LEWIS v. HARRIS

188 N.J. 415, 908 A. 2d 196 (Supreme Court of New Jersey, 2006)

Justice **ALBIN** delivered the opinion of the Court.

The statutory and decisional laws of this State protect *individuals* from discrimination based on sexual orientation. When those individuals are gays and lesbians who follow the inclination of their sexual orientation and enter into a committed relationship with someone of the same sex, our laws treat them, as *couples,* differently than heterosexual couples. As committed same-sex partners, they are not permitted to marry or to enjoy the multitude of social and financial benefits and privileges conferred on opposite-sex married couples.

In this case, we must decide whether persons of the same sex have a fundamental right to marry that is encompassed within the concept of liberty guaranteed by Article I, Paragraph 1 of the New Jersey Constitution. Alternatively, we must decide whether Article I, Paragraph 1's equal protection guarantee requires that committed same-sex couples be given on equal terms the legal benefits and privileges awarded to married heterosexual couples and, if so, whether that guarantee also requires that the title of marriage, as opposed to some other term, define the committed same-sex legal relationship.

Only rights that are deeply rooted in the traditions, history, and conscience of the people are deemed to be fundamental. Although we cannot find that a fundamental right to same-sex marriage exists in this State, the unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated under our State Constitution. With this State's legislative and judicial commitment to eradicating sexual orientation discrimination as our backdrop, we now hold that denying rights and benefits to committed same-sex couples that are statutorily given to their heterosexual counterparts violates the equal protection guarantee of Article I, Paragraph 1. To comply with this constitutional mandate, the Legislature must either amend the marriage statutes to include same-sex couples or create a parallel statutory structure, which will provide for, on equal terms, the rights and benefits enjoyed and burdens and obligations borne by married couples. We will not presume that a separate statutory scheme, which uses a title other than marriage, contravenes equal protection principles, so long as the rights and benefits of civil marriage are made equally available to same-sex couples. The name to be given to the statutory scheme that provides full rights and benefits to same-sex couples, whether marriage or some other term, is a matter left to the democratic process.

I.

A.

Plaintiffs are seven same-sex couples who claim that New Jersey's laws, which restrict civil marriage to the union of a man and a woman, violate the liberty and equal protection guarantees of the New Jersey Constitution. Each plaintiff has been in a "permanent committed relationship" for more than ten years and each seeks to marry his or her partner and to enjoy the legal, financial, and social benefits that are afforded by marriage. When the seven couples applied for marriage licenses

in the municipalities in which they live, the appropriate licensing officials told them that the law did not permit same-sex couples to marry. Plaintiffs then filed a complaint in the Superior Court, Law Division, challenging the constitutionality of the State's marriage statutes.

In terms of the value they place on family, career, and community service, plaintiffs lead lives that are remarkably similar to those of opposite-sex couples. Alicia Toby and Saundra Heath, who reside in Newark, have lived together for seventeen years and have children and grandchildren. Alicia is an ordained minister in a church where her pastoral duties include coordinating her church's HIV prevention program. Saundra works as a dispatcher for Federal Express.

Mark Lewis and Dennis Winslow reside in Union City and have been together for fourteen years. They both are pastors in the Episcopal Church. In their ministerial capacities, they have officiated at numerous weddings and signed marriage certificates, though their own relationship cannot be similarly sanctified under New Jersey law. When Dennis's father was suffering from a serious long-term illness, Mark helped care for him in their home as would a devoted son-in-law.

Diane Marini and Marilyn Maneely were committed partners for fourteen years until Marilyn's death in 2005. The couple lived in Haddonfield, where Diane helped raise, as though they were her own, Marilyn's five children from an earlier marriage. Diane's mother considered Marilyn her daughter-in-law and Marilyn's children her grandchildren. The daily routine of their lives mirrored those of "other suburban married couples [their] age." Marilyn was a registered nurse. Diane is a businesswoman who serves on the planning board in Haddonfield, where she is otherwise active in community affairs.

Karen and Marcye Nicholson-McFadden have been committed partners for seventeen years, living together for most of that time in Aberdeen. There, they are raising two young children conceived through artificial insemination, Karen having given birth to their daughter and Marcye to their son. They own an executive search firm where Marcye works full-time and Karen at night and on weekends. Karen otherwise devotes herself to daytime parenting responsibilities. Both are generally active in their community, with Karen serving on the township zoning board.

Suyin and Sarah Lael have resided together in Franklin Park for most of the sixteen years of their familial partnership. Suyin is employed as an administrator for a non-profit corporation, and Sarah is a speech therapist. They live with their nine-year-old adopted daughter and two other children who they are in the process of adopting. They legally changed their surname and that of their daughter to reflect their status as one family. Like many other couples, Suyin and Sarah share holidays with their extended families.

Cindy Meneghin and Maureen Kilian first met in high school and have been in a committed relationship for thirty-two years. They have lived together for twenty-three years in Butler where they are raising a fourteen-year-old son and a twelve-year-old daughter. Through artificial insemination, Cindy conceived their son and Maureen their daughter. Cindy is a director of web services at Montclair State University, and Maureen is a church administrator. They are deeply involved in their children's education, attending after-school activities and PTA meetings. They also play active roles in their church, serving with their children in the soup kitchen to help the needy.

Chris Lodewyks and Craig Hutchison have been in a committed relationship with each other

since their college days thirty-five years ago. They have lived together in Pompton Lakes for the last twenty-three years. Craig works in Summit, where he is an investment asset manager and president of the Summit Downtown Association. He also serves as the vice-chairman of the board of trustees of a YMCA camp for children. Chris, who is retired, helps Craig's elderly mother with daily chores, such as getting to the eye doctor.

The seeming ordinariness of plaintiffs' lives is belied by the social indignities and economic difficulties that they daily face due to the inferior legal standing of their relationships compared to that of married couples. Without the benefits of marriage, some plaintiffs have had to endure the expensive and time-consuming process of cross-adopting each other's children and effectuating legal surname changes. Other plaintiffs have had to contend with economic disadvantages, such as paying excessive health insurance premiums because employers did not have to provide coverage to domestic partners, not having a right to “family leave” time, and suffering adverse inheritance tax consequences.

