- **Diversity Panel CLE – “The Long Road to Marriage Equality in New Jersey”** (8:30 to 9:20)

1. A Marriage Equality retrospective: Exploring LGBTQ Rights in New Jersey, through the lens of the law by examining Cases and Legislation that gave rise to Marriage Equality. A further examination of where marriage equality stands today (10 years after the Obergefell decision).
2. Moderator: Jeffrey Fiorello, Esq.

- Tom Prol, Esq.

NJ INSTITUTE FOR CONTINUING LEGAL EDUCATION
FAMILY LAW RETREAT 2025

MARRIAGE EQUALITY

& LGBTQ Rights

"Waiting at the Altar: How Marriage Equality Finally Got Hitched to NJ Law"

Thomas Prol, Esq.
Member
1 Riverfront Plaza
Newark, NJ 07102
973 643-5059 | tprol@sillscummis.com

Sills Cummis & Gross P.C.

Copyright 2025 by Thomas Prol

MARRIAGE EQUALITY

- **Thomas Prol, MPH/JD**
  - Member of Sills Cummis & Gross PC
  - NJ State Bar Association President 2016-17
    - Amicus Briefs for Marriage Equality, etc.
    - Argued defense of Anti-bullying Bill of Rights & Criminal Justice Reform legislation
    - Plug for organized bar (mentoring, diversity – NJSBA amicus)
  - Peace Corps Volunteer in Nepal
    - Former Board Member of LGBT Bar of Greater NY
    - National LGBT Bar Vice-chair
  - Garden State Equality
    - Founding (02/04) and Current Executive Committee
  - Seton Hall Univ School of Law / NY Law School
  - ABA Board of Governors, HOD, COREJ, SOGI
  - -No Governmental Authority

Welcome - 2 DE&I Credits

Today, discuss Marriage Equality in context of Obergefell, a 10-year look-back

Obergefell 10 Years Later *Obergefell vs. Hodges established a nationwide right to marriage equality for committed same-sex couples, based partly upon the modernized interpretation of the 14th Amendment's substantive due process requirements. The conversation will consider the role of U.S. v. Windsor and the substantive issues in New Jersey's marriage equality litigations, Lewis v. Harris and Garden State Equality v. Dow. This program will address the status of same-sex marriage ten years after the landmark Obergefell decision. The speakers, including a co-founder of Garden State Equality and the co-author of New Jersey's marriage equality statute (signed into law by Governor Murphy on January 10, 2022), will discuss the current state of the law, what to expect in the coming months and what advice attorneys can give to their clients in light of the recent executive orders signed by the President.*

But wait, there's more….

- Looking back →LGBTQ Rights in NJ
- Walk Through History (18-35 slides)
  - Tiptoe through Statutory and Case Law
  - Language will be shocking, amusing
- Focus on NJ's Marriage Equality fight against backdrop of national/federal fight

“A Few Words About Lawyering”

- **Law is a noble profession**
- **Our roles – guardians of democracy, hold the keys to the courthouse doors for many, give a voice of the voiceless**
- **Sacred trust that people come to us when there is a problem and ask us to fashion a strategy to solve or help avoid it**
  - **Honor that trust by doing your best work**
  - **Understand they may be frustrated /angry**
  - **Develop coping strategies to handle negativity**
    - **Alcohol, drugs, things that distract from being the best you can be**
    - NJLAP.org
    - **You are not alone**

- **LGBTQ History Lesson Through NJ Law**
  - Understand NJ legal history and treatment of LGBTQ people
  - Inspire → harness the power of law to make good trouble/change
  - *NJ Law Journal* Article – 50th Anniversary of Pride (in materials)
    - NY Times article

LGBTQ Civil Rights in NJ – Looking Back

- Those who don't study history…

- Written case law provides poignant snapshots of time gone by, recorded in the language and tradition in which it was decided

- A couple of the cases today will likely shock and disturb you (trigger warning)

- OK to chuckle, but do not ignore the damage & pain they inflicted as lives were ruined
  - *Understand your role and power → sacred trust → keys to the courthouse doors → James Dale example*

LGBTQ Civil Rights in NJ – Looking Back

Backdrop

- Landmark Aug. 17, 2018, Appellate Division published decision in *Moreland v. Park*, 456 N.J. Super. 71 (App. Div. 2018). The unanimous panel remarked on the historical inequality that has impacted LGBTQ residents of the Garden State:

  "The notion of same-sex couples and their children constituting a 'familial relationship' worthy of legal recognition was considered by a significant number of our fellow citizens as socially and morally repugnant and legally absurd. The overwhelming number of our fellow citizens now unequivocally reject this shameful, morally untenable bigotry; our laws, both legislatively and through judicial decisions, now recognize and protect the rights of LGBTQ people to equal dignity and treatment under law." Id. at 83–84.

Sills Cummis & Gross P.C.

LGBTQ Civil Rights in NJ – Looking Back

LGBTQ Civil Rights Retrospective

- Stonewall Rebellion, NYC West Village – June 28, 1969
  - Violent and raucous demonstration, pushing back against a police raid at the Stonewall Inn in Greenwich Village
    - *Judy Garland died 6 days earlier*
  - Considered the start of the modern fight for LGBTQ rights in the United States, but the story began much earlier
  - New Jersey case law tells us of how that community fought back earlier, albeit in less dramatic fashion, through lawyers before our state courts

LGBTQ Civil Rights in NJ – Looking Back

NJ LGBTQ Civil Rights Perspective in Case Law

Begin in 1956 in the heart of Asbury Park at a gay bar, a frequent target of law enforcement in the broader scheme of LGBTQ oppression.

April 6, 1956, and the State Division of Alcoholic Beverage Control ("ABC") commenced a series of inspections of Paddock Bar at 810-812 Cookman Ave

At a May 4, 1956, enforcement proceeding, the ABC charged:

On April 6, 7, 8, 21 and 22, 1956, you allowed, permitted and suffered your licensed place of business to be conducted in such manner as to become a nuisance in that you allowed, permitted and suffered female impersonators and persons who appeared to be homosexuals in and upon your licensed premises; allowed, permitted and suffered such persons to frequent and congregate in large numbers in and upon your licensed premises; and otherwise conducted your place of business in a manner offensive to common decency and public morals."
Paddock Bar v. Div. of Alc. Bev. Contr., 46 N.J. Super. 405, 407 (1957).

Sills Cummis & Gross P.C.

LGBTQ Civil Rights in NJ – Looking Back

NJ LGBTQ Civil Rights Perspective

- Paddock Bar was found in violation and shuttered for 60 days for allowing alleged “homosexuals” to “congregate.”

- They appealed the ruling to the Appellate Division
- Court held that their role was to support the ABC and

  “discourage and prevent not only lewdness, fornication, prostitution, but all forms of licentious practices and immoral indecency on the licensed premises. The primary intent of the regulation is to suppress the Inception of any immoral activity, not to withhold disciplinary action until the actual consummation of the apprehended evil.”

  Id. at 408 citing In re Schneider, 12 N.J. Super. 449 (App. Div. 1951).

Sills Cummis & Gross P.C.

LGBTQ Civil Rights in NJ – Looking Back

NJ LGBTQ Civil Rights Perspective

The appellate judges equated the allegedly gay patrons at Paddock Bar with an "adult vagabond, ex-convict, sexual deviate, or prostitute." Id.

Appeals court found that there was insufficient support in the record to uphold the charged violation, BUT the panel found them in violation anyway because the men at Paddock Bar acted effeminate which, in 1957, was a hallmark of a gay man at a gay bar:

True, in the present proceeding the evidence was not of the probative quality to establish beyond uncertainty that the specified patrons of the tavern were in actuality homosexuals. Neither was there any proof that any of such individuals indulged in any licentious solicitations on the premises … [t]he appellant was charged with the misconduct of permitting persons who conspicuously displayed by speech, tone of voice, bodily movements, gestures, and other mannerisms the common characteristics of homosexuals habitually and in inordinate numbers (on one occasion, as many as 45) to congregate at the tavern, which, incidentally, was advertised to be "the gayest spot in town." Id.

Sills Cummis & Gross P.C.

LGBTQ Civil Rights in NJ – Looking Back

<u>NJ LGBTQ Civil Rights Perspective</u>

- The court specifically remarked on the necessity of a public policy to prevent gay men from socializing in public, finding "it is inimical to the preservation of our social and moral welfare to permit public taverns to be converted into recreational fraternity houses for homosexuals or prostitutes." Id.
- The panel added, "[i]t is the policy and practice of the Division of Alcoholic Beverage Control to nip reasonably apprehended evils while they are in the bud." Id.

Lack of Facts Does Not Matter: The appellate court determined that a "detailed recitation of the informational testimony submitted to the director need not be undertaken." Id. The reason was simple, according to the unanimous panel:

- *If the evidence here failed adequately to prove that the described patrons were in fact homosexuals, it certainly proved that they had the conspicuous guise, demeanor, carriage, and appearance of such personalities. It is often in the plumage that we identify the bird.* 408-409.

LGBTQ Civil Rights in NJ – Looking Back

NJ LGBTQ Civil Rights Perspective

- This 1957 appellate panel felt compelled to actually describe the "plumage" of gay men:

  Illustrative in part is the evidence that these congregated males in a noticeably effeminate pitch of voice addressed each other affectionately as "dearie, honey, doll, and darling." One was overheard to remark, "Well, I think I will wait for my husband." One of the inquisitive investigating agents inquired of the bartender as he ordered a drink, "What are all these guys in here, queers?" The bartender surveyed the customers and replied, 'Most of them are.' They are said to have manipulated their cigarettes, giggled, and rocked and swayed their posteriors in a maidenly fashion. Id. at 409.

Sills Cummis & Gross P.C.

LGBTQ Civil Rights in NJ – Looking Back

NJ LGBTQ Civil Rights Perspective

- A decade later, September 11-12, 1967—2 years before Stonewall riot & 2 months after the July 12-17, 1967, Newark riots

- NJ Supreme Court heard from six lawyers in three consolidated cases involving enforcement of morality laws against three gay bars
  - *One Eleven Liquors in New Brunswick, Val's Bar in Atlantic City, Murphy's Tavern in Newark*

- ABC sought to "discipline[] the appellants for permitting apparent homosexuals to congregate at their licensed premises." One Eleven Liquors, *supra*, 50 N.J. 329, 330 (1967). (Emphasis added.)

- NJ Supreme Court took just shy of two months to issue a unanimous opinion that, for the very first time in state history, allowed "well behaved apparent homosexuals" to congregate in bars. Id. at 341.

LGBTQ Civil Rights in NJ – Looking Back

NJ LGBTQ Civil Rights Perspective

The case focused on the ABC investigator's observation:

> *They were conversing and some of them in a lisping tone of voice, and during certain parts of their conversations they used limp-wrist movements to each other. One man would stick his tongue out at another and they would laugh and they would giggle. They were very, very chummy and close. When they drank their drinks, they extended their pinkies in a very dainty manner. They took short sips from their straws; took them quite a long time to finish their drinks ….They were very, very endearing to one another, very very delicate to each other …. They looked in each other's eyes when they conversed. They spoke in low tones like an effeminate male. When walking, getting up from the stools, they very politely excused each other, hold on to the arm and swish and sway down to the other end of the bar and come back. … [T]heir actions and mannerisms and demeanor appeared to me to be males impersonating females, they appeared to be homosexuals commonly known as queers, fags, fruits and other names.* Id. at 334.

LGBTQ Civil Rights in NJ – Looking Back

NJ LGBTQ Civil Rights Perspective

The 1967 NJ Supreme Court noted:

There was no charge nor any substantial evidence at the hearing before the director that lewd or immoral conduct was permitted at the licensed premises [and] … for the most part the patrons were "normally dressed" and showed "very good behavior.

The High Court turned to the scholarly publications of the day:
[A]lthough such establishments are sometimes condemned as breeding grounds of homosexuality, the charge is not convincing. Most of the people who go there (apart from tourists and some "straight" friends) already are involved in the homosexual life. Anyone who wanders in and who is offended by what he sees is perfectly free to leave. The authors of a recent "view from within" emphasize that although an increase in homosexuality may increase the demand for homosexual bars, the bars can scarcely be said to produce homosexuals. Indeed, as these writers go on to suggest, the bars serve to keep homosexuals "in their place"—out of more public places and, to a certain extent, beyond the public view. Id. at 336.

LGBTQ Civil Rights in NJ – Looking Back

NJ LGBTQ Civil Rights Perspective

[T]hough in our culture homosexuals are indeed unfortunates, their status does not make them criminals or outlaws. So long as their public behavior violates no legal proscriptions they have the undoubted right to congregate in public. And so long as their public behavior conforms with currently acceptable standards of decency and morality, they may, at least in the present context, be viewed as having the equal right to congregate within licensed establishments. Id.

LGBTQ equality began in New Jersey in 1967 with the Supreme Court declaring equal rights for gay men to be drunk together in the same room as it kept them out sight.

The New York Times

Liquor Laws Once Targeted Gay Bars. Now, One State Is Apologizing.

New Jersey's attorney general apologized for decades-old state policies that shuttered bars for allowing gay patrons to congregate.

June 29, 2021

One tavern in Newark was shut down for a month in 1939 after a man "made up with rouge, lipstick, mascara and fingernail polish" asked for a drink in a "very effeminate voice," records show.

In Paterson, N.J., a saloon owner lost her liquor license in 1955 after investigators spotted 15 male couples dancing and sitting with "heads close together, caressing and giggling."

And in 1956 in Asbury Park, which was then, as it is today, a hub of gay life on the Jersey Shore, a bar was cited for serving men who "rocked and swayed their posteriors in a maidenly fashion."

From the end of Prohibition in 1933 through 1967, when a State Supreme Court ruling finally outlawed the practice, New Jersey, like many other states, wielded its liquor laws like bludgeons to shutter gay bars.

Two years ago, to mark the 50th anniversary of the Stonewall uprising, Thomas H. Prol, the first openly gay president of New Jersey's bar association, began researching the practice for a scholarly article. Garden State Equality eventually brought the information to the attorney general's office, which asked its alcoholic beverage division to determine how widespread the practice was.

What the agency found surprised even Mr. Grewal, who said he decided to offer a public apology to "make sure that our actions reflect our values."

MARRIAGE EQUALITY

- **The Journey Starts with the Statute -1/10/22** A5367/S3416 – “Codifies same-sex marriage in the statutes”
  - January 10, 2022, Governor Murphy signed A5367/S3416
  - Marriage equality as a statutory right for committed same-sex couples.
  - Requires that all laws concerning marriage & civil union are to be read with gender neutral intent.
  - Long, strange, trip (History)

Sills Cummis & Gross P.C.

History-How We Got Here

- October 8, 2002 Complaint – Lewis v. Harris
  - 22+ years ago, Lambda Legal, a national LGBTQ legal advocacy organization, joined Larry Lustberg, Jennifer Ching and the strike team at the Gibbons law firm to file *Lewis v. Harris*, 188 N.J. 415 (October 25, 2006), the first of New Jersey's two marriage equality lawsuits.

MARRIAGE EQUALITY

History (continued)

- From the filing of the initial *Lewis* Complaint in 2002 to Judge Jacobson's *Garden State Equality* 2013 ruling to Governor Murphy affixing his seal to the 2022 legislation, the LGBTQ+ community's pursuit of the basic civil right of marriage followed a long, winding trail of political turmoil and legal strategy. On that trek, numerous obstacles and enemies were encountered.
- CURC, 2 SCOTUS Justices now affirmatively attempting to overturn Obergefell and Windsor
- What and Who is Garden State Equality

History - How We Got Here

- Appellate Division (2-1) (Right of Appeal)
- Judge Collester, in dissent, *Lewis v. Harris*, 378 N.J. Super. 168, 206 (App. Div. 2005):
  - "History should be considered a guide, not a harness, to recognition of constitutional rights, and patterns of the past cannot justify contemporary violations of constitutional guarantees. As Justice Holmes famously declared over a century ago, '[i]t is revolting to have no better reason for a rule of law then that so it was laid down in the name of Henry IV. It is more revolting if [its foundation has] vanished long since, and the rule simply persists from blind imitation of the past.[Justice Oliver Wendell Holmes, The Path of the Law, 10 Harv. L.Rev. 457, 469 (1897).]…"
  - "[I]t would be folly to challenge that the common historic and legal conception of marriage is as a heterosexual institution. Moreover, I fully agree with the majority that the idea of marriage between persons of the same sex would have been alien both to those who drafted and those who ratified the New Jersey Constitution of 1947. But so were spaceships, computers and reproductive technology. "

MARRIAGE EQUALITY

***Lewis v. Harris*, 188 N.J. 415 (October 25, 2006)**

-High Court ruled unanimously that same-sex couples are entitled to all of the same rights, privileges and obligations of marriage as different sex couples,

- "unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated under our State Constitution." *Lewis* at 423.

In *Lewis*, the New Jersey Supreme Court held that the state violated the equal protection guarantee of Article I, paragraph 1 of the State Constitution by denying rights and benefits to committed same-sex couples which were statutorily given to their heterosexual counterparts.

MARRIAGE EQUALITY

Lewis (continued)

- The Court split on the remedy, with a slim majority stating that the "State can fulfill that constitutional requirement in **one of two ways**. It can **either [1]** amend the marriage statutes to include same-sex couples or **[2]** 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." *Lewis* at 463. (Emphasis added)

- The New Jersey Legislature chose the latter, to create a parallel statutory structure for the relationships of committed same-sex couples and their families that was to be **separate, but equal.**

- That **separate, but equal*** relationship status, the Civil Unions Act, N.J.S. 37:1-28 et seq., took effect on February 19, 2007.
- **But it actually was not equal on Day 1 – e.g., irreconcilable differences*

Sills Cummis & Gross P.C.

MARRIAGE EQUALITY

After *Lewis*

- Senate Judiciary 12/07/09 https://tinyurl.com/ProlJudiciaryTestimony
- The Act's Civil Unions Review Commission (CURC) was formed, held hearings, took testimony, and issued findings, as discussed below.
  - In December 2008, the 13-member CURC unanimously issued a 79-page report that reflected a raw honestly in the LGBT community they encountered in the CURC hearing
  - They found that civil unions:
    - Are "not clear to the general public"; confer "second-class status" on the couples who form them
    - "[I]nvites and encourages unequal treatment of same-sex couples and their children"
    - they concluded, the legislature's adoption of the Civil Unions Act created "[s]eparate treatment [that] was wrong then and it is just as wrong now."

Sills Cummis & Gross P.C.

After *Lewis*

- As a result of those findings along with the ensuing three years of continuing inequality and discrimination that Civil Unions exacerbated:
  - March 18, 2010, the Lewis plaintiffs approached the Supreme Court on a Motion in Aid of Litigants' Rights.
- Unfortunately, the Court was strained by political turmoil in its co-equal branches of government and did not have a full complement of Justices
- As a result, the Motion failed by a 3-3 tie vote and the plaintiffs were turned away to continue to suffer inequality. CJ, RS, HH

MARRIAGE EQUALITY

- On June 29, 2011, Garden State Equality filed a new litigation seeking equal marriage rights for committed same-sex couples and to remove the label of inferiority affixed to gay and lesbian relationships under Civil Unions.

- June 26, 2013 - *United States v. Windsor*, 570 U.S. 744 (2013) the U.S. Supreme Court ruled that section 3 of the so-called "Defense of Marriage Act" (DOMA) is unconstitutional and that the federal government cannot discriminate against married lesbian and gay couples for the purposes of determining federal benefits and protections

MARRIAGE EQUALITY

- On September 27, 2013, the Honorable Mary C. Jacobson, A.J.S.C., ruled in *Garden State Equality et al. v. Dow, et al.*, 82 A. 3d 336 (N.J. Super. Ct. Law Div. 2013) that, consistent with the United States Supreme Court holding in *United States v. Windsor*, limiting same-sex couples to civil unions violated the rights of same-sex couples to equal protection under the New Jersey Constitution.

- Judge Jacobson held that civil unions were not equivalent to marriage because same-sex couples did not have access to federal benefits available to married couples.
  - The trial court, Appellate Division and Supreme Court each declined the State's request for a stay of the trial court's decision and the ruling took effect on October 21, 2013.

MARRIAGE EQUALITY

- Obergefell v. Hodges, 576 U.S. 644 (2015) - June 26, 2015
- United States Supreme Court ruled that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the Constitution
- The 5–4 ruling requires all 50 states, the District of Columbia, and the Insular Areas to perform and recognize the marriages of same-sex couples on the same terms and conditions as the marriages of opposite-sex couples, with equal rights and responsibilities.

MARRIAGE EQUALITY

Public Law No: 117-228 (12/13/2022)
Respect for Marriage Act

This act provides statutory authority for same-sex and interracial marriages.

- Specifically, the act replaces provisions that define, for purposes of federal law, *marriage* as between a man and a woman and *spouse* as a person of the opposite sex with provisions that recognize any marriage between two individuals that is valid under state law. (The Supreme Court held that the current provisions were unconstitutional in *United States v. Windsor* in 2013.)

- The act also replaces provisions that do not require states to recognize same-sex marriages from other states with provisions that prohibit the denial of full faith and credit or any right or claim relating to out-of-state marriages on the basis of sex, race, ethnicity, or national origin. (The Supreme Court held that state laws barring same-sex marriages were unconstitutional in *Obergefell v. Hodges* in 2015; the Court held that state laws barring interracial marriages were unconstitutional in *Loving v. Virginia* in 1967.) The act allows the Department of Justice to bring a civil action and establishes a private right of action for violations.

MARRIAGE EQUALITY

- Nationally: Do be afraid – Alito & Thomas
- NJ: Don’t be afraid, but be smart
- - In NJ, we are doing okay
  - Statutory protections and legal rights
  - Strong public policy
  - Still, must take steps….

MARRIAGE & CIVIL UNIONS – PROTECTIONS, BUT CONSEQUENCES

Make sure parentage is secured by a judgment signed by a judge. Do not rely on a birth certificate.

Make sure updated planning documents in case of death. Wills are necessary and mandated for anyone whose marital or parental status could be challenged. Of equal if not more importance are beneficiary designation forms.

Other essential documents. Durable business power of attorney, proxy directive for health care and living will. Just because you are married doesn't mean that you have any authority in your spouse's place to act in the time of a health or financial crisis. It can take months for someone to be appointed as guardian of an incapacitated person.

Make sure that name and gender marker are aligned on all of identity documents – most importantly driver's license, Social Security records and passport. If they do not, it is relatively easy in NJ to obtain a judicial name change judgment. With a NJ birth certificate, one can change the gender marker by self-attestation.

LGBTQ Civil Rights in NJ – Looking Back

Useful Definitions & Guidelines in Dealing with LGBTQ Issues

GENDER: Means a person's sex-related or gender-related characteristics, including one's gender identity. For legal purposes, "gender" has the same meaning as "sex".

GENDER IDENTITY: A person's innate, deeply held knowledge of their own gender as a man, a woman, or some other status, which may or may not correspond with their external body or sex assigned at birth (i.e. listed on their birth certificate). All people have a gender identity, not just transgender people.

SEX (or GENDER) Assigned at Birth: Means the sex that someone was thought to be at birth, typically recorded on their original birth certificate. The sex and / or gender someone was assigned at birth may or may not match their gender identity.

GENDER EXPRESSION: The external manifestation of a person's gender identity, which may or may not conform to the socially-defined behaviors and external characteristics that are commonly referred to as either masculine or feminine. These behaviors and characteristics are expressed through movement, dress, grooming, hairstyles, jewelry, mannerisms, physical characteristics, social interactions, and speech patterns (voice).

GENDER NON-CONFORMING: A term for individuals whose gender expression is different from societal expectations and/or stereotypes related to gender. Not all gender non-conforming people identify as transgender.

GENDERQUEER: Terms used by some people who experience their gender identity and/or gender expression as falling outside the categories of man and woman. They may define their gender as falling somewhere in between man and woman, or they may define it as wholly different from these terms. The term may be used by individuals whose gender identity and/or role does not conform to a binary understanding of gender as limited to the categories of man or woman, male or female.

NON-BINARY: People whose gender identity is neither male or female often use the term non-binary to describe themselves. Other terms people

TRANSGENDER WOMAN: A term for a transgender individual who, assigned male at birth, identifies as a woman. This is sometimes shortened to transwoman.

CISGENDER: A term for individuals whose gender id
or behavior conforms with those typically associated wit
gender assigned at birth.

GENDER Confirmation, Gender Affirmation
When an individual begins to live as the sex different fron
at birth that process is referred to as going through the ge
or gender affirmation process. It is also referred to as tran
transitions are individual and may involve different steps
The steps each person takes depends on their individual n
resources. Medical procedures may be part of the ge
process, but are not necessary, for someone to transition.

GENDER DYSPHORIA: A strong and persist
identification and persistent discomfort with one's
inappropriateness in the gender role or sex which
significant distress or impairment in social, occupational,
areas of functioning. Some, but not all, transgender indivi
dysphoria.

Gender Confirming Surgery or Gender Affir
Terms that refer to various surgical procedures that char
align gender identity and presentation. Contrary to popu
not one surgery; in fact, there are many different surgerie

SEXUAL ORIENTATION: A term describing a per
members of the same gender and/or different gender. Sexu
gender identity are different concepts.

GAY: Refers to a person who identifies as a male who is emotionally, spiritually, physically, and/or sexually attracted to people of the same gender. "Gay" is also sometimes used as an umbrella term for people who are emotionally, spiritually, physically, and/or sexually attracted to those of

GENERAL INFORMATION

Best Practices

Whenever possible, ask everyone you encounter which pronouns they use in advance of meeting with them or going on the record or using a particular pronoun. This information could be gathered on a sign-in sheet or when checking in with staff.

If it is not possible, avoid the use of pronouns all together. For example, use the person's title ("Defendant", "Counsel") and their last name if you feel this is necessary to further identify them. Default to the use of "they" as a singular pronoun, such as "Counsel, have you had the opportunity to confer with opposing counsel? They have not checked in with my staff. Plaintiff Smith is present in the courtroom but Attorney Jones is running late."

If someone has specifically asked for the use of a particular pronoun, you should use it when referring to them, even if you think a different pronoun fits them.

If you mistakenly use the wrong pronoun, correct the mistake respectfully and move on quickly.

GARDEN STATE EQUALITY; DANIEL WEISS and JOHN GRANT; MARSHA SHAPIRO and LOUISE WALPIN; MAUREEN KILIAN and CINDY MENEGHIN; SARAH KILIAN-MENEGHIN, a minor, by and through her guardians; ERICA and TEVONDA BRADSHAW; TEVERICO BARACK HAYES BRADSHAW, a minor, by and through his guardians; MARCYE and KAREN NICHOLSON-McFADDEN; KASEY NICHOLSON-McFADDEN, a minor, by and through his guardians; MAYA NICHOLSON-McFADDEN, a minor, by and through her guardians; THOMAS DAVIDSON and KEITH HEIMANN; MARIE HEIMANN DAVIDSON, a minor, by and through her guardians; GRACE HEIMANN DAVIDSON, a minor, by and through her guardians; ELENA and ELIZABETH QUINONES; DESIREE NICOLE RIVERA, a minor, by and through her guardian; JUSTINE PAIGE LISA, a minor, by and through her guardian; PATRICK JAMES ROYLANCE, a minor, by and through his guardian; and ELI QUINONES, a minor, by and through his guardians,

Plaintiffs,

- vs -

PAULA DOW, in her official capacity as Attorney General of New Jersey; JENNIFER VELEZ, in her official capacity as Commissioner of the New Jersey Department of Human Services, and MARY E. O'DOWD, in her official capacity as Commissioner of the New Jersey Department of Health and Senior Services,

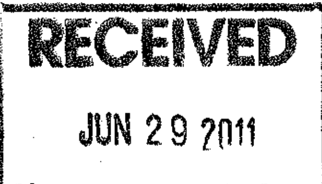
Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MERCER COUNTY

Docket No. ____________

Civil Action

COMPLAINT for Declaratory and Injunctive Relief



INTRODUCTION

1. Plaintiffs, Garden State Equality ("GSE"), which is the state's largest organization

advocating for lesbian, gay, bisexual and transgender ("LGBT") rights; and committed same-sex couples and their minor children Daniel Weiss and John Grant; Marsha Shapiro and Louise Walpin; Maureen Kilian and Cindy Meneghin and their daughter, Sarah Kilian-Meneghin; Erica Bradshaw and Tevonda Hayes Bradshaw and their son Teverico Barack Hayes Bradshaw; Marcye and Karen Nicholson-McFadden and their son, Kasey Nicholson-McFadden, and daughter, Maya Nicholson-McFadden; Thomas Louis Davidson and William Keith Heimann and their daughters Marie Frances Pan Xiao Jai Heimann Davidson and Grace Louise Chen Rong Kai Heimann Davidson; and Elena and Elizabeth Quinones and their children Desiree Nicole Rivera, Justine Paige Lisa, Patrick James Roylance, and Eli Quinones, seek a declaration that their exclusion from the institution of civil marriage violates Article I, Paragraph 1 of the New Jersey Constitution of 1947 and the Fourteenth Amendment to the Constitution of the United States, and that for those couples who are legally married in another jurisdiction, it is unconstitutional for the Defendants to deny recognition of marriages validly entered in other jurisdictions by same-sex couples. Plaintiffs also seek an injunction preventing the Defendants from denying them access to civil marriage, and from maintaining the separate and unequal legal status of "civil union" solely for same-sex couples, and for those same-sex couples who are legally married in another jurisdiction, enjoining the Defendants from denying recognition of those marriages.

2. Today, New Jersey shunts lesbian and gay couples into the novel and inferior status of "civil union," while reserving civil marriage only for heterosexual couples. As the Plaintiffs' experience shows, the relegation of lesbian and gay couples to civil unions, and their exclusion from civil marriage, and thereby from the legal status of "marriage" and "spouse," violates the guarantee of equal protection under Article I, Paragraph 1 of the New Jersey

Constitution of 1947. Specifically, the separate and inherently unequal statutory scheme singles out lesbians and gay men for inferior treatment on the basis of their sexual orientation and sex, and also has a profoundly stigmatizing effect on them, their children, and on other lesbian and gay New Jerseyans. As the Supreme Court of New Jersey made clear, the equal protection guarantee forbids "the unequal dispensation of rights and benefits to committed same-sex partners[.]" *Lewis v. Harris*, 188 *N.J.* 415, 423 (2006). This exclusion also violates the Fourteenth Amendment to the Constitution of the United States.

3. The denial of access to the legal status of "marriage" and "spouse" has caused the Plaintiff couples, couples who are members of GSE, and other same-sex couples and their children concrete harms. Because of the novel legal construct to which they have been consigned, they face a persistent and widespread lack of recognition of their rights in civic and commercial dealings. They are denied workplace benefits and protections equal to those accorded to married couples. They are blocked from seeing their loved ones during medical emergencies. Their exclusion from marriage deprives them of certainty in their legal rights and status, and burdens them and their families with the resulting financial consequences. Their separate status is a badge that requires that they reveal their sexual orientation whether they wish to or not, in situations such as job interviews and jury service, invading their privacy and exposing them to additional discrimination. The segregation of lesbian and gay couples into a novel legal status, like other classifications unrelated to a person's ability to perform or contribute to society, also wrongly enshrines in the law the view that lesbian and gay individuals are not as worthy or deserving as others, causing dignitary and psychic harms. This inequality contravenes the Supreme Court of New Jersey's directive that "the unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated under our State

Constitution." *Lewis v. Harris*, 188 *N.J.* at 423. This treatment also violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

4. Further, the exclusion of lesbian and gay individuals from civil marriage violates the constitutional imperative that in the absence of compelling justification, the government may not infringe the rights of individuals to marry, as protected for "all persons" by the New Jersey Constitution of 1947, Article I, Paragraph 1, and by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. The Plaintiff couples and couples who are members of GSE here seek only the freedom for lesbian and gay individuals to enter into the established, highly venerated institution of civil marriage with the person of their choosing, just as heterosexuals may do. Today, however, same sex couples may attain formal recognition of their family relationships through "civil union" only, a novel and unfamiliar legal construct that lacks the universal legal, economic, historical, and social meaning of civil marriage. This limitation violates the State's due process obligations to Plaintiffs and other same-sex couples.

PARTIES

Plaintiffs

5. Garden State Equality Educational Fund ("GSE") is New Jersey's largest organization advocating for LGBT civil rights. It has more than 82,000 members, both LGBT individuals and their allies. Many members are in a committed, same-sex relationship, and a large number are raising children with a committed, same-sex partner. Numerous members of GSE are in a civil union and would like to marry, but are barred from doing so because New Jersey does not allow same-sex couples to marry. Some have declined to enter a civil union due to their objection to its second-class status, but likewise would marry if they could. Through sponsorship of programs for LGBT-headed families and LGBT youth, and through its educational outreach activities, Plaintiff Garden State Equality has become thoroughly familiar

with the challenges, inequality, and harms facing same-sex couples and their children, as a result of New Jersey denying those couples access to marriage and instead providing them only the novel status of civil union, which places same-sex couples and their children in a second-class status in relation to families where parents are allowed to marry. Furthermore, GSE, through its participation in anti-bullying initiatives in New Jersey and its program of identifying resources for children who require support services to address the negative impact of discrimination against LGBT people, is familiar with the difficulties and stigmatization facing LGBT youth in New Jersey, which are compounded by the state-sponsored discrimination inherent in the relegation of same-sex couples to the separate and unequal status of civil union.

6. Daniel ("Danny") Weiss, 46, and John Grant, 46, reside in Asbury Park, New Jersey. Danny runs a small law firm specializing in immigration law, and John, until a devastating accident, worked as controller of the Michael J. Fox Foundation for Parkinson's Research. They have been together four years, and entered into a civil union on May 17, 2009. In October 2010, John was critically injured when he was struck by a car. Despite their civil union, doctors and hospital staff did not recognize their legal relationship, and did not acknowledge Danny's authority to make decisions for John's critical care. Discussions with doctors and other hospital staff about what a civil union meant, and whether it was "like a Massachusetts marriage," took place as John was suffering a brain hemorrhage, and John's sister was summoned in the middle of the night from Delaware to participate in treatment decisions. After lifesaving surgical procedures, John is on a long road of rehabilitation. Danny has reworked his entire schedule to organize and attend John's appointments with neurologists, neurosurgeons, physiatrists, and other health care professionals and to monitor John's progress and setbacks. The couple traveled to Connecticut to be married in December 2010, as soon as

John was strong enough to make the drive, because they had learned through painful experience that a civil union would not protect them when they were most vulnerable. They wish to be recognized as a married couple in New Jersey, where they work and make their home, which New Jersey law does not now allow because it limits marriage to different-sex couples and demotes marriages from other jurisdictions to civil unions.

