if they were being raised in a household with married parents. That does not mean that the Legislature must accord the full of marital status on every household raising children. Rather, the Legislature need only have some rational basis for concluding that, at present, those alternate family structures have not yet been conclusively shown to be the equivalent of the marital family structure that has established itself as a successful one over a period of centuries. People are of course at liberty to raise their children in various family structures, so long as they are not literally harming their children by doing so. That does not mean that the State is required to provide identical forms of encouragement, endorsement, and support to all of the infinite variety of household structures that a free society permits.…

As a matter of social history, today's opinion may represent a great turning point that many will hail as a tremendous step toward a more just society. As a matter of constitutional jurisprudence, however, the case stands as an aberration. To reach the result it does, the court has tortured the rational basis test beyond recognition. I fully appreciate the strength of the temptation to find this particular law unconstitutional—there is much to be said for the argument that excluding gay and lesbian couples from the benefits of civil marriage is cruelly unfair and hopelessly outdated; the inability to marry has a profound impact on the personal lives of committed gay and lesbian couples (and their children) to whom we are personally close (our friends, neighbors, family members, classmates, and co-workers); and our resolution of this issue takes place under the intense glare of national and international publicity. Speaking metaphorically, these factors have combined to turn the case before us into a “perfect storm” of a constitutional question. In my view, however, such factors make it all the more imperative that we adhere precisely and scrupulously to the established guideposts of our constitutional jurisprudence, a jurisprudence that makes the rational basis test an extremely deferential one that focuses on the rationality, not the persuasiveness, of the potential justifications for the classifications in the legislative scheme. I trust that, once this particular “storm” clears, we will return to the rational basis test as it has always been understood and applied. Applying that deferential test in the manner it is customarily applied, the exclusion of gay and lesbian couples from the institution of civil marriage passes constitutional muster. I respectfully dissent.

MR. JUSTICE CORDY, with whom MR. JUSTICE SPINA and MS. JUSTICE SOSMAN join, dissenting.

The Massachusetts marriage statute does not impair the exercise of a recognized fundamental right, or discriminate on the basis of sex in violation of the equal rights amendment to the Massachusetts Constitution. Consequently, it is subject to review only to determine whether it satisfies the rational basis test. Because a conceivable rational basis exists upon which the Legislature could conclude that the marriage statute furthers the legitimate State purpose of ensuring, promoting, and supporting an optimal social structure for the bearing and raising of children, it is a valid exercise of the State's police power.

Limiting marriage to the union of one man and one woman does not impair the exercise of a fundamental right. Civil marriage is an institution created by the State. In Massachusetts, the marriage statutes are derived from English common law and were first enacted in colonial times. They were enacted to secure public interests and not for religious purposes or to promote personal interests or aspirations. As the court notes in its opinion, the institution of marriage is "the legal union of a man and woman as husband and wife," and it has always been so under Massachusetts law, colonial or otherwise.

The plaintiffs contend that because the right to choose to marry is a "fundamental" right, the right to marry the person of one's choice, including a member of the same sex, must also be a "fundamental" right.… Supreme Court cases that have described marriage or the right to marry as "fundamental" have focused primarily on the underlying interest of every individual in procreation, which, historically, could only legally occur within the construct of marriage because sexual intercourse outside of marriage was a criminal act.… Because same-sex couples are unable to procreate on their own, any right to marriage they may possess cannot be based on their interest in procreation, which has been essential to the Supreme Court's denomination of the right to marry as fundamental.

Supreme Court cases recognizing a right to privacy in intimate decision-making have also focused primarily on sexual relations and the decision whether or not to procreate, and have refused to recognize an "unlimited right" to privacy. In Massachusetts jurisprudence, protected decisions generally have been limited to those concerning "whether or not to beget or bear a child." …

While the institution of marriage is deeply rooted in the history and traditions of our country and our State, the right to marry someone of the same sex is not. No matter how personal or intimate a decision to marry someone of the same sex might be, the right to make it is not guaranteed by the right of personal autonomy.…

Because the rights and interests discussed above do not afford the plaintiffs any fundamental right that would be impaired by a statute limiting marriage to members of the opposite sex, they have no fundamental right to be declared "married" by the State.