When some plaintiffs have been hospitalized, medical facilities have denied privileges to their partners customarily extended to family members. For example, when Cindy Meneghin contracted meningitis, the hospital's medical staff at first ignored her pleas to allow her partner Maureen to accompany her to the emergency room. After Marcye Nicholson-McFadden gave birth to a son, a hospital nurse challenged the right of her partner Karen to be present in the newborn nursery to view their child. When Diane Marini received treatment for breast cancer, medical staff withheld information from her partner Marilyn “that would never be withheld from a spouse or even a more distant relative.” Finally, plaintiffs recount the indignities, embarrassment, and anguish that they as well as their children have suffered in attempting to explain their family status.

B.

In a complaint filed in the Superior Court, plaintiffs sought both a declaration that the laws denying same-sex marriage violated the liberty and equal protection guarantees of Article I, Paragraph 1 of the New Jersey Constitution and injunctive relief compelling defendants to grant them marriage licenses....

The complaint detailed a number of statutory benefits and privileges available to opposite-sex couples through New Jersey's civil marriage laws but denied to committed same-sex couples. Additionally, in their affidavits, plaintiffs asserted that the laws prohibiting same-sex couples to marry caused harm to their dignity and social standing, and inflicted psychic injuries on them, their children, and their extended families.

...The trial court entered summary judgment in favor of the State and dismissed the complaint.... A divided three-judge panel of the Appellate Division affirmed....

II.

...Plaintiffs contend that the State's laws barring members of the same sex from marrying their chosen partners violate the New Jersey Constitution. They make no claim that those laws contravene the Federal Constitution. Plaintiffs present a twofold argument. They first assert that same-sex couples have a fundamental right to marry that is protected by the liberty guarantee of

Article I, Paragraph 1 of the State Constitution. They next assert that denying same-sex couples the right to marriage afforded to opposite-sex couples violates the equal protection guarantee of that constitutional provision.

In defending the constitutionality of its marriage laws, the State submits that same-sex marriage has no historical roots in the traditions or collective conscience of the people of New Jersey to give it the ranking of a fundamental right, and that limiting marriage to opposite-sex couples is a rational exercise of social policy by the Legislature. The State concedes that state law and policy do not support the argument that limiting marriage to heterosexual couples is necessary for either procreative purposes or providing the optimal environment for raising children. Indeed, the State not only recognizes the right of gay and lesbian parents to raise their own children, but also places foster children in same-sex parent homes through the Division of Youth and Family Services.

The State rests its case on age-old traditions, beliefs, and laws, which have defined the essential nature of marriage to be the union of a man and a woman. The long-held historical view of marriage, according to the State, provides a sufficient basis to uphold the constitutionality of the marriage statutes. Any change to the bedrock principle that limits marriage to persons of the opposite sex, the State argues, must come from the democratic process.

The legal battle in this case has been waged over one overarching issue-the right to marry. A civil marriage license entitles those wedded to a vast array of economic and social benefits and privileges-the rights of marriage. Plaintiffs have pursued the singular goal of obtaining the right to marry, knowing that, if successful, the rights of marriage automatically follow. We do not have to take that all-or-nothing approach. We perceive plaintiffs' equal protection claim to have two components: whether committed same-sex couples have a constitutional right to the benefits and privileges afforded to married heterosexual couples, and, if so, whether they have the constitutional right to have their “permanent committed relationship” recognized by the name of marriage. After we address plaintiffs' fundamental right argument, we will examine those equal protection issues in turn.

III.

Plaintiffs contend that the right to marry a person of the same sex is a fundamental right secured by the liberty guarantee of Article I, Paragraph 1 of the New Jersey Constitution. Plaintiffs maintain that the liberty interest at stake is “the right of every adult to choose whom to marry without intervention of government.” Plaintiffs do not profess a desire to overthrow all state regulation of marriage, such as the prohibition on polygamy and restrictions based on consanguinity and age. They therefore accept some limitations on “the exercise of personal choice in marriage.” They do claim, however, that the State cannot regulate marriage by defining it as the union between a man and a woman without offending our State Constitution. In assessing their liberty claim, we must determine whether the right of a person to marry someone of the same sex is so deeply rooted in the traditions and collective conscience of our people that it must be deemed fundamental under Article I, Paragraph 1. We thus begin with the text of Article I, Paragraph 1, which provides: “All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.”

The origins of Article I, Paragraph 1 date back to New Jersey's 1844 Constitution. That first paragraph of our Constitution is, in part, "a 'general recognition of those absolute rights of the citizen which were a part of the common law.' " King v. S. Jersey Nat'l Bank, 66 N.J. 161, 178 (1974). In attempting to discern those substantive rights that are fundamental under Article I, Paragraph 1, we have adopted the general standard followed by the United States Supreme Court in construing the Due Process Clause of the Fourteenth Amendment of the Federal Constitution. We "look to 'the traditions and [collective] conscience of our people to determine whether a principle is so rooted [there] ... as to be ranked as fundamental.' " *Ibid.* (quoting Griswold v. Connecticut (1965) (Goldberg, J., concurring).

Under Article I, Paragraph 1, as under the Fourteenth Amendment's substantive due process analysis, determining whether a fundamental right exists involves a two-step inquiry. First, the asserted fundamental liberty interest must be clearly identified. See Washington v. Glucksberg (1997). Second, that liberty interest must be objectively and deeply rooted in the traditions, history, and conscience of the people of this State.

How the right is defined may dictate whether it is deemed fundamental. One such example is *Glucksberg,* a case involving a challenge to Washington's law prohibiting and criminalizing assisted suicide. In that case, the Supreme Court stated that the liberty interest at issue was not the " 'liberty to choose how to die,' " but rather the "right to commit suicide with another's assistance." Having framed the issue that way, the Court concluded that the right to assisted suicide was not deeply rooted in the nation's history and traditions and therefore not a fundamental liberty interest under substantive due process. *Id.*

The right to marriage is recognized as fundamental by both our Federal and State Constitutions. See, e.g., Zablocki v. Redhail (1978); J.B. v. M.B., 170 N.J. 9, 23-24 (2001). That broadly stated right, however, is "subject to reasonable state regulation." Although the fundamental right to marriage extends even to those imprisoned, Turner v. Safley (1987), and those in noncompliance with their child support obligations, *Zablocki,* it does not extend to polygamous, incestuous, and adolescent marriages. In this case, the liberty interest at stake is not some undifferentiated, abstract right to marriage, but rather the right of people of the same sex to marry. Thus, we are concerned only with the question of whether the right to same-sex marriage is deeply rooted in this State's history and its people's collective conscience.[1]

In answering that question, we are not bound by the nation's experience or the precedents of other states, although they may provide guideposts and persuasive authority. Our starting point is the State's marriage laws.