7. Marsha Shapiro, 56, and Louise Walpin, 57, reside in South Brunswick, New Jersey. They have been a couple for twenty-two years. Marsha is a social worker, and Louise is a nurse. They have raised four children together, including Marsha's biological son Aaron, who had severe cognitive and physical disabilities and died just before his twenty-first birthday in 2008. In addition to Aaron, they have raised Louise's three biological children, now adults. Marsha and Louise have sought to celebrate and legalize their relationship in every manner afforded them in New Jersey. In 1992, they committed to each other in a ceremony performed by a rabbi. Their ketubah, or Jewish wedding vow and contract, hangs in their home as a daily reminder of their love and commitment. In 2003, they entered a civil union in Vermont. When New Jersey began offering domestic partnership in 2004, Marsha and Louise entered into a domestic partnership. On February 23, 2007, they entered into a civil union in New Jersey. However, for the reasons set forth below, they seek to enter civil marriage in order to realize the full panoply of rights, benefits, status, and recognition that civil marriage affords, and which they are currently denied. Marsha and Louise are eligible to marry in New Jersey but for the fact that they are a same-sex couple; they have not sought to obtain a marriage license in New Jersey, because to do so would be futile in light of New Jersey's prevailing law.

8. Maureen Kilian, 53, and Cindy Meneghin, 53, reside in Butler, New Jersey. They met in high school and have been in a committed relationship for more than thirty-five years.

They have two children, Joshua Kilian-Meneghin, 18, and Sarah Kilian-Meneghin, 16. They are very active in their church, the Episcopal Church of the Redeemer in Morristown, and in their children's school activities. They have long sought legal equality for their relationship and family, first as plaintiffs in *Lewis v. Harris*, and now in this action. They sought to obtain a New Jersey marriage license in 2002, and were refused because they are a same-sex couple. They entered into a civil union on February 24, 2007, and celebrated with a crowd of more than 300 people at their church. However, they have found that their civil union does not protect them in the way that they had hoped. In emergency medical situations both before and after having a civil union, Maureen has been denied access to Cindy, and the ability to direct her treatment. Because they feel vulnerable, and because they do not want the State to continue to send the message to their children that their family is not legitimate, or is less valid than other families, they continue to seek the right to enter civil marriage. Cindy and Maureen are eligible to marry in New Jersey but for the fact that they are a same-sex couple; they have not sought to obtain a marriage license in New Jersey since 2002, because to do so would be futile in light of New Jersey's prevailing law.

9. Sarah Kilian-Meneghin ("Sarah"), a minor child, is represented in this action by and through her guardians, Cindy and Maureen. *R.* 4:26-2(a). She asks that her parents be allowed to marry so that her family no longer carries the confusing, stigmatizing, and inferior label of "civil union," rather than marriage. She faces a loss of dignity and legitimacy, in her own eyes, the eyes of many others, and under law, from her parents' not having the freedom to marry one another. Cindy and Maureen fear that she will internalize the message that she receives from the State that her family is not as worthy as other families, and that she and her brother and parents do not deserve the support and respect other families receive.

10. Tevonda Hayes Bradshaw and Erica Bradshaw, both 36, reside in North Plainfield, New Jersey. They have been in a committed relationship since 2007. Both commute to New York City: Tevonda is a disability analyst at the Office of Temporary and Disability Assistance in New York City, and Erica is a teaching artist with ENACT, a group that helps New York City public school students learn social, emotional and behavioral skills through creative drama and drama therapy techniques. Erica also sells real estate in New Jersey, at Century 21 in Scotch Plains, New Jersey. Tevonda and Erica have an infant son, Teverico Barack Hayes Bradshaw, born April 8, 2011. Aware of and deeply concerned about the disregard for and confusion about civil unions that has negatively affected other lesbian and gay couples in New Jersey, the Bradshaws have expended time, energy, and money to execute multiple additional documents to attempt to protect their relationship. Most recently, on June 17, 2011, they concluded adoption proceedings in court for Erica to adopt Teverico, though he is a child of their civil union and should be regarded as her son. In order to adopt her own child, Erica had to undergo court-related examination of her background, including being fingerprinted, which she found extremely offensive.

11. Teverico ("Teverico"), a minor child, is represented in this action by and through his guardians, Tevonda and Erica, in his claim that his parents be allowed to marry so that his family no longer carries the confusing, stigmatizing and inferior label of "civil union," rather than marriage. *R.* 4:26-2(a). Because the State does not allow Tevonda and Erica to marry, their child does not have the benefit of the rights, obligations, cost savings, and benefits conferred on married parents under New Jersey law, nor of the rights and status conferred on children of married parents by New Jersey law, that help and provide security to other New Jersey children in good times and bad. For example, Tevonda and Erica would have preferred but were unable

to save or invest the money that they paid in adoption-related legal fees and expenses to secure Erica's parent-child relationship with Teverico toward their child's future education instead. Teverico also faces a loss of dignity and legitimacy, in his own eyes, the eyes of many others, and under law, from his parents not having the freedom to marry one another. Tevonda and Erica fear that their son will internalize the message that he receives from their government that his family is not as worthy as other families, and that he and his parents do not deserve the support and respect that other families receive.

12. Karen and Marcye Nicholson-McFadden reside in Aberdeen, New Jersey. They have been in a committed relationship for twenty-one years. Together they run an executive search firm. They have two children, Kasey Nicholson-McFadden, 11, and Maya Nicholson-McFadden, 8, and have supported each other through the ups and downs of life. They have long sought legal equality for their relationship and family, first as plaintiffs in *Lewis v. Harris*, and now in this action. They continue to press for marriage equality, because they want the full rights, benefits, and recognition that other married couples and their families receive. They also do not want to have their children taught that their parents' relationship or their family is of lesser importance than any other family in New Jersey. They sought to obtain a New Jersey marriage license in 2002, and were refused because they are a same-sex couple. They entered a civil union in April, 2007; Karen and Marcye are eligible to marry in New Jersey but for the fact that they are a same-sex couple; they have not sought to obtain a marriage license in New Jersey since 2002, because to do so would be futile in light of New Jersey's prevailing law.

13. Kasey Nicholson-McFadden ("Kasey") and Maya Nicholson-McFadden ("Maya"), minor children, are represented in this action by and through their guardians, Karen and Marcye. *R.* 4:26-2(a). They ask that their parents be allowed to marry so that their family

no longer carries the stigmatizing and inferior label of "civil union," rather than marriage. Kasey and Maya are unperturbed that their parents are lesbians, but are troubled that their parents are unmarried, because the State will not allow it. Maya has raised with her classroom teacher and classmates her concern that her parents are unable to marry. Because the State does not allow Karen and Marcye to marry, their children do not have the benefit of all of the rights, obligations, cost savings, and benefits conferred on married parents under New Jersey law, nor of the rights and status conferred on children of married parents by New Jersey law, that help and provide security to other New Jersey children in good times and bad. Kasey and Maya face a loss of dignity and legitimacy, and their parents worry that their children will internalize the State's message that their family is not as worthy or deserving as others.

14. Thomas Louis Davidson ("Tom"), 49, and William Keith Heimann ("Keith"), 53, reside in Shrewsbury, New Jersey. They have together adopted two daughters, Grace Louise Chen Rong Kai Heimann Davidson, age 8, and Marie Frances Pan Xiao Jai Heimann Davidson, age 11. Tom and Keith will celebrate their twenty-fifth anniversary as a couple in January 2012. They were married on July 31, 2008 in California, and entered a civil union in New Jersey on February 23, 2007. The family is very active in their church, the Methodist Church of Red Bank, where Keith has taught Sunday school. Tom recently lost his job as a visual designer of merchandise displays at Food Emporium, when his employer downsized. Keith, who has taught at Brookdale Community College since 2001, has for ten years maintained Tom and their children on his health insurance policy. During a recent statewide audit in New Jersey, the state contractor questioned whether they had adequate documentation of their relationship, and cancelled health care coverage for Tom and the children. It took months to reinstate the policy, because the insurance auditor did not recognize "civil union" as a legally valid relationship.

Keith and Tom want to have the status of being married under New Jersey law because marriage has a universally understood meaning, and one that reflects their family structure.

15. Grace Heimann Davidson ("Grace") and Marie Heimann Davidson ("Marie"), minor children, are represented in this action by and through their guardians, Tom and Keith. *R.* 4:26-2(a). The girls greatly dislike having to repeatedly offer lengthy explanations of civil unions to other children who are curious about their family. They ask that their parents be allowed to marry so that their family no longer carries the confusing, stigmatizing, and inferior label of "civil union," rather than marriage. Because the State does not recognize Keith and Tom as married, their children do not have the benefit of the rights, obligations, cost savings, and benefits conferred on married parents under New Jersey law, that help and provide security to other New Jersey children in good times and bad. The children's loss of health care coverage last summer illustrates one of the concrete effects of their status, resulting from the fact that they are the children of a civil union instead of a marriage. The children also face a loss of dignity and legitimacy, in their own eyes, the eyes of many others, and under law, from their parents not having the freedom to marry one another.

16. Elena and Elizabeth ("Liz") Quinones reside in Phillipsburg, New Jersey. Elena works at a bank in Hoboken, and Liz is a security sergeant at Farleigh Dickinson University. They have been together nine years and sought legal recognition of their committed and loving relationship by entering a civil union in February 2007, as soon as they could set the date to celebrate. Elena and Liz have a two-year-old son, Eli, and also raise Elena's three children: Desiree Nicole Rivera, 17 ("Desiree"); Justine Paige Lisa, 15 ("Justine); and Patrick James Roylance, 12 ("Patrick"). Elena and Liz were initially optimistic that entering a civil union would provide them the same rights and benefits as marriage, and celebrated their civil union

with a ceremony and gala reception for friends and family, including Elena's stepfather, who checked himself out of the hospital for the day to celebrate with the couple. But Elena and Liz have found that the construct of "civil union" fails to offer them the same protection as marriage would. Elena and Liz are eligible to marry in New Jersey but for the fact that they are a same-sex couple; they have not sought to obtain a marriage license in New Jersey, because to do so would be futile in light of New Jersey's prevailing law.

17. Justine, Desiree, Patrick, and Eli, all minor children, are represented in this action by and through their guardians, Elena and Liz Quinones. *R.* 4:26-2(a). They ask that their parents be allowed to marry, so that their family no longer carries the confusing, stigmatizing and inferior label of "civil union," rather than marriage. Because the State does not allow Elena and Liz to marry, their children do not have the benefit of the rights, obligations, cost savings and protections conferred on married parents under New Jersey law, nor of the rights and status conferred on married parents and their children by New Jersey law that help and provide security to other New Jersey children in good times and bad. Justine, Desiree, Patrick, and Eli are harmed by the ill-understood civil union status of their parents, which causes their parents to incur additional expenses to protect familial relationships, beyond those that are needed by families headed by married couples. For example, they paid additional adoption-related legal fees and expenses to secure Liz's parent-child relationship with Eli, and could not save or invest that money toward their children's future education. The children also face a loss of dignity and legitimacy, in their own eyes, the eyes of many others, and under the law, as a result of their parents not having the freedom to marry one another. To avoid the unequal status and confusion engendered by the label "civil union," the children often use the term "marriage" with regard to Elena and Liz, but doing so is uncomfortable, because their children are painfully aware that in

reality Elena and Liz are barred from legal marriage by the State. Elena and Liz fear that their children will internalize the message that they receive from their government that their family is not as worthy as other families, and that they and their parents do not deserve the support for their relationships to each other that other children and their parents receive.

Defendants

18. Defendant Paula T. Dow, as the Attorney General of the State of New Jersey, is the chief law enforcement officer of the State. In this constitutional role, *see N.J. Const.* Art. V,§ IV, ¶ 3, she is responsible for enforcing the laws that exclude Plaintiff couples, couples who are members of GSE, and other same-sex couples from civil marriage.

19. The Legislature has delegated to Defendant Jennifer Velez, as the Commissioner of the New Jersey Department of Human Services, the power to adopt rules and regulations necessary to effectuate the marriage statutes, *N.J.S.A.* 37:1-12.3, and as such she is responsible for maintaining the exclusion of same-sex couples from civil marriage.

20. The Legislature has delegated to Defendant Mary E. O'Dowd, as the Commissioner of the New Jersey Department of Health and Senior Services, the power, pursuant to *N.J.S.A.* 37:1-29 and 37:1-35, to adopt rules and regulations necessary to implement the Civil Union Act, including those addressing "the issue of how partners in a civil union couple may legally answer questions on forms, governmental and private, concerning their status as partners in a civil union couple." *N.J.S.A.* 37:1-35. Also as Commissioner of the Department of Health and Senior Services, Commissioner O'Dowd oversees the New Jersey Registrar of Vital Statistics, which maintains records of marriages and civil unions in the state, and provides the forms for marriage and civil union licenses, *N.J.S.A.* 37:1-8. In these capacities, she is responsible for maintaining the separate legal construct of "civil union" for committed same-sex couples.

VENUE

21. Venue is proper in Mercer County because the cause of action arises there, where Defendants enforce the Civil Union Act and deny Plaintiffs the right to enter civil marriage. *R.* 4:3-2(a)(2). This action is properly brought in the Law Division because the relief sought herein is primarily legal. *R.* 4:3-1(a)(4).

STATEMENT OF FACTS

22. Civil marriage provides tangible and intangible benefits to its participants and their families in legal, economic, cultural, historical, emotional, psychological, and social dimensions.

23. New Jersey permits only different-sex couples to enter into civil marriage. As noted by the Supreme Court in *Lewis v. Harris*, the civil marriage statutes, *N.J.S.A.* 37:1-1 to 37:2-41, limit marriage to heterosexual couples. 188 *N.J.* at 436-37. According to information on a website maintained by the Department of Health and Senior Services, Vital Statistics and Registry, in order for two people to establish a marriage in the State, it "shall be necessary that they . . . [b]e of the opposite sex[.]"

24. Individuals in committed same-sex relationships may attain legal recognition of their relationship only through "civil union." This legal status was created by the Civil Union Act, *N.J.S.A.* 37:1-28, *et seq.*, enacted on December 21, 2006, and effective February 19, 2007. *L.* 2006 *c.* 103. By its terms, the Civil Union Act applies only to same-sex couples. *N.J.S.A.* 37:1-29. Different-sex couples may not enter into a civil union.

25. Civil unions were introduced in New Jersey as a result of the decision of the Supreme Court of New Jersey in *Lewis v. Harris*, 188 *N.J.* 415 (2006), which required, as a matter of State constitutional law, that the benefits and obligations of marriage be made available on equal terms to same- and different-sex couples. 188 *N.J.* at 423. *See N.J.S.A.* 37:1-28(e)

(Civil Union Act adopted purportedly in order "to comply with the constitutional mandate set forth" in *Lewis*).

26. Rather than allowing same-sex couples access to the longstanding, venerated institution of civil marriage, the Legislature chose instead to relegate same-sex couples to a separate legal category — that of "civil union" — for the purpose of distributing rights and benefits purportedly equal to those available to couples in civil marriage. *See L.* 2006 *c.* 103 (enacted Dec. 21, 2006 and effective Feb. 19, 2007), *codified at N.J.S.A.* 37:1-28 *et seq.*

27. In recognition of the possibility that civil unions might fail to provide equality, as required by the Constitution and as recognized by *Lewis*, the Legislature, in the same Act, also created the Civil Union Review Commission, *see N.J.S.A.* 37:1-36, which it charged with studying the effectiveness of civil unions, *N.J.S.A.* 37:1-36(c)(1) and (3), and of providing "civil unions rather than marriage" to same-sex couples, *N.J.S.A.* 37:1-36(c)(5) and (6). The Legislature asked the Commission to report its findings, *N.J.S.A.* 37:1-36(g), which it did provisionally on February 19, 2008, *see* N.J. Civ. Union Rev. Comm., *First Interim Report*, and finally on December 10, 2008, *see* N.J. Civ. Union Rev. Comm., *Final Report*. The Commission unanimously found that "the separate categorization established by the Civil Union Act invites and encourages unequal treatment[,]" resulting in a lack of equality for same-sex couples and their children in multiple facets of civic and social dealings, such that "the provisioning of the rights of marriage through the separate status of civil unions perpetuates the unequal treatment of committed same-sex couples."

28. Three years after passage of the Civil Union Act, and with the benefit of the findings of the Civil Union Review Commission, the Legislature considered a bill that would have made civil marriage available to all consenting and otherwise qualified couples, regardless

of sexual orientation. The text of this bill, known in the Senate as S. 1967, The Freedom of Religion and Equality in Civil Marriage Act, recognized that "[a]lthough same-sex couples may enter into civil unions, nonetheless New Jersey's discriminatory exclusion of these couples from marriage further harms same-sex couples and their families by denying them unique public recognition and affirmation." This bill was approved by the Senate Judiciary Committee on December 7, 2009, but defeated by the full Senate on January 7, 2010.

29. Although the Civil Union Act purported to provide same-sex couples "all the rights and benefits that married heterosexual couples enjoy," *N.J.S.A.* 37:1-28(d), in practice this novel legal category is an inferior legal status, and one that stigmatizes its participants. Plaintiffs are harmed by the exclusion from civil marriage in many ways, as set forth below.

Unequal Treatment and Lack of Recognition in Public Accommodations and Civic Life

30. The Plaintiffs are harmed because the novel legal status of "civil union" to which they are relegated is largely unknown, unfamiliar, and not recognized, both in New Jersey and outside the State. This means that in daily transactions from the mundane to the momentous, same-sex couples and their children experience a lack of recognition of their legal status, which results in a denial of civil rights in a variety of public accommodations and facets of civic life.

31. The Plaintiff couples, couples who are members of GSE, and other same-sex couples have been denied access to their family members by medical providers in a variety of contexts, from life-threatening emergency situations to routine medical visits, by both public and private health care providers. Specifically, the Plaintiff couples, couples who are members of GSE, and other same-sex couples have found that many nurses, doctors, and other health care workers and staff are unfamiliar with the term "civil union" or "civil union partner." Hospital forms, including computerized programs utilized during hospital intake procedures, do not

provide for such a designation, and recognize instead only "spouse." The Plaintiff couples, couples who are members of GSE, and other same-sex couples have found that their relationships have been described as "other," "friend," "roommate," or "unknown" — designations that are inaccurate, diminishing, and accord no legal status, access, or decision-making authority in medical settings.

a. For example, in October 2010, John Grant was struck by a car in New York City. His skull shattered, he was rushed to a local hospital. Police called the last number listed in his cell phone and reached his civil union partner, Danny Weiss, who rushed to his side. Despite their civil union, doctors and hospital staff did not recognize their legal relationship. Desperate to demonstrate their connection when the civil union failed, Danny at one point tried to show hospital personnel that he and John were wearing matching rings. Discussions with doctors and other hospital staff about what a civil union meant, and whether it was "like a Massachusetts marriage," took place as John was suffering a brain hemorrhage. Confused about Danny's authority to make medical decisions, hospital staff had John's sister summoned in the middle of the night from Delaware to participate in treatment decisions.

b. When Tevonda Bradshaw went into labor this April, she and her civil union partner Erica Bradshawn went to the hospital, and Tevonda forgot to bring her wallet containing her identification. While Tevonda was in labor, hospital staff sent Erica home to retrieve the wallet so Tevonda could sign their infant out of the hospital afterwards; though Erica had her own identification with her, and the couple had pre-registered as parents at the hospital, Erica was not recognized as Teverico's parent, as a married spouse would have been.

c. On February 8, 2011, Marsha Shapiro brought her civil union partner, Louise Walpin, to the emergency room at Princeton Medical Center, because Louise was experiencing gastrointestinal pain. The hospital registrar did not recognize the term "civil union partner," and insisted on listing Louise as "single," leaving them with no legally recognized relationship for purposes of allowing Marsha to make medical decisions on Louise's behalf. Louise, who works as a nurse at Children's Specialized Hospital, is familiar with the widely-used medical record-keeping system "Meditech." This computerized system has no way of registering "civil union partner."

d. Prior to having a civil union, Cindy Meneghin experienced a medical emergency when she came down with meningitis. In the emergency room, her partner, Maureen Kilian, was denied access until she was ultimately able to assert that she had a valid advance directive for Cindy. Their relationship was no more recognized after their civil union, when Cindy again had to go to the emergency room with suspected appendicitis. Cindy told a nurse there that her civil union partner, Maureen, would soon be arriving, but the nurse did not know what a civil union partner was, and kept insisting that "it's not a marriage," and that therefore Maureen did not have any rights of access or voice in Cindy's treatment.

32. Because of the way in which their relationships are labeled differently by the State, the Plaintiff couples, couples who are members of GSE, and other same-sex couples must disclose their sexual orientation in their civic dealings, in a manner that is discriminatory, unfair and violates their privacy. This forced disclosure impinges on the couples' activities in the public sphere, including in the quintessential civic duty of jury service. Prospective jurors are routinely asked their marital status. Because civil union partners cannot truthfully respond that

they are single or married or describe their same-sex partners as legal "spouses," their answers to these questions, which require that they attempt to educate the judge, court staff, and all jurors present about civil union, revealing their sexual orientation. For example, in 2010 Plaintiff Louise Walpin was called to jury service at the Middlesex County Courthouse. In court, in front of court staff and other jurors, the judge asked questions about her marital status. Answering truthfully, that she lived with her "civil union partner," exposed her sexual orientation to everyone in the room. Had she been able to answer that she was married and lived with her "spouse," she would not have been in that position, and nor would she have to wonder whether discrimination based on her sexual orientation was a factor in her dismissal from jury service that day.

33. The Plaintiff couples, couples who are members of GSE, and other same-sex couples have experienced confusion about and disregard for their civil union status when seeking government and private-sector services that require they accurately fill out required forms, as the forms fail to acknowledge "civil union" as a family or legal structure. These experiences occur frequently, in a wide variety of contexts including at their children's schools, in medical offices they visit for routine appointments, and with an array of other service providers. In other aspects of public life, the Plaintiff couples, couples who are members of GSE, and other same-sex couples and their children are burdened by a need to explain and justify their legal relationship, as a direct consequence of their exclusion from civil marriage and segregation into the category of "civil union."

a. For example, Marsha Shapiro and Louise Walpin's extreme sorrow at the time of their son Aaron's death in 2008 was increased because the funeral home with which they were dealing did not recognize the term "civil union." While picking out a

casket for Aaron, and arranging for official forms to accompany his burial, the funeral home insisted that Marsha produce documentation of her relationship to Louise, even though she had already stated that they had a civil union.

b. Marcye Nicholson-McFadden recently dealt with her car insurance carrier, who questioned her about whether she was married, and when Marcye explained her civil union status, informed Marcye that she should just be able to state that she was married, and that the civil union designation was "silly."

c. Last month Karen Nicholson-McFadden went to a new dentist, and again she created her own box for "civil union" on a form that did not contain the option. The staff person to whom she gave the form suggested altering her response to say "married," so that it would be recognized by the health insurance system.

34. When they travel, the Plaintiff couples, couples who are members of GSE, and other same-sex couples and their children are harmed by the denial of access to civil marriage. "Civil union," which currently exists in only one other state, is not a well-understood term with a fixed meaning, as is marriage. Therefore, when traveling outside of New Jersey, the Plaintiff couples, couples who are members of GSE, and other same-sex couples and their children are again unable to convey the nature of their relationship and unable to access the set of rights and privileges that marriage provides. Even when traveling in states that do recognize marriages of same-sex couples, the relationships of Plaintiff couples, couples who are members of GSE, and other New Jersey same-sex couples and their children are regarded as less than equal.

35. Furthermore, many states, including regional neighbors such as Maryland, New York (which next month will allow same-sex couples to marry), and Rhode Island, recognize marriages of same-sex couples validly performed in other jurisdictions. But civil-union partners

have had to litigate in order to have their status recognized, and in many areas and jurisdictions, civil union recognition remains an open question. Thus, in many jurisdictions civil union status denies these couples and their children the same basis to claim rights and responsibilities that is given to married couples and their children in jurisdictions that currently respect the marriages of same-sex couples, because "civil union," as the Civil Union Act makes clear, is not the same as "marriage," and thus has no cognate in the laws of those states.

Unequal Workplace Benefits and Protections

36. The Plaintiff couples, couples who are members of GSE, and other same-sex couples and their children are denied workplace benefits equivalent to those afforded married spouses, because of the novel nomenclature that New Jersey has created to define their legal relationships. Although under *N.J.S.A.* 37:1-32(e), insurance carriers covered by state law are supposed to provide equal benefits to civil union partners and spouses, in practice this frequently does not occur. Civil union partners and their children are not automatically covered by employee benefit plans or collectively bargained agreements that provide benefits for, or extend coverage to, the married spouse of an employee. In many instances, this difference means that same-sex couples are denied the same level of benefits provided to married spouses, or are forced to pay more money to attain the same benefits afforded others.

37. In other jurisdictions, such as Connecticut, the District of Columbia, Iowa, Massachusetts, New Hampshire, and Vermont, where same-sex couples may enter civil marriage, employers commonly extend benefits to same-sex spouses on the same terms as to other married spouses, even if current federal law would allow them to discriminate. However, in New Jersey, where same-sex couples are designated by a separate term and are never recognized as married (because even if they have married in another jurisdiction, New Jersey

demotes their valid marriages and recognizes them only as civil unions), they are not viewed as "spouses," and employers therefore often deny benefits to civil union partners. Often, the Plaintiff couples, couples who are members of GSE, and other civil-unioned same-sex couples are forced to curtail their employment options or incur additional expenses to provide health insurance for their partners and children, because they lack the legal status of married spouses — even if married elsewhere. For example, Plaintiff Louise Walpin provides health insurance for her family because her partner, Marsha Shapiro, is self-employed. Their family's need for health insurance has historically been high, as their deceased son Aaron had profound special needs, and another son required special schooling and care. The family's expenses associated with their children's care have been so high that Marsha and Louise had to take out second and third mortgages on their home. Louise has had to limit her employment to jobs that offer benefits to civil union partners. In November 2009, the human resources department at her current nursing job, which she loves, notified her that, because of financial circumstances, the company was reevaluating whether it would continue to offer benefits to civil union partners of employees. The same consideration was not given to eliminating spousal benefits. The employer subsequently advised that benefits for Marsha would continue, but for one year only. Another one-year extension for civil union partner coverage was issued in 2011, with the express caveat that the commitment again is only for the current year. Such uncertainty, and the great anxiety and worry that it creates for the couple, would not exist if they could marry.

Lack of Family Law Protection

38. A critical aspect of marriage is the protection it affords families and spouses in the event of separation or divorce. Obviously the Plaintiff couples seek to marry, not divorce, but it is the case that family law protections available to same-sex couples seeking to divorce in New

Jersey are unequal with respect to access to the courts if, as could occur for some same-sex as well as different-sex couples, the relationship becomes troubled. Significantly, the statute providing for dissolution of marriage upon the grounds of "irreconcilable differences" does not clearly apply to civil union. This ground for divorce absolves either party of the need to allege bad faith or specific acts on the part of the other party, and as a result makes divorce proceedings significantly less litigious, and therefore less expensive. Although the Civil Union Act provided that "[t]he laws of domestic relations, including . . . divorce . . . shall apply to civil union couples[,]" *N.J.S.A.* 37:1-31(c), the later-enacted statute creating no-fault divorce did not mention civil unions. *See L.* 2007 *c.* 6. Family Part judges remain confused about the applicability of this provision to civil union dissolution, as do family law practitioners. At the very least, it is a question that must be answered in each and every civil union dissolution proceeding, at the litigants' expense.

39. Furthermore, same-sex couples who have been married in other jurisdictions face uncertainty in the event of dissolution. The State has opposed the ability of such couples to receive a divorce, as opposed to a dissolution, leaving these couples and third parties uncertain as to whether their marriage remains in effect in other jurisdictions. The current Family Part Case Information Statement which must accompany every filing in the Superior Court, Family Part, including a dissolution of civil union, uses the nomenclature of "marriage," asking litigants to report "date of marriage." It does not mention "civil union."

40. The legal status of out-of-state marriages of same-sex couples is characterized by uncertainty in other respects as well. Although the Attorney General issued an opinion that such marriages should be recognized as civil unions for purposes of New Jersey law, the State also created the process of "reaffirmation," whereby same-sex couples may formally apply to have

their out-of-state marriages recognized as civil unions. Marriages between different-sex people do not require any such formal conversion, as they are automatically granted recognition. The existence of the "reaffirmation" process both indicates the level of confusion about what civil unions are and creates confusion about the status of valid marriages of same-sex couples entered into in other jurisdictions. This confusion arises because of the State-created civil union status to which same-sex couples in New Jersey have been consigned.

Disparate and Unfair Financial Burdens

41. Because they are denied access to civil marriage and its universally recognized meaning, the Plaintiff couples, couples who are members of GSE, and other same-sex couples incur additional costs to ensure that their property rights, family relationships, and tax obligations are properly understood, enforceable, and protected in light of their separate categorization. Access to civil marriage would reduce or obviate the need for specialized legal services for same-sex couples.

42. Many of the Plaintiff couples, couples who are members of GSE, and other same-sex couples have executed health-care proxies, in the event that their civil unions are not recognized in a medical emergency. For example, Danny Weiss carries copies of such documents on paper and on a keychain flash drive everywhere he goes, and Liz Quinones carries a binder of family documents in her car.

43. Several of the Plaintiff couples, as well as many couples who are members of GSE, and other same-sex couples have pursued and paid for court proceedings to adopt their own children, because they are deeply concerned that the presumption of parenthood will not be applied to them, as members of a civil union.

44. Many of the Plaintiff couples, couples who are members of GSE, and other same-

sex couples experience complications and confusion when filing their taxes, because tax professionals often do not understand "civil union." Elena and Liz Quinones, for example, had trouble getting their taxes handled properly at the New Jersey office of a national chain of tax professionals unfamiliar with civil union.

45. Relegating same-sex couples to civil unions hinders their ability to seek marriage-based benefits when Section 3 of the Defense of Marriage Act, 1 *U.S.C.* § 7 ("DOMA") is no longer operative. The United States Government Accountability Office has catalogued 1,138 federal statutory provisions that distinguish between married and unmarried individuals and couples. In several states that allow same-sex couples to marry, those couples are challenging the denial of marriage-related federal benefits such as Social Security benefits, pension rights, taxation exemptions (and, conversely, penalties), educational loans, and inheritance rights. Indeed, the President and the Department of Justice have concluded that Section 3 of DOMA is unconstitutional and are refusing to defend it in court, *see* Letter from Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html (last accessed June 28, 2011); several federal courts have held DOMA to be unconstitutional and enjoined its enforcement, *see Gill v. Office of Pers. Mgmt.*, 699 *F.Supp.*2d 374 (D. Mass. 2010); *Massachusetts v. Dep't of Health & Human Servs.*, 689 *F. Supp.*2d 234 (D. Mass. 2010); *In re Balas*, No. 2:11-bk-17831, 2011 Bankr. LEXIS 2157 (C.D. Cal. June 13, 2011); and another federal court has denied a motion to dismiss a complaint challenging DOMA's constitutionality, *see Dragovich v. U.S. Dep't of the Treasury*, No. 10-01564, 2011 U.S. Dist. LEXIS 4859 (N.D. Cal. Jan. 18, 2011). The viability of DOMA is in serious doubt. Yet New Jersey bars same-sex couples from marriage, so Plaintiff couples, couples who are members of GSE, and other same-sex couples are

hindered from engaging in marriage-based challenges to DOMA and its discriminatory effects, and will not gain the rights and benefits that will be available after the repeal or striking down of DOMA: under New Jersey law, they are not married spouses, but rather civil union partners, a term that has no established legal meaning in relation to marriage-based federal benefits.

Encouraging Discrimination by Private Individuals

46. By labeling the relationships of lesbian and gay couples as different from those of heterosexual couples, the State ratifies and legitimizes the notion that lesbian and gay individuals are worthy of lesser stature in society and encourages discrimination against lesbian and gay people. The State's exclusion of same-sex couples from marriage and creation of a separate institution for them triggers and fuels social stigma, harassment, discrimination, and even violence against people who are lesbian and gay and their children.

47. State-created civil unions enable discrimination by forcing the Plaintiff couples, couples who are members of GSE, and other same-sex couples to disclose their sexual orientation in order to realize benefits to which they are legally entitled. Because same-sex couples are denied access to the legal status of "marriage" and "spouse," they must reveal their sexual orientation in situations where otherwise they might not choose to, or where they could not legally be forced — or even asked — to do so. For instance, this invasion of privacy occurs when a civil union partner must ask his or her current employer about benefits for civil union partners that would automatically be extended to married spouses, or must inquire whether a prospective employer will extend benefits to a civil union partner. Louise Walpin, who would not otherwise discuss her sexual orientation at a job interview, felt compelled to inquire whether her prospective employers offered benefits to civil union partners when looking for a nursing job in New Jersey. Prospective employers often did not know what a "civil union" was, or would

not provide benefits for civil union partners. Louise wonders whether some employers discriminated against her and did not hire her because her inquiries disclosed her sexual orientation.

Stigmatization, Psychological Harm, and Dignitary Harm

48. By distinguishing between the relationships of lesbians and gay men, in contrast to those of heterosexuals, the government labels lesbians and gay men, their partners, and their children with a badge of inferiority. Exclusion of same-sex couples from marriage also perpetuates false and harmful stereotypes about lesbian and gay individuals, such as that they are promiscuous, incapable of forming lasting bonds, and sub-optimal parents.

49. Social science and medical literature establishes that repeated stigmatization and exposure to discrimination has consequences that go beyond mere passing indignity. Such stigmatization and discrimination can impose lasting and even permanent physical, emotional, and psychological harm.

Additional Specific Harms to Children

50. Furthermore, the Civil Union Act has failed to remedy the unconstitutional circumstance in which "inequities" are "borne by [the] children" of same-sex couples, 188 *N.J.* at 450. As before, the law of the State "visit[s] on these children a flawed and inferior scheme directed at their parents," *id.* at 453. In addition to affording less protection to households headed by same-sex couples while at the same time disproportionately imposing financial burdens upon such households, the unequal treatment of lesbian and gay relationships causes direct and indirect dignitary harm to the children of same-sex couples, and to lesbian and gay youth.

51. Children in households headed by same-sex couples are harmed by the fact that their parents are excluded from marriage. They suffer from stigma directed at their parents as a

consequence of their State-imposed second-class status, and they are denied the same level of security and legal protection afforded their peers with married parents.

52. The Plaintiff couples, couples who are members of GSE, and other same-sex couples in New Jersey cannot invoke the status of marriage in order to communicate to their children and others the depth and permanence of the couples' commitment in terms that society, and even young children, readily understand and respect. Their children are left to grow up with the State-sponsored message that their parents and families are inferior to others and that they and their parents do not deserve the same societal recognition and support as families headed by different-sex couples do.

53. The benefits of marriage are needed as much by children in homes headed by same-sex couples as they are by children reared in the homes of different-sex couples. Marriage is as likely to benefit the minor Plaintiffs, children of couples who are members of GSE, and children of other same-sex couples emotionally, economically, and legally as it does other children, and would secure greater dignity and social legitimacy for them and their families.

54. Minor Plaintiffs, children of couples who are members of GSE, and children of other same-sex couples have the same needs for emotional, legal, and economic security; personal dignity; familial stability; and social acceptance and legitimacy for their families and themselves as do children of different-sex couples, including the need for clearly defined and readily recognized legal relationships with both parents. Children whose parents cannot access or afford adoption would, in particular, benefit from access to, and ready recognition of, the automatic parent-child ties that matrimonial law clearly provides to children born into a marriage.