This is not to say that a statute that has no rational basis must nevertheless be upheld so long as it is of ancient origin. However, "[t]he long history of a certain practice … and its acceptance as an uncontroversial part of our national and State tradition do suggest that [the court] should reflect carefully before striking it down." As this court has recognized, the "fact that a challenged practice 'is followed by a large number of states' " …is plainly worth considering in determining whether the practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Although public attitudes toward marriage in general and same-sex marriage in particular have changed and are still evolving, it is not readily apparent to what extent contemporary values have embraced the concept of same-sex marriage. Perhaps the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." No State Legislature has enacted laws permitting same-sex marriages; and a large majority of States, as well as the United States Congress, has affirmatively prohibited the recognition of such marriages for any purpose.

In such circumstances, the law with respect to same-sex marriages must be left to develop through legislative processes, subject to the constraints of rationality, lest the court be viewed as using the liberty and due process clauses as vehicles merely to enforce its own views regarding better social policies, a role that the strongly worded separation of powers principles in art. 30 of the Declaration of Rights of our Constitution forbids, and for which the court is particularly ill suited.

The marriage statute, in limiting marriage to heterosexual couples, does not constitute discrimination on the basis of sex in violation of the Equal Rights Amendment to the Massachusetts Constitution. In his concurrence, Justice Greaney contends that the marriage statute constitutes discrimination on the basis of sex in violation of art. 1 of the Declaration of Rights as amended by art. 106 of the Amendments to the Constitution of the Commonwealth, the Equal Rights Amendment (ERA). Such a conclusion is analytically unsound and inconsistent with the legislative history of the ERA.

The central purpose of the ERA was to eradicate discrimination against women and in favor of men or vice versa. Consistent with this purpose, we have construed the ERA to prohibit laws that advantage one sex at the expense of the other, but not laws that treat men and women equally. The Massachusetts marriage statute does not subject men to different treatment from women; each is equally prohibited from precisely the same conduct.

Of course, a statute that on its face treats protected groups equally may still harm, stigmatize, or advantage one over the other. Such was the circumstance in *Loving v. Virginia* (1967), where the Supreme Court struck down a State statute that made interracial marriage a crime, as constituting invidious discrimination on the basis of race. BV contrast, here there is no evidence that limiting marriage to opposite-sex couples was motivated by sexism in general or a desire to disadvantage men or women in particular. Moreover, no one has identified any harm, burden, disadvantage, or advantage accruing to either gender as a consequence of the Massachusetts marriage statute. In the absence of such effect, the statute limiting marriage to couples of the opposite sex does not violate the ERA's prohibition of sex discrimination.…

In analyzing whether a statute satisfies the rational basis standard, we look to the nature of the classification embodied in the enactment, then to whether the statute serves a legitimate State purpose, and finally to whether the classification is reasonably related to the furtherance of that purpose. With this framework, we turn to the challenged statute, G.L. c. 207, which authorizes local town officials to issue licenses to couples of the opposite sex authorizing them to enter the institution of civil marriage.

1. *Classification*. The nature of the classification at issue is readily apparent. Opposite-sex couples can obtain a license and same-sex couples cannot. The granting of this license, and the completion of the required solemnization of the marriage, opens the door to many statutory benefits and imposes numerous responsibilities. The fact that the statute does not permit such licenses to be issued to couples of the same sex thus bars them from civil marriage. The classification is not drawn between men and women or between heterosexuals and homosexuals, any of whom can obtain a license to marry a member of the opposite sex; rather, it is drawn between same-sex couples and opposite-sex couples.

2. *State purpose*. The court's opinion concedes that the civil marriage statute serves legitimate State purposes, but further investigation and elaboration of those purposes is both helpful and necessary.

Civil marriage is the institutional mechanism by which societies have sanctioned and recognized particular family structures, and the institution of marriage has existed as one of the fundamental organizing principles of human society. Paramount among its many important functions, the institution of marriage has systematically provided for the regulation of heterosexual behavior, brought order to the resulting procreation, and ensured a stable family structure in which children will be reared, educated, and socialized. Admittedly, heterosexual intercourse, procreation, and child care are not necessarily conjoined (particularly in the modern age of widespread effective contraception and supportive social welfare programs), but an orderly society requires some mechanism for coping with the fact that sexual intercourse commonly results in pregnancy and childbirth. The institution of marriage is that mechanism.…

3. *Rational relationship.* The question we must turn to next is whether the statute, construed as limiting marriage to couples of the opposite sex, remains a rational way to further that purpose. Stated differently, we ask whether a conceivable rational basis exists on which the Legislature could conclude that continuing to limit the institution of civil marriage to members of the opposite sex furthers the legitimate purpose of ensuring, promoting, and supporting an optimal social structure for the bearing and raising of children.