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[1]The dissent posits that we have defined the right too narrowly and that the fundamental right to marry involves nothing less than "the liberty to choose, as a matter of personal autonomy." That expansively stated formulation, however, would eviscerate any logic behind the State's authority to forbid incestuous and polygamous marriages. For example, under the dissent's approach, the State would have no legitimate interest in preventing a sister and brother or father and daughter (assuming child bearing is not involved) from exercising their "personal autonomy" and "liberty to choose" to marry.

Plaintiffs do not dispute that New Jersey's civil marriage statutes, N.J.S.A. 37:1-1 to 37:2-41, which were first enacted in 1912, limit marriage to heterosexual couples. That limitation is clear from the use of gender-specific language in the text of various statutes. More recently, in passing the Domestic Partnership Act to ameliorate some of the economic and social disparities between committed same-sex couples and married heterosexual couples, the Legislature explicitly acknowledged that same-sex couples cannot marry.

Three decades ago, Justice (then Judge) Handler wrote that "[d]espite winds of change," there was almost a universal recognition that "a lawful marriage requires the performance of a ceremonial marriage of two persons of the opposite sex, a male and a female." M.T. v. J.T. (1976). With the exception of Massachusetts, every state's law, explicitly or implicitly, defines marriage to mean the union of a man and a woman.

Although today there is a nationwide public debate raging over whether same-sex marriage should be authorized under the laws or constitutions of the various states, the framers of the 1947 New Jersey Constitution, much less the drafters of our marriage statutes, could not have imagined that the liberty right protected by Article I, Paragraph 1 embraced the right of a person to marry someone of his or her own sex.

Times and attitudes have changed, and there has been a developing understanding that discrimination against gays and lesbians is no longer acceptable in this State, as is evidenced by various laws and judicial decisions prohibiting differential treatment based on sexual orientation. On the federal level, moreover, the United States Supreme Court has struck down laws that have unconstitutionally targeted gays and lesbians for disparate treatment.

In Romer v. Evans (1996), Colorado passed an amendment to its constitution that prohibited all legislative, executive, or judicial action designed to afford homosexuals protection from discrimination based on sexual orientation. The Supreme Court declared that Colorado's constitutional provision violated the Fourteenth Amendment's Equal Protection Clause because it "impos [ed] a broad and undifferentiated disability on a single named group" and appeared to be motivated by an "animus toward" gays and lesbians. The Court concluded that a state could not make "a class of persons a stranger to its laws."

More recently, in Lawrence v. Texas (2003), the Court invalidated on Fourteenth Amendment due process grounds Texas's sodomy statute, which made it a crime for homosexuals "to engage in certain intimate sexual conduct." The Court held that the "liberty" protected by the Due Process Clause prevented Texas from controlling the destiny of homosexuals "by making their private sexual conduct a crime." The *Lawrence* Court, however, pointedly noted that the case did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." In a concurring opinion, Justice O'Connor concluded that the Texas law, as applied to the private, consensual conduct of homosexuals, violated the Equal Protection Clause, but strongly suggested that a state's legitimate interest in "preserving the traditional institution of marriage" would allow for distinguishing between heterosexuals and homosexuals without offending equal protection principles.

Plaintiffs rely on the *Romer* and *Lawrence* cases to argue that they have a fundamental right to marry under the New Jersey Constitution, not that they have such a right under the Federal

Constitution. Although those recent cases openly advance the civil rights of gays and lesbians, they fall far short of establishing a right to same-sex marriage deeply rooted in the traditions, history, and conscience of the people of this State.

Plaintiffs also rely on Loving v. Virginia (1967) to support their claim that the right to same-sex marriage is fundamental. In *Loving,* the United States Supreme Court held that Virginia's antimiscegenation statutes, which prohibited and criminalized interracial marriages, violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Although the Court reaffirmed the fundamental right of marriage, the heart of the case was invidious discrimination based on race, the very evil that motivated passage of the Fourteenth Amendment. The Court stated that "[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." For that reason, the Court concluded that "restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." From the fact-specific background of that case, which dealt with intolerable racial distinctions that patently violated the Fourteenth Amendment, we cannot find support for plaintiffs claim that there is a fundamental right to same-sex marriage under our State Constitution. We add that all of the United States Supreme Court cases cited by plaintiffs, *Loving, Turner,* and *Zablocki,* involved heterosexual couples seeking access to the right to marriage and did not implicate directly the primary question to be answered in this case.

Within the concept of liberty protected by Article I, Paragraph 1 of the New Jersey Constitution are core rights of such overriding value that we consider them to be fundamental. Determining whether a particular claimed right is fundamental is a task that requires both caution and foresight.... In searching for the meaning of "liberty" under Article I, Paragraph 1, we must resist the temptation of seeing in the majesty of that word only a mirror image of our own strongly felt opinions and beliefs. Under the guise of newly found rights, we must be careful not to impose our personal value system on eight-and-one-half million people, thus bypassing the democratic process as the primary means of effecting social change in this State. That being said, this Court will never abandon its responsibility to protect the fundamental rights of all of our citizens, even the most alienated and disfavored, no matter how strong the winds of popular opinion may blow.

Despite the rich diversity of this State, the tolerance and goodness of its people, and the many recent advances made by gays and lesbians toward achieving social acceptance and equality under the law, we cannot find that a right to same-sex marriage is so deeply rooted in the traditions, history, and conscience of the people of this State that it ranks as a fundamental right. When looking for the source of our rights under the New Jersey Constitution, we need not look beyond our borders. Nevertheless, we do take note that no jurisdiction, not even Massachusetts, has declared that there is a fundamental right to same-sex marriage under the federal or its own constitution.[2]

Having decided that there is no fundamental right to same-sex marriage does not end our inquiry. We now must examine whether those laws that deny to committed same-sex couples both the right to and the rights of marriage afforded to heterosexual couples offend the equal protection

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[2]...Goodridge v. Dep't of Pub. Health, 440 Mass. 309 (2003) (stating that it was not necessary to reach fundamental right issue in light of finding that no rational basis existed for denying same-sex couples right to marry under state constitution).

principles of our State Constitution.

IV.