55. Such clear definition of the parent-child relationship is especially important

during times of crisis, such as medical emergencies or the death of a parent. Secure legal ties can assure continuity in the child's relationship with the surviving parent and minimize the risk of claims by others for custody. Likewise, should parents separate, secure legal ties make it unlawful for one parent arbitrarily to seek to cut off the other parent-child relationship. Marriage, in this way and others set forth herein, increases the overall economic resources available to children, whether the marriage continues or ends by death or divorce. Confusion regarding legal status, as is commonly experienced in connection with civil unions, thus threatens the well-being of the minor Plaintiffs and the children of couples who are members of GSE.

56. Allowing same-sex couples to marry is in the best interests of and will benefit children being raised by same-sex couples and the couples themselves, without having any detrimental effect on different-sex couples or their children.

57. Lesbian and gay youth — whether they have or had different-sex, same-sex or single parents — are also harmed by the exclusion of same-sex couples from marriage. These youth receive the message that they, and their future relationships, are not worthy of the esteemed institution of marriage, and that they are therefore not valued equally by their government and communities. Such discrimination and stigmatization compounds psychological harm and contributes to disproportionate rates of substance abuse, victimization, bullying, depression, and suicide.

No Valid Justification for Exclusion

58. The continued exclusion of lesbians and gay men from the institution of civil marriage is consistent with the historical practice of marginalizing and demeaning disfavored groups by excluding them from the most favored legal status. Classifications based on sexual

orientation have a history of fueling invidious discrimination. In New Jersey and nationwide, lesbians and gay men have been the subject of marginalization and discrimination.

59. In other areas of its law, New Jersey has recognized that lesbians and gay men are subject to discrimination, and that such discrimination is harmful and should be illegal. For example, New Jersey has brought sexual orientation within ambit of the Law Against Discrimination. *N.J.S.A.* 10:5-12(a); *Lewis*, 188 *N.J.* at 444-48 (discussing commitment of New Jersey to eliminating sexual orientation discrimination).

60. Even in maintaining a separate system of civil union for same-sex couples, the State recognizes that same-sex couples form lasting relationships for the purposes of mutual support and love, and evinces its state interest in promoting the durability and stability of these relationships. *N.J.S.A.* 37:1-28(a), (b).

61. The State also recognizes, and medical, psychological, and social science literature supports, that sexual orientation has no bearing on an individual or couple's ability to successfully raise children. *See Lewis*, 188 *N.J.* at 444-45. Thus, the State, which has disavowed reliance upon procreation and child-rearing considerations as justifications for excluding lesbian and gay individuals from marriage, *Lewis*, 188 *N.J.* at 429 n.6, 432, recognizes the right of lesbian and gay parents to raise their own children, and places foster children in same-sex parent homes through the Division of Youth and Family Services.

62. The State previously sought to justify its exclusion of same-sex couples from civil marriage in part by reference to its "interest in uniformity with other states' laws." 188 *N.J.* at 453. To the extent that the State would still assert an interest in uniformity, interim developments have rendered New Jersey's treatment of same-sex relationships an anomaly. In the region surrounding New Jersey, the States of Connecticut, Maryland, Massachusetts, New

Hampshire, New York, Rhode Island, and Vermont all provide or recognize marriages of same-sex couples. Today, because New Jersey designates the relationships of same-sex couples as something other than marriage, it is increasingly out-of-step with the majority of surrounding states, and denies same-sex relationships the stature accorded them in many neighboring jurisdictions — even in those that do not themselves issue marriage licenses to same-sex couples.

63. The State has no legitimate interest in denying same-sex couples access to civil marriage. Indeed, the State has an interest in promoting the stability of same-sex relationships and in promoting positive outcomes for children raised by lesbian and gay parents. The categorization of lesbian and gay relationships as less than, different from, and inferior to the relationships of heterosexual people undermines these interests.

CLAIMS FOR RELIEF

64. The Plaintiff couples, couples who are members of GSE, and other same-sex couples are harmed by the stigmatizing, separate-but-unequal system of "civil union" maintained by New Jersey. The exclusion of the Plaintiff couples, couples who are members of GSE, and other same-sex couples from civil marriage is at best irrational, and at worst, an intentional signal of governmental disapproval of lesbian and gay relationships and an invitation to discriminate against lesbians and gay men and their children.

65. Though the exclusion of lesbian and gay couples from civil marriage lacks even a rational basis, the State's exclusion must be subjected to a heightened standard of review, because it is a classification based on sexual orientation and sex, and because it impinges upon fundamental rights.

Claim One: Denial of Equal Protection Mandated by Article I, Paragraph 1 of the New Jersey Constitution

66. Plaintiffs reallege and incorporate by reference the preceding allegations as if fully set forth herein.

67. Article I, Paragraph 1 of the New Jersey Constitution provides that every person possesses the "unalienable rights" to enjoy life, liberty, and property, and to pursue happiness, and protects against the unequal treatment of those who should be treated alike.

68. By imposing civil unions on same-sex couples only, New Jersey harms Plaintiff same-sex couples and their children, who are similarly situated to different-sex couples and their children with respect to the formation of loving and familial bonds, barring them from civil marriage for no legitimate purpose or countervailing public need.

69. Furthermore, the state's exclusion is unconstitutional under the decision in *Lewis v. Harris*, in which the New Jersey Supreme Court recognized that a "parallel statutory structure" could be permissible under the New Jersey Constitution only if it provided for equal rights and benefits. *Lewis*, 188 *N.J.* at 423. "[T]he unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated under our State Constitution." *Id.*

70. As set forth above, the institution of "civil union" is unequal and inferior to the institution of marriage, which is a legal relationship that is universally understood and recognized. A civil union does not even provide all of the tangible rights and benefits of marriage. Furthermore, it effectively invites and sanctions discrimination on the basis of sexual orientation by government officials and private individuals and entities.

71. Civil unions also do not and cannot provide the intangible and symbolic rights and benefits attendant to marriage, and the deprivation of these benefits constitutes a cognizable constitutional harm for the Plaintiff couples, couples who are members of GSE, and other same-

sex couples and their children. The state reserves civil marriage, the most socially valued form of relationship, for different-sex couples, and has created an inferior legal relationship for lesbian and gay people and their children in the eyes of the law and the community, denying them equal rights on the basis of the adults' sexual orientation and their sex and impermissibly classifying their children on the bases of their parents' sexual orientation, sex and marital status.

72. The State cannot demonstrate that there is a "public need" to exclude Plaintiffs from civil marriage sufficient to outweigh the harm to Plaintiffs caused by the manifest inequality and inferiority of civil union status relative to marriage. *See Lewis*, 188 *N.J.* at 443. This is especially true given that the State recognizes the right and ability of same-sex couples to raise children, *Lewis*, 188 *N.J.* at 429 n.6, 432, and has further acknowledged the necessity of "promoting stable and durable relationships" between same-sex couples, and "eliminating obstacles and hardships these couples may face." *N.J.S.A.* 37:1-28(b).

73. The State's imposition of civil unions and denial of access to marriage violate the equal protection of the laws guaranteed by Article I, Paragraph 1 of the New Jersey Constitution.

Claim Two: Denial of the Fundamental Right to Marry Protected by Article I, Paragraph 1 of the New Jersey Constitution

74. Plaintiffs reallege and incorporate by reference all preceding paragraphs as if set forth fully herein.

75. The right to marriage is recognized as fundamental and is accordingly protected by Article I, Paragraph 1 of the New Jersey Constitution. *Lewis*, 188 *N.J.* at 435.

76. Denying the Plaintiff couples, couples who are members of GSE, and other same-sex couples the right to enter civil marriages, which is the primary and preferred State-sanctioned family relationship, and instead relegating them to the separate status of civil unions deprives them and their families of the fundamental liberties protected by Article I, Paragraph 1 of the

New Jersey Constitution. Through this denial, the State stigmatizes lesbian and gay New Jerseyans, as well as their children and families, and denies them the same autonomy, dignity, respect, and status afforded married people, in violation of the New Jersey Constitution.

77. Moreover, denying same-sex couples the right to enter civil marriages and relegating lesbians and gay men to civil unions also infringes the fundamental rights of same-sex couples to autonomy and privacy in their relationships, as guaranteed by Article I, Paragraph 1 of the New Jersey Constitution of 1947. The right of privacy includes the right to nondisclosure of confidential or personal information and protects against unwarranted disclosure of one's sexual orientation. As set forth above, by labeling the relationships of same-sex couples differently from the relationships of different-sex couples, the state forces lesbian and gay individuals in committed relationships to disclose their sexual orientation in a variety of public situations.

78. Civil unions and the exclusion of Plaintiffs and other same-sex couples from civil marriage deprive the Plaintiff couples, couples who are members of GSE, and other same-sex couples of the due process guaranteed by Article I, Paragraph 1 of the New Jersey Constitution.

Claim Three: Denial of Equal Protection Mandated by the Fourteenth Amendment to the United States Constitution, in Violation of 42 U.S.C. § 1983

79. Plaintiffs reallege and incorporate by reference the preceding allegations as if fully set forth herein.

80. The Fourteenth Amendment to the Constitution of the United States provides that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

81. Denying the Plaintiff couples, couples who are members of GSE, and other same-sex couples the ability to marry, and instead shunting them to civil unions, violates the Equal Protection Clause of the Fourteenth Amendment. The State improperly distinguishes between heterosexual New Jerseyans on the one hand and lesbian and gay New Jerseyans on the other,

and excludes only lesbians and gay men from the institution of civil marriage, with harmful consequences to those families defined by civil unions.

82. In their familial relationships, lesbian and gay individuals and their children are similarly situated to heterosexual individuals and their children in every way relevant to the State-sponsored institution of civil marriage. The State thus discriminates between similarly situated individuals on the basis of the adults' sexual orientation and their sex, and impermissibly classifies their children on the bases of their parents' sexual orientation, sex, and marital status.

83. There is no legitimate governmental object to be attained by treating the relationships of lesbian and gay individuals differently and as inferior to the relationships of heterosexuals. Rather, given that the State has already conceded that "[S]tate 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," *Lewis*, 188 *N.J.* at 432, and that the State has determined that same-sex relationships should be accorded a legal status that provides "all the rights and benefits that married heterosexual couples enjoy[,]" *N.J.S.A.* 37:1-28(d), the maintenance of a separate legal status for same-sex couples has no purpose other than to preserve and perpetuate discrimination. It does just that.

84. The legislative classification embodied in the Civil Union Act does not serve even a legitimate and rational government purpose and cannot satisfy any standard of review. Moreover, it was enacted to single out for disfavored status a politically vulnerable minority that has historically been targeted for discrimination based on immutable characteristics unrelated to the ability to contribute to society. Thus, heightened scrutiny of the legislative classification embodied in the Civil Union Act, and of the exclusion of lesbians and gay men from civil marriage, is warranted because the State places lesbians and gays in a separate category with

of same-sex couples of the right to equal protection of the law secured by the Fourteenth Amendment to the United States Constitution, in violation of 42 *U.S.C.* § 1983.

Claim Four: Denial of Substantive Due Process Protected by the Fourteenth Amendment to the United States Constitution in Violation of 42 U.S.C. § 1983

89. Plaintiffs reallege and incorporate by reference the preceding allegations as if fully set forth herein.

90. The Fourteenth Amendment to the Constitution of the United States precludes any State from "depriv[ing] any person of life, liberty, or property, without due process of law[.]" *U.S. Const.* amend. XIV, § 1. The Due Process Clause dictates that governmental interference with a fundamental right may be sustained only upon a showing that the burdening legislation is narrowly tailored to serve a compelling governmental interest.

91. This due process guarantee protects choices central to personal dignity and autonomy and provides individuals the right to demand respect for conduct protected by the substantive guarantee of liberty.

92. Federal law recognizes that marriage is a personal, fundamental right, and the substantive liberty protected by the Due Process Clause protects personal decisions relating to marriage. Civil marriage is a singular and unitary institution denied to the Plaintiff couples, couples who are members of GSE, and other same-sex couples by the State of New Jersey. The Civil Union Act thus prevents the Plaintiff couples, couples who are members of GSE, and other same-sex couples from exercising a fundamental liberty interest by denying them access to the universally recognized institution of marriage.

93. Civil unions do not fulfill New Jersey's due process obligations to the Plaintiff couples, couples who are members of GSE, and other same-sex couples. This legal status is distinct and inferior, and serves only to discriminate against individuals in same-sex

relationships, who are denied access to civil marriage. Thus, the exclusion of lesbians and gay men from marriage and the imposition of the Civil Union Act, on its face and as applied to Plaintiffs, violates the Due Process Clause.

94. Insofar as they are excluding the Plaintiff couples, couples who are members of GSE, and other same-sex couples from civil marriage, Defendants, acting under color of state law, are depriving and will continue to deprive Plaintiffs of the right to due process of the law secured by the Fourteenth Amendment to the Constitution of the United States, in violation of 42 *U.S.C.* § 1983.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs prays that the Court enter an Order:

1) Declaring that denying the Plaintiff couples, couples who are members of GSE, and other same-sex couples the right to marry and relegating them to civil unions violates their rights and their children's rights under Article I, Paragraph 1 of the New Jersey Constitution and the Fourteenth Amendment to the Constitution of the United States, and for those couples who are legally married in another jurisdiction, declaring that it is unconstitutional for the Defendants to deny recognition of marriages validly entered in other jurisdictions by same-sex couples, as marriages;

2) Permanently enjoining Defendants from denying the Plaintiff couples, couples who are members of GSE, and other same-sex couples the right to enter civil marriages in New Jersey or from limiting them to civil unions, and for those same-sex couples who are legally married in another jurisdiction, enjoining Defendants from denying recognition of the marriages;

3) Awarding Plaintiffs legal fees and costs; and

4) Any other relief as is deemed just and warranted.

Respectfully submitted,

Lawrence S. Lustberg, Esq.
Eileen M. Connor, Esq.
GIBBONS P.C.
One Gateway Center
Newark, New Jersey 07103
(973) 596-4753

Hayley J. Gorenberg, Esq.*
LAMBDA LEGAL
125 Wall Street
Suite 1500
New York, New York 10005
**pro hac vice admission pending*

Dated: June 29, 2011

CERTIFICATION OF NO OTHER ACTIONS

The undersigned hereby certifies pursuant to *R.* 4.5-1(b)(2) that the matter in controversy is not the subject of any other action pending in any other court or a pending arbitration proceeding, and no other action or arbitration proceeding is contemplated. Further, other than the parties set forth in this complaint, the undersigned knows of no other parties that should be made a part of this lawsuit. In addition, the undersigned recognizes the continuing obligation to file and serve on all parties and the court an amended certification if there is a change in the facts stated in this original certification.

Dated: Newark, New Jersey
June 29, 2011

By: ____________________

Lawrence S. Lustberg, Esq.
GIBBONS P.C.
One Gateway Center
Newark, New Jersey 07102-5310
(973) 596-4731

DESIGNATION OF TRIAL COUNSEL

In accordance with *R.* 4:5-1(c), Plaintiffs hereby designate Lawrence S. Lustberg as trial counsel in this matter.

Dated: Newark, New Jersey
June 29, 2011

Respectfully submitted,

By: [signature]

Lawrence S. Lustberg
Eileen M. Connor
GIBBONS P.C.
One Gateway Center
Newark, New Jersey 07102-5310
(973) 596-4731

Hayley J. Gorenberg*
Lambda Legal
120 Wall Street, Suite 1500
New York, New York 10005
(212) 809-8585

Attorneys for Plaintiffs

* *pro hac vice application pending*

KeyCite Yellow Flag - Negative Treatment
Judgment Affirmed as Modified by Lewis v. Harris, N.J., October 25, 2006

378 N.J.Super. 168
Superior Court of New Jersey,
Appellate Division.

Mark LEWIS and Dennis Winslow; Saundra Heath and Clarita Alicia Toby; Craig Hutchison and Chris Lodewyks; Maureen Kilian and Cindy Meneghin; Sarah and Suyin Lael; Marilyn Maneely and Diane Marini; and Karen and Marcye Nicholson–McFadden, Plaintiffs–Appellants,
v.
Gwendolyn L. HARRIS, in her official capacity as Commissioner of the New Jersey Department of Human Services; Clifton R. Lacy, in his official capacity as the Commissioner of the New Jersey Department of Health and Senior Services; and Joseph Komosinski, in his official capacity as Acting State Registrar of Vital Statistics of the New Jersey State Department of Health and Senior Services, Defendants–Respondents.

Argued Dec. 7, 2004.
|
Decided June 14, 2005.

Synopsis
Background: Same-sex couples brought action against state officials with supervisory responsibilities relating to local officials' issuance of marriage licenses, alleging local officials' refusal to issue marriage licenses to plaintiff same-sex couples violated their state constitutional rights to privacy, due process, and equal protection. The Superior Court, Law Division, Mercer County, granted summary judgment to defendants. Plaintiffs appealed.

Holdings: The Superior Court, Appellate Division, Skillman, P.J.A.D., held that:

[1] the right to marry, which is a fundamental right that is subject to the substantive due process and privacy protections of the New Jersey Constitution, extends only to marriages between members of the opposite sex, and

[2] restricting marriages to members of opposite sex did not violate equal protection, under New Jersey Constitution.

Affirmed.

Parrillo, J.A.D., filed a concurring opinion.

Collester, J.A.D., filed a dissenting opinion.

West Headnotes (13)

[1] **Constitutional Law**
Presumptions and Construction as to Constitutionality

In reviewing the constitutionality of statutes, the court must keep in mind that those provisions represent the considered action of a body composed of popularly elected representatives and therefore are entitled to a strong presumption of validity. (Per Skillman, P.J.A.D., with one Judge concurring.)

Cases that cite this headnote

[2] **Constitutional Law**
Clearly, positively, or unmistakably unconstitutional
Constitutional Law
Proof beyond a reasonable doubt

The presumption of the constitutionality of a statute can be rebutted only upon a showing that the statute's repugnancy to the Constitution is clear beyond a reasonable doubt. (Per Skillman, P.J.A.D., with one Judge concurring.)

Cases that cite this headnote

[3] **Constitutional Law**
Policy
Constitutional Law

Wisdom

The personal views of the members of the court concerning the wisdom or policy of a statute should play no part in determining its constitutionality. (Per Skillman, P.J.A.D., with one Judge concurring.)

1 Cases that cite this headnote

[4] **Constitutional Law**
Procedural due process in general
Constitutional Law
Substantive Due Process in General

The New Jersey constitutional provision declaring that all people have certain natural and unalienable rights protects both procedural and substantive due process rights. (Per Skillman, P.J.A.D., with one Judge concurring.) N.J.S.A. Const. Art. 1, par. 1.

1 Cases that cite this headnote

[5] **Constitutional Law**
Privacy and Sexual Matters

The substantive due process rights protected by the New Jersey constitutional provision declaring that all people have certain natural and unalienable rights include the right of privacy. (Per Skillman, P.J.A.D., with one Judge concurring.) N.J.S.A. Const. Art. 1, par. 1.

Cases that cite this headnote

[6] **Constitutional Law**
Sex and Procreation

The right of privacy under the New Jersey Constitution embraces the right to make procreative decisions and the right of consenting adults to engage in sexual conduct. (Per Skillman, P.J.A.D., with one Judge concurring.) N.J.S.A. Const. Art. 1, par. 1.

Cases that cite this headnote

[7] **Constitutional Law**
Rights and interests protected; fundamental rights

In determining whether a claimed right is entitled to protection as a matter of substantive due process, a court should look to he traditions and collective conscience of the people to determine whether a principle is so rooted there as to be ranked as fundamental. (Per Skillman, P.J.A.D., with one Judge concurring.) N.J.S.A. Const. Art. 1, par. 1.

1 Cases that cite this headnote

[8] **Amicus Curiae**
Powers, functions, and proceedings

Although an amicus curiae is ordinarily limited to arguing issues raised by the parties, an amicus may present different arguments than the parties relating to those issues. (Per Skillman, P.J.A.D., with one Judge concurring.)

1 Cases that cite this headnote

[9] **Amicus Curiae**
Powers, functions, and proceedings

Appellate Division of Superior Court would consider, in same-sex couples' appeal of trial court's denial of their state constitutional claims to a right to marry, arguments of amici curiae that promotion of procreation and creating optimal environment for raising children were justifications for limiting marriage to members of opposite sex, though Attorney General, as representative of state defendants, disclaimed any reliance on such justifications, where plaintiff couples were afforded adequate

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

opportunity to answer those arguments and had devoted half of their reply brief to answering those arguments. (Per Skillman, P.J.A.D., with one Judge concurring.) N.J.S.A. Const. Art. 1, par. 1.

8 Cases that cite this headnote

[10] **Constitutional Law**
Sexual orientation
Constitutional Law
Marital Relationship
Marriage and Cohabitation
Sex or Gender; Same-Sex Marriage

The right to marry, which is a fundamental right that is subject to the substantive due process and privacy protections of the New Jersey Constitution, extends only to marriages between members of the opposite sex. (Per Skillman, P.J.A.D., with one Judge concurring.) N.J.S.A. Const. Art. 1, par. 1.

6 Cases that cite this headnote

[11] **Constitutional Law**
Discrimination and Classification

In determining whether the State has violated the equal protection guarantees of the New Jersey Constitution, courts employ a balancing test that considers the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction. (Per Skillman, P.J.A.D., with one Judge concurring.) N.J.S.A. Const. Art. 1, par. 1.

Cases that cite this headnote

[12] **Constitutional Law**
Levels of Scrutiny

The crucial threshold step in the required constitutional analysis of an equal protection claim is identification of the nature of the claimed right. (Per Skillman, P.J.A.D., with one Judge concurring.) N.J.S.A. Const. Art. 1, par. 1.

Cases that cite this headnote

[13] **Constitutional Law**
Marriage and civil unions
Marriage and Cohabitation
Sex or Gender; Same-Sex Marriage

Same-sex couples did not have constitutionally protected right to marry, as threshold step in equal protection analysis, and thus, state laws restricting marriage to opposite sex couples did not violate equal protection. (Per Skillman, P.J.A.D., with one Judge concurring.) N.J.S.A. Const. Art. 1, par. 1.

6 Cases that cite this headnote

Attorneys and Law Firms

****261 *172** David S. Buckel (Lambda Legal Defense and Education Fund, Inc.) of the New York bar, admitted pro hac vice, New York City, argued the cause for appellants (Gibbons, Del Deo, Dolan, Griffinger & Vecchione and Mr. Buckel, attorneys; Lawrence S. Lustberg and Jennifer Ching (Gibbons, Del Deo, Dolan, Griffinger & Vecchione), Newark, Mr. Buckel and Susan L. Sommer (Lambda Legal Defense and Education Fund, Inc.), on the brief).

***173** Patrick DeAlmeida, Assistant Attorney General, argued the cause for respondents (Peter C. Harvey, Attorney General, attorney; Mr. DeAlmeida, of counsel; Mr. DeAlmeida and Mary Beth Wood, Deputy Attorney General, on the brief).

Messina & Laffey, for amicus curiae the New Jersey Catholic Conference, the New Jersey Coalition to Preserve and Protect Marriage, the New Jersey Family Policy Council and Mr. and Mrs. David C. Heslington (Joshua K. Baker, Lincoln C. Oliphant and William C. Duncan, of counsel; Michael Behrens, on the brief).

Dennis M. Caufield, for amicus curiae the Family Research Council (Glen Lavy, Byron Babione and Dale Schowengerdt (Alliance Defense Fund), of counsel; Mr. Caufield, on the brief).

**262 Levow & Costello, for amicus curiae Legal Momentum (Jennifer Brown and Deborah Widiss (Legal Momentum), Elizabeth L. Rosenblatt and Douglas NeJaime (Irell & Manella), of counsel; Kevin Costello, on the brief).

Blank Rome, for amicus curiae National Association of Social Workers and National Association of Social Workers New Jersey Chapter (Carolyn Polowy and Sherri Morgan, of counsel; Stephen M. Orlofsky and Jordana Cooper, on the brief).

American Civil Liberties Union of New Jersey Foundation, for amicus curiae American Civil Liberties Union of New Jersey, American–Arab Anti–Discrimination Committee, Asian American Legal Defense and Education Fund, Hispanic Bar Association of New Jersey, National Organization for Women of New Jersey, and the National Organization for Women Legal Defense and Education Fund (Edward Barocas, on the brief).

Nashel, Kates, Nussman, Rapone & Ellis, for amicus curiae American Psychological Association and New Jersey Psychological Association (Paul M. Smith and William M. Hohengarten (Jenner & Block), and Nathalie F.P. Gilfoyle (American ***174** Psychological Association), of counsel; Howard M. Nashel, on the brief).

Weinstein Snyder Lindemann Sarno, for amicus curiae Professors of the History of Marriage, Families, and the Law (Suzanne B. Goldberg (Rutgers School of Law, Newark), of counsel; Jeffrey P. Weinstein, on the brief).

Latham & Watkins, for amicus curiae Human Rights Campaign, Human Rights Campaign Foundation, Children of Lesbians and Gays Everywhere (COLAGE), Family Pride Coalition, Freedom to Marry, Gay & Lesbian Advocates & Defenders (GLAD), National Center for Lesbian Rights, National Gay and Lesbian Task Force, New Jersey Lesbian and Gay Coalition (NJLGC), and Parents, Families and Friends of Lesbians and Gays (PFLAG) (Alan E. Kraus, Richard S. Zbur, Stuart S. Kurlander, Charles J. Butler and Jeffrey R. Hamlin (Latham & Watkins), and Elizabeth A. Seaton (Human Rights Campaign), on the brief).

Lowenstein Sandler, for amicus curiae City of Asbury Park (Douglas S. Eakeley, of counsel and on the brief).

Demetrios K. Stratis, for amicus curiae Monmouth Rubber & Plastics Corp. and John M. Bonforte, Sr. (Mr. Stratis and Vincent P. McCarthy and Kristina J. Wenberg (American Center for Law & Justice, Northeast, Inc.), on the brief).

Campbell & Campbell, for amicus curiae United Families International and United Families New Jersey (Donald D. Campbell, Paul Benjamin Linton and Richard G. Wilkins, on the brief).

Anderl & Oakley, for amicus curiae Alliance for Marriage (David R. Oakley and Dwight G. Duncan, on the brief).

Before Judges SKILLMAN, COLLESTER and PARRILLO.

Opinion

The opinion of the court was delivered by

***175** SKILLMAN, P.J.A.D.

The issue presented by this appeal is whether the New Jersey Constitution compels the State to allow same-sex couples to marry. We conclude that the statutory limitation of the institution of marriage to members of the opposite sex does not violate our Constitution.

Plaintiffs are seven same-sex couples. Defendants are state officials with supervisory responsibilities relating to local officials' issuance of marriage licenses. Plaintiffs' complaint alleges that each couple applied for a marriage license in the municipality ****263** in which they reside, but the clerk refused to issue the license because New Jersey law does not authorize a marriage between members of the same sex. Plaintiffs claim that the denial of their applications for marriage licenses violates their rights of privacy and equal protection of the law protected by the New Jersey Constitution. Plaintiffs do not contend that New Jersey's marriage statutes authorize a marriage between members of the same sex or that the limitation of marriage to members of the opposite sex violates the United States Constitution. As relief for the claimed violations of their state constitutional rights, plaintiffs sought a mandatory injunction compelling the defendant state officials to provide them access to the institution of marriage on the same terms and conditions as a couple of the opposite sex.

Defendants filed a motion to dismiss plaintiffs' complaint pursuant to *R.* 4:6–2(e) on the ground that it fails to state a claim upon which relief can be granted. Plaintiffs filed a cross-motion for summary judgment. After oral argument,

defendants' motion was converted to a motion for summary judgment.

The trial court issued a comprehensive written opinion rejecting plaintiffs' claims and upholding the constitutionality of New Jersey's statutory provisions that only allow members of the opposite sex to marry. In rejecting plaintiffs' claim that they have a fundamental right to marry and that the State violated this right by refusing to issue them marriage licenses, the court stated:

> ***176** The right to marry has always been understood in law and tradition to apply only to couples of different genders. A change in that basic understanding would not lift a restriction on the right, but would work a fundamental transformation of marriage into an arrangement that could never have been within the intent of the Framers of the 1947 Constitution. Significantly, such a change would contradict the established and universally accepted legal precept that marriage is the union of people of different genders.

In rejecting plaintiffs' equal protection claim, the court stated:

> Plaintiffs, like anyone else in the state, may receive a marriage license, provided that they meet the statutory criteria for marriage, including an intended spouse of the opposite gender. Plaintiffs are, in that sense, in the same position as all other New Jersey residents. The State makes the same benefit, mixed-gender marriage, available to all individuals on the same basis. Whether or not plaintiffs wish to enter into a mixed-gender marriage is not determinative of the statute's validity. It is the availability of the right on equal terms, not the equal use of the right that is central to the constitutional analysis. Plaintiffs seek not to lift a barrier to marriage, but to change its very essence.

Based on this opinion, the trial court entered final judgment dismissing plaintiffs' complaint.

During the pendency of this appeal, the Legislature enacted the Domestic Partnership Act, *L.* 2003, *c.* 246, which confers substantial legal rights upon same-sex couples who enter into domestic partnerships corresponding in many respects to the rights of opposite-sex couples who marry. This new legislation, which was enacted on January 12, 2004 and became effective on July 10, 2004, *L.* 2003, *c.* 246, § 60, is based on legislative findings and declarations 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 with another individual," ****264** *N.J.S.A.* 26:8A–2(a); that "[t]hese familial relationships, which are known as domestic partnerships, assist the State by their establishment of a private network of support for the financial, physical and emotional health of their participants," *N.J.S.A.* 26:8A–2(b); and that "[b]ecause of the material and other support that these familial relationships provide to their participants, the Legislature believes that these mutually supportive relationships should be formally recognized by statute, and that certain rights and benefits should be made available to individuals ***177** participating in them," *N.J.S.A.* 26:8A–2(c). The Domestic Partnership Act also contains a legislative declaration that:

> The need for all persons who are in domestic partnerships, regardless of their sex, 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 and to cope with adversity when a medical emergency arises that affects a domestic partnership.
>
> [*N.J.S.A.* 26:8A–2(d).]

To accomplish these legislative objectives, the Domestic Partnership Act provides that members of the same sex who "have a common residence and are otherwise jointly responsible for each other's common welfare as evidenced by joint financial arrangements or joint ownership of real or personal property," *N.J.S.A.* 26:8A–4(b)(1), who "agree to be jointly responsible for each other's basic living expenses during the domestic partnership," *N.J.S.A.* 26:8A–4(b)(2), and who satisfy the other statutory prerequisites of such a State-sanctioned union, see *N.J.S.A.* 26:8A–4(b)(3) to (9), are entitled to receive a Certificate of Domestic Partnership, *N.J.S.A.* 26:8A–8(b). Upon issuance of this certificate, a patient's domestic partner and his or her children have the same right of visitation in a health care facility as a patient's spouse or children. *N.J.S.A.* 26:2H–12.22. In addition, a domestic partner is authorized to consent to an autopsy upon the body of his or her partner, *N.J.S.A.* 26:6–50, and has the same right as a spouse to consent to donation of a deceased domestic partner's organs for statutorily approved purposes, *N.J.S.A.* 26:6–58(b)(1). The Domestic Partnership Act also amends the State's tax laws to give

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

domestic partners the same exemption from the State's inheritance tax provided to married couples, *N.J.S.A.* 54:34–1(f); *N.J.S.A.* 54:34–2(a); *N.J.S.A.* 54:34–1(j), the same $1,000 exemption from the State gross income tax that can be claimed for a spouse who does not file a separate return, *N.J.S.A.* 54A:3–1, and the right to claim a domestic partner as a "dependent" under the Gross Income Tax Act, *N.J.S.A.* 54A:1–2(e). Moreover, a domestic partner of a State employee is entitled to the same benefits under the State pension laws and State Health Benefits Program as a spouse, ***178** *N.J.S.A.* 18A:66–2; *N.J.S.A.* 43:6A–3; *N.J.S.A.* 43:15A–6; *N.J.S.A.* 43:16A–1; *N.J.S.A.* 52:14–17.26; *N.J.S.A.* 53:5A–3, and private insurance companies that provide dependent coverage for health, hospital, medical and dental expenses benefits must provide such coverage for a covered person's domestic partner, *N.J.S.A.* 17:48A–7aa; *N.J.S.A.* 17:48D–9.5; *N.J.S.A.* 17:48E–35.26; *N.J.S.A.* 17B:26–2.1x; *N.J.S.A.* 17B:27–46.1bb; *N.J.S.A.* 17B:27A–7.9; *N.J.S.A.* 17B:27A–19.12; *N.J.S.A.* 26:25–4.27; *N.J.S.A.* 26:8A–11; *N.J.S.A.* 34:11A–20. In addition, the Act amends the Law Against Discrimination (LAD), *N.J.S.A.* 10:5–1 to –42, to extend the prohibitions of that statute to discrimination on the basis ****265** of domestic partnership status. *L.* 2003, *c.* 246, § 12.

As a result of enactment of the Domestic Partnership Act, which extends many of the economic benefits and regulatory protections of marriage to persons of the same sex who enter into domestic partnerships, plaintiffs may now avoid many of the adverse consequences of being denied the opportunity to marry alleged in their complaint, such as denial of the right to participate in family insurance plans, denial of hospital visitation rights, denial of the right to make health care decisions when their partner is incapacitated, denial of the right to bury and control the disposition of a partner's remains, and denial of the benefit of the protections against discrimination provided by the LAD, by entering into domestic partnerships. The record does not indicate whether any of the plaintiff couples have entered into or plan to enter into domestic partnerships because the case was heard in the trial court before enactment of the Domestic Partnership Act. Consequently, this case does not involve any claim of a denial of constitutional rights to same-sex domestic partners on the ground that they are not afforded all the benefits and rights of opposite-sex married couples. Rather, plaintiffs' claim is that even if the Domestic Partnership Act conferred all the benefits and legal rights of marriage, the New Jersey Constitution would nevertheless compel recognition of same-sex marriage.