In considering whether such a rational basis exists, we defer to the decision-making process of the Legislature, and must make deferential assumptions about the information that it might consider and on which it may rely. We must assume that the Legislature (1) might conclude that the institution of civil marriage has successfully and continually provided this structure over several centuries; (2) might consider and credit studies that document negative consequences that too often follow children either born outside of marriage or raised in households lacking either a father or a mother figure, and scholarly commentary contending that children and families develop best when mothers and fathers are partners in their parenting; and (3) would be familiar with many recent studies that variously support the proposition that children raised in intact families headed by same sex couples fare as well on many measures as children raised in similar families headed by opposite-sex couples; support the proposition that children of same-sex couples fare worse on some measures; or reveal notable differences between the two groups of children that warrant further study.…

Taking all of this available information into account, the Legislature could rationally conclude that a family environment with married opposite-sex parents remains the optimal social structure in which to bear children, and that the raising of children by same sex couples, who by definition cannot be the two sole biological parents of a child and cannot provide children with a parental authority figure of each gender, presents an alternative structure for child rearing that has not yet proved itself beyond reasonable scientific dispute to be as optimal as the biologically based marriage norm. Working from the assumption that a recognition of same-sex marriages will increase the number of children experiencing this alternative, the Legislature could conceivably conclude that declining to recognize same-sex marriages remains prudent until empirical questions about its impact on the upbringing of children are resolved.

The fact that the Commonwealth currently allows same-sex couples to adopt does not affect the rationality of this conclusion. The eligibility of a child for adoption presupposes that at least one of the child's biological parents is unable or unwilling, for some reason, to participate in raising the child. In that sense, society has “lost” the optimal setting in which to raise that child—it is simply not available. In these circumstances, the principal and overriding consideration is the “best interests of the child,” considering his or her unique circumstances and

the options that are available for that child. The objective is an individualized determination of the best environment for a particular child, where the normative social structure—a home with both the child's biological father and mother—is not an option. That such a focused determination may lead to the approval of a same-sex couple's adoption of a child does not mean that it would be irrational for a legislator, in fashioning statutory laws that cannot make such individualized determinations, to conclude generally that being raised by a same-sex couple has not yet been shown to be the absolute equivalent of being raised by one's married biological parents.

That the State does not preclude different types of families from raising children does not mean that it must view them all as equally optimal and equally deserving of State endorsement and support.

There is no reason to believe that legislative processes are inadequate to effectuate legal changes in response to evolving evidence, social values, and views of fairness on the subject of same-sex relationships. The advancement of the rights, privileges, and protections afforded to homosexual members of our community in the last three decades has been significant, and there is no reason to believe that that evolution will not continue. Changes of attitude in the civic, social, and professional communities have been even more profound. Thirty years ago, *The Diagnostic and Statistical Manual*, the seminal handbook of the American Psychiatric Association, still listed homosexuality as a mental disorder. Today, the Massachusetts Psychiatric Society, the American Psychoanalytic Association, and many other psychiatric, psychological, and social science organizations have joined in an amicus brief on behalf of the plaintiffs' cause. A body of experience and evidence has provided the basis for change, and that body continues to mount. The Legislature is the appropriate branch, both constitutionally and practically, to consider and respond to it. It is not enough that we as Justices might be personally of the view that we have learned enough to decide what is best. So long as the question is at all debatable, it must be the Legislature that decides. The marriage statute thus meets the requirements of the rational basis test.

While "[t]he Massachusetts Constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution," this case is not about government intrusions into matters of personal liberty. It is not about the rights of same-sex couples to choose to live together, or to be intimate with each other, or to adopt and raise children together. It is about whether the State must endorse and support their choices by changing the institution of civil marriage to make its benefits, obligations, and responsibilities applicable to them. While the courageous efforts of many have resulted in increased dignity, rights, and respect for gay and lesbian members of our community, the issue presented here is a profound one, deeply rooted in social policy, that must, for now, be the subject of legislative not judicial action.