Article I, Paragraph 1 of the New Jersey Constitution sets forth the first principles of our governmental charter-that every person possesses the "unalienable rights" to enjoy life, liberty, and property, and to pursue happiness. Although our State Constitution nowhere expressly states that every person shall be entitled to the equal protection of the laws, we have construed the expansive language of Article I, Paragraph 1 to embrace that fundamental guarantee.

Plaintiffs claim that the State's marriage laws have relegated them to "second-class citizenship" by denying them the "tangible and intangible" benefits available to heterosexual couples through marriage. Depriving same-sex partners access to civil marriage and its benefits, plaintiffs contend, violates Article I, Paragraph 1's equal protection guarantee. We must determine whether the State's marriage laws permissibly distinguish between same-sex and heterosexual couples.

When a statute is challenged on the ground that it does not apply evenhandedly to similarly situated people, our equal protection jurisprudence requires that the legislation, in distinguishing between two classes of people, bear a substantial relationship to a legitimate governmental purpose. The test that we have applied to such equal protection claims involves the weighing of three factors: the nature of the right at stake, the extent to which the challenged statutory scheme restricts that right, and the public need for the statutory restriction. The test is a flexible one, measuring the importance of the right against the need for the governmental restriction.[3] Under that approach, each claim is examined "on a continuum that reflects the nature of the burdened right and the importance of the governmental restriction." Accordingly, "the more personal the right, the greater the public need must be to justify governmental interference with the exercise of that right."Unless the public need justifies statutorily limiting the exercise of a claimed right, the State's action is deemed arbitrary.

A.

In conducting this equal protection analysis, we discern two distinct issues. The first is whether committed same-sex couples have the right to the statutory benefits and privileges conferred on heterosexual married couples. Next, assuming a right to equal benefits and privileges, the issue is whether committed same-sex partners have a constitutional right to define their relationship by the name of marriage, the word that historically has characterized the union of a man and a woman. In addressing plaintiffs' claimed interest in equality of treatment, we begin with a retrospective look at the evolving expansion of rights to gays and lesbians in this State.

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[3]Our state equal protection analysis differs from the more rigid, three-tiered federal equal protection methodology. When a statute is challenged under the Fourteenth Amendment's Equal Protection Clause, one of three tiers of review applies-strict scrutiny, intermediate scrutiny, or rational basis-depending on whether a fundamental right, protected class, or some other protected interest is in question. Clark v. Jeter (1988). All classifications must at a minimum survive rational basis review, the lowest tier. *Ibid.*

Today, in New Jersey, it is just as unlawful to discriminate against individuals on the basis of sexual orientation as it is to discriminate against them on the basis of race, national origin, age, or sex. Over the last three decades, through judicial decisions and comprehensive legislative enactments, this State, step by step, has protected gay and lesbian individuals from discrimination on account of their sexual orientation.

In 1974, a New Jersey court held that the parental visitation rights of a divorced homosexual father could not be denied or restricted based on his sexual orientation. Five years later, the Appellate Division stated that the custodial rights of a mother could not be denied or impaired because she was a lesbian. This State was one of the first in the nation to judicially recognize the right of an individual to adopt a same-sex partner's biological child. *J.M.G.* (recognizing "importance of the emotional benefit of formal recognition of the relationship between [the non-biological mother] and the child" and that there is not one correct family paradigm for creating "supportive, loving environment" for children). Additionally, this Court has acknowledged that a woman can be the "psychological parent" of children born to her former same-sex partner during their committed relationship, entitling the woman to visitation with the children. V.C. v. M.J.B. (2000); see also *id.* (Long, J., concurring) (noting that no one "particular model of family life" has monopoly on " 'family values' " and that "[t]hose qualities of family life on which society places a premium ... are unrelated to the particular form a family takes"). Recently, our Appellate Division held that under New Jersey's change of name statute an individual could assume the surname of a same-sex partner.

Perhaps more significantly, New Jersey's Legislature has been at the forefront of combating sexual orientation discrimination and advancing equality of treatment toward gays and lesbians. In 1992, through an amendment to the Law Against Discrimination (LAD), New Jersey became the fifth state in the nation to prohibit discrimination on the basis of "affectional or sexual orientation." In making sexual orientation a protected category, the Legislature committed New Jersey to the goal of eradicating discrimination against gays and lesbians. In 2004, the Legislature added "domestic partnership status" to the categories protected by the LAD.

The LAD guarantees that gays and lesbians, as well as same-sex domestic partners, will not be subject to discrimination in pursuing employment opportunities, gaining access to public accommodations, obtaining housing and real property, seeking credit and loans from financial institutions, and engaging in business transactions. The LAD declares that access to those opportunities and basic needs of modern life is a civil right....

In 2004, the Legislature passed the Domestic Partnership Act, making available to committed same-sex couples "certain rights and benefits that are accorded to married couples under the laws of New Jersey." With same-sex partners in mind, the Legislature declared that "[t]here are a significant number of individuals in this State who choose to live together in important personal, emotional and economic committed relationships," and that those "mutually supportive relationships should be formally recognized by statute." The Legislature also acknowledged that such relationships "assist the State by their establishment of a private network of support for the financial, physical and emotional health of their participants."...

In passing the Act, the Legislature expressed its clear understanding of the human dimension that propelled it to provide relief to same-sex couples. It emphasized that the need for committed same-sex partners "to have access to these rights and benefits is paramount in view of their essential

relationship to any reasonable conception of basic human dignity and autonomy, and the extent to which they will play an integral role in enabling these persons to enjoy their familial relationships as domestic partners."

Aside from federal decisions such as *Romer,* and *Lawrence,* this State's decisional law and sweeping legislative enactments, which protect gays and lesbians from sexual orientation discrimination in all its virulent forms, provide committed same-sex couples with a strong interest in equality of treatment relative to comparable heterosexual couples.

B.

We next examine the extent to which New Jersey's laws continue to restrict committed same-sex couples from enjoying the full benefits and privileges available through marriage. Although under the Domestic Partnership Act same-sex couples are provided with a number of important rights, they still are denied many benefits and privileges accorded to their similarly situated heterosexual counterparts. Thus, the Act has failed to bridge the inequality gap between committed same-sex couples and married opposite-sex couples. Among the rights afforded to married couples but denied to committed same-sex couples are the right to: (1) a surname change without petitioning the court; (2) ownership of property as tenants by the entirety, which would allow for both automatic transfer of ownership on death, and protection against severance and alienation; (3) survivor benefits under New Jersey's Workers' Compensation Act; (4) back wages owed to a deceased spouse; (5) compensation available to spouses, children, and other relatives of homicide victims under the Criminal Injuries Compensation Act; (6) free tuition at any public institution of higher education for surviving spouses and children of certain members of the New Jersey National Guard; (7) tuition assistance for higher education for spouses and children of volunteer firefighters and first-aid responders; (8) tax deductions for spousal medical expenses; (9) an exemption from the realty transfer fee for transfers between spouses; and (10) the testimonial privilege given to the spouse of an accused in a criminal action.