***179** [1] [2] [3] In reviewing the constitutionality of the statutes that limit marriage to members of the opposite sex, as in reviewing any other statute, we must keep in mind that those provisions "represent[ ] the considered action of a body composed of popularly elected representatives" and therefore are entitled to a strong presumption of validity. *N.J. Sports & Exposition Auth. v. McCrane,* 61 *N.J.* 1, 8, 292 *A.*2d 545 (1972), *appeal dismissed sub nom., Borough of E. Rutherford v. N.J. Sports & Exposition Auth.,* 409 *U.S.* 943, 93 *S.Ct.* 270, 34 *L.Ed.*2d 215 (1972). This presumption "can be rebutted only upon a showing that the statute's 'repugnancy to the Constitution is clear beyond a reasonable doubt.' " *Hamilton Amusement Ctr. v. Verniero,* 156 *N.J.* 254, 285, 716 *A.*2d 1137 (1998) (quoting *Harvey v. Bd. of Chosen Freeholders,* 30 *N.J.* 381, 388, 153 *A.*2d 10 (1959)), *cert. denied,* 527 *U.S.* 1021, 119 *S.Ct.* 2365, 144 *L.Ed.*2d 770 (1999). The personal views of the members of the court concerning "the wisdom or policy of a statute" should play no part in determining its constitutionality. *N.J. Sports & Exposition Auth., supra,* 61 *N.J.* at 8, 292 *A.*2d 545. A constitution is not simply an empty receptacle into which judges may pour their own conceptions of evolving social mores. "To yield to the impulse to [invalidate legislation merely because members of the court disapprove of its public policy] is to subvert the sensitive interrelationship between the three branches of government which is at the heart of our form of democracy." *Vornado, Inc. v. Hyland,* 77 *N.J.* 347, 355, 390 *A.*2d 606 (1978), *appeal dismissed sub nom., Vornado, Inc. v. Degnan,* 439 *U.S.* 1123, 99 *S.Ct.* 1037, 59 *L.Ed.*2d 84 (1979). Consequently, our personal views of the legislative decision to limit the institution of marriage to members of the opposite sex are irrelevant. The only question is whether this legislative decision violates a specific constitutional provision.

Plaintiffs' claim of a constitutional right to recognition of same-sex marriage is based on article I, paragraph 1, of the New Jersey Constitution, 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 ****266 *180** liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

Our Supreme Court has held that this paragraph confers state constitutional rights to due process and equal protection of the law. *Sojourner A. v. N.J. Dep't of Human Servs.,* 177 *N.J.* 318, 332, 828 *A.*2d 306 (2003);

Greenberg v. Kimmelman, 99 *N.J.* 552, 568, 494 *A.*2d 294 (1985). Plaintiffs invoke both of these rights in support of their challenge to the limitation of the institution of marriage to members of the opposite sex. We address plaintiffs' due process claim in section I of this opinion and their equal protection claim in section II.

I

[4] [5] [6] Article I, paragraph 1, protects both procedural and substantive due process rights. *See Doe v. Poritz,* 142 *N.J.* 1, 99, 662 *A.*2d 367 (1995); *Greenberg, supra,* 99 *N.J.* at 568–69, 494 *A.*2d 294. The substantive due process rights protected by this provision include the right of privacy. *See Sojourner A., supra,* 177 *N.J.* at 332–33, 828 *A.*2d 306; *Greenberg, supra,* 99 *N.J.* at 567–68, 571–72, 494 *A.*2d 294. This right of privacy "embraces the right to make procreative decisions ... [and] the right of consenting adults to engage in sexual conduct." *Greenberg, supra,* 99 *N.J.* at 571–72, 494 *A.*2d 294 (citations omitted).

Our Supreme Court has held that the due process and privacy protections of article I, paragraph 1, also include the right of members of the opposite sex to marry. *Ibid.* In fact, the Court has characterized this right as "fundamental." *J.B. v. M.B.,* 170 *N.J.* 9, 23–24, 783 *A.*2d 707 (2001); *In re Baby M.,* 109 *N.J.* 396, 447, 537 *A.*2d 1227 (1988). However, the Court has never considered whether the New Jersey Constitution confers a right to marry upon members of the same sex.

This court indirectly rejected the view that same-sex couples have a constitutional right to marry in a decision sustaining the validity of provisions of the State Health Plan that denied health benefits to same-sex partners that were extended to spouses of ***181** married public employees. *Rutgers Council of AAUP Chapters v. Rutgers,* 298 *N.J.Super.* 442, 452–62, 689 *A.*2d 828 (App.Div.1997), *certif. denied,* 153 *N.J.* 48, 707 *A.*2d 151 (1998). Relying upon decisions in other jurisdictions that have rejected same-sex couples' claims of a constitutional right to marry, we concluded that the determination whether to extend the same benefits to same-sex partners as to spouses involves "political and economic issues to be decided by the elected representatives of the people." *Id.* at 462, 689 *A.*2d 828.

Other jurisdictions have expressly rejected constitutional challenges to statutes that limit the institution of marriage to members of the opposite sex. *See, e.g., Standhardt v. Superior Court ex rel. Maricopa,* 206 *Ariz.* 276, 77 *P.*3d 451 (Ct.App.2003), *review denied* (Ariz.2004); *Dean v. Dist. of Columbia,* 653 *A.*2d 307 (D.C.1995); *Morrison v. Sadler,* 821 *N.E.*2d 15 (Ind.Ct.App.2005); *Jones v. Hallahan,* 501 *S.W.*2d 588 (Ky.Ct.App.1973); *Baker v. Nelson,* 291 *Minn.* 310, 191 *N.W.*2d 185 (1971), *appeal dismissed for want of a substantial federal question,* 409 *U.S.* 810, 93 *S.Ct.* 37, 34 *L.Ed.*2d 65 (1972); *In re Cooper,* 187 *A.D.*2d 128, 592 *N.Y.S.*2d 797, 799–801, *appeal dismissed,* 82 *N.Y.*2d 801, 604 *N.Y.S.*2d 558, 624 *N.E.*2d 696 (1993); *Singer v. Hara,* 11 *Wash.App.* 247, 522 *P.*2d 1187, *review denied,* 84 *Wash.*2d 1008 (1974). In *Singer,* the court concluded that the limitation of the institution of marriage to members of the opposite sex "is based upon the state's recognition that ****267** our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children," 522 *P.*2d at 1195, and that "marriage is so clearly related to the public interest in affording a favorable environment for the growth of children that we are unable to say that there is not a rational basis upon which the state may limit the protection of its marriage laws to the legal union of one man and one woman," *id.* at 1197. Other courts that have rejected challenges to the constitutionality of the limitation of marriage to members of the opposite sex also have relied upon the role that marriage plays in procreation and in providing the optimal environment for child rearing. *See* ***182** *Standhardt, supra,* 77 *P.*3d at 461–64; *Dean, supra,* 653 *A.*2d at 333; *Morrison, supra,* 821 *N.E.*2d at 23–35; *Nelson, supra,* 191 *N.W.*2d at 186.

The only state supreme court decision that has declared the limitation of the institution of marriage to members of the opposite sex to be unconstitutional is *Goodridge v. Dep't of Pub. Health,* 440 *Mass.* 309, 798 *N.E.*2d 941 (2003), which is discussed later in this opinion. *See also Opinions of the Justices to the Senate,* 440 *Mass.* 1201, 802 *N.E.*2d 565 (2004). In addition, the Vermont Supreme Court held that denial of the benefits incident to marriage to same-sex domestic partners violated the "common benefits" provision of the Vermont Constitution, but that this constitutional violation could be remedied by enactment of a domestic partnership act or other legislation that extends the benefits that flow from marriage to same-sex couples. *Baker v. State,* 170 *Vt.* 194, 744 *A.*2d 864, 886–87 (1999). The Vermont Legislature subsequently enacted legislation authorizing domestic partnerships to comply with this mandate. *Vt. Stat. Ann.* tit. 15 §§ 1201–07 (2004). The Hawaii Supreme Court held that the limitation of marriage to members of the opposite sex established a sex-based classification that required strict scrutiny under equal protection analysis, *Baehr v. Lewin,* 74 *Haw.* 530, 852 *P.*2d 44 (1993), and on remand, a trial court declared this limitation to be

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

violative of the Hawaii Constitution, but before the case was brought back before the Hawaii Supreme Court, the electorate approved a constitutional amendment prohibiting same-sex marriage, *Haw. Const.* art. I, § 23. *See* William C. Duncan, *Whither Marriage in the Law?,* 15 *Regent L. Rev.* 119, 119–20 (2003).[1]

***183** [7] Our Supreme Court has indicated that in determining whether a claimed right is entitled to protection as a matter of substantive due process, a court should "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.' " *King v. S. Jersey Nat'l Bank,* 66 *N.J.* 161, 178, 330 *A.*2d 1 (1974) (quoting *Griswold v. Connecticut,* 381 *U.S.* 479, 493, 85 *S.Ct.* 1678, 1686, 14 *L.Ed.*2d 510, 520 (1965) (Goldberg, J., concurring)). Similarly, the Supreme Court of the United States has recently reaffirmed that "the Due Process Clause specially ****268** protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.' " *Washington v. Glucksberg,* 521 *U.S.* 702, 720–21, 117 *S.Ct.* 2258, 2268, 138 *L.Ed.*2d 772, 787–88 (1997) (citations omitted). The Court noted that confining constitutional protection to "fundamental rights found to be deeply rooted in our legal tradition ... tends to rein in the subjective elements that are necessarily present in due-process judicial review." *Id.* at 722, 117 *S.Ct.* at 2268, 138 *L.Ed.*2d at 788.

Marriage between members of the same sex is clearly not a "fundamental right [ ] ... deeply rooted in our legal tradition." To the contrary, as we observed in *M.T. v. J.T.,* 140 *N.J.Super.* 77, 83–84, 355 *A.*2d 204 (App.Div.), *certif. denied,* 71 *N.J.* 345, 364 *A.*2d 1076 (1976):

> [A] lawful marriage requires the performance of a ceremonial marriage of two persons of the opposite sex, a male and a female. Despite winds of change, this understanding of a valid marriage is almost universal....
>
> ... The historic assumption in the application of common law and statutory strictures relating to marriages is that only persons who can become 'man and wife' have the capacity to enter marriage.

Plaintiffs' claim that a right to marriage between members of the same sex may be found in ***184** article I, paragraph 1, of the New Jersey Constitution has no foundation in its text, this Nation's history and traditions or contemporary standards of liberty and justice. It certainly is an idea that would have been alien to the delegates to the 1947 Constitutional Convention who proposed this provision and to the voters who approved it. Although there has been a substantial liberalization of public attitudes towards the rights of homosexuals in the intervening fifty-eight years, there is no current public consensus favoring recognition of marriages between members of the same sex. In fact, in 1996 Congress enacted the Defense of Marriage Act (DOMA), *Pub.L.* No. 104–199, 110 *Stat.* 2419, which provides that no State shall be required to give effect under the Full Faith and Credit Clause of the United States Constitution, *U.S. Const.* art. IV, § 1, to any other state's law that recognizes same-sex marriage, 28 *U.S.C.A.* § 1738C, and that all Acts of Congress that refer to "marriage" or "spouse" shall be interpreted to apply only to mixed-gender couples, 1 *U.S.C.A.* § 7. And as previously discussed, our Legislature recently enacted the Domestic Partnership Act, which confers substantial legal rights upon same-sex couples who enter into domestic partnership unions but stops short of recognizing the right of members of the same sex to marry.

[8] [9] Plaintiffs have failed to identify any source in the text of the New Jersey Constitution, the history of the institution of marriage or contemporary social standards for their claim that the Constitution mandates State recognition of marriage between members of the same sex. Plaintiffs describe marriage as simply a "compelling and definitive expression of love and commitment that can occur between two adults"—without any reference to the historical, religious or social foundations of the institution—and argue that because two members of the same sex have the same capacity as members of the opposite sex to "make a strong and meaningful lifetime commitment to each other," the State must extend the same recognition to same-sex marriage as a marriage between members of the opposite sex. However, our society and laws view marriage as something more than just State recognition ****269 *185** of a committed relationship between two adults. Our leading religions view marriage as a union of men and women recognized by God, *see* Larry Catá Backer, *Religion as the Language of Discourse of Same Sex Marriage,* 30 *Cap. U.L. Rev.* 221, 234–36 (2002), and our society considers marriage between a man and woman to play a vital role in propagating the species and in providing the ideal environment for raising children.[2] *See* George W. Dent, Jr., *The Defense of Traditional Marriage,* 15 *J.L. & Pol.,* 581, 593–601 (1999); William C. Duncan, *The State Interests in Marriage,* 2 *Ave Maria L. Rev.* 153, 164–72 (2004); Monte Neil Stewart, *Judicial Redefinition of Marriage,* 21 *Canadian J. Fam. L.,* 11, 41–85 (2004).

Indeed, the very cases that plaintiffs rely upon for the proposition that there is a fundamental right to marry

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

reflect these common understandings of the religious and social foundations of marriage that limit the institution to members of the opposite sex. ***186** For example, in *Turner v. Safley,* 482 *U.S.* 78, 96, 107 *S.Ct.* 2254, 2265, 96 *L.Ed.*2d 64, 83 (1987), the Court noted that "many religions recognize marriage as having spiritual significance; ... and ..., therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication." In *Zablocki v. Redhail,* 434 *U.S.* 374, 384, 98 *S.Ct.* 673, 680, 54 *L.Ed.*2d 618, 629 (1978), the Court "recognized that the right 'to marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause," and described marriage "as 'fundamental to the very existence and survival of the race.' " (Citations omitted).

The conclusion that marriage between members of the same sex has no historical foundation or contemporary societal acceptance and therefore is not constitutionally mandated is supported by decisions in other jurisdictions that have addressed the issue. In *Standhardt, supra,* 77 *P.*3d at 459, the court concluded that "[a]lthough same-sex relationships are more open and have garnered greater societal acceptance in recent years, same-sex marriages are neither deeply rooted in the legal and social history of our Nation or state nor are they implicit in the concept of ordered liberty." Similarly, in *Dean,* the court concluded that "same-sex marriage is not a 'fundamental right' protected by the due process clause, because that kind of relationship ****270** is not 'deeply rooted in this Nation's history and tradition.' " 653 *A.*2d at 331 (quoting *Moore v. City of E. Cleveland,* 431 *U.S.* 494, 503, 97 *S.Ct.* 1932, 1938, 52 *L.Ed.*2d 531, 540 (1977)); *see also Nelson, supra,* 191 *N.W.*2d at 186 (noting that "[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.").

Plaintiffs argue that the State's contention that the essence of the institution of marriage is a State-sanctioned union between members of the opposite sex constitutes "circular reasoning,"—a characterization adopted by the dissent in its discussion of decisions in other jurisdictions that have upheld the limitation of the ***187** institution of marriage to members of the opposite sex. *See infra,* 378 *N.J.Super.* at 204, 875 *A.*2d at 280–81. However, plaintiffs' argument proceeds along the same kind of circular path that they accuse the State of following. Plaintiffs start with the premise that there is no difference between a "compelling and definitive expression of love and commitment" between members of the same sex and a marriage between members of the opposite sex, and then argue from this premise that the State has failed to carry its burden of justifying the limitation of the institution of marriage to a man and a woman. But the significant difference between these arguments is that the State's argument is grounded on historical tradition and our nation's religious and social values, while plaintiffs' argument is based on nothing more than their own normative claim that society should give unions between same-sex couples the same form of recognition as marriages between members of the opposite sex.

The same form of constitutional attack that plaintiffs mount against statutes limiting the institution of marriage to members of the opposite sex also could be made against statutes prohibiting polygamy. Persons who desire to enter into polygamous marriages undoubtedly view such marriages, just as plaintiffs view same-sex marriages, as "compelling and definitive expression[s] of love and commitment" among the parties to the union. Indeed, there is arguably a stronger foundation for challenging statutes prohibiting polygamy than statutes limiting marriage to members of the opposite sex "because, unlike gay marriage, [polygamy] has been and still is condoned by many religions and societies."[3] Dent, *supra,* 15 *J.L. & Pol.* at 628. Nevertheless, courts have uniformly rejected constitutional challenges to statutes prohibiting polygamy on the grounds that polygamous marriage is offensive to our Nation's religious principles and social mores. *Reynolds v. United States,* 98 *U.S.* 145, 161–67, 25 *L.Ed.* 244, 248–51 (1878); *Potter v. Murray City,* 760 *F.*2d 1065, 1068–71 (10th Cir.), *cert.* ***188** *denied,* 474 *U.S.* 849, 106 *S.Ct.* 145, 88 *L.Ed.*2d 120 (1985); *see also State v. Green,* 99 *P.*3d 820 (Utah 2004). In *Reynolds,* the Court stated:

> Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and African people.... [F]rom the earliest history of England polygamy has been treated as an offence against society.
>
> ....
>
> ****271** ... In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life.
>
> [98 *U.S.* at 164–65, 25 *L.Ed.* at 250.]

More recently, the Tenth Circuit concluded:

> Monogamy is inextricably woven into the fabric of

> our society. It is the bedrock upon which our culture is built. In light of these fundamental values, the State is justified, by a compelling interest, in upholding and enforcing its ban on plural marriage to protect the monogamous marriage relationship.

[*Potter, supra,* 760 *F.*2d at 1070 (citation omitted).] Plaintiffs' only response to the State's comparison of the justification for limitation of the institution of marriage to members of the opposite sex with its limitation to a single man and a single woman is that "[t]hey do not challenge the 'binary nature of marriage' and indeed embrace the solemn statutory obligation of 'exclusivity.' " However, persons whose religions and cultural traditions condone polygamy, but disapprove of same-sex marriage, could just as easily say that they do not challenge the limitation of marriage to members of the opposite sex, only the requirement that marriage must be binary.

[10] In sum, the right to marry is a fundamental right that is subject to the privacy protections of article I, paragraph 1, of the New Jersey Constitution. However, this right extends only to marriages between members of the opposite sex. Plaintiffs' claim of a constitutional right to State recognition of marriage between members of the same sex has no foundation in the text of the Constitution, this Nation's history and traditions or contemporary standards of liberty and justice. Therefore, we reject plaintiffs' ***189** claim under the substantive due process and privacy protections of the New Jersey Constitution.

II

[11] [12] We turn next to plaintiffs' equal protection claim. In determining whether the State has violated the equal protection guarantees of article I, paragraph 1, our courts employ a balancing test that considers "the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." *Greenberg, supra,* 99 *N.J.* at 567, 494 *A.*2d 294. Thus, the "crucial" threshold step in the required constitutional analysis is identification of "the nature of the [claimed] right." *Ibid.*; *see also Poritz, supra,* 142 *N.J.* at 94, 662 *A.*2d 367.

In the decisions upon which plaintiffs construct their constitutional attack upon the limitation of marriage to members of the opposite sex, it was undisputed that the statute in issue affected a constitutional right. *See Sojourner A., supra,* 177 *N.J.* at 333, 828 *A.*2d 306 ("a woman's right to make procreative decisions"); *Greenberg, supra,* 99 *N.J.* at 571–72, 494 *A.*2d 294 (the right of members of the opposite sex to marry); *Right to Choose v. Byrne,* 91 *N.J.* 287, 303–04, 450 *A.*2d 925 (1982) ("a woman's right to choose whether to carry a pregnancy to full-term or to undergo an abortion"); *Planned Parenthood of Cent. N.J. v. Farmer,* 165 *N.J.* 609, 762 *A.*2d 620 (2000) (same). Consequently, the only question in those cases was "the extent to which the [challenged statute] intrude[d] upon [a recognized constitutional right], and the public need for the restriction." *Greenberg, supra,* 99 *N.J.* at 567, 494 *A.*2d 294.

****272** [13] In contrast, the essential question in this case is whether same-sex couples have any constitutional right to marry. For reasons set forth at length in section I of this opinion, we are satisfied that only members of the opposite sex have a constitutionally protected right to marry. Therefore, plaintiffs have failed to satisfy their threshold burden to show the existence of an ***190** "affected right," and for that reason the State is not required to show that the "public need" for restrictions upon that right outweigh plaintiffs' interest in its exercise.[4]

The primary federal decision upon which plaintiffs rely, *Loving v. Virginia,* 388 *U.S.* 1, 87 *S.Ct.* 1817, 18 *L.Ed.*2d 1010 (1967), rested upon the premise, derived from *Skinner v. Oklahoma,* 316 *U.S.* 535, 541, 62 *S.Ct.* 1110, 1113, 86 *L.Ed.* 1655, 1660 (1942), that members of the opposite sex have a constitutionally protected right to marry. Proceeding on this premise, the Court invalidated a Virginia statute that prohibited a "white person" from marrying anyone other than another "white person" on the grounds that "restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause [of the Fourteenth Amendment.]" *Loving, supra,* 388 *U.S.* at 12, 87 *S.Ct.* at 1823, 18 *L.Ed.*2d at 1018. Noting that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival[,]" the Court also held that the statute violated the Due Process Clause. *Ibid.* (quoting *Skinner, supra,* 316 *U.S.* at 541, 62 *S.Ct.* at 1113, 86 *L.Ed.* at 1660). However, nothing in *Loving* suggests that the Fourteenth Amendment prohibits a State from limiting the institution of marriage to a State-recognized union between a man and a woman. In fact, several years after *Loving,* when the Minnesota Supreme Court rejected a constitutional challenge to that State's prohibition against marriage by members of the same sex in a decision that distinguished *Loving* on the ground that "there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex," ***191** *Nelson, supra,* 191 *N.W.*2d at 187, the Supreme Court dismissed an appeal from that decision

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

"for want of a substantial federal question," 409 *U.S.* 810, 93 *S.Ct.* 37, 34 *L.Ed.*2d 65; *see also Adams v. Howerton,* 673 *F.*2d 1036, 1039 n. 2 (9th Cir.), *cert. denied,* 458 *U.S.* 1111, 102 *S.Ct.* 3494, 73 *L.Ed.*2d 1373 (1982). Subsequent Supreme Court decisions also indicate that the constitutionally protected right recognized by the Court is the right of members of the opposite sex to marry. *See Turner, supra,* 482 *U.S.* at 95–96, 107 *S. Ct.* at 2265, 96 *L.Ed.*2d at 83; *Zablocki, supra,* 434 *U.S.* at 383–86, 98 *S.Ct.* at 679–81, 54 *L.Ed.*2d at 628–31; *see also Standhardt, supra,* 77 *P.*3d at 458 (noting that *Loving* "was anchored to the concept of marriage as a union involving persons of the opposite sex," and that "[i]n contrast, recognizing a right to marry someone of the same sex would not expand the established right to marry, but would redefine the legal meaning of 'marriage.' ").

The only opinion by a member of the Court that directly addresses whether the Fourteenth Amendment may be found to compel recognition of a right of same-sex ****273** couples to marry is Justice Scalia's opinion in *Lawrence v. Texas,* 539 *U.S.* 558, 604–05, 123 *S.Ct.* 2472, 2497–98, 156 *L.Ed.*2d 508, 542–43 (2003) (Scalia, J., dissenting). In dissenting from the majority's holding that a Texas statute making it a crime for two persons of the same sex to engage in certain types of intimate sexual conduct violated the Due Process Clause, he stated:

> Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.
>
> [539 *U.S.* at 604, 123 *S.Ct.* at 2498, 156 *L.Ed.*2d at 542.]

However, Justice Kennedy's majority opinion rejected this contention, stating:

> [This case] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.
>
> [539 *U.S.* at 578, 123 *S.Ct.* at 2484, 156 *L.Ed.*2d at 525.]

Even more pointedly, Justice O'Connor stated in a concurring opinion that "preserving the traditional institution of marriage" is a "legitimate state interest" and that "other reasons exist to ***192** promote the institution of marriage beyond mere moral disapproval of an excluded group." 539 *U.S.* at 585, 123 *S.Ct.* at 2487–88, 156 *L.Ed.*2d at 530. Therefore, there is nothing in *Loving* or *Lawrence* that indicates that the Fourteenth Amendment bars a state from prohibiting marriage between members of the same sex, and significantly, plaintiffs have disavowed reliance upon the United States Constitution in their attack upon this State's limitation of marriage to members of the opposite sex.

In the only state supreme court decision that has held the limitation of the institution of marriage to members of the opposite sex to be violative of a state constitution, *Goodridge,* the court's plurality opinion starts with the premise that marriage is a social institution that reflects "[t]he exclusive commitment of two individuals to each other [that] nurtures love and mutual support[,]" 798 *N.E.*2d at 948, or as restated later in the opinion, "a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family," *id.* at 954. The opinion then frames the question in the case as whether the State has demonstrated a sufficient justification for withholding the benefits of marriage, as thus conceived, from same-sex couples. The opinion proceeds to consider the justifications relied upon by the State for limitation of marriage to opposite-sex couples—"(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"—and finds each one to be constitutionally inadequate. *Id.* at 961–68.

The essential premise of the *Goodridge* plurality opinion—that the institution of marriage is simply an "exclusive commitment of two individuals to each other," *id.* at 943—constitutes a normative judgment that conflicts with the traditional and still prevailing religious and societal view of marriage as a union between a man and a woman that plays a vital role in propagating the species and provides the ideal setting for raising children. Consequently, ***193** unlike *Loving*, *Goodridge* does not establish a right of equal access to marriage, regardless of race or any other invidiously discriminatory factor, but instead significantly alters the nature of this social institution. Indeed, the plurality opinion itself acknowledges that "our decision today ****274** 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." *Id.* at 965.

The understanding of the nature of marriage as a State-recognized union between a man and a woman reflects the understanding of the delegates to the 1947 Constitutional Convention who proposed article I, paragraph 1, of our Constitution and the voters who approved it. This constitutional provision does not give a court the license to create a new constitutional right to

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

same-sex marriage simply because its members may feel that the State should grant same-sex couples the same form of recognition as opposite-sex couples who choose to marry. Moreover, to whatever extent it may be appropriate to consider current social mores and values in interpreting the liberty and equality protections of article I, paragraph 1, there is no basis for concluding that our society now accepts the view that there is no essential difference between a traditional marriage of a man and woman and a marriage between members of the same sex. To the contrary, Congress's enactment in 1996 of the Defense of Marriage Act, the New Jersey Legislature's recent enactment of the Domestic Partnership Act, which confers substantial legal rights upon same-sex couples but stops short of recognizing the right of members of the same sex to marry, and the strongly negative public reactions to the decisions in *Goodridge* and in lower courts of other states that have held the limitation of the institution of marriage to members of the opposite sex to be unconstitutional, demonstrate that there is not yet any public consensus favoring recognition of same-sex marriage. Therefore, we reject plaintiffs' claim that the New Jersey Constitution requires extension of the institution of marriage to same-sex couples.

***194** Although same-sex couples do not have a constitutional right to marry, they have significant other legal rights. Same-sex couples may seek to adopt children together, *see In re Application for Change of Name by Bacharach,* 344 *N.J.Super.* 126, 134, 780 *A.*2d 579 (App.Div.2001); their right to engage in sexual relations is protected by both the United States and New Jersey Constitutions, *see Lawrence, supra,* 539 *U.S.* at 578, 123 *S.Ct.* at 2484, 156 *L.Ed.*2d at 525–26; *Greenberg, supra,* 99 *N.J.* at 571–72, 494 *A.*2d 294; *State v. Saunders,* 75 *N.J.* 200, 214, 381 *A.*2d 333 (1977); and they may enter into domestic partnership unions under the Domestic Partnership Act that entitle them to many of the same legal benefits enjoyed by married opposite-sex couples. Moreover, domestic partners may assert claims that the due process and equal protection guarantees of article I, paragraph 1, of the New Jersey Constitution entitle them to additional legal benefits provided by marriage. *See Baker v. State, supra,* 744 *A.*2d at 869–86.

A time may come when our society accepts the view that same-sex couples should be allowed to marry. If there were such an evolution in public attitudes, our Legislature presumably would amend the marriage laws to recognize same-sex marriage just as it recognized the increasing public acceptance of same-sex unions by enacting the Domestic Partnership Act. However, absent legislative action, there is no basis for construing the New Jersey Constitution to compel the State to authorize marriages between members of the same sex.

Affirmed.

PARRILLO, J.A.D., concurring.

I join in the majority decision essentially for the reasons so clearly expressed by Judge Skillman. I write separately to underscore ****275** the nature of the right being asserted, the continuing viability of the State's interest in preserving its originating force, and the proper divide between judicial and legislative activity in a matter of such profound social significance.

***195** Plaintiffs challenge New Jersey's marriage laws, *N.J.S.A.* 37:1–1 to –27, solely on state constitutional grounds because they implicitly recognize there is no federally protected right of same-sex couples to marry. So limited, their argument posits a right that is really twofold: the right *to* marry and the rights *of* marriage. Plaintiffs want the former, in part, because it bestows the latter, and because if the latter are fundamental, the former must be as well. Although the rhetoric of justification tends to collapse the nature of the rights in question, they are, upon closer examination, quite separate and not at all the same.

The rights *of* marriage—the so-called secular implications—are actually not contained in the marriage laws under attack, which simply delineate which persons may not marry each other, *see, e.g., N.J.S.A.* 37:1–1, but rather are conferred by a host of statutes not here in issue. Unquestionably, the economic, legal and regulatory benefits incident to a marriage license are significant. But, as Judge Skillman's opinion points out, many of these rights and protections are afforded to committed same-sex couples under our Domestic Partnership Act, *N.J.S.A.* 26:8A–1 to –12, as well as evolving case law that recognizes, among other privileges, the right of same-sex couples to seek to adopt children together. *See In re Application for a Change of Name by Bacharach,* 344 *N.J.Super.* 126, 134, 780 *A.*2d 579 (App.Div.2001) (citing *In re Adoption of Two Children by H.N.R.,* 285 *N.J.Super.* 1, 6, 666 *A.*2d 535 (App.Div.1995)). Of course, to the extent those laws unconstitutionally withhold any of the publicly-conferred tangible or intangible benefits of marriage from same-sex couples, plaintiffs remain free to redress any such deprivation on an ad-hoc basis, by challenging the particular statutory exclusion resulting in disparate or unfair treatment. In fact, it would seem a much more effective approach to address the claimed denial directly, rather than to simply advance the notion

as an additional basis for finding a constitutional mandate for state recognition of same-sex marriage.

***196** The latter's symbolic significance, however, lies at the heart of plaintiffs' argument. Although New Jersey's Domestic Partnership law affords plaintiffs a legally-recognized status more or less "marriage-like," it does not carry the title "marriage." This is, by no means, to suggest the legal conflict is merely semantic or not as rationally important to the people on each side of the issue. On the contrary, definitions matter. This is why the conflict over the core meaning and purpose of marriage is so highly charged. Indeed, notwithstanding equal benefits and protections under our law, plaintiffs would still argue that denial of the right *to* marry operates per se to deny a constitutionally protected right; that the right to marry, under New Jersey's constitution, compels state sanctioning of same-sex marriage. Resolution of this issue, therefore, requires an understanding of the precise status in issue.

Plaintiffs' claim of a right to marry relies on traditional equality and liberty jurisprudence, the latter couched in the more recent terminology of privacy, autonomy, and identity. No doubt, plaintiffs have taken their bearings from the "close personal relationship" model of marriage espoused in *Goodridge v. Department of Public Health,* 440 *Mass.* 309, 798 *N.E.*2d 941 (2003). Citing "respect for individual autonomy," *id.* at 949, the *Goodridge* plurality ****276** defined marriage simply as "the exclusive and permanent commitment of the married partners to one another[ ]," *id.* at 961; "the voluntary union of two persons as spouses, to the exclusion of all others[ ]," *id.* at 969; and "at once a deeply personal commitment to another human being and a highly public celebration of ideals of mutuality, companionship, intimacy, fidelity, and family." *Id.* at 954. Given this narrow view, it is no wonder the *Goodridge* plurality concluded that "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." *Id.* at 961.

This distillation of marriage down to its pure "close personal relationship" essence, however, strips the social institution "of any goal or end beyond the intrinsic emotional, psychological, or sexual ***197** satisfaction which the relationship brings to the individuals involved." Monte Neil Stewart, *Judicial Redefinition of Marriage,* 21 *Can. J. Fam. L.* 11, 81 (2004) (quoting D. Cere, "The Conjugal Tradition in Post Modernity: The Closure of Public Discourse?" at 6 (2003) (unpublished)). Yet, the marital form traditionally has embraced so much more, including:

> the fundamental facets of [traditional] conjugal life: the fact of sexual difference; the enormous tide of heterosexual desire in human life, the massive significance of male female bonding in human life; the procreativity of heterosexual bonding, the unique social ecology of heterosexual parenting which bonds children to their biological parents, and the rich genealogical nature of heterosexual family ties.
>
> [*Ibid.* (citation omitted.)].

The simple fact is that the very existence of marriage does "privilege procreative heterosexual intercourse." Marriage, plainly speaking, is a privileged state and that is precisely why plaintiffs are waging this battle. Procreative heterosexual intercourse is and has been historically through all times and cultures an important feature of that privileged status, and that characteristic is a fundamental, originating reason why the State privileges marriage. *Skinner v. Oklahoma,* 316 *U.S.* 535, 541, 62 *S.Ct.* 1110, 1113, 86 *L.Ed.* 1655 (1942); *J.B. v. M.B.,* 170 *N.J.* 9, 23, 783 *A.*2d 707 (2001); *Lindquist v. Lindquist,* 130 *N.J.Eq.* 11, 19, 20 *A.*2d 325 (E. & A.1941); *see also Dean v. District of Columbia,* 653 *A.*2d 307, 337 (D.C.1995). When plaintiffs, in defense of genderless marriage, argue that the State imposes no obligation on married couples to procreate, they sorely miss the point. Marriage's vital purpose is not to mandate procreation but to control or ameliorate its consequences—the so-called "private welfare" purpose. To maintain otherwise is to ignore procreation's centrality to marriage.

By seeking public recognition and affirmation of their private relationships, plaintiffs acknowledge that marriage is more than a merely private declaration, but an act of public significance and consequence for which the State exerts an important regulatory ***198** role.[1] Indeed, to seek such official assent is to concede the authority of those whose regard is sought.

****277** Because marriage has secular implications—the so-called "rights *of* marriage"—the State has a legitimate interest in determining eligibility criteria. In fact, no one really disputes that the State is empowered to privilege marriage by restricting access to, or drawing principled boundaries around, it. *Greenberg v. Kimmelman,* 99 *N.J.* 552, 572, 494 *A.*2d 294 (1985). Indeed, there are reasons for limiting unfettered access to marriage. Otherwise, by allowing the multiplicity of human choices that bear no resemblance to marriage to qualify, the institution would become non-recognizable and unable to perform its vital function. Thus, New Jersey statutes ban bigamous marriages, *N.J.S.A.* 2C:24–1, common law marriages, *N.J.S.A.* 37:1–10, incestuous marriages, *N.J.S.A.* 37:1–1, and marriages to persons adjudged to be mentally

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

incompetent or with a venereal disease in a communicable stage, *N.J.S.A.* 37:1–9. The governmental interest in these restrictions has been repeatedly and widely recognized.

To be sure, longstanding traditions restricting the right to marry are not immune from constitutional challenge. Yet, plaintiffs' reliance on *Loving v. Virginia,* 388 *U.S.* 1, 87 *S.Ct.* 1817, 18 *L.Ed.*2d 1010 (1967), does not advance this proposition. Anti-miscegenation laws simply may not be equated with laws reserving marriage to opposite-sex couples. Marriage has an inherent nature, and race is not intrinsic to that status. The so-called "tradition" of laws prohibiting interracial marriages "was contradicted by a *text*—an Equal Protection Clause that implicitly establishes racial equality as a constitutional value." *Planned* ***199** *Parenthood v. Casey,* 505 *U.S.* 833, 980, n. 1, 112 *S.Ct.* 2791, 120 *L.Ed.*2d 674 (1992) (Scalia, J., dissenting in part).