In addition, same-sex couples certified as domestic partners receive fewer workplace protections than married couples. For example, an employer is not required to provide health insurance coverage for an employee's domestic partner....

The Domestic Partnership Act, notably, does not provide to committed same-sex couples the family law protections available to married couples. The Act provides no comparable presumption of dual parentage to the non-biological parent of a child born to a domestic partner. As a result, domestic partners must rely on costly and time-consuming second-parent adoption procedures. The Act also is silent on critical issues relating to custody, visitation, and partner and child support in the event a domestic partnership terminates. For example, the Act does not place any support obligation on the non-biological partner-parent who does not adopt a child born during a committed relationship. Additionally, there is no statutory mechanism for post-relationship support of a domestic partner. Contrary to the law that applies to divorcing spouses, the Act states that a court shall not be required to equitably distribute property acquired by one or both partners during the domestic partnership on termination of the partnership.

Significantly, the economic and financial inequities that are borne by same-sex domestic partners are borne by their children too. With fewer financial benefits and protections available,

those children are disadvantaged in a way that children in married households are not. Children have the same universal needs and wants, whether they are raised in a same-sex or opposite-sex family, yet under the current system they are treated differently....

Thus, under our current laws, committed same-sex couples and their children are not afforded the benefits and protections available to similar heterosexual households.

C.

We now must assess the public need for denying the full benefits and privileges that flow from marriage to committed same-sex partners. At this point, we do not consider whether committed same-sex couples should be allowed to marry, but only whether those couples are entitled to the same rights and benefits afforded to married heterosexual couples. Cast in that light, the issue is not about the transformation of the traditional definition of marriage, but about the unequal dispensation of benefits and privileges to one of two similarly situated classes of people. We therefore must determine whether there is a public need to deny committed same-sex partners the benefits and privileges available to heterosexual couples.

The State does not argue that limiting marriage to the union of a man and a woman is needed to encourage procreation or to create the optimal living environment for children. Other than sustaining the traditional definition of marriage, which is not implicated in this discussion, the State has not articulated any legitimate public need for depriving same-sex couples of the host of benefits and privileges catalogued in Section IV.B. Perhaps that is because the public policy of this State is to eliminate sexual orientation discrimination and support legally sanctioned domestic partnerships. The Legislature has designated sexual orientation, along with race, national origin, and sex, as a protected category in the Law Against Discrimination. Access to employment, housing, credit, and business opportunities is a civil right possessed by gays and lesbians. Unequal treatment on account of sexual orientation is forbidden by a number of statutes in addition to the Law Against Discrimination.

The Legislature has recognized that the "rights and benefits" provided in the Domestic Partnership Act are directly related "to any reasonable conception of basic human dignity and autonomy." It is difficult to understand how withholding the remaining "rights and benefits" from committed same-sex couples is compatible with a "reasonable conception of basic human dignity and autonomy." There is no rational basis for, on the one hand, giving gays and lesbians full civil rights in their status as individuals, and, on the other, giving them an incomplete set of rights when they follow the inclination of their sexual orientation and enter into committed same-sex relationships.

Disparate treatment of committed same-sex couples, moreover, directly disadvantages their children.... Five of the seven plaintiff couples are raising or have raised children. There is no rational basis for visiting on those children a flawed and unfair scheme directed at their parents. To the extent that families are strengthened by encouraging monogamous relationships, whether heterosexual or homosexual, we cannot discern any public need that would justify the legal disabilities that now afflict same-sex domestic partnerships.

There are more than 16,000 same-sex couples living in committed relationships in towns and

cities across this State. Gays and lesbians work in every profession, business, and trade. They are educators, architects, police officers, fire officials, doctors, lawyers, electricians, and construction workers. They serve on township boards, in civic organizations, and in church groups that minister to the needy. They are mothers and fathers. They are our neighbors, our co-workers, and our friends. In light of the policies reflected in the statutory and decisional laws of this State, we cannot find a legitimate public need for an unequal legal scheme of benefits and privileges that disadvantages committed same-sex couples.

D.

In arguing to uphold the system of disparate treatment that disfavors same-sex couples, the State offers as a justification the interest in uniformity with other states' laws. Unlike other states, however, New Jersey forbids sexual orientation discrimination, and not only allows same-sex couples to adopt children, but also places foster children in their households. Unlike New Jersey, other states have expressed open hostility toward legally recognizing committed same-sex relationships.[4]

Today, only Connecticut and Vermont, through civil union, and Massachusetts, through marriage, extend to committed same-sex couples the full rights and benefits offered to married heterosexual couples. A few jurisdictions, such as New Jersey, offer some but not all of those rights under domestic partnership schemes.

The high courts of Vermont and Massachusetts have found that the denial of the full benefits and protections of marriage to committed same-sex couples violated their respective state constitutions. In Baker v. State (1999), the Vermont Supreme Court held that same-sex couples are entitled "to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples" under the Common Benefits Clause of the Vermont Constitution, "its counterpart [to] the Equal Protection Clause of the Fourteenth Amendment." To remedy the constitutional violation, the Vermont Supreme Court referred the matter to the state legislature. Afterwards, the Vermont Legislature enacted the nation's first civil union law.

In *Goodridge,* the Supreme Judicial Court of Massachusetts declared that Massachusetts, consistent with its own constitution, could not "deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry." Finding that the State's ban on same-sex marriage did "not meet the rational basis test for either due process or equal protection" under the Massachusetts Constitution, the high court redefined civil marriage to allow two persons of the same sex to marry. Massachusetts is the only state in the nation to legally recognize same-sex marriage.[5] In contrast to Vermont and Massachusetts, Connecticut did not act

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[4]A number of states declare that they will not recognize domestic relationships other than the union of a man and a woman, and specifically prohibit any marriage, civil union, domestic partnership, or other state sanctioned arrangement between persons of the same sex.