In contradistinction, a core feature of marriage is its binary, opposite-sex nature. Interestingly, plaintiffs admittedly have no quarrel with the legal requirement that marriage be limited to a union of two people. But, the binary idea of marriage arose precisely because there are two sexes. Plaintiffs simply have not posited an alternative theory of marriage that would include members of the same sex, but still limit the arrangement to couples, or that would otherwise justify the distinction. If, however, the meaning of marriage and the right to marital status is sufficiently defined without reference to gender, then what principled objection could there be to removing its binary barrier as well? If, for instance, marriage were only defined with reference to emotional or financial interdependence, couched only in terms of privacy, intimacy, and autonomy, then what non-arbitrary ground is there for denying the benefit to polygamous or endogamous unions whose members claim the arrangement is necessary for their self-fulfillment?

The legal nature of marriage cannot be totally malleable lest the durability and viability of this fundamental social institution be seriously compromised, if not entirely destabilized. Because the reasons for the existence of marriage retain substantial vitality to date, because the "specialness" of its opposite-sex feature makes it meaningful and achieves important public purposes, and because the meaning and value of alternative theories are speculative and unknown, the State's interest in maintaining the traditional gender block is rationally based.

It may well be, as some posit, that marriage "is socially constructed, and thus transformable[.]" Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra–Community Critique,* 21 *N.Y.U. Rev. of L. & Soc. Change,* 567, 589 (1994). Perhaps so. And it would be foolish not to recognize a certain dynamism in the evolving ****278** view of marriage and its role in society. Indeed, the basic reality of procreative ***200** capacity in right *to* marry cases to date may, in the future, take on different meaning or significance given the displacing potential of cross-cultural forces in our society, such as contraception and assisted reproductive technology. Suffice it to say, however, there is no plausible basis for suggesting the link is now so weak as to require the line be drawn any differently. Nothing before the court compels us to remove the "deep logic" of gender as a necessary component of marriage, or to recognize, on equal footing, any adult relationship characterized merely by interdependence, mutuality, intimacy, and endurance.

Any societal judgment to level the playing field must appreciate the proper divide between judicial and legislative activity. "[L]aw has a purpose and a power to preserve or change public meanings and thus a purpose and a power to preserve or change social institutions." Stewart, *supra,* at 80. In this vein, it is the Legislature's prerogative to define and advance governmental ends, while the judiciary ensures the means selected bear a just and reasonable relationship to the governmental objective, or, in the case of suspect classifications or fundamental rights, are supported by compelling State interests. It is, therefore, a proper role for the Legislature to weigh the societal costs against the societal benefits flowing from a profound change in the public meaning of marriage. On the other hand, the judiciary is not in the business of preferring, much less anointing, one value as more valid than another, particularly where, at least in the foreseeable future, the conflict is not susceptible to resolution by scientific or objective means. The choice must come from democratic persuasion, not judicial fiat.

COLLESTER, J.A.D., dissenting.

Although my colleagues and I arrive at a different conclusion, we are in agreement that any individual views we have on the morality or social implications of same-sex marriage must play no part in our analysis of the constitutional issues presented. In the ongoing public debate there are persons of intelligence, sensitivity ***201** and good will on each side of the issue. Some believe that lawful marriage between persons of the same gender would undermine the essential nature of both marriage and family life. Others argue that it would give proper

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

recognition to committed same-sex relationships and by doing so enhance marriage. Our function as judges is to interpret the Constitution, not rewrite it, and our interpretation must be principled rather than skewed to fit an individual philosophy or a desired result. *N.J. Sports Authority v. McCrane,* 61 *N.J.* 1, 8, 292 *A.*2d 545 (1972). Nonetheless, we must interpret our Constitution to uphold individual rights, liberties and guarantees for all citizens even though our conclusion may disappoint or offend some earnest and thoughtful citizens.

For all of its personal, familial and spiritual value, marriage is a creature of State laws governing its entrance, protecting its special status, and, when necessary, specifying the terms of its dissolution. Marriage is also a fundamental civil right protected by both the Federal and New Jersey Constitutions. *Zablocki v. Redhail,* 434 *U.S.* 374, 383, 98 *S.Ct.* 673, 680, 54 *L.Ed.*2d 618 (1978); *J.B. v. M.B.,* 170 *N.J.* 9, 23–24, 783 *A.*2d 707 (2001). Laws may not "interfere directly and substantially with the right to marry." *Zablocki, supra,* 434 *U.S.* at 387, 98 *S.Ct.* at 681, 54 *L.Ed.*2d at 631.

The right to marry is effectively meaningless unless it includes the freedom to ****279** marry a person of one's choice. *Goodridge v. Dep't of Pub. Health,* 440 *Mass.* 309, 798 *N.E.*2d 941, 958 (2003); *see also, Perez v. Lippold,* 32 *Cal.*2d 711, 198 *P.*2d 17, 21 (1948). In *Loving v. Virginia,* 388 *U.S.* 1, 12–13, 87 *S.Ct.* 1817, 1823–24, 18 *L.Ed.*2d 1010, 1018 (1967), the United States Supreme Court struck down laws prohibiting interracial marriage under both the Due Process and Equal Protection Clauses of the Federal Constitution. *Zablocki, supra,* 434 *U.S.* at 392, 98 *S.Ct.* at 685, 54 *L.Ed.*2d at 635, invalidated a Wisconsin law requiring a person under a child support order to meet financial requirements and seek court approval in order to marry. Prison inmates cannot be foreclosed from marrying a person of their choosing, who is either ***202** inside or outside the institution. *Turner v. Safley,* 482 *U.S.* 78, 94, 107 *S.Ct.* 2254, 2265, 96 *L.Ed.*2d 64, 83 (1987); *see also, Vazquez v. Dep't of Corrections,* 348 *N.J.Super.* 70, 76, 791 *A.*2d 281 (App.Div.2002) (holding the denial of a request by an inmate serving a life sentence violated her constitutional right to marry).

Statutory restrictions on the right to marry are few, and they are grounded in the State's proper regulatory authority, commonly called its police power, to protect general health, safety and welfare. Marriage is prohibited to a child, a close relative, a mental incompetent or a person afflicted with a venereal disease in a communicable stage. *See, N.J.S.A.* 37:1–1 to –9. None of the plaintiffs in this case fall within these proscribed categories, and neither the State nor the majority opinion suggest a reason of health, safety or general welfare to justify a prohibition of their right to marry the person of their choosing.

While New Jersey statutes do not specifically limit marriage to a union of a man and a woman or expressly prevent a person from marrying someone of the same sex, it is clear that they do so. *M.T. v. J.T.,* 140 *N.J.Super.* 77, 83–84, 355 *A.*2d 204 (App.Div.), *certif. denied,* 71 *N.J.* 345, 364 *A.*2d 1076 (1976). Plaintiffs argue that this prohibition deprives them of their fundamental right to marry a person of their choosing in contravention of their rights of liberty, privacy and equal protection of laws, guaranteed by the New Jersey Constitution. *See, Sojourner A. v. Dep't of Human Services,* 177 *N.J.* 318, 332, 828 *A.*2d 306 (2003); *Greenberg v. Kimmelman,* 99 *N.J.* 552, 568, 494 *A.*2d 294 (1995); *In re Quinlan,* 70 *N.J.* 10, 39–40, 355 *A.*2d 647 (1976).

Plaintiffs are diverse in background and occupation and have lived in committed relationships for decades. Chris Lodewycks and Craig Hutchinson have been together for thirty-four years. Chris is an investment asset manager, president of the Summit Business Association and a trustee of his local YMCA. Mark Lewis and Dennis Winslow are Episcopal priests whose pastoral duties have included officiating at hundreds of weddings and assisting congregants with marriage counseling. Mark is the chaplain for ***203** the Secaucus fire and police departments and a trustee of Christ Hospital in Jersey City. Another ordained minister, Alice Troy, is midway through the second decade in her relationship with Sandra Heath.

The other plaintiffs are raising children. The relationship of Cindy Meneghin and Maureen Kilian spans thirty years and they each gave birth following artificial insemination and adopted the other's child. As parents of a twelve year old boy and an eleven year old girl, they attend PTA meetings, coach soccer and are very involved in the lives of their children. Cindy is Director of Web Services at Montclair State University, and Maureen is a church administrator.

****280** Karen Nicholson–McFadden and Marcye Nicholson–McFadden also gave birth to their children, a boy now six and a girl now two, following artificial insemination and cross-adoption. Karen and Marcye have been partners for sixteen years and operate an executive search firm. Karen is a member of the local zoning board of adjustment.

Sarah Lael and her partner, Suyin Lael, adopted their

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

eight year old daughter and at last report were in the process of adopting two other children under the age of five. Marilyn Amneely gave birth to five children during an eighteen year marriage and retained their custody following her divorce. Marilyn's relationship with plaintiff Diane Marini began fourteen years ago, and since that time, Diane has participated in the lives of Marilyn's children as a step-parent. Diane owns two businesses and is a member of the Haddonfield planning board, while Marilyn is a registered nurse at Thomas Jefferson University Hospital in Philadelphia. Together they survived a health crisis after Diane was diagnosed with breast cancer in 1999.

My colleagues and I agree as to the fundamental nature of the right to marry, but they reject plaintiffs' constitutional claims by defining marriage strictly as heterosexual unions. By this definition, plaintiffs are not deprived of the right to marry as long as it is to a member of the opposite sex. But since they cannot marry ***204** the person of their choice, it is really no right at all. By so defining marriage, the majority views plaintiffs' assertion of a right to marry as a claim of a different kind of right or to a different kind of marriage, which is beyond judicial authority to recognize as lawful. This analysis mirrors decisions in other jurisdictions which have summarily rejected similar constitutional claims based on other State constitutions. *See, e.g., Standhardt v. Superior Court ex rel. County of Maricopa,* 206 *Ariz.* 276, 77 *P.*3d 451 (Ct.App.2003), *review denied* (Ariz.2004); *Baker v. Nelson,* 291 *Minn.* 310, 191 *N.W.*2d 185, 186 (1971), *appeal dismissed,* 409 *U.S.* 810, 93 *S.Ct.* 37, 34 *L.Ed.*2d 65 (1972). *But see, Goodridge v. Dep't of Pub. Health, supra,* 798 *N.E.*2d at 949.

The argument is circular: plaintiffs cannot marry because by definition they cannot marry. But it has the advantage of simplicity. If marriage by definition excludes plaintiffs from marrying persons of their choosing, then, unlike all others, they have no fundamental or constitutionally protected right and must seek creation of that right through the political process and a legislative redefinition of marriage. Therefore, opposite-sex marriage is a tautology. Same-sex marriage, an oxymoron. We need go no further. Case closed.

I disagree with both the analysis and the result. To cabin the right to marry within a definition of marriage which prohibits plaintiffs from even asserting a constitutional claim for entitlement to marry the person of their choosing robs them of constitutional protections and deprives them of the same rights of marriage enjoyed by the other individuals of this State, even those confined in State prisons.

After recasting the issue as to whether plaintiffs' claim fits within the restricted definition of marriage, not surprisingly the majority finds no support for marriage between same-sex persons that is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty," and thereby declares that plaintiffs have no fundamental right of marriage.

***205** The analysis is reminiscent of arguments in support of anti-miscegenation laws before *Loving.* Those laws defined marriage as the union of a man and woman of the same race, and proponents presented ****281** a long history in support of the definition.[1] Indeed, in *Loving* the State of Virginia argued that there was no fundamental right to interracial marriage because "the historic tradition of marriage" did not contemplate such marriages. In rejecting the argument, the Supreme Court framed the issue not as a claim of right to interracial marriage but rather as an assertion of a fundamental right to marriage. *Loving, supra,* 388 *U.S.* at 12, 87 *S.Ct.* at 1823–24, 18 *L.Ed.*2d at 1018 (1967). The Court declared that the right to marry was one of the "basic civil rights of man" and could not be restricted or prohibited by racial classification. *Loving, supra,* 388 *U.S.* at 12, 87 *S.Ct.* at 1824, 18 *L.Ed.*2d at 1018, quoting *Skinner v. State of Oklahoma,* 316 *U.S.* 535, 541, 62 *S.Ct.* 1110, 1113, 86 *L.Ed.* 1655, 1660 (1942). Therefore, while *Loving* rejected a prohibition of marriage based on race, the analysis is relevant to the instant case because *Loving* also rejected a definition of marriage foreclosing an individual's right to marry a person of one's choosing and addressed the issue of the constitutional viability of the restriction in terms of the fundamental right to marriage itself rather than to a separate right or different form of marriage.

The majority grounds its definition of marriage excluding persons of the same sex upon historic or religious tradition as well as the societal value attached to procreation. In my view, the first reason is unpersuasive, the second, irrelevant.

With respect to religious beliefs and traditions, it is clear that no matter how marriage is defined, the marriage ceremony has ***206** spiritual significance to most, and many consider it a sacrament or exercise of religious faith. *Turner v. Safley,* 482 *U.S.* 78, 96, 107 *S.Ct.* 2254, 2265, 96 *L.Ed.*2d 64, 83 (1987). To a great number of people, same-sex marriage is contrary to religious faith and teachings. Their objections must be respected, not demeaned. But it is slippery constitutional footing to base a definition of marriage on religious tradition, and, more to the point, plaintiffs seek access only to civil marriage.

WESTLAW © 2017 Thomson Reuters. No claim to original U.S. Government Works.

None of them, not even the three ordained clergy, maintain that same-sex marriage is supported by religious doctrine or tradition, and in this action they do not seek acceptance or recognition within a particular religious community. What they do say is that the spiritual dimension of marriage is unjustly denied to them by civil laws prohibiting them from marrying the person of their choice.

History should be considered a guide, not a harness, to recognition of constitutional rights, and patterns of the past cannot justify contemporary violations of constitutional guarantees. As Justice Holmes famously declared over a century ago,

> [i]t is revolting to have no better reason for a rule of law then that so it was laid down in the name of Henry IV. It is more revolting if [its foundation has] vanished long since, and the rule simply persists from blind imitation of the past.
>
> [Justice Oliver Wendell Holmes, *The Path of the Law,* 10 *Harv. L. Rev.* 457, 469 (1897).]

That said, it would be folly to challenge that the common historic and legal conception of marriage is as a heterosexual institution. ****282** [2] Moreover, I fully agree with the majority that the idea of marriage between persons of the same sex would have been alien both to those who drafted and those who ratified the New Jersey Constitution of 1947. But so were spaceships, computers and reproductive technology. A constitutional right of privacy was not recognized by the United States Supreme Court until 1965 in ***207** *Griswold v. Connecticut,* 381 *U.S.* 479, 484–85, 85 *S.Ct.* 1678, 1681, 14 *L.Ed.*2d 510, 514–15 (1965), and it was almost a decade later when our Supreme Court discerned that right in Article I, paragraph 1 of our Constitution. *In re Quinlan, supra,* 70 *N.J.* at 39–40, 355 *A.*2d 647. It is also farfetched to assume that the framers of the Constitution envisioned a constitutional right for a woman to choose to have an abortion since at that time abortion was a crime which was vigorously prosecuted. *State v. Moretti,* 52 *N.J.* 182, 244 *A.*2d 499 (1968), *cert. denied,* 393 *U.S.* 952, 89 *S.Ct.* 376, 21 *L.Ed.*2d 363 (1968); *State v. Raymond,* 113 *N.J.Super.* 222, 227, 273 *A.*2d 399 (App.Div.1971).

Certainly, marriage was not perceived as a partnership to the extent that it is today. The common law concept of marriage as a unity was still prevalent. Interspousal immunity from civil suit, then considered fundamental to marriage, was not rejected until decades later. *Immer v. Risko,* 56 *N.J.* 482, 488, 267 *A.*2d 481 (1970); *Merenoff v. Merenoff,* 76 *N.J.* 535, 557, 388 *A.*2d 951 (1978). The unity of marriage precluded spouses from being co-conspirators until the 1970s. *See, State v. Pittman,* 124 *N.J.Super.* 334, 336, 306 *A.*2d 500 (Law Div.1973). A more egregious example was the marriage defense to rape, whereby a husband could avoid prosecution because marriage was a unity and consent by the wife to sexual intercourse was implied. *See, State v. Smith,* 85 *N.J.* 193, 426 *A.*2d 38 (1981).

By far the greatest changes in marriage as it has evolved from its common law unity to a partnership were in terms of its dissolution. Equitable distribution of property acquired during marriage, rehabilitative alimony, child support guidelines and joint custody are just some of the issues which judges routinely consider, but they were outside the scope of divorce litigation law a generation past. Indeed, divorce was relatively uncommon when our State Constitution was adopted. Current estimates are that up to fifty percent of marriages end in divorce, most of which are granted on no-fault grounds, which did not exist in 1947. The dynamics within marriage have also undergone great changes. Married couples, with or without children, are commonly both ***208** employed. Single parent households have multiplied as divorce rates have climbed, and adoptions are now more readily available to unmarried persons, including same-sex couples. Rather than a static concept, marriage has been described as an “evolving paradigm,” *Goodridge, supra,* 798 *N.E.*2d at 966–67, and another paradigm, that of the nuclear family, has also undergone vast changes. *See, V.C. v. M.J.B.,* 163 *N.J.* 200, 232–34, 748 *A.*2d 539 (2000) (Long, J., concurring).

While public debate on same-sex marriage is polarized, there should be agreement as to the greater acceptance of gay and lesbian relationships in popular culture and as individuals living in the communities of our State. The 2000 census reported that at least 16,000 same-sex couples reside in New Jersey, a figure considered markedly conservative. Ruth Padawer, ****283** *Census 2000: Gay Couples, At Long Last, Feel Acknowledged, The Record,* August 15, 2001. In its amicus curiae brief, the city of Asbury Park contends in support of plaintiffs' position that the right of same-sex marriage would assist in building stronger communities in the State.

There have been significant alterations to the legal landscape in the past decades since the 1947 Constitution respecting claims of right by gays and lesbians in both constitutional adjudications and domestic relations cases. Most notably is *Lawrence v. Texas,* 539 *U.S.* 558, 123 *S.Ct.* 2472, 156 *L.Ed.*2d 508 (2003) in which the United States Supreme Court specifically overruled *Bowers v. Hardwick,* 478 *U.S.* 186, 106 *S.Ct.* 2841, 92 *L.Ed.*2d 140 (1986), its precedent of less than twenty years earlier, and

held that the criminalization of intimate sexual contact between adult homosexuals in private impinged upon their liberty interests protected by the Due Process Clause of the Fourteenth Amendment. *Lawrence, supra,* 539 *U.S.* at 578, 123 *S.Ct.* at 2484, 156 *L.Ed.*2d at 525. In disclaiming the historical rationale of *Bowers,* the *Lawrence* majority opinion by Justice Kennedy quoted language applicable to the case at bar from Justice Stevens' *Bowers* dissent:

> ***209** "Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons."
>
> [*Lawrence, supra,* 539 *U.S.* at 577–78, 123 *S.Ct.* at 2483, 156 *L. Ed.*2d at 525 (quoting *Bowers v. Hardwick, supra,* 478 *U.S.* at 216, 106 *S.Ct.* at 2858, 92 *L. Ed.*2d at 162). (Stevens, J., dissenting.)]

Judicial decisions of this State have enhanced the rights of gays and lesbians in matters of family law. As witnessed by the Lael family, sexual orientation is not a bar to adoption. *Adoption of Two Children by H.N.R.,* 285 *N.J.Super.* 1, 11, 666 *A.*2d 535 (App.Div.1995); *Matter of Adoption of Child by J.M.G.,* 267 *N.J.Super.* 622, 631–32, 632 *A.*2d 550 (Ch.Div.1993); *see also, In re Application for Change of Name by Bacharach,* 344 *N.J.Super.* 126, 134, 780 *A.*2d 579 (App.Div.2001). Similarly, the custody and visitation rights of natural or psychological parents cannot be denied or abridged based on sexual orientation. *V.C., supra,* 163 *N.J.* at 230, 748 *A.*2d 539; *M.P. v. S.P.,* 169 *N.J.Super.* 425, 439, 404 *A.*2d 1256 (App.Div.1979); *In re J.S. & C.,* 129 *N.J.Super.* 486, 489, 324 *A.*2d 90 (Ch.Div.1974), *aff'd,* 142 *N.J.Super.* 499, 362 *A.*2d 54 (App.Div.1976). Moreover, a same-sex partner may lawfully change a surname to match that of his or her partner. *Bacharach, supra,* 344 *N.J.Super.* at 134, 780 *A.*2d 579.

The enhancement of rights in family law for gays and lesbians is representative of a more functional view of family than when our Constitution was adopted. *See, e.g., Braschi v. Stahl Assoc.,* 74 *N.Y.*2d 201, 544 *N.Y.S.*2d 784, 543 *N.E.*2d 49, 54 (1989) (holding that for purposes of the New York rent control laws, a surviving homosexual could not be evicted after his long-term partner died because in "the reality of family life" he qualified as a spouse or member of the immediate family). *See generally,* Martha Minow, *The Free Exercise* ****284** *of Families,* 1991 *U. Ill. L. Rev.* 925, 931–32 (1991); Note, *Looking For a Family Resemblance,* 104 *Harv. L.* ***210** *Rev.* 1640 (1991); Barbara J. Cox, *Love Makes a Family—Nothing More, Nothing Less: How the Judicial System Has Refused to Protect Nonlegal Parents in Alternative Families,* 8 *J.L. & Pol.,* 5 (1991).

Our Supreme Court explored the dimensions and functional reality of "family" in *V.C., supra,* 163 *N.J.* at 227–28, 748 *A.*2d 539, in which it held that a former same-sex partner had standing as a psychological parent to seek legal custody and visitation of twins born to her former partner following artificial insemination. In her separate concurring opinion, Justice Long gave substance to the functional view of family, stating:

> [W]e should not be misled into thinking that any particular model of family life is the only one that embodies "family values." Those qualities of family life on which society places a premium—its stability, the love and affection shared by its members, their focus on each other, the emotional and physical care and nurturance that parents provide their offspring, the creation of a safe harbor for all involved, the wellspring of support family life provides its members, the ideal of absolute fealty in good and bad times that infuses the familial relationship (all of which justify isolation from outside intrusion)—are merely characteristics of family life that, except for its communal aspect, are unrelated to the particular form a family takes.
>
> [*Id.* at 232, 748 *A.*2d 539.]

The "winds of change" in the traditional understanding of family and marriage which we noted almost thirty years ago in *M.T. v. J.T.,* 140 *N.J.Super.* 77, 83–84, 355 *A.*2d 204 (App.Div.), *certif. denied,* 71 *N.J.* 345, 364 *A.*2d 1076 (1976), have been felt by the Legislature, which enacted the Domestic Partnership Act, *L.* 2003, *c.* 246, while this appeal was pending. The Act confers some but not all state legal rights afforded married persons to those who qualify and register as domestic partners. *N.J.S.A.* 26:8A–1 to –12.[3]

***211** Therefore, while conclusions drawn from the past admittedly depend to a degree on where one focuses the telescope, history since 1947 points to changes in the reality of marriage and family life as well as greater acceptance of committed same-sex relationships. I see no basis in the history of marriage to justify a definition

which denies plaintiffs the right to enter into lawful marriage in this State with the person of their choice.

Although the Attorney General disclaims the promotion of procreation as a rationale for prohibiting same-sex marriage, the majority does give it weight, stating that "our society considers marriage between a man and woman to play a vital role in propagating the species and in providing the ideal environment for raising children." I agree with the Attorney General. Procreation is irrelevant to the issue before us.

Promotion of procreation as a factor defining marriage to exclude same-sex applicants is relied upon in those cases cited by the majority which recognize that history or tradition cannot alone justify its restrictive ****285** definition of marriage or distinguish it from the argument based on history which was rejected by the Supreme Court in *Loving. See, e.g., Baker v. Nelson,* 291 *Minn.* 310, 191 *N.W.*2d 185, 186–87 (1971) ("procreation and the rearing of children within a family" provides "a clear distinction between a marital distinction based merely on race and one based on the fundamental difference in sex."). *See generally,* William H. Hohengarten, *Same–Sex Marriage and the Right of Privacy,* 103 *Yale L.J.* 1495, 1513–23 (1994).

However, there is not, nor could there be, a threshold requirement to marriage of the intention or ability to procreate. *See, M.T., supra,* 140 *N.J.Super.* at 83–84, 355 *A.*2d 204. Of course many heterosexuals marry for reasons unrelated to having children. Some never intend to do so. Some are unable to do so by reason of physical inability, age or health. Moreover, tying the ***212** essence of marriage to procreation runs into cases upholding as a right of privacy the election not to procreate. *See, Griswold, supra,* 381 *U.S.* at 485, 85 *S.Ct.* at 1682, 14 *L.Ed.*2d at 515 (protecting the right of married persons to use contraceptives); *Eisenstadt v. Baird,* 405 *U.S.* 438, 454–55, 92 *S.Ct.* 1029, 1039, 31 *L.Ed.*2d 349, 363 (1972) (extending the same rights to persons who are not married), *Roe v. Wade,* 410 *U.S.* 113, 153, 93 *S.Ct.* 705, 727, 35 *L.Ed.*2d 147, 177 (1972) (upholding a woman's right to choose an abortion). *See also, Right to Choose v. Byrne,* 91 *N.J.* 287, 305–06, 450 *A.*2d 925 (1982).

Also if procreation or the ability to procreate is central to marriage, logic dictates that the inability to procreate would constitute grounds for its termination. However, as opposed to the inability or unwillingness to engage in sexual intercourse, the inability or refusal to procreate is not a legal basis for divorce or annulment. *See, e.g., T. v. M.,* 100 *N.J.Super.* 530, 538, 242 A.2d 670 (Ch.Div.1968). Finally, the claim that the promotion of procreation is a vital element of marriage and justifies exclusion of persons of the same gender falls on its face when confronted with reproductive science and technology. The fact is some persons in committed same-sex relationships can and do legally and functionally procreate. Cindy Meneghin, Maureen Kilian, Karen Nicholson–McFadden and Marcye Nicholson–McFadden, all plaintiffs in this case, each gave birth to their children following artificial insemination.

Moreover, the majority mentions the conventional wisdom of "the role that marriage plays in procreation and providing the optimal environment for child rearing," but no authority is given to justify this "optimal" status. This presents simply as an article of faith and one which ignores the reality of present family life parenting, which includes adoption, step-parenting and the myriad of other relationships of parenting noted by our Supreme Court in *V.C.* Further, the argument that opposite-sex persons provide a more suitable environment for raising children because they are married simply underscores that plaintiffs and their children are ***213** unjustly treated by denying them a right to marry their committed partners. Finally, there is nothing in the record to indicate that the eight plaintiffs in this case currently raising or having raised children as natural parents, adoptive parents or step-parents, are providing an environment for growth and happiness of the children that is anything less than optimal.

Two New Jersey cases are cited by the majority in support of its position. The first, *Rutgers Council of AAUP Chapters v. Rutgers,* 298 *N.J.Super.* 442, 689 *A.*2d 828 (App.Div.1997), *certif. denied,* 153 *N.J.* 48, 707 *A.*2d 151 (1998), bears only indirectly. There we declined to interpret the term "dependents" to include domestic ****286** partners for purposes of coverage in the State Health Benefits Plan, *id.* at 452, 689 *A.*2d 828, a result which spawned two separate concurring opinions terming it "distasteful." *Id.* at 463, 464, 689 *A.*2d 828 (Baime, J.A.D., and Levy, J.A.D., concurring.).[4] I submit that the comments in the *Rutgers* majority opinion relating to a same-sex marriage were simply dicta and not authoritative or persuasive in this case.

The other case, *M.T. v. J.T.,* 140 *N.J.Super.* 77, 355 *A.*2d 204 (App.Div.) *certif. denied,* 71 *N.J.* 345, 364 *A.*2d 1076 (1976), is cited and quoted for its support of the historic understanding of marriage as the lawful union of a man and a woman. Interestingly, M.T. was both. Born a man, he cohabited with J.T. in a homosexual relationship for five years and then underwent transsexual surgery which involved removal of his male sex organs and the

construction and placement of "a vagina and labia adequate for traditional penile/vaginal intercourse." *Id.* at 80, 355 *A.*2d 204. M.T. and J.T. later married in New York and continued their cohabitation, this time as husband and wife, for two years in New Jersey during which time they regularly engaged in sexual intercourse. *Id.* at 79, 355 *A.*2d 204. After they separated, M.T. filed ***214** a support complaint as a non-working wife. J.T. countered that he had no obligation to pay support because M.T. was in reality a man and that therefore their marriage was void. We held that M.T. was a woman, that the marriage was valid and that she was entitled to support for the following reason:

> Plaintiff has become physically and psychologically unified and fully capable of sexual activity with her reconciled sexual attributes of gender and anatomy. Consequently, plaintiff should be considered a member of the female sex for marital purposes. It follows that such an individual would have the capacity to enter into a valid marriage relationship with a person of the opposite sex and did so here.
>
> [*Id.* at 89–90, 355 *A.*2d 204.]

I gather from *M.T.* that a relationship qualifies as a lawful marriage if the genitalia of the partners are different so that they can engage in sexual intercourse. Accordingly, history and procreation are irrelevant provided surgery is successful, and the new woman and her partner are then entitled to a constitutional right to marry that neither he nor she had in the pre-op room. Constitutional rights should not be limited by genitalia or the ability to engage in a particular form of sexual intimacy. *See, Lawrence, supra,* 539 *U.S.* at 575, 123 *S.Ct.* at 2482, 156 *L.Ed.*2d at 523.

The arguments based on tradition, history, promotion of procreation or existing case law do not justify a definition of marriage which proscribes plaintiffs from asserting their right to marry the person of their choosing under Article I, paragraph 1 of the Constitution. That provision reads as follows:

> 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 expansive language of this paragraph has been interpreted by our Supreme Court to guarantee all substantive rights of due process to all persons as well ****287** as equal protection of the laws of this State. *Sojourner A., supra,* 177 *N.J.* at 332, 828 *A.*2d 306; *Doe v. Poritz,* 142 *N.J.* 1, 8, 662 *A.*2d 367 (1995); *Greenberg, supra,* 99 *N.J.* at 568, 494 *A.*2d 294. While the Federal Constitution remains the primary source of individual rights, the New Jersey ***215** Constitution is a separate source of individual freedoms and may provide more expansive protection of individual liberties. *See, e.g., State v. Novembrino,* 105 *N.J.* 95, 146, 519 *A.*2d 820 (1987) (exclusionary rule unaffected by federal good faith exception); *Right to Choose v. Byrne,* 91 *N.J.* 287, 300, 450 *A.*2d 925 (1982) (statute restricting Medicaid funding abortion to circumstances where necessary to saving life of mother held to be a denial of equal protection contrary to *Harris v. McRae,* 448 *U.S.* 297, 100 *S.Ct.* 2671, 65 *L.Ed.*2d 784 (1980)); *State v. Schmid,* 84 *N.J.* 535, 559, 423 *A.*2d 615 (1980) (broader concept of individual rights of speech). *See also,* Justice Stewart G. Pollock, *Adequate and Independent Grounds as a Means of Balancing the Relationship Between State and Federal Courts,* 63 *Tex. L. Rev.* 977 (1986); Justice William J. Brennan, *State Constitutions and The Protection of Individual Rights,* 90 *Harv. L. Rev.* 489 (1977).

Plaintiffs base their due process challenges on the constitutional right of privacy recognized in Article I, paragraph 1 of the New Jersey Constitution. At first blush, plaintiffs' claim of a right of privacy in support of a right to marry may seem anomalous, for privacy is commonly understood with a right to be left alone as famously discussed in legal parlance by Justice Brandeis in *The Right to Privacy,* 4 *Harv. L. Rev.* 5 (1890). But the constitutional right of privacy also means the right of an individual to make his or her fundamental life choices rather than the State making those decisions. *See generally,* Hoehengarten, *supra,* 103 *Yale L.J.* at 1524–30; *see also,* Jeb Rubenfeld, *The Right to Privacy,* 102 *Harv. L. Rev.* 737, 754–56 (1989). So a married couple may choose not to procreate by using contraception. *Griswold, supra,* 381 *U.S.* at 484–85, 85 *S.Ct.* at 1681–82, 14 *L.Ed.*2d at 514–15. A woman may make her own decision whether to bear or beget a child. *Roe, supra,* 410 *U.S.* at 153, 93 *S.Ct.* at 727, 35 *L.Ed.*2d at 177 (1973); *Right to Choose, supra,* 91 *N.J.* at 305–06, 450 *A.*2d 925; *Planned Parenthood v. Casey,* 505 *U.S.* 833, 112 *S.Ct.* 2791, 120 *L.Ed.*2d 674 (1992). Two consenting adults, heterosexual or homosexual, may elect to engage in sexual relations. *Lawrence, supra,* 539 *U.S.* at 578, 123 *S.Ct.* at 2484, 156 *L.Ed.*2d at 525; ***216** *State v. Saunders,* 75 *N.J.* 200, 381 *A.*2d 333 (1977). And a person may elect to discontinue life support knowing that

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

death will result. *Quinlan, supra,* 70 *N.J.* at 10, 355 *A.*2d 647. In all these and other cases the law has recognized rights of individuals to make fundamental life decisions in the conduct of their lives despite State opposition. We should do so here.

Of course there are proper limits in an individual's rights of choice, just as there are proper government limits on privacy and liberty. But when the limitation amounts to a prohibition of a central life choice to some and not others based on sexual orientation, it constitutes State deprivation of an individual's fundamental right of substantive due process as well as equal protection of the laws.

Which leads me to polygamy. My colleagues view the nature of the right to marry asserted by plaintiffs as equally applicable to polygamy. The spectre of polygamy was raised by Justice Scalia in his *Lawrence* dissent in which he expanded a slippery slope analysis into a loop-de-loop by arguing that decriminalizing acts of homosexual intimacy would lead to the downfall of moral legislation of society by implicitly authorizing same-sex marriage and ****288** polygamy as well as "adult incest, prostitution, masturbation, adultery, fornication, bestiality and obscenity." *Lawrence, supra,* 539 *U.S.* at 590, 123 *S.Ct.* at 2490, 156 *L.Ed.*2d at 533 (Scalia, J., dissenting).[5]

It is just as unnecessary for us to consider here the question of the constitutional rights of polygamists to marry persons of their choosing as it would be to join Justice Scalia's wild ride. Plaintiffs do not question the binary aspect of marriage; they embrace it. Moreover, despite the number of amicus curiae briefs filed in this ***217** appeal and the myriad of views presented, no polygamists have applied. One issue of fundamental constitutional rights is enough for now.[6]

Challenges to state laws on grounds of a right of privacy impact both substantive due process and equal protection. While analytically distinct, these concepts are linked and tend to overlap constitutional adjudication involving marriage, family life and sexual intimacy. *Lawrence, supra,* 539 *U.S.* at 575, 123 *S.Ct.* at 2482, 156 *L.Ed.*2d at 523; *Goodridge, supra,* 798 *N.E.*2d at 953. Early decisions considered the right to marry as a matter of liberty within due process protection, *Meyer v. Nebraska,* 262 *U.S.* 390, 399, 43 *S.Ct.* 625, 626, 67 *L.Ed.* 1042, 1045 (1923). In *Griswold, supra,* 381 *U.S.* at 484–85, 85 *S.Ct.* at 1681–82, 14 *L.Ed.*2d at 514–15, the majority found a right of privacy inclusive of marriage in the "penumbra" of the First, Third, Fourth, and Ninth Amendments of the Federal Constitution. A right of marriage was held to be inherent in substantive due process, *Zablocki, supra,* 434 *U.S.* at 383–86, 98 *S.Ct.* at 679–81, 54 *L.Ed.*2d at 628–30, and as a protectable interest for equal protection of laws in *Skinner, supra,* 316 *U.S.* at 541–42, 62 *S.Ct.* at 1113–14, 86 *L.Ed.* at 1660. In all instances the right to marry was heralded as a fundamental right subject only to reasonable State regulations such as the banning of incestuous marriages, *N.J.S.A.* 37:1–1, bigamous marriages, *N.J.S.A.* 2C:24–1, and marriages to those persons mentally incompetent, *N.J.S.A.* 37:1–9.

In adjudicating claims of constitutional right of substantive due process or equal protection, our Supreme Court has eschewed the multi-tiered analysis employed by the United States Supreme Court in cases such as ***218** *City of Cleburne v. Cleburne Living Ctr.,* 473 *U.S.* 432, 440, 105 *S.Ct.* 3249, 3254, 87 *L.Ed.*2d 313, 320 (1985) and *Carey v. Population Services Intl.,* 431 *U.S.* 678, 686, 97 *S.Ct.* 2010, 2016, 52 *L.Ed.*2d 675, 677 (1977). Aptly described in dissent by Justice Clifford as a "veil of tiers," *Matthews v. City of Atlantic City,* 84 *N.J.* 153, 174, 417 *A.*2d 1011 (1980) (Clifford, J., dissenting), the federal framework tends to be inflexible and shroud the "full understanding of the clash between individual and governmental interests." *Planned Parenthood of Cent. N.J. v. Farmer,* 165 *N.J.* 609, 630, 762 *A.*2d 620 (2000). *See also, Robinson v. Cahill,* 62 *N.J.* 473, 491–92, 303 *A.*2d 273, *cert. denied sub. nom.,* ****289** *Dickey v. Robinson,* 414 *U.S.* 976, 94 *S.Ct.* 292, 38 *L.Ed.*2d 219 (1973). In its place our Supreme Court has adopted a test to evaluate claims of due process or equal protection under the State Constitution by examining each claim of right on a continuum and weighing the extent of the right asserted, the governmental restriction challenge and the public need for the restriction. *Greenberg, supra,* 99 *N.J.* at 567–69, 494 *A.*2d 294. *See also, Planned Parenthood, supra,* 165 *N.J.* at 629–31, 762 *A.*2d 620; *Right to Choose, supra,* 91 *N.J.* at 299–301, 450 *A.*2d 925. This balancing test is especially appropriate where, as in this case, state law infringes on a fundamental right such as the right to marry. *Greenberg, supra,* 99 *N.J.* at 571, 494 *A.*2d 294; *see also, Right to Choose, supra,* 91 *N.J.* at 308–09, 450 *A.*2d 925; *United States Chamber of Commerce v. State,* 89 *N.J.* 131, 157–58, 445 *A.*2d 353 (1982).

The right to marry is to my view a fundamental right of substantive due process protected by the New Jersey Constitution and, for the reasons stated earlier, the exclusion of plaintiffs from the right cannot be justified by tradition or procreation. The balancing test then considers the extent to which the governmental restriction impinges upon that right. *Greenberg, supra,* 99 *N.J.* at 567, 494 *A.*2d 294. Here there is not only a restriction but a prohibition which excludes a sizeable number of

persons and their children from the personal, familial and spiritual aspects of marriage. Finally, the balancing test inquires as to the public need for the restriction, or as in this case, the prohibition of the ***219** right. *Ibid.* Here the majority and concurring opinions again rely on history, tradition and procreation. It is not necessary to repeat all the arguments set forth earlier in this dissent. Tradition in itself is not a compelling state interest. If it were, many societal institutions as well as individual rights would be compromised. After all, slavery was a traditional institution for over 200 years. *See, People v. Greenleaf,* 5 *Misc.*3d 337, 780 *N.Y.S.*2d 899, 901 (Just.Ct.2004). To deprive plaintiffs of marrying the person of their choice, a right enjoyed by all others, on the basis of a tradition of exclusion serves only to unjustifiably and unconstitutionally discriminate against them. Moreover, procreation is even less persuasive as a public need. Can there be serious thought that legal recognition of same-sex marriage will significantly reduce heterosexual marriages or the birth rate? While some cases do link defining of marriage solely to members of the opposite sex to "the survival of the [human] race," *see, e.g., Baker, supra,* 191 *N.W.*2d at 186, I cannot fathom that a list of threats to our survival would include same-sex marriage. Also if there is an under-population crisis, somehow it has escaped my attention.

Even if plaintiffs' claim of a right to marry is not considered a *fundamental* right, their constitutional challenge meets the "rational basis test," which is the third tier of the Federal tiers test. Briefly, the first tier requires "strict scrutiny" for legislative acts directly affecting fundamental rights; a lesser standard of "important government objections" is the intermediate tier test where a substantial right is indirectly affected or a semi-suspect class, like gender, is involved; and the bottom rung is occupied by other governmental acts for which the State must show only that the law rationally relates to a legitimate interest. *Greenberg, supra,* 99 *N.J.* at 564–65, 494 *A.*2d 294.

While the balancing test stated in *Greenberg* still sets the standard, I believe that plaintiffs prevail on their constitutional challenge even if the least restrictive or "rational basis" standard of review is employed since there is no showing of a basis of other than tradition or procreation to ****290** exclude plaintiffs from the significant ***220** (if not fundamental) state of marriage. *See, Goodridge, supra,* 798 *N.E.*2d at 961 ("[W]e conclude that the marriage ban does not meet the rational basis test for either due process or equal protection.").

As to equal protection, my conclusion is the same. Our Constitution and the Federal Constitution require that all similarly situated people be treated alike. *Cleburne, supra,* 473 *U.S.* at 439, 105 *S.Ct.* at 3254, 87 *L.Ed.*2d at 330; *Brown v. State,* 356 *N.J.Super.* 71, 79, 811 *A.*2d 501 (App.Div.2002). It is disingenuous to say that plaintiffs are treated alike because they can marry but not the person they choose. By prohibiting them from a real right to marry, plaintiffs as well as their children suffer the real consequences of being "different." While the Domestic Partnership Act gives, at some cost, many, but not all, of the benefits and protections automatically granted to married persons, we have learned after much pain that "separate but equal" does not substitute for equal rights. Plaintiff Sarah Lael describes the difference in this way:

> For me, being denied marriage, despite how hard we work and support each other and our children, it is demeaning and humiliating. These feelings are part of my daily life ... because of constant reminders that we are second class.

What Sarah Lael and her partner lack and seek may be summed up in the word dignity. But there is more they will gain from lawful marriage. That something else goes to the essence of marriage and is probably best left to poets rather than judges. It is the reason that people do get married. For marriage changes who you are. It gives stability, legal protection and recognition by fellow citizens. It provides a unique meaning to everyday life, for legally, personally and spiritually a married person is never really alone. Few would choose life differently.

With great admiration for the wisdom, logic and eloquence of my colleagues, I must dissent.

All Citations

378 N.J.Super. 168, 875 A.2d 259

Footnotes

1 There also have been a number of state lower court decisions, mostly unpublished, that have concluded that the limitation of marriage to members of the opposite sex violated those states' constitutions. *See, e.g., Brause v. Bureau of Vital Statistics,* No. 3AN–95–6562 CI, 1998 WL 88743 (Alaska Super.Ct. Feb. 27, 1998); *Li v. State,* No. 0403–03057, 2004 WL 1258167 (Or.Cir.Ct. Apr.

20, 2004). Several of those decisions were promptly followed by the adoption of constitutional amendments prohibiting same-sex marriage. *See, e.g., Alaska Const.* art. I, § 25; *Or. Const.* art. XV, § 5a; *see Li v. State,* 338 *Or.* 376, 110 *P.*3d 91, 98 (2005) (recognizing that, as a result of the constitutional amendment in Oregon, the institution of marriage in that State is now limited to “opposite-sex couples.”).

2 The Attorney General disclaims reliance upon promotion of procreation and creating the optimal environment for raising children as justifications for the limitation of marriage to members of the opposite sex. However, several amici curiae, including the New Jersey Coalition to Preserve and Protect Marriage, the New Jersey Family Policy Council and the New Jersey Catholic Conference, argue that our current form of marriage provides an environment in which procreation may be embraced and the optimal condition established for child rearing. Although an amicus curiae is ordinarily limited to arguing issues raised by the parties, an amicus may present different arguments than the parties relating to those issues. *See James v. Arms Tech., Inc.,* 359 *N.J.Super.* 291, 324, 820 *A.*2d 27 (App.Div.2003); *Keating v. State,* 157 *So.*2d 567, 569 (Fla.Dist.Ct.App.1963) (noting that an “amicus is not at liberty to inject new issues in a proceeding ... [but] is not confined solely to arguing the parties’ theories in support of a particular issue.”). We also note that plaintiffs were afforded an adequate opportunity to answer those arguments; in fact, half of their reply brief is devoted to those arguments. Therefore, we consider the amici’s arguments regarding procreation and child rearing to be properly before us. In any event, there is no need for us to determine the validity of those justifications for limitation of the institution of marriage to opposite-sex couples. We only note that the historical and prevailing contemporary conception of marriage as solely a union between a single man and a single woman is based partly on society’s view that this institution plays an essential role in propagating the species and child rearing.

3 For a general discussion of the institution of polygamous marriage, see Richard A. Posner, *Sex and Reason* 253–60 (1992).

4 This is not to suggest that there are no public interests served by the limitation of the institution of marriage to members of the opposite sex. As discussed in section I, this limitation is deeply rooted in our nation’s history and traditions and contemporary religious and cultural values, and also supported by the public interests discussed in depth in Judge Parrillo’s concurring opinion. *See infra,* 378 *N.J.Super.* at 197–200, 875 *A.*2d at 276–78. However, the State is not required to show that those interests outweigh a presumed right of same-sex couples to marry in order to defeat plaintiffs’ equal protection claim.

1 Unlike the usual contexts in which privacy and liberty interests are asserted, namely to seek protection from unwarranted governmental intrusion into matters of intimate personal concern, *In re Grady,* 85 *N.J.* 235, 249–50, 426 *A.*2d 467 (1981); *In re Quinlan,* 70 *N.J.* 10, 40, 355 *A.*2d 647 (1976), *cert. denied sub nom., Garger v. New Jersey,* 429 *U.S.* 922, 97 *S.Ct.* 319, 50 *L.Ed.*2d 289 (1976), or to gain the right to engage in private conduct without criminal sanction, *State v. Saunders,* 75 *N.J.* 200, 216–17, 381 *A.*2d 333 (1977), plaintiffs here affirmatively seek public approval of purely private behavior.

1 In 1947 thirty-one of the forty-eight states had criminal statutes punishing those who entered into such marriages as well as those who performed them. Twenty years later when *Loving* was decided, sixteen states still had these laws. Robert J. Sickels, *Race, Marriage, and the Law,* 64 (1972); James Trosino, *American Wedding: Same–Sex Marriage and the Miscegenation Analogy,* 73 *B.U. L. Rev.* 93 (1993).

2 A somewhat contrary view of history is set forth in William N. Eskridge, Jr., *A History of Same–Sex Marriage,* 79 *Va. L. Rev.* 1419, 1435–84 (1993). Compare, George W. Dent, Jr., *The Defense of Traditional Marriage,* 15 *J.L. Pol.* 581, 593–601 (1999).

3 Two important legal distinctions between domestic partners and married persons are that (1) property acquired by a partner during a domestic partnership is treated as individual unlike in a marriage where joint ownership may arise as a matter of law; and (2) the status of domestic partnership “neither creates nor diminishes individual partners’ rights and responsibilities toward children, unlike in a marriage where both spouses possess legal rights and obligations with respect to any children born during the marriage.” *N.J.S.A.* 26:8A–1.

4 The Legislature subsequently remedied the matter through the Domestic Partnership Act. *N.J.S.A.* 26:8A–1 to –12. *See also, N.J.S.A.* 18A:66–2; *N.J.S.A.* 43:6A–3; *N.J.S.A.* 43:15A–6; *N.J.S.A.* 43:16A-l; *N.J.S.A.* 52:14–17.26.

5 Justice Scalia’s tirade spawned many scholarly articles on privacy and polygamy. *See, e.g.,* Joseph Buzzuti, *The Constitutionality of Polygamy Prohibitions After Lawrence v. Texas: Is Scalia a Punchline or a Prophet?,* 43 *Cath. Law.* 409 (2004); Cassiah M. Ward, Note, *I Now Pronounce You Husband and Wives: Lawrence v. Texas and the Practice of Polygamy in Modern America,* 11 *Wm. & Mary J. Women & Law,* 131 (2004).

6 The curious may consider the following authorities in distinguishing polygamy. Richard A. Posner, *Sex and Reason,* 253–60 (1992); Alyssa Rower, *The Legality of Polygamy: Using the Due Process Clause of the Fourteenth Amendment,* 38 *Fam. L.Q.* 711 (2004). For a popular, albeit controversial, history of polygamy and Morman religious fundamentalism, see Jon Krakauer, *Under the Banner of Heaven: A Story of Violent Faith* (2004).

End of Document

© 2017 Thomson Reuters. No claim to original U.S. Government Works.

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

KeyCite Yellow Flag - Negative Treatment
Disagreed With by In re Marriage Cases, Cal., May 15, 2008

188 N.J. 415
Supreme Court of New Jersey.

Mark **LEWIS** and Dennis Winslow; Saundra Heath and Clarita Alicia Toby; Craig Hutchison and Chris Lodewyks; Maureen Kilian and Cindy Meneghin; Sarah and Suyin Lael; Marilyn Maneely and Diane Marini; and Karen and Marcye Nicholson–McFadden, Plaintiffs–Appellants,
v.
Gwendolyn L. **HARRIS**, in her official capacity as Commissioner of the New Jersey Department of Human Services; Clifton R. Lacy, in his official capacity as the Commissioner of the New Jersey Department of Health and Senior Services; and Joseph Komosinski, in his official capacity as Acting State Registrar of Vital Statistics of the New Jersey State Department of Health and Senior Services, Defendants–Respondents.

Argued Feb. 15, 2006.
|
Decided Oct. 25, 2006.

Synopsis
Background: Same-sex couples brought action against state officials with supervisory responsibilities relating to local officials' issuance of marriage licenses, alleging local officials' refusal to issue marriage licenses to plaintiff same-sex couples violated their state constitutional rights to privacy, due process, and equal protection. The Superior Court, Law Division, Mercer County, granted summary judgment to defendants. Plaintiffs appealed. The Superior Court, Appellate Division, Skillman, P.J.A.D., 378 N.J.Super. 168, 875 A.2d 259, affirmed. Plaintiffs appealed.

Holdings: The Supreme Court, Albin, J., held that:

[1] same-sex marriage is not a fundamental right entitled to protection under the liberty guarantee of the New Jersey Constitution;

[2] committed same-sex couples must be afforded the same rights and benefits enjoyed by married opposite-sex couples; and

[3] Legislature would be required to, within 180 days, either amend the marriage statutes or enact an statutory structure affording same-sex couples the same rights and benefits enjoyed by married opposite-sex couples.

Affirmed in part and modified in part.

Poritz, C.J., concurred in part and dissented in part and filed an opinion in which Long and Zazzali, JJ., joined.

West Headnotes (15)

[1] **Appeal and Error**
Findings of fact and conclusions of law

The Supreme Court, when addressing solely questions of law, is not bound to defer to the legal conclusions of the lower courts.

3 Cases that cite this headnote

[2] **Constitutional Law**
Personal liberty

In attempting to discern those substantive rights that are fundamental under the liberty guarantee of the New Jersey Constitution, the Supreme Court has 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; the Court looks to the traditions and collective conscience of the people to determine whether a principle is so rooted there as to be ranked as fundamental. U.S.C.A. Const.Amend. 14; N.J.S.A. Const. Art. 1, par. 1.

12 Cases that cite this headnote

[3] **Constitutional Law**
Personal liberty

Determining whether there exists a fundamental right secured by the liberty guarantee of the New Jersey Constitution involves a two-step inquiry; first, the asserted fundamental liberty interest must be clearly identified, and second, that liberty interest must be objectively and deeply rooted in the traditions, history, and conscience of the people of the State. N.J.S.A. Const. Art. 1, par. 1.

7 Cases that cite this headnote

[4] **Marriage and Cohabitation**
Right to marry or cohabit in general

The right to marriage is recognized as fundamental by both the Federal and State Constitutions. U.S.C.A. Const.Amend. 14; N.J.S.A. Const. Art. 1, par. 1.

2 Cases that cite this headnote

[5] **Marriage and Cohabitation**
Regulation and control in general

The fundamental right to marriage is subject to reasonable state regulation. U.S.C.A. Const.Amend. 14; N.J.S.A. Const. Art. 1, par. 1.

1 Cases that cite this headnote

[6] **Constitutional Law**
Personal liberty
Marriage and Cohabitation
Sex or Gender; Same-Sex Marriage

Same-sex marriage is not a fundamental right entitled to protection under the liberty guarantee of the New Jersey Constitution. N.J.S.A. Const. Art. 1, par. 1.

7 Cases that cite this headnote

[7] **Constitutional Law**
Statutes and other written regulations and rules

When a statute is challenged on the ground that it does not apply evenhandedly to similarly situated people, equal protection jurisprudence requires that the legislation, in distinguishing between two classes of people, bear a substantial relationship to a legitimate governmental purpose. N.J.S.A. Const. Art. 1, par. 1.

3 Cases that cite this headnote

[8] **Constitutional Law**
Statutes and other written regulations and rules

The test applied to equal protection challenges under the New Jersey Constitution 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. N.J.S.A. Const. Art. 1, par. 1.

5 Cases that cite this headnote

[9] **Constitutional Law**
Differing levels set forth or compared

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. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

[10] **Constitutional Law**
Differing levels set forth or compared

In an equal protection analysis under the New Jersey Constitution, 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. N.J.S.A. Const. Art. 1, par. 1.

2 Cases that cite this headnote

[11] **Constitutional Law**
Marriage and civil unions
Marriage and Cohabitation
Sex or Gender; Same-Sex Marriage

Unequal scheme of benefits and privileges afforded same-sex couples was not supported by a legitimate public need, for purposes of equal protection analysis under the New Jersey Constitution. N.J.S.A. Const. Art. 1, par. 1.

18 Cases that cite this headnote

[12] **Constitutional Law**
Marriage and civil unions

Under the equal protection guarantee 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. N.J.S.A. Const. Art. 1, par. 1.

22 Cases that cite this headnote

[13] **Constitutional Law**
Nature and scope in general
Marriage and Cohabitation
Sex or Gender; Same-Sex Marriage

Issue of whether long-accepted definition of marriage would be altered to include same-sex marriage, or a parallel scheme should be enacted, providing to committed same-sex couples, on equal terms, the full rights and benefits enjoyed by heterosexual married couples, was a legislative issue, and thus Legislature would be required to, within 180 days, either amend the marriage statutes or enact an appropriate statutory structure, so as to afford same-sex couples the same rights and benefits enjoyed by married opposite-sex couples. N.J.S.A. Const. Art. 1, par. 1.

25 Cases that cite this headnote

[14] **Constitutional Law**
Clearly, positively, or unmistakably unconstitutional

The Supreme Court will give deference to any legislative enactment unless it is unmistakably shown to run afoul of the Constitution.

3 Cases that cite this headnote

[15] **Constitutional Law**
Statutes and other written regulations and rules

For purposes of an equal protection analysis, a legislature must have substantial latitude to establish classifications, and therefore determining what is different and what is the same ordinarily is a matter of legislative discretion.

Cases that cite this headnote

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

West Codenotes

Validity Called into Doubt
N.J.S.A. 26:8A–10(a)(3)N.J.S.A. 26:8A–4(b)(1, 2, 6)

Attorneys and Law Firms

****198** David S. Buckel, New York, NY, a member of the New York bar, argued the cause for appellants (Gibbons, Del Deo, Dolan, Griffinger & Vecchione, attorneys; Mr. Buckel, Susan L. Sommer, a member of the New York bar, Lawrence S. Lustberg, Newark, and Megan **Lewis**, on the briefs).

Patrick DeAlmeida, Assistant Attorney General argued the cause for respondents (Anne Milgram, Acting Attorney General of New Jersey, attorney; Mr. DeAlmeida and Mary Beth Wood, on the briefs).

David R. Oakley, Princeton, submitted a brief on behalf of amicus curiae Alliance for Marriage, Inc. (Anderl & Oakley, attorneys).

Edward L. Barocas, Legal Director, submitted a brief on behalf of amici curiae American Civil Liberties Union of New Jersey, American–Arab Anti–Discrimination Committee, Asian American Legal Defense and Education Fund, Hispanic Bar Association of New Jersey, and The National Organization for Women of New Jersey.

Howard M. Nashel, Hackensack, submitted a brief on behalf of amici curiae American Psychological Association and New Jersey Psychological Association (Nashel, Kates, Nussman, Rapone & Ellis, attorneys).

Franklyn C. Steinberg, III, Somerville, submitted a brief on behalf of amicus curiae The Anscombe Society at Princeton University.

Douglas S. Eakeley, Roseland, submitted a brief on behalf of amicus curiae City of Asbury Park (Lowenstein Sandler, attorneys).

Kevin H. Marino and John A. Boyle, Newark, submitted a brief on behalf of amici curiae Asian Equality, Equality Federation, People for the American Way Foundation and Vermont Freedom to Marry Task Force (Marino & Associates, attorneys; Paul A. Saso, New York, NY, of counsel).

Mark L. Hopkins, Long Valley, submitted a brief on behalf of amicus curiae Clergy of New Jersey.

Richard F. Collier, Jr., Princeton, submitted a brief on behalf of amicus curiae Family Leader Foundation (Collier & Basil, attorneys).

Dennis M. Caufield submitted a brief on behalf of amicus curiae Family Research Council.

****199** Leslie A. Farber, Montclair, and Thomas H. Prol submitted a brief on behalf of amici curiae Garden State Equality Education Fund, Inc. and Garden State Equality, LLC, a Continuing Political Committee (Leslie A. Farber, attorneys; Mr. Prol, of counsel).

Alan E. Kraus, Newark, submitted a brief on behalf of amici curiae Human Rights Campaign, Human Rights Campaign Foundation, Children of Lesbians and Gays Everywhere (COLAGE), Family Pride Coalition, Freedom to Marry, Gay & Lesbian Advocates & Defenders (GLAD), National Center for Lesbian Rights, National Gay and Lesbian Task Force, New Jersey Lesbian and Gay Coalition (NJLGC), and Parents, Families and Friends of Lesbians and Gays (PFLAG) (Latham & Watkins, attorneys).

Kevin Costello, Cherry Hill, submitted a brief on behalf of amicus curiae Legal Momentum (Levow & Costello, attorneys).

Cliona A. Levy, New York, NY, submitted a brief on behalf of amicus curiae Madeline Marzano–Lesnevich (Sonnenschein Nath & Rosenthal, attorneys).

Demetrios K. Stratis submitted a brief on behalf of amici curiae Monmouth Rubber & Plastics, Corp. and John M. Bonforte, Sr., (Demetrios K. Stratis, attorneys; Mr. Stratis and Vincent P. McCarthy, on the brief).

Stephen M. Orlofsky and Jordana Cooper, Cherry Hill, submitted a brief on behalf of amici curiae National Association of Social Workers and National Association of Social Workers New Jersey Chapter (Blank Rome, attorneys).

Steven G. Sanders, Chatham, submitted a brief on behalf of amicus curiae National Black Justice Coalition (Arseneault, Fassett & Mariano, attorneys).

Robert R. Fuggi, Jr., Toms River, submitted a brief on behalf of amicus curiae National Legal Foundation (Fuggi & Fuggi, attorneys).

Michael Behrens, Madison, submitted a brief on behalf of amici curiae The New Jersey Coalition to Preserve and Protect Marriage, The New Jersey Family Policy Council and The New Jersey Catholic Conference (Messina & Laffey, attorneys).

Debra E. Guston, Glen Rock, and Trayton M. Davis, New

York, NY, a member of the New York bar, submitted a brief on behalf of amici curiae New Jersey Religious Leaders and National and Regional Religious Organizations in Support of Marriage (Guston & Guston, attorneys).

Stuart A. Hoberman, Woodbridge, President, submitted a brief on behalf of amicus curiae New Jersey State Bar Association (Mr. Hoberman, attorney; Felice T. Londa, Elizabeth, Andrew J. DeMaio, Matawan, Gail Oxfeld Kanef, Newwark, Robert A Knee, Saddle Brook, Scott A. Laterra and Thomas J. Snyder, Denville, on the brief).

R. William Potter, Princeton, submitted a brief on behalf of amici curiae Princeton Justice Project and Undergraduate Student Government of Princeton University (Potter and Dickson, attorneys; Mr. Potter and Linda A. Colligan, Rye, NY, on the brief).

Michael P. Laffey, Holmdel, submitted a brief on behalf of amicus curiae Professors of Psychology and Psychiatry.

Adam N. Saravay, Newark, submitted a brief on behalf of amicus curiae Professors of the History of Marriage, Families, and the Law (McCarter & English, attorneys; Mr. Saravay and Sydney E. Dickey, on the brief).

Donald D. Campbell submitted a letter in lieu of brief on behalf of amici curiae United Families International and United ****200** Families–New Jersey (Campbell & Campbell, attorneys).

Ralph Charles Coti submitted a brief on behalf of amici curiae James Q. Wilson, Douglas Allen, Ph.D., David Blankenhorn, Lloyd R. Cohen, J.D., Ph.D., John Coverdale, J.D., Nicholas Eberstadt, Ph.D., Robert P. George, J.D., Harold James, Ph.D., Leon R. Kass, M.D., Ph.D., Douglas W. Kmiec and Katherine Shaw Spaht (Coti & Segrue, attorneys).

Opinion

Justice ALBIN delivered the opinion of the Court.

***422** 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 ***423** 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

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

marry his or her partner and to enjoy the legal, ***424** financial, and social benefits that are afforded by marriage. When the seven couples applied for marriage ****201** 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.[1] 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.[2] 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." ***425** 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 ****202** 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 ***426** 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,

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

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.[3]

***427** 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.[4] The defendants named in the complaint are Gwendolyn L. ****203 Harris**, the then Commissioner of the New Jersey Department of Human Services responsible for implementing the State's marriage statutes; Clifton R. Lacy, the then Commissioner of the New Jersey Department of Health and Senior Services responsible for the operation of the State Registrar of Vital Statistics; and Joseph Komosinski, the then Acting State Registrar of Vital Statistics of the Department of Health and Senior Services responsible for supervising local registration of marriage records.[5] The departments run by those officials have oversight duties relating to the issuance of 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.

***428** The State moved to dismiss the complaint for failure to state a claim upon which relief could be granted, *see R.* 4:6–2(e), and later both parties moved for summary judgment, *see R.* 4:46–2(c). The trial court entered summary judgment in favor of the State and dismissed the complaint.

In an unpublished opinion, the trial court first concluded that marriage is restricted to the union of a man and a woman under New Jersey law. The court maintained that the notion of "same-sex marriage was so foreign" to the legislators who in 1912 passed the marriage statute that "a ban [on same-sex marriage] hardly needed mention." The court next rejected plaintiffs' argument that same-sex couples possess a fundamental right to marriage protected by the State Constitution, finding that such a right was not so rooted in the collective conscience and traditions of the people of this State as to be deemed fundamental. Last, the court held that the marriage laws did not violate the State Constitution's equal protection guarantee. The court determined that "limiting marriage to mixed-gender couples is a valid and reasonable exercise of government authority" and that the rights of gays and lesbians could "be protected in ways other than alteration of the traditional understanding of marriage." Plaintiffs were attempting "not to lift a barrier to marriage," according to the court, but rather "to change its very essence." To accomplish that end, the court suggested that plaintiffs would have to seek relief from the Legislature, which at the time was considering the passage of a domestic partnership act.

C.

A divided three-judge panel of the Appellate Division affirmed. ***Lewis** v. **Harris***, 378 *N.J.Super.* 168, 194, 875 *A.*2d 259 (App.Div.2005). Writing for the majority, Judge Skillman determined that New Jersey's marriage statutes do not contravene the substantive due process and equal protection guarantees of Article I, Paragraph 1 of the State Constitution. *Id.* at 188–89, 875 *A.*2d 259. In analyzing the substantive due process claim, Judge Skillman concluded ***429** that "[m]arriage between members of the same sex is clearly not a fundamental right." *Id.* at 183, 875 *A.*2d 259 (internal quotation marks omitted). He reached that conclusion because he could find no support for such a proposition in the text of the State Constitution, this State's history and traditions, or contemporary ****204** social standards. *Id.* at 183–84, 875 *A.*2d 259. He noted that "[o]ur leading religions view marriage as a union of men and women recognized by God" and that "our society considers marriage between a man and woman to play a vital role in propagating the species and in providing the ideal environment for raising children." *Id.* at 185, 875 *A.*2d 259.[6]

In rebuffing plaintiffs' equal protection claim, Judge Skillman looked to the balancing test that governs such claims—a consideration of " 'the nature of the affected right, the extent to which the governmental restriction

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

intrudes upon it, and the public need for the restriction.' " *Id.* at 189, 875 *A.*2d 259 (quoting *Greenberg v. Kimmelman,* 99 *N.J.* 552, 567, 494 *A.*2d 294 (1985)). Starting with the premise that there is no fundamental right to same-sex marriage, Judge Skillman reasoned that plaintiffs could not demonstrate the existence of an "affected" or "claimed" right. *Id.* at 189–90, 875 *A.*2d 259 (internal quotation marks omitted). From that viewpoint, the State was not required to show that a public need for limiting marriage to opposite-sex couples outweighed a non-existent affected right to same-sex marriage. *Id.* at 190, 875 *A.*2d 259.

Judge Skillman chronicled the legislative progress made by same-sex couples through such enactments as the Domestic Partnership Act and expressed his view of the constricted role of judges in setting social policy: "A constitution is not simply an empty receptacle into which judges may pour their own conceptions of evolving social mores." *Id.* at 176–79, 875 *A.*2d 259. In ***430** the absence of a constitutional mandate, he concluded that only the Legislature could authorize marriage between members of the same sex. *Id.* at 194, 875 A.2d 259. Judge Skillman, however, emphasized that same-sex couples "may assert claims that the due process and equal protection guarantees of [the State Constitution] entitle them to additional legal benefits provided by marriage." *Ibid.*

In a separate opinion, Judge Parrillo fully concurred with Judge Skillman's reasoning, but added his view of the twofold nature of the relief sought by plaintiffs—"the right *to* marry and the rights *of* marriage." *Id.* at 194–95, 875 *A.*2d 259 (Parrillo, J., concurring). Judge Parrillo observed that the right to marry necessarily includes significant "economic, legal and regulatory benefits," the so-called rights of marriage. *Id.* at 195, 875 *A.*2d 259. With regard to those "publicly-conferred tangible [and] intangible benefits" incident to marriage that are denied to same-sex couples, Judge Parrillo asserted plaintiffs are free to challenge "on an ad-hoc basis" any "particular statutory exclusion resulting in disparate or unfair treatment." *Ibid.* He concluded, however, that courts had no constitutional authority to alter "a core feature of marriage," namely "its binary, opposite-sex nature." *Id.* at 199–200, 875 *A.*2d 259. He maintained that "[p]rocreative heterosexual intercourse is and has been historically through all times and cultures an important feature of that privileged status, and that characteristic is a fundamental, originating reason why the State privileges marriage." *Id.* at 197, 875 *A.*2d 259. He submitted that it was the Legislature's role "to weigh the societal costs against the societal benefits flowing from a profound change in the public meaning of marriage." *Id.* at 200, 875 *A.*2d 259.

In dissenting, Judge Collester concluded that the substantive due process and equal ****205** protection guarantees of Article I, Paragraph 1 obligate the State to afford same-sex couples the right to marry on terms equal to those afforded to opposite-sex couples. *Id.* at 218–20, 875 *A.*2d 259 (Collester, J., dissenting). He charted the evolving nature of the institution of marriage and of the rights ***431** and protections afforded to same-sex couples, and reasoned that outdated conceptions of marriage "cannot justify contemporary violations of constitutional guarantees." *Id.* at 206–10, 875 *A.*2d 259. He described the majority's argument as circular: Plaintiffs have no constitutional right to marry because this State's laws by definition do not permit same-sex couples to marry. *Id.* at 204, 875 *A.*2d 259. That paradigm, Judge Collester believed, unfairly insulated the State's marriage laws from plaintiffs' constitutional claims and denied "plaintiffs the right to enter into lawful marriage in this State with the person of their choice." *Id.* at 204, 211, 875 *A.*2d 259. Judge Collester dismissed the notion that "procreation or the ability to procreate is central to marriage" today and pointed out that four plaintiffs in this case gave birth to children after artificial insemination. *Id.* at 211–12, 875 *A.*2d 259. He further asserted that if marriage indeed is "the optimal environment for child rearing," then denying plaintiffs the right to marry their committed partners is fundamentally unfair to their children. *Id.* at 212–13, 875 *A.*2d 259 (internal quotation marks omitted). Because the current marriage laws prohibit "a central life choice to some and not others based on sexual orientation" and because he could find no rational basis for limiting the right of marriage to opposite-sex couples, Judge Collester determined that the State had deprived plaintiffs of their right to substantive due process and equal protection of the laws. *Id.* at 216–20, 875 *A.*2d 259.

We review this case as of right based on the dissent in the Appellate Division. *See R.* 2:2–1(a)(2). We granted the motions of a number of individuals and organizations to participate as amici curiae.

II.

[1] This appeal comes before us from a grant of summary judgment in favor of the State. *See R.* 4:46–2(c). As this case raises no factual disputes, we address solely questions of law, and thus are not bound to defer to the legal conclusions of the lower ***432** courts. *See Balsamides v. Protameen Chems., Inc.,* 160 *N.J.* 352, 372, 734 *A.*2d 721 (1999) (stating that "matters of law are subject to a *de novo* review").

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

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 ****206** environment for raising children.[7] 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 ***433** 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.[8] 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 ***434** 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.

[*N.J. Const.* art. I, ¶ 1.]