[5]After rendering its decision, the Massachusetts Supreme Judicial Court issued an opinion advising the state legislature that a proposed bill prohibiting same-sex couples from entering into marriage but allowing them to form civil unions would violate the equal protection and due process requirements of the Massachusetts Constitution and Declaration of Rights. The court later upheld

pursuant to a court decree when it passed a civil union statute.

Vermont, Massachusetts, and Connecticut represent a distinct minority view. Nevertheless, our current laws concerning same-sex couples are more in line with the legal constructs in those states than the majority of other states. In protecting the rights of citizens of this State, we have never slavishly followed the popular trends in other jurisdictions, particularly when the majority approach is incompatible with the unique interests, values, customs, and concerns of our people. See New State Ice Co. v. Liebmann (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). Equality of treatment is a dominant theme of our laws and a central guarantee of our State Constitution, and fitting for a State with so diverse a population. The New Jersey Constitution not only stands apart from other state constitutions, but also "may be a source of 'individual liberties more expansive than those conferred by the Federal Constitution.' " Indeed, we have not hesitated to find that our State Constitution provides our citizens with greater rights to privacy, free speech, and equal protection than those available under the United States Constitution.

Article I, Paragraph 1 protects not just the rights of the majority, but also the rights of the disfavored and the disadvantaged; they too are promised a fair opportunity "of pursuing and obtaining safety and happiness." N.J. Const. art. I, ¶ 1. Ultimately, we have the responsibility of ensuring that every New Jersey citizen receives the full protection of our State Constitution. In light of plaintiffs' strong interest in rights and benefits comparable to those of married couples, the State has failed to show a public need for disparate treatment. We conclude that denying to committed same-sex couples the financial and social benefits and privileges given to their married heterosexual counterparts bears no substantial relationship to a legitimate governmental purpose. We now hold that under the equal protection guarantee of Article I, Paragraph 1 of the New Jersey Constitution, committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples.

V.

The equal protection requirement of Article I, Paragraph 1 leaves the Legislature with two apparent options. The Legislature could simply amend the marriage statutes to include same-sex couples, or it could create a separate statutory structure, such as a civil union, as Connecticut and Vermont have done.

Plaintiffs argue that even equal social and financial benefits would not make them whole unless they are allowed to call their committed relationships by the name of marriage. They maintain that a parallel legal structure, called by a name other than marriage, which provides the social and financial benefits they have sought, would be a separate-but-equal classification that offends Article I, Paragraph 1. From plaintiffs' standpoint, the title of marriage is an intangible right, without which they are consigned to second-class citizenship. Plaintiffs seek not just legal standing, but also social acceptance, which in their view is the last step toward true equality. Conversely, the State asserts that

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the validity of an initiative petition, which if successful would amend the Massachusetts Constitution to define "'marriage only as the union of one man and one woman.'"

it has a substantial interest in preserving the historically and almost universally accepted definition of marriage as the union of a man and a woman. For the State, if the age-old definition of marriage is to be discarded, such change must come from the crucible of the democratic process. The State submits that plaintiffs seek by judicial decree “a fundamental change in the meaning of marriage itself,” when “the power to define marriage rests with the Legislature, the branch of government best equipped to express the judgment of the people on controversial social questions.”

Raised here is the perplexing question-“what's in a name?”-and is a name itself of constitutional magnitude after the State is required to provide full statutory rights and benefits to same-sex couples? We are mindful that in the cultural clash over same-sex marriage, the word marriage itself-independent of the rights and benefits of marriage-has an evocative and important meaning to both parties. Under our equal protection jurisprudence, however, plaintiffs' claimed right to the name of marriage is surely not the same now that equal rights and benefits must be conferred on committed same-sex couples.

We do not know how the Legislature will proceed to remedy the equal protection disparities that currently exist in our statutory scheme. The Legislature is free to break from the historical traditions that have limited the definition of marriage to heterosexual couples or to frame a civil union style structure, as Vermont and Connecticut have done. Whatever path the Legislature takes, our starting point must be to presume the constitutionality of legislation. We will give, as we must, deference to any legislative enactment unless it is unmistakably shown to run afoul of the Constitution. Because this State has no experience with a civil union construct that provides equal rights and benefits to same-sex couples, we will not speculate that identical schemes called by different names would create a distinction that would offend Article I, Paragraph 1. We will not presume that a difference in name alone is of constitutional magnitude.

...If the Legislature creates a separate statutory structure for same-sex couples by a name other than marriage, it probably will state its purpose and reasons for enacting such legislation. To be clear, it is not our role to suggest whether the Legislature should either amend the marriage statutes to include same-sex couples or enact a civil union scheme. Our role here is limited to constitutional adjudication, and therefore we must steer clear of the swift and treacherous currents of social policy when we have no constitutional compass with which to navigate.

Despite the extraordinary remedy crafted in this opinion extending equal rights to same-sex couples, our dissenting colleagues are willing to part ways from traditional principles of judicial restraint to reach a constitutional issue that is not before us. Before the Legislature has been given the opportunity to act, the dissenters are willing to substitute their judicial definition of marriage for the statutory definition, for the definition that has reigned for centuries, for the definition that is accepted in forty-nine states and in the vast majority of countries in the world. Although we do not know whether the Legislature will choose the option of a civil union statute, the dissenters presume in advance that our legislators cannot give any reason to justify retaining the definition of marriage solely for opposite-sex couples. A proper respect for a coordinate branch of government counsels that we defer until it has spoken. Unlike our colleagues who are prepared immediately to overthrow the long established definition of marriage, we believe that our democratically elected representatives should be given a chance to address the issue under the constitutional mandate set forth in this opinion.

We cannot escape the reality that the shared societal meaning of marriage-passed down through the common law into our statutory law-has always been the union of a man and a woman. To alter that meaning would render a profound change in the public consciousness of a social institution of ancient origin. When such change is not compelled by a constitutional imperative, it must come about through civil dialogue and reasoned discourse, and the considered judgment of the people in whom we place ultimate trust in our republican form of government. Whether an issue with such far-reaching social implications as how to define marriage falls within the judicial or the democratic realm, to many, is debatable. Some may think that this Court should settle the matter, insulating it from public discussion and the political process. Nevertheless, a court must discern not only the limits of its own authority, but also when to exercise forbearance, recognizing that the legitimacy of its decisions rests on reason, not power. We will not short-circuit the democratic process from running its course.