[2] The origins of Article I, Paragraph 1 date back to New Jersey's 1844 Constitution. ****207** [9] 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, 330 *A.*2d 1 (1974) (quoting *Ransom v. Black,* 54 *N.J.L.* 446, 448, 24 *A.* 1021 (Sup.Ct.1892), *aff'd per curiam,* 65 *N.J.L.* 688, 51 *A.* 1109 (E. & A. 1900)). 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.* (internal quotation marks omitted) (alterations in original) (quoting *Griswold v. Connecticut,* 381 *U.S.* 479,

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

493, 85 *S.Ct.* 1678, 1686, 14 *L.Ed.*2d 510, 520 (1965) (Goldberg, J., concurring)); *see also Watkins v. Nelson,* 163 *N.J.* 235, 245, 748 *A.*2d 558 (2000); *Doe v. Poritz,* 142 *N.J.* 1, 120, 662 *A.*2d 367 (1995); *State v. Parker,* 124 *N.J.* 628, 648, 592 *A.*2d 228 (1991), *cert. denied,* 503 *U.S.* 939, 112 *S.Ct.* 1483, 117 *L.Ed.*2d 625 (1992).

***435** [3] 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,* 521 *U.S.* 702, 721, 117 *S.Ct.* 2258, 2268, 138 *L.Ed.*2d 772, 788 (1997). Second, that liberty interest must be objectively and deeply rooted in the traditions, history, and conscience of the people of this State. *See King, supra,* 66 *N.J.* at 178, 330 *A.*2d 1; *see also Glucksberg, supra,* 521 *U.S.* at 720–21, 117 *S.Ct.* at 2268, 138 *L.Ed.*2d at 787–88 (stating that liberty interest must be "objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty" (internal quotation marks omitted)).

How the right is defined may dictate whether it is deemed fundamental. One such example is *Glucksberg, supra,* a case involving a challenge to Washington's law prohibiting and criminalizing assisted suicide. 521 *U.S.* at 705–06, 117 *S.Ct.* at 2261, 138 *L.Ed.*2d at 779. 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." *Id.* at 722–24, 117 *S.Ct.* at 2269, 138 *L.Ed.*2d at 789–90. 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.* at 723, 728, 117 *S.Ct.* at 2269, 2271, 138 *L.Ed.*2d at 789, 792.

[4] [5] The right to marriage is recognized as fundamental by both our Federal and State Constitutions. *See, e.g., Zablocki v. Redhail,* 434 *U.S.* 374, 383–84, 98 *S.Ct.* 673, 679–80, 54 *L.Ed.*2d 618, 628–29 (1978); *J.B. v. M.B.,* 170 *N.J.* 9, 23–24, 783 *A.*2d 707 (2001). That broadly stated right, however, is "subject to reasonable state regulation." *Greenberg, supra,* 99 *N.J.* at 572, 494 *A.*2d 294. Although the fundamental right to marriage extends even to those imprisoned, *Turner v. Safley,* 482 *U.S.* 78, 95–96, 107 *S.Ct.* 2254, 2265, 96 *L.Ed.*2d 64, 83 (1987), and those in ****208** noncompliance ***436** with their child support obligations, *Zablocki, supra,* 434 *U.S.* at 387–91, 98 *S.Ct.* at 681–83, 54 *L.Ed.*2d at 631–33, it does not extend to polygamous, incestuous, and adolescent marriages, *N.J.S.A.* 2C:24–1; *N.J.S.A.* 37:1–1, –6. 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.[10]

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. *See Doe v. Poritz, supra,* 142 *N.J.* at 119–20, 662 *A.*2d 367 (stating that although practice "followed by a large number of states is not conclusive[,] ... it 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" (internal quotation marks omitted)). Our starting point is the State's marriage laws.

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. *See, e.g., N.J.S.A.* 37:1–1 (describing prohibited marriages in terms of opposite-sex relatives); *N.J.S.A.* 37:2–10 (providing that "husband" is not liable for debts of "wife" incurred before or after marriage); *N.J.S.A.* 37:2–18.1 (providing release ***437** rights of curtesy and dower for "husband" and "wife"). 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. *See N.J.S.A.* 26:8A–2(e).

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.,* 140 *N.J.Super.* 77, 83–84, 355 *A.*2d 204 (App.Div.), *certif. denied,* 71 *N.J.* 345, 364 *A.*2d 1076 (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.[11]

****209** 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 ***438** Article I, Paragraph 1 embraced the right of a person to

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

marry someone of his or her own sex. *See, e.g., Baker v. Nelson,* 291 *Minn.* 310, 191 *N.W.*2d 185, 186 (1971) ("The institution of marriage as a union of man and woman ... is as old as the book of Genesis."), *appeal dismissed,* 409 *U.S.* 810, 93 *S.Ct.* 37, 34 *L.Ed.*2d 65 (1972); Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 2–3 (2000) (describing particular model of marriage "deeply implanted" in United States history to be "lifelong, faithful monogamy, formed by the mutual consent of a man and a woman"); *see also* 1 *U.S.C.A.* § 7 (defining under Federal Defense of Marriage Act "the word 'marriage' [to] mean[ ] only a legal union between one man and one woman as husband and wife").

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. *See, e.g., N.J.S.A.* 10:5–4 (prohibiting discrimination on basis of sexual orientation); *N.J.S.A.* 26:8A–1 to –13 (affording various rights to same-sex couples under Domestic Partnership Act); *In re Adoption of a Child by J.M.G.,* 267 *N.J.Super.* 622, 623, 625, 632 *A.*2d 550 (Ch.Div.1993) (determining that lesbian partner was entitled to adopt biological child of partner). *See generally* Joshua Kaplan, *Unmasking the Federal Marriage Amendment: The Status of Sexuality,* 6 *Geo. J. Gender & L.* 105, 123–24 (2005) (noting that "1969 is widely recognized as the beginning of the gay rights movement," which is considered "relatively new to the national agenda"). 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,* 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. 517 *U.S.* 620, 623–24, 116 *S.Ct.* 1620, 1623, 134 *L.Ed.*2d 855, 860–61 (1996). The Supreme Court ***439** 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. *Id.* at 632, 116 *S.Ct.* at 1627-28, 134 *L.Ed.*2d at 865–66. The Court concluded that a state could not make "a class of persons a stranger to its laws." *Id.* at 635, 116 *S.Ct.* at 1629, 134 *L.Ed.*2d at 868.

More recently, in *Lawrence v. Texas,* the Court invalidated on Fourteenth Amendment due process grounds Texas's sodomy statute, which made it a crime for ****210** homosexuals "to engage in certain intimate sexual conduct." 539 *U.S.* 558, 562, 578, 123 *S.Ct.* 2472, 2475, 2484, 156 *L.Ed.*2d 508, 515, 525–26 (2003). 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." *Id.* at 578, 123 *S.Ct.* at 2484, 156 *L.Ed.*2d at 525. 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." *Ibid.* 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. *Id.* at 585, 123 *S.Ct.* at 2487–88, 156 *L.Ed.*2d at 530 (O'Connor, J., concurring).

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.

***440** Plaintiffs also rely on *Loving v. Virginia,* 388 *U.S.* 1, 87 *S.Ct.* 1817, 18 *L.Ed.*2d 1010 (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. *Id.* at 2, 87 *S.Ct.* at 1818, 18 *L.Ed.*2d at 1012. 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. *Id.* at 10–12, 87 *S.Ct.* at 1823–24, 18 *L.Ed.*2d at 1017–18. 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." *Id.* at 10, 87 *S.Ct.* at 1823, 18 *L.Ed.*2d at 1017. 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." *Id.* at 12, 87 *S.Ct.* at 1823, 18 *L.Ed.*2d at 1018. 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.

[6] 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. When engaging in a substantive due process analysis under the Fourteenth Amendment, the United States Supreme Court has instructed that it must "exercise the utmost care" before finding new rights, which ***441** place important social ****211** issues beyond public debate, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of [the] Court." *Glucksberg, supra,* 521 *U.S.* at 720, 117 *S.Ct.* at 2267–68, 138 *L.Ed.*2d at 787 (internal quotation marks omitted). 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.[12]

***442** Having decided that there is no fundamental right to same-sex marriage does not end our inquiry. *See WHS Realty Co. v. Town of Morristown,* 323 *N.J.Super.* 553, 562–63, 733 *A.*2d 1206 (App.Div.) (recognizing that although provision of municipal service is not fundamental right, inequitable provision of that service is subject to equal protection analysis), *certif. denied,* 162 *N.J.* 489, 744 *A.*2d 1211 (1999). 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 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. *Sojourner A. v. N.J. Dep't of Human Servs.,* 177 *N.J.* 318, 332, 828 *A.*2d 306 (2003); *Greenberg, supra,* 99 *N.J.* at 568, 494 *A.*2d 294. Quite simply, that first paragraph to our State Constitution "protect[s] against injustice and against the unequal treatment of those ****212** who should be treated alike." *Greenberg, supra,* 99 *N.J.* at 568, 494 *A.*2d 294.

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 ***443** State's marriage laws permissibly distinguish between same-sex and heterosexual couples.

[7] [8] [9] [10] 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. *Caviglia v. Royal Tours of Am.,* 178 *N.J.* 460, 472–73, 842 *A.*2d 125 (2004); *Barone v. Dep't of Human Servs.,* 107 *N.J.* 355, 368, 526 *A.*2d 1055 (1987). 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. *Greenberg,*

supra, 99 *N.J.* at 567, 494 *A.*2d 294; *Robinson v. Cahill,* 62 *N.J.* 473, 491–92, 303 *A.*2d 273, *cert. denied,* 414 *U.S.* 976, 94 *S.Ct.* 292, 38 *L.Ed.*2d 219 (1973). The test is a flexible one, measuring the importance of the right against the need for the governmental restriction.[13] *See Sojourner A., supra,* 177 *N.J.* at 333, 828 *A.*2d 306. 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." *Ibid.* Accordingly, "the more personal the right, the greater the public need must be to justify governmental interference with the exercise of that right." *George Harms Constr. Co. v. N.J. Tpk. Auth.,* 137 *N.J.* 8, 29, 644 *A.*2d 76 (1994); *see also Taxpayers Ass'n of Weymouth Twp. v. Weymouth Twp.,* 80 *N.J.* 6, 43, 364 *A.*2d 1016 (1976), *cert. denied,* 430 *U.S.* 977, 97 *S.Ct.* 1672, 52 *L.Ed.*2d 373 (1977). Unless ***444** the public need justifies statutorily limiting the exercise of a claimed right, the State's action is deemed arbitrary. *See Robinson, supra,* 62 *N.J.* at 491–92, 303 *A.*2d 273.

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.

Today, in New Jersey, it is just as unlawful to discriminate against individuals ****213** on the basis of sexual orientation as it is to discriminate against them on the basis of race, national origin, age, or sex. *See N.J.S.A.* 10:5–4. 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. *In re J.S. & C.,* 129 *N.J.Super.* 486, 489, 324 *A.*2d 90 (Ch.Div.1974), *aff'd per curiam,* 142 *N.J.Super.* 499, 362 *A.*2d 54 (App.Div.1976). 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. *M.P. v. S.P.,* 169 *N.J.Super.* 425, 427, 404 *A.*2d 1256 (App.Div.1979). 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 ***445** child.[14] *J.M.G., supra,* 267 *N.J.Super.* at 625, 626, 631, 632 *A.*2d 550 (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); *see also In re Adoption of Two Children by H.N.R.,* 285 *N.J.Super.* 1, 3, 666 *A.*2d 535 (App.Div.1995) (finding that "best interests" of children supported adoption by same-sex partner of biological mother). 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.,* 163 *N.J.* 200, 206–07, 230, 748 *A.*2d 539, *cert. denied,* 531 *U.S.* 926, 121 *S.Ct.* 302, 148 *L.Ed.*2d 243 (2000); *see also id.* at 232, 748 *A.*2d 539 (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. *In re Application for Change of Name by Bacharach,* 344 *N.J.Super.* 126, 130–31, 136, 780 *A.*2d 579 (App.Div.2001).

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), *L.* 1991, *c.* 519, New Jersey became the fifth state[15] in the ***446** nation to prohibit discrimination on the basis of "affectional or sexual orientation."[16] *See N.J.S.A.* 10:5–4. In making ****214** sexual orientation a protected category, the Legislature committed New Jersey to the goal of eradicating discrimination against gays and lesbians. *See also Fuchilla v. Layman,* 109 *N.J.* 319, 334, 537 *A.*2d 652 ("[T]he overarching goal of the [LAD] is nothing less than the eradication of the cancer of discrimination." (internal quotation marks omitted)), *cert. denied,* 488 *U.S.* 826, 109 *S.Ct.* 75, 102 *L.Ed.*2d 51 (1988). In 2004, the Legislature added "domestic partnership status" to the categories protected by the LAD. *L.* 2003, *c.* 246.

The LAD guarantees that gays and lesbians, as well as

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

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. *N.J.S.A.* 10:5–12. The LAD declares that access to those opportunities and basic needs of modern life is a civil right. *N.J.S.A.* 10:5–4.

Additionally, discrimination on the basis of sexual orientation is outlawed in various other statutes. For example, the Legislature has made it a bias crime for a person to commit certain offenses with the purpose to intimidate an individual on account of sexual orientation, *N.J.S.A.* 2C:16–1(a)(1), and has provided a civil cause of action against the offender, *N.J.S.A.* 2A:53A–21. It is a crime for a public official to deny a person any "right, privilege, power or immunity" on the basis of sexual orientation. *N.J.S.A.* 2C:30–6(a). It is also unlawful to discriminate against gays and lesbians under ***447** the Local Public Contracts Law and the Public Schools Contracts Law. *N.J.S.A.* 40A:11–13; *N.J.S.A.* 18A:18A–15. The Legislature, moreover, formed the New Jersey Human Relations Council to promote educational programs aimed at reducing bias and bias-related acts, identifying sexual orientation as a protected category, *N.J.S.A.* 52:9DD–8, and required school districts to adopt anti-bullying and anti-intimidation policies to protect, among others, gays and lesbians, *N.J.S.A.* 18A:37–14, –15(a).

In 2004, the Legislature passed the Domestic Partnership Act, *L.* 2003, *c.* 246, making available to committed same-sex couples "certain rights and benefits that are accorded to married couples under the laws of New Jersey."[17] *N.J.S.A.* 26:8A–2(d). 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," *N.J.S.A.* 26:8A–2(a), and that those "mutually supportive relationships should be formally recognized by statute," *N.J.S.A.* 26:8A–2(c). 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." *N.J.S.A.* 26:8A–2(b).

For those same-sex couples who enter into a domestic partnership, the Act provides a limited number of rights and benefits possessed by married couples, including "statutory protection against various forms of discrimination against domestic partners; certain visitation and decision- ****215** making rights in a health care setting; certain tax-related benefits; and, in some cases, health and pension benefits that are provided in the same manner as for spouses." *N.J.S.A.* 26:8A–2(c). Later amendments to other statutes have provided domestic partners with additional rights pertaining ***448** to funeral arrangements and disposition of the remains of a deceased partner, *L.* 2005, *c.* 331, inheritance privileges when the deceased partner dies without a will, *L.* 2005, *c.* 331, and guardianship rights in the event of a partner's incapacitation, *L.* 2005, *c.* 304.

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." *N.J.S.A.* 26:8A–2(d).

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, *see Bacharach, supra,* 344 *N.J.Super.* at 135–36, 780 *A.*2d 579;
>
> ***449** (2) ownership of property as tenants by the entirety, *N.J.S.A.* 46:3–17.2, which would allow for both automatic transfer of ownership on death, *N.J.S.A.*

46:3–17.5, and protection against severance and alienation, *N.J.S.A.* 46:3–17.4;

(3) survivor benefits under New Jersey's Workers' Compensation Act, *N.J.S.A.* 34:15–13;

(4) back wages owed to a deceased spouse, *N.J.S.A.* 34:11–4.5;

(5) compensation available to spouses, children, and other relatives of homicide victims under the Criminal Injuries Compensation Act, *N.J.S.A.* 52:4B–10(c), –2;

(6) free tuition at any public institution of higher education for surviving spouses and children of certain members of the New Jersey National Guard, *N.J.S.A.* 18A:62–25;

(7) tuition assistance for higher education for spouses and children of volunteer firefighters and first-aid responders, *N.J.S.A.* 18A:71–78.1;

(8) tax deductions for spousal medical expenses, *N.J.S.A.* 54A:3–3(a);

(9) an exemption from the realty transfer fee for transfers between spouses, *N.J.S.A.* 46:15–10(j), –6.1; and

(10) the testimonial privilege given to the spouse of an accused in a criminal action, *N.J.S.A.* 2A:84A–17(2).

****216** 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. *N.J.S.A.* 34:11A–20(b). Because the New Jersey Family Leave Act does not include domestic partners within the definition of family member, *N.J.S.A.* 34:11B–3(j), gay and lesbian employees are not entitled to statutory leave for the purpose of caring for an ill domestic partner, *see N.J.S.A.* 34:11B–4(a). The disparity of rights and remedies also extends to the laws governing wills. For instance, a bequest in a will by one domestic partner to another is not automatically revoked after termination of the partnership, as it would be for a divorced couple, *N.J.S.A.* 3B:3–14. For that reason, the failure to revise a will prior to death may result in an estranged domestic partner receiving a bequest that a divorced spouse would not. There is also no statutory provision permitting the payment of an allowance for the support and maintenance of a surviving domestic partner when a will contest is pending. *See N.J.S.A.* 3B:3–30 (stating that support and maintenance may be paid out of decedent's estate to surviving spouse pending will contest).

***450** 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, *N.J.S.A.* 9:17–43, –44.[18] As a result, domestic partners must rely on costly and time-consuming second-parent adoption procedures.[19] The Act also is silent on critical issues relating to custody, visitation, and partner and child support in the event a domestic partnership terminates. *See, e.g., N.J.S.A.* 9:2–4 (providing custody rights to divorced spouses).[20] 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. *See N.J.S.A.* 2A:34–23 (providing for spousal support following filing of matrimonial complaint). Contrary to the law that applies to divorcing spouses, *see N.J.S.A.* 2A:34–23, –23.1, 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. *N.J.S.A.* 26:8A–10(a)(3).

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 ***451** children are disadvantaged in a way that children in married households are not. Children ****217** 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.

Last, even though they are provided fewer benefits and rights, same-sex couples are subject to more stringent requirements to enter into a domestic partnership than opposite-sex couples entering into marriage. The Act requires that those seeking a domestic partnership share "a common residence;" prove that they have assumed joint responsibility "for each other's common welfare as evidenced by joint financial arrangements or joint ownership of real or personal property;" "agree to be jointly responsible for each other's basic living expenses during the domestic partnership;" and show that they "have chosen to share each other's lives in a committed relationship of mutual caring." *N.J.S.A.* 26:8A–4(b)(1), (2), (6). Opposite-sex couples do not have to clear those hurdles to obtain a marriage license. *See N.J.S.A.* 37:1–1 to –12.3.

Thus, under our current laws, committed same-sex

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

couples and their children are not afforded the benefits and protections available to similar heterosexual households.

C.

[11] 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.

***452** 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. *N.J.S.A.* 10:5–4, –12. Access to employment, housing, credit, and business opportunities is a civil right possessed by gays and lesbians. *See ibid.* 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.” *N.J.S.A.* 26:8A–2(d). 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.

****218** Disparate treatment of committed same-sex couples, moreover, directly disadvantages their children. We fail to see any legitimate governmental purpose in disallowing the child of a deceased same-sex parent survivor benefits under the Workers’ Compensation Act or Criminal Injuries Compensation Act when children of married parents would be entitled to such benefits. Nor do we see the governmental purpose in not affording the child of a same-sex parent, who is a volunteer firefighter or first-aid responder, ***453** tuition assistance when the children of married parents receive such assistance. There is something distinctly unfair about the State recognizing the right of same-sex couples to raise natural and adopted children and placing foster children with those couples, and yet denying those children the financial and social benefits and privileges available to children in heterosexual households. 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. Ruth Padawer, *Gay Couples, At Long Last, Feel Acknowledged, The Rec.,* Aug. 15, 2001, at 104. 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

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

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 ***454** committed same-sex relationships.[21] *See* Symposium, *State Marriage Amendments: Developments, Precedents, and Significance,* 7 *Fla. Coastal L.Rev.* 403, 403 (2005) (noting that "[s]ince November 1998, nineteen states have passed state marriage amendments ... defining marriage as the union of a man and a woman" and "[v]oters in thirteen states ratified [those amendments] in the summer and fall of 2004 alone and by overwhelming margins").

****219** 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. *See Conn. Gen.Stat.* §§ 46b–38aa to –38pp; *Vt. Stat. Ann.* tit. 15, §§ 1201–1207; *Goodridge v. Dep't of Pub. Health,* 440 *Mass.* 309, 798 *N.E.*2d 941, 969 (2003). A few jurisdictions, such as New Jersey, offer some but not all of those rights under domestic partnership schemes.[22]

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.[23] In *Baker v. State,* the Vermont Supreme Court held ***455** 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." 170 *Vt.* 194, 744 *A.*2d 864, 870, 886 (1999). To remedy the constitutional violation, the Vermont Supreme Court referred the matter to the state legislature. *Id.* at 886. Afterwards, the Vermont Legislature enacted the nation's first civil union law. *See Vt. Stat. Ann.* tit. 15, §§ 1201–1207; *see also* Mark Strasser, *Equal Protection at the Crossroads: On Baker, Common Benefits, and Facial Neutrality,* 42 *Ariz. L.Rev.* 935, 936 n. 8 (2000).

In *Goodridge, supra,* 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." 798 *N.E.*2d at 948. 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. *Id.* at 961, 969. Massachusetts is the only state in the nation to legally recognize same-sex marriage.[24] In ****220** contrast to Vermont and Massachusetts, Connecticut ***456** did not act 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,* 285 *U.S.* 262, 311, 52 *S.Ct.* 371, 386–87, 76 *L.Ed.* 747, 771 (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.' " *State v. Novembrino,* 105 *N.J.* 95, 144–45, 519 *A.*2d 820 (1987) (quoting *PruneYard Shopping Ctr. v. Robins,* 447 *U.S.* 74, 81, 100 *S.Ct.* 2035, 2040, 64 *L.Ed.*2d 741, 752 (1980)). 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. *See, e.g., State v. McAllister,* 184 *N.J.* 17, 26, 32–33, 875 *A.*2d 866 (2005) (concluding ***457** that New Jersey Constitution recognizes interest in privacy of bank records, unlike Federal Constitution); *N.J. Coal. Against War in the Middle East v. J.M.B. Realty Corp.,* 138 *N.J.* 326, 332, 349, 374, 650 *A.*2d 757 (1994) (holding that free speech protection of New Jersey Constitution requires, subject to reasonable restrictions, privately-owned shopping centers to permit speech on political and societal issues on premises, unlike First Amendment of Federal Constitution), *cert. denied,* 516 *U.S.* 812, 116 *S.Ct.* 62, 133 *L.Ed.*2d 25 (1995); *Right to Choose v. Byrne,* 91 *N.J.* 287, 298, 310, 450 *A.*2d 925 (1982) (holding that restriction of Medicaid funding to those abortions that are "necessary to save the life of the mother" violates equal protection guarantee of New Jersey Constitution although same restriction does not violate United States Constitution).

[12] 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

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

"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 ****221** 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.

[13] 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 ***458** couples, or it could create a separate statutory structure, such as a civil union, as Connecticut and Vermont have done. *See Conn. Gen.Stat.* §§ 46b–38aa to –38pp; Vt. Stat. Ann. tit. 15, §§ 1201–1207.

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 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.

***459** [14] 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. *Caviglia, supra,* 178 *N.J.* at 477, 842 *A.*2d 125 ("A legislative enactment is presumed to be constitutional and the burden is on those challenging the legislation to show that it lacks a rational basis."). We will give, as we must, deference to any legislative enactment unless it is unmistakably shown to run afoul of the Constitution. *Hamilton Amusement Ctr. v. Verniero,* 156 *N.J.* 254, 285, 716 *A.*2d 1137 (1998) (stating that presumption of statute's validity "can be rebutted only upon a showing that the statute's repugnancy to the Constitution is clear beyond a reasonable doubt" (internal quotation marks omitted)), *cert. denied,* 527 *U.S.* 1021, 119 *S.Ct.* 2365, 144 *L.Ed.*2d 770 (1999). Because this State has no ****222** 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.

[15] "A legislature must have substantial latitude to establish classifications," and therefore determining "what is 'different' and what is 'the same' " ordinarily is a matter of legislative discretion. *Plyler v. Doe,* 457 *U.S.* 202, 216, 102 *S.Ct.* 2382, 2394, 72 *L.Ed.*2d 786, 798–99 (1982); *see also Greenberg, supra,* 99 *N.J.* at 577, 494 *A.*2d 294 ("Proper classification for equal protection purposes is not a precise science.... As long as the classifications do not discriminate arbitrarily between persons who are similarly situated, the matter is one of legislative prerogative.").[25] If the Legislature ***460** creates a separate statutory structure for same-sex couples by a

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

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. ***461** 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 ****223** 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. *See Bacharach, supra,* 344 *N.J.Super.* at 135, 780 *A.*2d 579 (noting that state laws and policies are not offended if same-sex couples choose to "exchange rings, proclaim devotion in a public or private ceremony, [or] call their relationship a marriage"); Lynn D. Wardle, *Is Marriage Obsolete?,* 10 *Mich. J. Gender & L.* 189, 191–92 ("What is deemed a 'marriage' for purposes of law may not be exactly the same as what is deemed marriage for other purposes and in other settings [such as] religious doctrines....").

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 ***462** 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.[26] Through the passage of statutory laws, the Legislature gave women the freedom to own property, to contract, to incur debt, and to sue.[27] The Legislature has played a major role, along with the courts, in ushering marriage into the modern era. *See, e.g.,* Reva B. Siegel, Symposium, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings 1860–1930,* 82 *Geo. L.J.* 2127, 2148–49 (1994) (discussing courts' role in reformulation of married women's rights).

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.

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

****224 *463** VI.

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.[28] 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.

***464** 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.[1] *Ante* at 423, 908 *A.*2d at 200. 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." *Ante* at 422–23, 908 *A.*2d at 200. 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." *Ante* at 423, 908 *A.*2d at 200. Yet, by asking whether there is a right to ****225** *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.

***465 I.**

The majority has provided the procedural and factual context for the issues the Court decides today. I will not repeat that information except as it is directly relevant to the analytical framework that supports this dissent. In that vein, then, some initial observations are appropriate.

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. As the majority points out, same-sex couples have been forced to cross-adopt their partners' children, have paid higher health insurance premiums than those paid by heterosexual married couples, and have been denied family leave-time even though, like heterosexual couples, they have children who need care. *Ante* at 426, 908 *A.*2d at 202. Further, those burdens represent only a few of the many imposed on same-sex couples because of their status, because they are unable to be civilly married. The majority addresses those specific concerns in its opinion.

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

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

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." ***466** *Griswold v. Connecticut,* 381 *U.S.* 479, 486, 85 *S.Ct.* 1678, 14 *L.Ed.*2d 510 (1965). Because it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition.

[*Goodridge v. Dep't. of Pub. Health,* 440 *Mass.* 309, 798 *N.E.*2d 941, 954–55 (2003).]

Plaintiffs are no less eloquent. They have presented their sense of the meaning of marriage in affidavits submitted to the Court:

In our relationship, Saundra and I have the same level of love and commitment as our married friends. But being able to proudly say that we are married is important to us. Marriage is the ultimate expression of love, commitment, and honor that you can give to another human being.

****226** * * * *

Alicia and I live our life together as if it were a marriage. I am proud that Alicia and I have the courage and the values to take on the responsibility to love and cherish and provide for each other. When I am asked about my relationship, I want my words to match my life, so I want to say I am married and know that my relationship with Alicia is immediately understood, and after that nothing more needs be explained.

* * * *

I've seen that there is a significant respect that comes with the declaration "[w]e're married." Society endows the institution of marriage with not only a host of rights and responsibilities, but with a significant respect for the relationship of the married couple. When you say that you are married, others know immediately that you have taken steps to create something special.... The word "married" gives you automatic membership in a vast club of people whose values are clarified by their choice of marriage. With a marriage, everyone can instantly relate to you and your relationship. They don't have to wonder what kind of relationship it is or how to refer to it or how much to respect it.

* * * *

My parents long to talk about their three married children, all with spouses, because they are proud and happy that we are all in committed relationships. They want to be able to use the common language of marriage to describe each of their children's lives. Instead they have to use a different language, which discounts and cheapens their family as well as mine[, because I have a same-sex partner and cannot be married].

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 ***467** couples, but then suggest that "a separate statutory scheme, which uses a title other than marriage," is presumptively constitutional, *ante* at 423, 908 *A.*2d at 200, we demean plaintiffs' claim. What we "name" things matters, language matters.

In her book *Making all the Difference: Inclusion, Exclusion, and American Law,* Martha Minnow 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.

[Martha Minnow, *Making all the Difference: Inclusion, Exclusion, and American Law* 4, 6 (1990).]

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" ****227** marriage, that such lesser relationships cannot have the name of marriage.[2]

II.

A.

Beginning with *Robinson v. Cahill,* this Court has repeatedly rejected a "mechanical" framework for due process and equal ***468** protection analyses under Article I, Paragraph 1 of our State Constitution. 62 *N.J.* 473, 491–92, 303 *A.*2d 273 (1973). *See Right to Choose v. Byrne,* 91 *N.J.* 287, 308–09, 450 *A.*2d 925 (1982); *Greenberg v. Kimmelman,* 99 *N.J.* 552, 567–68, 494 *A.*2d 294 (1985); *Planned Parenthood v. Farmer,* 165 *N.J.* 609, 629–30, 762 *A.*2d 620 (2000); *Sojourner A. v. N.J. Dept. of Human Serv.,* 177 *N.J.* 318, 332–33, 828 *A.*2d 306 (2003). Chief Justice Weintraub described the process by which the courts should conduct an Article I review:

> [A] court must weigh the nature of the restraint or the denial against the apparent public justification, and decide whether the State action is arbitrary. In that process, if the circumstances sensibly so require, the court may call upon the State to demonstrate the existence of a sufficient public need for the restraint or the denial.
>
> [*Robinson, supra,* 62 *N.J.* at 492, 303 *A.*2d 273 (citation omitted).]

Later, the Court "reaffirmed that approach [because] it provided a ... flexible analytical framework for the evaluation of equal protection and due process claims." *Sojourner A., supra,* 177 *N.J.* at 333, 828 *A.*2d 306. There, we restated the nature of the weighing process:

> In keeping with Chief Justice Weintraub's direction, we "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.
>
> [*Ibid.* (quoting *Planned Parenthood, supra,* 165 *N.J.* at 630, 762 *A.*2d 620).]

The majority begins its discussion, as it should, with the first prong of the test, the nature of the affected right. *Ante* at 444, 908 *A.*2d at 212. 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."[3] When we ask the question whether there is ***469** a fundamental right to *same-sex* marriage " rooted in the traditions, and collective conscience of our people," *ante* at 434, 908 *A.*2d at 206, we suggest the answer, and it is "no."[4] That is because ****228** 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, 821 *N.Y.S.*2d 770, 855 *N.E.*2d 1 (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 v. Virginia,* 388 *U.S.* 1, 87 *S.Ct.* 1817, 18 *L.Ed.*2d 1010 (1967); *Turner v. Safley*, 482 *U.S.* 78, 107 *S.Ct.* 2254, 96 *L.Ed.*2d 64 (1987); *Zablocki v. Redhail,* 434 *U.S.* 374, 98 *S.Ct.* 673, 54 *L.Ed.*2d 618 (1978); *see also J.B. v. M.B.,* 170 *N.J.* 9, 23–24, 783 *A.*2d 707 (2001) (noting that right to marry is a fundamental right protected by both federal and state constitutions); *In re Baby M.,* 109 *N.J.* 396, 447, 537 *A.*2d 1227 (1988) (same); *Greenberg v. Kimmelman, supra,* 99 *N.J.* at 571, 494 *A.*2d 294 (same). 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 ***470** 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." ***Lewis** v. **Harris***, 378 *N.J.Super.* 168, 204, 875 *A.*2d 259 (App.Div.2005) (Collester, J., dissenting); *see Hernandez, supra,* 7 *N.Y.*3d at 385, 821 *N.Y.S.*2d 770, 855 *N.E.*2d 1 (Kaye, C.J., dissenting) ("It is no answer that same-sex couples can be excluded from marriage because 'marriage,' by definition, does not include them. In the end, 'an argument that marriage is heterosexual because it 'just is' amounts to circular reasoning.' " (quoting *Halpern v. Attorney Gen. of Can.,* 65 *O.R.*3d 161, 181 (2003))).

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. *See* ***Lewis**, supra,* 378 *N.J.Super.* at 205, 875 *A.*2d 259. 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." *Loving, supra,* 388 *U.S.* at 12, 87 *S.Ct.* at 1824, 18 *L.Ed.*2d at 1018. 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 them access to one of our most cherished institutions simply because they are homosexuals.

Lawrence v. Texas, 539 *U.S.* 558, 123 *S.Ct.* 2472, 156 *L.Ed.*2d 508 (2003), in overruling ****229** *Bowers v. Hardwick,* 478 *U.S.* 186, 106 *S.Ct.* 2841, 92 *L.Ed.*2d 140 (1986), made a different but equally powerful point. In *Bowers,* the Court had sustained a Georgia statute that made sodomy a crime. ***471** 478 *U.S.* at 189, 106 *S.Ct.* at 2843, 92 *L.Ed.*2d at 145. When it rejected the *Bowers* holding seventeen years later, the Court stated bluntly that "*Bowers* was not correct when it was decided, and it is not correct today." *Lawrence, supra,* 539 *U.S.* at 578, 123 *S.Ct.* at 2484, 156 *L.Ed.*2d at 525. Justice Kennedy explained further that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Id.* at 579, 123 *S.Ct.* at 2484, 156 *L.Ed.*2d at 526.

We are told that when the Justices who decided *Brown v. Board of Education,* 347 *U.S.* 483, 74 *S.Ct.* 686, 98 *L.Ed.* 873 (1954), finally rejected legal segregation in public schools, they were deeply conflicted over the issue. Michael J. Klarman, *Brown and Lawrence (and Goodridge),* 104 *Mich. L.Rev.* 431, 433 (2005). "The sources of constitutional interpretation to which they ordinarily looked for guidance—text, original understanding, precedent, and custom—indicated that school segregation was permissible. By contrast, most of the Justices privately condemned segregation, which Justice Hugo Black called 'Hitler's creed.' Their quandary was how to reconcile their legal and moral views." *Ibid.* (footnote omitted). Today, it is difficult to believe that "*Brown* was a hard case for the Justices." *Ibid.*

Without analysis, our Court turns to history and tradition and finds that marriage has never been available to same-sex couples. That may be so—but the Court has not asked whether the limitation in our marriage laws, "once thought necessary and proper in fact serve[s] only to oppress." I would hold that plaintiffs have a liberty interest in civil marriage that cannot be withheld by the State. Framed differently, the right that is burdened under the first prong of the Court's equal protection/due process test is a right of constitutional dimension.

B.