New language is developing to describe new social and familial relationships, and in time will find its place in our common vocabulary. Through a better understanding of those new relationships and acceptance forged in the democratic process, rather than by judicial fiat, the proper labels will take hold. However the Legislature may act, same-sex couples will be free to call their relationships by the name they choose and to sanctify their relationships in religious ceremonies in houses of worship.

The institution of marriage reflects society's changing social mores and values. In the last two centuries, that institution has undergone a great transformation, much of it through legislative action. The Legislature broke the grip of the dead hand of the past and repealed the common law decisions that denied a married woman a legal identity separate from that of her husband.[6] Through the passage of statutory laws, the Legislature gave women the freedom to own property, to contract, to incur debt, and to sue.[7] The Legislature has played a major role, along with the courts, in ushering marriage into the modern era.

Our decision today significantly advances the civil rights of gays and lesbians. We have decided that our State Constitution guarantees that every statutory right and benefit conferred to heterosexual couples through civil marriage must be made available to committed same-sex couples. Now the Legislature must determine whether to alter the long accepted definition of marriage. The great engine for social change in this country has always been the democratic process. Although courts can ensure equal treatment, they cannot guarantee social acceptance, which must come through the evolving ethos of a maturing society. Plaintiffs' quest does not end here. Their next appeal must be to their fellow citizens whose voices are heard through their popularly elected representatives.

VI.

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[6]See Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 12 (2000) (explaining that marriage resulted in husband becoming “the one *full* citizen in the household”); Hendrick Hartog, *Man and Wife in America: A History* 99 (2000) (stating that “merger” of wife's identity led to wife's loss of control over property and over her contractual capacity).

[7]See, e.g., L. 1906, c. 248 (May 17, 1906) (affording married women right to sue); L. 1852, c. 171 (Mar. 25, 1852) (providing married women property rights).

To comply with the equal protection guarantee of Article I, Paragraph 1 of the New Jersey Constitution, the State must provide to committed same-sex couples, on equal terms, the full rights and benefits enjoyed by heterosexual married couples. The State can fulfill that constitutional requirement in one of two ways. It can either amend the marriage statutes to include same-sex couples or enact a parallel statutory structure by another name, in which same-sex couples would not only enjoy the rights and benefits, but also bear the burdens and obligations of civil marriage. If the State proceeds with a parallel scheme, it cannot make entry into a same-sex civil union any more difficult than it is for heterosexual couples to enter the state of marriage. It may, however, regulate that scheme similarly to marriage and, for instance, restrict civil unions based on age and consanguinity and prohibit polygamous relationships.

The constitutional relief that we give to plaintiffs cannot be effectuated immediately or by this Court alone. The implementation of this constitutional mandate will require the cooperation of the Legislature. To bring the State into compliance with Article I, Paragraph 1 so that plaintiffs can exercise their full constitutional rights, the Legislature must either amend the marriage statutes or enact an appropriate statutory structure within 180 days of the date of this decision.

For the reasons explained, we affirm in part and modify in part the judgment of the Appellate Division.

Chief Justice **PORITZ**, concurring and dissenting.

I concur with the determination of the majority that "denying rights and benefits to committed same-sex couples that are statutorily given to their heterosexual counterparts violates the equal protection guarantee of Article I, Paragraph 1[,]" of the New Jersey Constitution. I can find no principled basis, however, on which to distinguish those rights and benefits from the right to the title of marriage, and therefore dissent from the majority's opinion insofar as it declines to recognize that right among all of the other rights and benefits that will be available to same-sex couples in the future.

I dissent also from the majority's conclusion that there is no fundamental due process right to same-sex marriage "encompassed within the concept of liberty guaranteed by Article I, Paragraph 1." The majority acknowledges, as it must, that there is a universally accepted fundamental right to marriage "deeply rooted in the traditions, history, and conscience of the people." Yet, by asking whether there is a right to *same-sex* marriage, the Court avoids the more difficult questions of personal dignity and autonomy raised by this case. Under the majority opinion, it appears that persons who exercise their individual liberty interest to choose same-sex partners can be denied the fundamental right to participate in a state-sanctioned civil marriage. I would hold that plaintiffs' due process rights are violated when the State so burdens their liberty interests.

I.

...Plaintiffs have not sought relief in the form provided by the Court-they have asked, simply, to be married. To be sure, they have claimed the specific rights and benefits that are available to all married couples, and in support of their claim, they have explained in some detail how the withholding of those benefits has measurably affected them and their children....

But there is another dimension to the relief plaintiffs' seek. In their presentation to the Court, they speak of the deep and symbolic significance to them of the institution of marriage. They ask to participate, not simply in the tangible benefits that civil marriage provides-although certainly those benefits are of enormous importance-but in the intangible benefits that flow from being civilly married. Chief Justice Marshall, writing for the Massachusetts Supreme Judicial Court, has conveyed some sense of what that means:

> 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*. 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. *Goodridge*.

Plaintiffs are no less eloquent. They have presented their sense of the meaning of marriage in affidavits submitted to the Court... By those individual and personal statements, plaintiffs express a deep yearning for inclusion, for participation, for the right to marry in the deepest sense of that word. When we say that the Legislature cannot deny the tangible benefits of marriage to same-sex couples, but then suggest that "a separate statutory scheme, which uses a title other than marriage," is presumptively constitutional, we demean plaintiffs' claim. What we "name" things matters, language matters.

In her book *Making all the Difference: Inclusion, Exclusion, and American Law* (1990), Martha Minow discusses "labels" and the way they are used: "Human beings use labels to describe and sort their perceptions of the world. The particular labels often chosen in American culture can carry social and moral consequences while burying the choices and responsibility for those consequences....Language and labels play a special role in the perpetuation of prejudice about differences."

We must not underestimate the power of language. Labels set people apart as surely as physical separation on a bus or in school facilities. Labels are used to perpetuate prejudice about differences that, in this case, are embedded in the law. By excluding same-sex couples from civil marriage, the State declares that it is legitimate to differentiate between their commitments and the commitments of heterosexual couples. Ultimately, the message is that what same-sex couples have is not as important or as significant as "real"marriage, that such lesser relationships cannot have the name of marriage.

II.

A.

Beginning with Robinson v. Cahill (1973), this Court has repeatedly rejected a "mechanical" framework for due process and equal protection analyses under Article I, Paragraph 1 of our State Constitution. [W]e "consider the nature of the affected right, the extent to which the governmental

restriction intrudes upon it, and the public need for the restriction." [In so doing] we are able to examine each claim on a continuum that reflects the nature of the burdened right and the importance of the governmental restriction.

The majority begins its discussion, as it should, with the first prong of the test, the nature of the affected right. The inquiry is grounded in substantive due process concerns that include whether the affected right is so basic to the liberty interests found in Article I, Paragraph 1, that it is "fundamental."[8] When we ask the question whether there is a fundamental right to *same-sex* marriage " rooted in the traditions, and collective conscience of our people," we suggest the answer, and it is "no."[9] That is because the liberty interest has been framed "so narrowly as to make inevitable the conclusion that the claimed right could not be fundamental because historically it has been denied to those who now seek to exercise it." Hernandez v. Robles, 7 N.Y.3d 338, 381 (2006) (Kaye, C.J., dissenting from majority decision upholding law limiting marriage to heterosexual couples). When we ask, however, whether there is a fundamental right to marriage rooted in the traditions, history and conscience of our people, there is universal agreement that the answer is "yes." See *Loving*. What same-sex couples seek is admission to that most valuable institution, what they seek is the liberty to choose, as a matter of personal autonomy, to commit to another person, a same-sex person, in a civil marriage. Of course there is no history or tradition including same-sex couples; if there were, there would have been no need to bring this case to the courts. As Judge Collester points out in his dissent below, "[t]he argument is circular: plaintiffs cannot marry because by definition they cannot marry."

I also agree with Judge Collester that *Loving* should have put to rest the notion that fundamental rights can be found only in the historical traditions and conscience of the people. Had the United States Supreme Court followed the traditions of the people of Virginia, the Court would have sustained the law that barred marriage between members of racial minorities and caucasians. The Court nevertheless found that the Lovings, an interracial couple, could not be deprived of "the freedom to marry [that] has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." Most telling, the Court did not frame the issue as a right to interracial marriage but, simply, as a right to marry sought by individuals who had traditionally been denied that right. *Loving* teaches that the fundamental right to marry no more can be limited to same-race couples than it can be limited to those who choose a committed relationship with persons of the opposite sex. By imposing that limitation on same-sex couples, the majority denies

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[8]Professor Laurence Tribe has described in metaphoric terms, the relationship between due process and equal protection analyses. Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name, 117 Harv. L.Rev. 1893, 1897-98. His understanding is especially apt in respect of New Jersey's test. He finds in judges' "conclusions" a "narrative in which due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix ... [representing] a single, unfolding tale of equal liberty and increasingly universal dignity." *Ibid.* This case is a paradigm for the interlocking concepts that support both the due process and the equal protection inquiry.

[9]The majority understands that "[h]ow the right is defined may dictate whether it is deemed fundamental." By claiming that the broad right to marriage is "undifferentiated" and "abstract," and by focusing on the narrow question of the right to same-sex marriage, the Court thereby removes the right from the traditional concept of marriage.

them access to one of our most cherished institutions simply because they are homosexuals....

B.

...Although the State has not made the argument, I note that the Appellate Division, and various amici curiae, have claimed the "promotion of procreation and creating the optimal environment for raising children as justifications for the limitation of marriage to members of the opposite sex." That claim retains little viability today. Recent social science studies inform us that "same-sex couples increasingly form the core of families in which children are conceived, born, and raised." Gregory N. Herek, Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective, 61 Am. Psychol. 607, 611 (2006). It is not surprising, given that data, that the State does not advance a "promotion of procreation" position to support limiting marriage to heterosexuals. Further, "[e]mpirical 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," *id.*, suggesting that the "optimal environment" position is equally weak. Without such arguments, the State is left with the "but that is the way it has always been" circular reasoning.

C.

Perhaps the political branches will right the wrong presented in this case by amending the marriage statutes to recognize fully the fundamental right of same-sex couples to marry. That possibility does not relieve this Court of its responsibility to decide constitutional questions, no matter how difficult. Deference to the Legislature is a cardinal principle of our law except in those cases requiring the Court to claim for the people the values found in our Constitution. Alexander Hamilton, in his essay, *Judges as Guardians of the Constitution, The Federalist No. 78*, (Benjamin Fletcher Wright ed., 1961) spoke of the role of the courts and of judicial independence. He argued that "the courts of justice are ... the bulwarks of a limited Constitution against legislative encroachments" because he believed that the judicial branch was the only branch capable of opposing "oppressions [by the elected branches] of the minor party in the community." *Id.* Our role is to stand as a bulwark of a constitution that limits the power of government to oppress minorities.

The question of access to civil marriage by same-sex couples "is not a matter of social policy but of constitutional interpretation." Opinions of the Justices to the Senate, 440 Mass. 1201 (2004). It is a question for this Court to decide.

III.

In his essay *Three Questions for America,* Professor Ronald Dworkin talks about the alternative of recognizing "a special 'civil union' status" that is not "marriage but nevertheless provides many of the legal and material benefits of marriage." N.Y. Rev. Books, Sept. 21, 2006 at 24, 30. He explains:

> Such a step reduces the discrimination, but falls far short of eliminating it. The institution of marriage is unique: it is a distinct mode of association and commitment with long traditions of historical, social, and personal meaning. It means something slightly different to each couple, no doubt. For some it is primarily a union that

> sanctifies sex, for others a social status, for still others a confirmation of the most profound possible commitment. But each of these meanings depends on associations that have been attached to the institution by centuries of experience. We can no more now create an alternate mode of commitment carrying a parallel intensity of meaning than we can now create a substitute for poetry or for love. The status of marriage is therefore a social resource of irreplaceable value to those to whom it is offered: it enables two people together to create value in their lives that they could not create if that institution had never existed. We know that people of the same sex often love one another with the same passion as people of different sexes do and that they want as much as heterosexuals to have the benefits and experience of the married state. If we allow a heterosexual couple access to that wonderful resource but deny it to a homosexual couple, we make it possible for one pair but not the other to realize what they both believe to be an important value in their lives.

On this day, the majority parses plaintiffs' rights to hold that plaintiffs must have access to the tangible benefits of state-sanctioned heterosexual marriage. I would extend the Court's mandate to require that same-sex couples have access to the "status" of marriage and all that the status of marriage entails.

Justices **LONG** and **ZAZZALI** join in this opinion.