Although the majority rejects the argument I find compelling, it does grant a form of relief to plaintiffs on equal protection ***472** grounds, finding a source for plaintiffs' interest outside of the Constitution. *Ante* at 448, 458–59, 908 *A.*2d at 221. Having previously separated the right to the tangible "benefits and privileges" of marriage from the right to the "name of marriage," and having dismissed the right to the name of marriage for same-sex couples because it is not part of our history or traditions, the majority finds the right to the tangible benefits of marriage in enactments and decisions of the legislative, executive, and judicial branches protecting gays and lesbians from discrimination, allowing adoption by same-sex partners, and conferring some of the benefits of marriage on domestic partners. *Ante* at 438–39, 444–48, 452, 908 *A.*2d at 208, 212–15, 217.

The enactments and decisions relied on by the majority as a source of same-sex couples' interest in equality of treatment are belied by the very law at issue in this case that confines the right to marry to heterosexual couples. Moreover, as the majority painstakingly demonstrates, the Domestic Partnership Act, *N.J.S.A.* 26:8A–1 to –13, does not provide many of the tangible benefits that accrue automatically when heterosexual couples marry. *Ante* at 448–51, 908 *A.*2d at 215–17. New ****230** Jersey's statutes reflect both abhorrence of sexual orientation discrimination and a desire to prevent same-sex couples from having access to one of society's most cherished institutions, the institution of marriage. Plaintiffs' interests arise out of constitutional principles that are integral to the liberty of a free people and not out of the legislative provisions described by the majority. In any

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

case, it is clear that civil marriage and all of the benefits it represents is absolutely denied same-sex couples, and, therefore, that same-sex couples' fundamental rights are not simply burdened but are denied altogether (the second prong of the Court's test).

Finally, the majority turns to the third prong—whether there is a public need to deprive same-sex couples of the tangible benefits and privileges available to heterosexual couples. *Ante* at 451, 908 *A.*2d at 217. Because the State has argued only that historically ***473** marriage has been limited to opposite-sex couples, and because the majority has accepted the State's position and declined to find that same-sex couples have a liberty interest in the choice to marry, the majority is able to conclude that *no* interest has been advanced by the State to support denying the rights and benefits of marriage to same-sex couples. *Ante* at 451–53, 908 *A.*2d at 217–18. Without any state interest to justify the denial of tangible benefits, the Court finds that the Legislature must provide those benefits to same-sex couples. *Ibid.*. I certainly agree with that conclusion but would take a different route to get there.

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." ***Lewis****, supra,* 378 *N.J.Super.* at 185 n. 2, 875 *A.*2d 259. 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.* at 613, 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 discussed *supra* at 469–70, 908 A.2d at 227–28.

C.

Perhaps the political branches will right the wrong presented in this case by amending the marriage statutes to recognize fully the ***474** 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 ****231** 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.* at 494. 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, 802 *N.E.*2d 565, 569 (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 ***475** 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.

[*Ibid.*]

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.

For affirmance in part/modification in part—Justices LaVECCHIA, ALBIN, WALLACE and RIVERA–SOTO—4.

For concurring in part/dissenting in part—Chief Justice PORITZ and Justices LONG and ZAZZALI—3.

All Citations

188 N.J. 415, 908 A.2d 196

Footnotes

1 The following sketches of plaintiffs' lives come from affidavits submitted to the trial court in 2003 and from factual assertions in the complaint. We assume that their familial relationships remain unchanged.

2 As a result of Marilyn's passing, Diane, who remains a party to this action, seeks only declaratory relief.

3 While plaintiffs' appeal was pending before the Appellate Division, the Legislature enacted the Domestic Partnership Act, *L.* 2003, *c.* 246, affording certain rights and benefits to same-sex couples who enter into domestic partnerships. With the passage of the Act and subsequent amendments, some of the inequities plaintiffs listed in their complaint and affidavits have been remedied. *See* discussion *infra* Part IV.A–B. For example, under the Domestic Partnership Act, same-sex domestic partners now have certain hospital visitation and medical decision-making rights. *N.J.S.A.* 26:8A–2(c).

4 The initial complaint in this case was filed on June 26, 2002. That complaint was replaced by the "amended complaint" now before us. All references in this opinion are to the amended complaint.

5 Each defendant was sued in his or her official capacity and therefore stands as an alter ego of the State. For the sake of simplicity, we refer to defendants as "the State."

6 It should be noted that the "Attorney General disclaim[ed] reliance upon promotion of procreation and creating the optimal environment for raising children as justifications for the limitation of marriage to members of the opposite sex." *Id.* at 185 n. 2, 875 *A.*2d 259.

7 Unlike the Appellate Division, we will not rely on policy justifications disavowed by the State, even though vigorously advanced by amici curiae.

8 Plaintiffs concede that the State can insist on the binary nature of marriage, limiting marriage to one per person at any given time. As Judge Skillman pointed out, polygamists undoubtedly would insist that the essential nature of marriage is the coupling of people of the opposite sex while defending multiple marriages on religious principles. ***Lewis**, supra,* 378 *N.J.Super.* at 187–88, 875 *A.*2d 259.

9 The text of Article I, Paragraph 1 of the 1947 New Jersey Constitution largely parallels the language of the 1844 Constitution. *Compare N.J. Const.* art. I, ¶ 1, *with N.J. Const. of 1844* art. I, ¶ 1.

10 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." *Post* at 469, 908 *A.*2d at 228. 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.

11 *Alaska Const.* art. I, § 25; *Ark. Const.* amend. 83, § 1; *Ga. Const.* art. I, § IV, ¶ I; *Haw. Const.* art. I, § 23; *Kan. Const.* art. XV, § 16; *Ky. Const.* § 233a; *La. Const.* art. XII, § 15; *Mich. Const.* art. I, § 25; *Miss. Const.* art. 14, § 263A; *Mo. Const.* art. I, § 33; *Mont. Const.* art. XIII, § 7; *Neb. Const.* art. I, § 29; *Nev. Const.* art. I, § 21; *N.D. Const.* art. XI, § 28; *Ohio Const.* art. XV, § 11; *Okla. Const.* art. II, § 35; *Or. Const.* art. XV, § 5a; *Tex. Const.* art. I, § 32; *Utah Const.* art. I, § 29; *Ala.Code* § 30–1–19; *Ariz.Rev.Stat.* § 25–101; *Cal. Fam.Code* § 308.5; *Colo.Rev.Stat.* § 14–2–104; *Conn. Gen.Stat.* § 45a–727a; *Del.Code Ann. tit.* 13, § 101; *Fla. Stat.* § 741.212; *Idaho Code Ann.* § 32–201; 750 *Ill. Comp. Stat.* 5/201, 5/212; *Ind.Code* § 31–11–1–1; *Iowa Code* § 595.2; *Me.Rev.Stat. Ann.* tit. 19–A, §§ 650, 701; *Md.Code Ann., Fam. Law* § 2–201; *Minn.Stat.* §§ 517.01, 517.03; *N.H.Rev.Stat. Ann.* §§ 457:1, 457:2; *N.J.S.A.* 37:1–1, –3; *N.M. Stat.* § 40–1–18; *N.Y. Dom. Rel. Law* §§ 12, 50; *N.C. Gen.Stat.* §§ 51–1, 51–1.2; 23 *Pa. Cons.Stat.* §§ 1102, 1704; *R.I. Gen. Laws* §§ 15–1–1, 15–1–2, 15–2–1; *S.C.Code Ann.* § 20–1–15; *S.D. Codified Laws* § 25–1–1; *Tenn.Code Ann.* § 36–3–113; *Vt. Stat. Ann.* tit. 15, § 8; *Va.Code Ann.* §§ 20–45.2, 20–45.3; *Wash. Rev.Code* § 26.04.020(1)(c); *W. Va.Code* § 48–2–104(c); *Wis. Stat.* §§ 765.001(2), 765.01; *Wyo. Stat. Ann.* § 20–1–101.

12 *See Dean v. District of Columbia,* 653 *A.*2d 307, 331 (D.C.1995); *Standhardt v. Superior Court of Ariz.,* 206 *Ariz.* 276, 77 *P.*3d 451, 459–60 (**App**.2003); *Baehr v. Lewin,* 74 *Haw.* 530, 852 *P.*2d 44, 57 (1993); *Morrison v. Sadler,* 821 *N.E.*2d 15, 34 (Ind.Ct.App.2005); *Baker, supra,* 191 *N.W.*2d at 186; *Hernandez v. Robles,* 7 *N.Y.*3d 338, 362–63, 821 *N.Y.S.*2d 770, 855 *N.E.*2d 1 (2006) (plurality opinion); *Andersen v. King County,* 158 *Wash*.2d 1, 27 – 31, 43 – 45, 138 *P.*3d 963, 978–79, 986 (2006) (plurality opinion); *see also Goodridge v. Dep't of Pub. Health,* 440 *Mass.* 309, 798 *N.E.*2d 941, 961 (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).

13 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,* 486 *U.S.* 456, 461, 108 *S.Ct.* 1910, 1914, 100 *L.Ed.*2d 465, 471 (1988). All classifications must at a minimum survive rational basis review, the lowest tier. *Ibid.*

14 Unlike New Jersey, a number of states prohibit adoption by same-sex couples. *See* Kari E. Hong, *Parens Patriarchy: Adoption, Eugenics, and Same–Sex Couples,* 40 *Cal.W.L.Rev.* 1, 2–3 (2003) (detailing states that have enacted measures to restrict adoption by same-sex couples).

15 At the time of New Jersey's amendment, only four other states, Wisconsin, Massachusetts, Connecticut, and Hawaii, had adopted similar anti-discrimination provisions. *See L.* 1981, *c.* 112 (codified at *Wis. Stat.* §§ 111.31 to 111.39 (1982)); *St.* 1989, *c.* 516 (codified at *Mass. Gen. Laws* ch. 151B, §§ 1 to 10 (1989)); *Public Act No.* 91–58 (codified at *Conn. Gen.Stat.* §§ 46a–81a to –81r (1991)); *L.* 1991, *c.* 2 (codified at *Haw.Rev.Stat.* §§ 378–1 to 6 (1991)); *L.* 1991, *c.* 519 (codified at *N.J.S.A.* 10:5–1 to –42 (1992)).

16 "Affectional or sexual orientation" is defined to mean "male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation." *N.J.S.A.* 10:5–5(hh).

17 The rights and benefits provided by the Domestic Partnership Act extend to two classes of people—persons who "are of the same sex and therefore unable to enter into a marriage with each other that is recognized by New Jersey law" and persons "who are each 62 years of age or older and not of the same sex." *N.J.S.A.* 26:8A–4(b)(5).

18 Every statutory provision applicable to opposite-sex couples might not be symmetrically applicable to same-sex couples. The presumption of parentage would apply differently for same-sex partners inasmuch as both partners could not be the biological parents of the child. It appears that the presumption in such circumstances would be that the non-biological partner consented to the other partner either conceiving or giving birth to a child.

19 *But see In re Parentage of Child of Robinson,* 383 *N.J.Super.* 165, 176, 890 *A.*2d 1036 (Ch.Div.2005) (declaring that same-sex partner was entitled to statutory presumption of parenthood afforded to husbands).

20 To obtain custody or visitation rights, the non-biological parent must petition the courts to be recognized as a psychological parent. *See V.C., supra,* 163 *N.J.* at 206, 230, 748 *A.*2d 539 (declaring former lesbian partner of biological mother of twins "psychological parent," and awarding regular visitation).

21 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. *See, e.g., Ga. Const.* art. I, § IV, ¶ I(b); *Kan. Const.* art. XV, § 16(b); *Ky. Const.* § 233a; *La. Const.* art. XII, § 15; *Mich. Const.* art. I, § 25; *Neb. Const.* art. I, § 29; *N.D. Const.* art. XI, § 28; *Ohio Const.* art. XV, § 11; *Utah Const.* art. I, § 29; *Alaska Stat.* § 25.05.013; *Okla. Stat.* tit. 51, § 255(A)(2); *Tex. Fam.Code Ann.* § 6.204(b); *Va.Code Ann.* § 20–45.3.

22 *See Cal. Fam.Code* §§ 297–299.6; *Haw.Rev.Stat.* §§ 572C–1 to –7; *Me.Rev.Stat. Ann.* tit. 22, § 2710; *N.J.S.A.* 26:8A–1 to –13; *D.C.Code* §§ 32–701 to –710.

23 The Hawaii Supreme Court was the first state high court to rule that sexual orientation discrimination possibly violated the equal protection rights of same-sex couples under a state constitution. *See Encyclopedia of Everyday Law, Gay Couples,* http://law.enotes.com/everyday-law-encyclopedia/gay-couples (last visited Oct. 10, 2006). In *Baehr, supra,* the Hawaii Supreme Court concluded that the marriage statute "discriminates based on sex against the applicant couples in the exercise of the civil right of marriage, thereby implicating the equal protection clause of article I, section 5 of the Hawaii Constitution" and remanded for an evidentiary hearing on whether there was a compelling government interest furthered by the sex-based classification. 852 *P.*2d at 57, 59. After the remand but before the Hawaii Supreme Court had a chance to address the constitutionality of the statute, Hawaii passed a constitutional amendment stating that "[t]he legislature shall have the power to reserve marriage to opposite-sex couples." *Haw. Const.* art. I, § 23. The Hawaii Legislature enacted a statute conferring certain rights and benefits on same-sex couples through a reciprocal beneficiary relationship. *Haw.Rev.Stat.* §§ 572C–1 to –7.

24 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. *Opinions of the Justices to the Senate,* 440 *Mass.* 1201, 802 *N.E.*2d 565, 566, 572 (2004). The court later upheld 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.' " *Schulman v. Attorney General,* 447 *Mass.* 189, 850 *N.E.*2d 505, 506–07 (2006).

25 We note that what we have done and whatever the Legislature may do will not alter federal law, which only confers marriage rights and privileges to opposite-sex married couples. *See* 1 *U.S.C.A.* § 7 (defining marriage, under Federal Defense of Marriage Act, as "legal union between one man and one woman").

26 *See Newman v. Chase,* 70 *N.J.* 254, 260 n. 4, 359 *A.*2d 474 (1976) (noting that prior to Married Women's Property Act of 1852 "the then prevailing rule" entitled husband "to the possession and enjoyment of his wife's real estate during their joint lives"); 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).

27 *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).

28 We note, for example, that the Domestic Partnership Act requires, as a condition to the establishment of a domestic partnership, that the partners have "a common residence" and be "otherwise jointly responsible for each other's common welfare." *N.J.S.A.* 26:8A–4(b)(1). Such a condition is not placed on heterosexual couples who marry and thus could not be imposed on same-sex couples who enter into a civil union.

1 Article I, Paragraph 1, states:

> 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.
>
> [*N.J. Const.* art. I, ¶ 1.]

This language constitutes our State equivalent of the Due Process and Equal Protection Clauses of the Federal Constitution.

2 Professor Michael Wald, in *Same–Sex Couple Marriage: A Family Policy Perspective* similarly states that "if a State passed a civil union statute for same-sex couples that paralleled marriage, it would be sending a message that these unions were in some way second class units unworthy of the term 'marriage'[,] ... that these are less important family relationships." 9 *Va. J. Soc. Pol'y. & L.* 291, 338 (2001).

 © 2017 Thomson Reuters. No claim to original U.S. Government Works.

3 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.

4 The majority understands that "[h]ow the right is defined may dictate whether it is deemed fundamental." *Ante* at 435, 908 *A*.2d at 207. 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. *Ante* at 435–36, 908 *A*.2d at 207–08.

End of Document

© 2017 Thomson Reuters. No claim to original U.S. Government Works.

The Legislature finds and declares:

a. Civil marriage is a legal institution recognized by the State in order to encourage stable relationships and to protect individuals from discrimination, and the State has an interest in encouraging stable relationships and protecting individuals from discrimination.

b. In the 2007 unanimous holding in Lewis v. Harris, 188 N.J. 415 (October 25, 2006), the New Jersey Supreme Court ruled that same-sex are entitled to all of the same rights, privileges and obligations of marriage as different sex couples, stating that the "unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated under our State Constitution." Id. at 423.

c. In Lewis, the High Court held that the state violated the equal protection guarantee of Article I, paragraph 1 of the State Constitution by denying rights and benefits to committed same-sex couples which were statutorily given to their heterosexual counterparts. The Court split on the remedy, however, with a slim majority stating that 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." Lewis, *supra*, at 463.

d. Consistent with the majority holding in Lewis, the New Jersey Legislature chose to create a parallel statutory structure for the relationships of committed same-sex couples and their families that was intended to be separate, but equal. That separate relationship status, the Civil Unions Act, N.J.S. 37:1-28 et seq., took effect on February 19, 2007.

e. Under the Civil Unions Act at N.J.S. 37:1-28, the New Jersey Civil Unions Review Commission ("NJCURC") was created to evaluate the implementation, operation and effectiveness of the act; collect information about the act's effectiveness from members of the public, State agencies and private and public sector businesses and organizations; determine whether additional protections are needed; collect information about the recognition and treatment of civil unions by other states and jurisdictions including the procedures for dissolution; evaluate the effect on same-sex couples, their children and other family members of being provided civil unions rather than marriage; evaluate the financial impact on the State of New Jersey of same-sex couples being provided civil unions rather than marriage; and review the Domestic Partnership Act, N.J.S. 26:8A-1 et seq., and

make recommendations whether this act should be repealed. In December 2008, after undertaking multiple public hearings, the 13-member NJCURC unanimously issued a 79-page report that found: civil unions are "not clear to the general public"; confer "second-class status" on the couples who form them; "invites and encourages unequal treatment of same-sex couples and their children"; and concluded that, at the time of the legislature's adoption of the Civil Unions Act, "[s]eparate treatment was wrong then and it is just as wrong now."

f. On June 29, 2011, the LGBT civil rights advocacy organization Garden State Equality filed a new litigation seeking equal marriage rights for committed same-sex couples and seeking to remove the label of inferiority affixed to gay and lesbian relationships where Civil Unions were intended to create a second, alternate relationship status solely for them. On September 27, 2013, the Honorable Mary C. Jacobson, A.J.S.C., ruled in that litigation, Garden State Equality et al. v. Dow, et al., 82 A. 3d 336 (N.J. Super. Ct. Law Div. 2013), consistent with United States Supreme Court holding in United States v. Windsor, 570 U.S. 744 (2013), limiting same-sex couples to civil unions violated the rights of same-sex couples to equal protection under the New Jersey Constitution. Judge Jacobson ruled that since civil unions were not equivalent to marriage under federal law, same-sex couples did not have access to federal benefits available to married couples. The trial court, Appellate Division and Supreme Court each refused the State's request for a stay of the trial court's decision and the ruling took effect on October 21, 2013.

g. Since October 21, 2013, same-sex couples have been authorized to enter into marriage relationships pursuant to N.J.S. 37:1-1 by way of the aforementioned trial court holding under Garden State Equality. However, it is necessary and proper for that holding to now be formally codified under legislation so that committed same-sex couples are afforded access to equality under New Jersey statutory law in addition to the state's common law.

h. Enactment of this legislation is intended to and will codify the two judicial decisions, Lewis v. Harris and Garden State Equality v. Dow, into the New Jersey statutes.

i. Consistent with the long standing public policy of the State of New Jersey, the Legislature hereby declares that committed same-sex couples and their families are entitled to equality, liberty, dignity, and protection in their domestic partnership, civil union and marriage relationships.

j. All marriage relationships, including those of same-sex couples, entered into in New Jersey are to be afforded equal dispensation of rights and benefits from federal and state government, and the recognition of the legislative acts, public records, and judicial decisions related thereto are matters of strong public policy to be afforded full faith and credit under the United States Constitution.

k. The New Jersey Legislature renews its support for the Civil Unions Act as a statutory option for all New Jersey couples regardless of gender or age, but hereby acknowledges that is was wrong to have created that parallel statutory structure for the sole purpose of depriving committed same-sex couples of the ability to enter into a marriage. Accordingly, the state hereby apologizes for this mistake and the historical discrimination it foisted upon the LGBT community by the denial of equal marriage rights.

Governor Murphy Signs Legislation to Enshrine Marriage Equality into State Law

01/10/2022

TRENTON – Governor Murphy today signed into law S3416, which codifies marriage equality in New Jersey law by providing that all laws concerning marriage and civil union are to be read with gender neutral intent. Marriage equality currently exists in New Jersey based on state and federal Court decisions. This new law demonstrates the Governor and Legislature's commitment to protecting marriage equality by codifying it into New Jersey law.

"Despite the progress we have made as a country, there is still much work to be done to protect the LGBTQ+ community from intolerance and injustice. New Jersey is stronger and fairer when every member of our LGBTQ+ family is valued and given equal protection under the law," **said Governor Murphy.** "I am honored to sign legislation that represents our New Jersey values and codifies marriage equality into state law."

Primary sponsors of the bill include Senators Steve Sweeney, Loretta Weinberg, and Vin Gopal, and Assemblymembers Valerie Vainieri Huttle, Mila M. Jasey, Annette Quijano, Andrew Zwicker, and Joann Downey.

"This is about acting to ensure equal treatment and civil rights for all New Jerseyans, including same-sex couples," **said Senate President Steve Sweeney**. "Marriage equality respects the rights of loving couples who deserve to be treated equally. The courts have ruled that same-sex marriages are a fundamental right, but we want to put it into statute to protect against any backtracking by the U. S. Supreme Court. It is the right thing to do."

"Devoted same-sex couples all across New Jersey are raising families as contributing members of their communities," **said Senate Majority Leader Loretta Weinberg**. "We fought to correct the injustice that denied these rights for too many loving couples for far too long. We don't want to see those rights lost to an arch-conservative agenda of recent Supreme Court appointees."

"Basic equal rights should not be denied to any class of citizen, regardless of gender identity or sexual orientation," **said Senator Vin Gopal**. "The law must protect all civil rights and continue to honor the union between two people who love each other. We need to make these rights more secure by writing them into law."

"In 2012, I was proud to be a prime sponsor of New Jersey's Marriage Equality Act. Following Governor Christie's veto, advocates continued the fight to the New Jersey Supreme Court, where they were finally successful in legalizing same-sex marriage**," said Assemblywoman Valerie Vainieri Huttle.** "I am proud to once again have led the

charge to ensure that the rights of the LGBTQ community are safeguarded."

"As Justice Kennedy so eloquently observed in Obergefell, 'No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than they once were," **said Assemblywoman Mila Jasey.** "Today, we recommit to guaranteeing that one of 'civilization's oldest institutions' is forever enshrined in statute for all who desire to embark upon the commitment above all others."

"Today we take action with this new law in order to preserve marriage equality in New Jersey," **said Assemblywoman Annette Quijano.** "We remain committed to our friends in the Garden State's LGBTQ community and do all we can to ensure same-sex couples have equal rights under the law which includes marriage."

"In 2013, I was ecstatic and grateful that the Court ruled that New Jersey must recognize same-sex marriage," **said Assemblyman Andrew Zwicker.** "Today, I am proud to stand in solidarity with everyone who fought the good fight for a right that couples should have always had: the right for someone to marry who they love. It is important for State law to forever enshrine the legality of marriage equality."

"This new law is just one more step to show we continue to stand strong against discrimination and prejudice, and we seek to create a New Jersey that is inclusive and unified for all people**," said Assemblywoman Joann Downey.**

This legislation brings New Jersey statutory law into conformance with the 2013 decision in Garden State Equality v. Dow as well as the 2015 United Supreme Court decision in Obergefell v. Hodges, which held that same-sex marriage is a fundamental right and that all states are required to allow same-sex couples to marry. Enacting S3416 into law ensures that the right to same-sex marriage will continue to exist in New Jersey even if these state and federal court precedents were to be overturned.

"How the world has changed since last time the legislature passed marriage equality in 2012. This time we have a Governor who is a champion of civil and human rights second to none," **said Steven Goldstein, founder of Garden State Equality.** "I am also thrilled this new statue marks the final law steered to passage by our equality legend Senator Loretta Weinberg. What a fitting, crowning legacy."

"Securing marriage equality in New Jersey for committed same-sex couples and their families has literally been a labor of love at Garden State Equality for nearly two decades," **said Thomas Prol, a founding and current Garden State Equality executive committee member and co-author of the legislation.** "We are grateful to the Governor and the legislative leadership for helping us protect these vital rights from the national onslaught being leveled against the LGBTQ community every day. Our community can now sleep tight knowing that their relationships are cemented in New Jersey's statutory law books."

"Twelve years ago, the Senate failed to pass marriage equality and then Senate President Dick Codey predicted that one day they would all look back and say, 'what were we thinking?' As one of the first couples to be married when marriage equality was established, our gratitude goes to all who saw this as a civil rights issue then and continued the fight to bring us to this day, especially Senators Loretta Weinberg and Raymond Lesniak," **said Marsha Shapiro and Louise Walpin.** "Special thanks to Governor Phil Murphy for keeping his promise to move New Jersey forward and codifying the right for all New Jerseyans to marry the one they love into law."

(https://twitter.com/GovMurphy)
(https://www.facebook.com/governorphilmurphy)
(https://www.youtube.com/njgovernorsoffice)
(https://www.instagram.com/govmurphy/)
(https://www.snapchat.com/add/philmurphy)

Governor Phil Murphy

Home (/governor/)

Administration

Governor Phil Murphy (/governor/admin/about)

Lt. Governor Tahesha Way (/governor/admin/lt)

In memoriam of Lt. Governor Sheila Y. Oliver (/governor/admin/lt-sheila-y-oliver)

Senior Staff (/governor/admin/staff)

Cabinet (/governor/admin/cabinet)

Office of Climate Action and the Green Economy (/governor/climateaction/)

Office of Equity (/governor/admin/equity/)

Office of Health Care Affordability and

Key Initiatives

Economy & Jobs (/governor/initiatives/#Economy)

Education (/governor/initiatives/#Education)

Environment (/governor/initiatives/#Environment)

Health (/governor/initiatives/#Health)

Law & Justice (/governor/initiatives/#Justice)

Transportation (/governor/initiatives/#Transportation)

News & Events

Press Releases (/governor/news/news/562024/approved/news_archive.shtml)

Photos (https://www.flickr.com/photos/govmurphy)

Public Addresses (/governor/news/addresses)

Executive Orders (/infobank/eo/056murphy/approved/eo_archive.html)

Social

Facebook (https://www.facebook.com/governorphilmurphy/)

Twitter (https://twitter.com/GovMurphy)

Instagram (https://www.instagram.com/govmurphy/)

Snapchat (https://www.snapchat.com/add/philmurphy)

YouTube (https://www.youtube.com/njgovernorsoffice)

Contact Us

Scheduling Requests (/governor/contact/scheduling/)

Contact Us (/governor/contact/all/)

Statewide

NJ Home (//www.nj.gov)

Services A to Z (//www.nj.gov/nj/gov/njgov/alphaserv.html)

Departments/Agencies (//www.nj.gov/nj/gov/deptserv/)

FAQs (//www.nj.gov/faqs/)

Contact Us (//www.nj.gov/nj/feedback.html)

Privacy Notice (//www.nj.gov/nj/privacy.html)

Legal Statement & Disclaimers (//www.nj.gov/nj/legal.html)

Accessibility Statement (//www.nj.gov/nj/accessibility.html)

(https://twitter.com/GovMurphy)

(https://www.facebook.com/governorphilmurphy)

(https://www.youtube.com/njgovernorsoffice)

(https://www.instagram.com/govmurphy/)

(https://www.snapchat.com/add/philmurphy)

Transparency (/governor/admin/affordablehealthcare/index.shtml)

Boards, Commissions & Authorities (/governor/admin/bca)

New Jersey Puerto Rico Commission (https://www.nj.gov/puertoricocommission/)

Internship Opportunities (/governor/admin/internship.shtml)

Governor's Fellows Program (/governor/admin/fellows)

Governor's Residence - Drumthwacket (http://drumthwacket.org/)

Administrative Orders (/governor/news/ao/approved/ao_archive.shtml)

Direct Appointments (/governor/news/appointments)

Advice and Consent Appointments (/governor/news/acappointments)

Statements

Legislation (/governor/news/statements/approved/statements_archive.shtml)

Administration Reports (/governor/news/adminreports/approved/archive.shtml)

Transition Reports (/governor/news/reports/approved/reports_archive.shtml)

Press Kits (/governor/news/press)

(https://twitter.com/GovMurphy)

(https://www.facebook.com/governorphilmurphy)

(https://www.youtube.com/njgovernorsoffice)

(https://www.instagram.com/govmurphy/)

(https://www.snapchat.com/add/philmurphy)

(//nj.gov/opra/)

(https://my.nj.gov/)

(https://tech.nj.gov/)

Copyright © State of New Jersey, 1996-2025
Office of Governor PO Box 001
Trenton, NJ 08625
609-292-6000

AN ACT concerning marriage, revising various parts of the statutory law and supplementing Title 37 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. (New section) This act shall be known and may be cited as the "Marriage Equality Act."

2. (New section) The Legislature finds and declares that:

a. On June 26, 2013 the United States Supreme Court ruled in U.S. v. Windsor, No. 12-307, 133 S. Ct. 2675; 186 L. Ed. 2d 808; 2013 U.S. LEXIS 4921 that the federal government must grant federal benefits to same-sex couples who are lawfully married in states that have granted these couples the right to marry.

b. On September 27, 2013 a judge of the New Jersey Superior Court ruled in Garden State Equality et al. v. Dow, Docket No. L-1729-11, 2013 N.J. Super. LEXIS 169, that same-sex couples would have the right to marry in New Jersey beginning on October 21, 2013.

c. On October 18, 2013 the New Jersey Supreme Court unanimously refused to issue a stay of the Superior Court order, holding that "the State has not shown a reasonable probability it will succeed on the merits." On October 21, 2013 the State withdrew its appeal.

d. The first same-sex marriages in the State took place on October 21, 2013, pursuant to the Superior Court order.

e. Including New Jersey, 16 states and the District of Columbia currently allow same-sex couples to marry.

f. Same-sex marriage in this State would have been authorized by Senate Bill No. 1 of 2012-2013, which passed both Houses of the Legislature in February 2012 and was conditionally vetoed by the Governor. The conditional veto would have eliminated the same-sex marriage provision and would have created a new State office to increase awareness and enforcement of the civil union law.

g. However, increased awareness and enforcement of the civil union law are inferior to marriage equality. Civil unions were established by the Legislature by P.L.2006, c.103, in response to a 2006 decision of the New Jersey Supreme Court. In Lewis v. Harris, 188 N.J. 415 (2006), the court had ruled 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. The court held that to comply with this constitutional mandate, the Legislature must either amend the marriage statutes to include those couples or create a parallel statutory structure to attempt to provide the rights and benefits enjoyed by, and burdens

EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

D R A F T

and obligations borne by, married couples. The civil union law was the Legislature's attempt to create this "parallel statutory structure."

h. The New Jersey Civil Union Review Commission was established by P.L.2006, c.103 to investigate whether "provid[ing] civil unions rather than marriage" to same-sex couples afforded them equality.

i. The commission unanimously concluded that the civil union law, instead of ending discrimination against same-sex couples, "invite[d] and encourage[d] unequal treatment." The commission found that employers had denied civil union partners equal benefits and hospitals had denied civil union partners equal rights to visitation and medical decision-making. The commission also found that the children of same-sex couples would benefit by society's recognition that their parents are married, because the separate and inferior label of civil union stigmatized these children.

j. Because civil unions are available only to same-sex couples, the civil union enactment invades their privacy and invites discrimination when these couples are forced to disclose their civil union status on forms, in job interviews, and in other settings.

k. Civil marriage is a legal institution recognized by the State in order to encourage stable relationships and to protect individuals from discrimination, and the State has an interest in encouraging stable relationships and protecting individuals from discrimination.

l. In enacting this bill to grant same-sex marriage statutory recognition, it is the intent of the Legislature to codify the ruling of the Superior Court in Garden State Equality et al. v. Dow and the public policy of this State.

m. It is also the intent of the Legislature in enacting this bill to leave decisions about religious marriage to religions, and to uphold the free exercise of religion guaranteed by the First Amendment to the United States Constitution and by Article I, paragraph 4 of the New Jersey Constitution.

n. Therefore, this bill includes a religious exemption stating that no member of the clergy of any religion authorized to solemnize marriage and no religious society, institution or organization in this State shall be required to solemnize any marriage in violation of the free exercise of religion guaranteed by the First Amendment to the United States Constitution or by Article I, paragraph 4 of the New Jersey Constitution.

o. This bill specifies that no religious society, institution or organization in this State serving a particular faith or denomination shall be compelled to provide space, services, advantages, goods, or privileges related to the solemnization, celebration or promotion of marriage if such solemnization, celebration or promotion of marriage is in violation of the beliefs of such religious society, institution or organization.

p. In addition, this bill specifies that no civil claim or cause of action against any religious society, institution or organization, or any employee thereof, shall arise out of any refusal to provide

DRAFT

space, services, advantages, goods, or privileges. No State action to penalize or withhold benefits from any such religious society, institution or organization, or any employee thereof, shall result from any refusal to provide space, services, advantages, goods, or privileges pursuant to this exemption.

3. (New section) "Marriage" means the legally recognized union of two consenting persons in a committed relationship. Whenever the term "marriage" occurs or the term "man," "woman," "husband" or "wife" occurs in the context of marriage or any reference is made thereto in any law, statute, rule, regulation or order, the same shall be deemed to mean or refer to the union of two persons pursuant to this amendatory and supplementary act.

4. (New section) A marriage of two persons of the same sex entered into outside this State which is valid under the laws of the jurisdiction in which the marriage was entered shall be valid in this State.

5. (New section) It is the intent of the Legislature that this amendatory and supplementary act be interpreted consistently with the guarantees of the First Amendment to the United States Constitution and of Article I, paragraph 4 of the New Jersey Constitution.

6. (New section) a. No member of the clergy of any religion authorized to solemnize marriage and no religious society, institution or organization in this State shall be required to solemnize any marriage in violation of the free exercise of religion guaranteed by the First Amendment to the United States Constitution or by Article I, paragraph 4 of the New Jersey Constitution.

b. No religious society, institution or organization in this State shall, other than when providing a place of public accommodation as defined in section 5 of P.L.1945, c.169 (C.10:5-5), be compelled to provide space, services, advantages, goods, or privileges related to the solemnization, celebration or promotion of marriage if such solemnization, celebration or promotion of marriage is in violation of the beliefs of such religious society, institution or organization.

c. No civil claim or cause of action against any religious society, institution or organization, or any employee thereof, shall arise out of any refusal to provide space, services, advantages, goods, or privileges pursuant to this section, other than when providing a place of public accommodation as defined in section 5 of P.L.1945, c.169 (C.10:5-5). No State action to penalize or withhold benefits from any such religious society, institution or organization, or any employee thereof, shall result from any refusal to provide space, services, advantages, goods, or privileges pursuant to this section.

DRAFT

7. (New section) On and after the effective date of this amendatory and supplementary act:

a. no new civil unions shall be established under P.L.2006, c.103 (C.37:1-28 et al.); and

b. all partners in civil unions previously established under P.L.2006, c.103 (C.37:1-28 et al.) may apply for a marriage license in accordance with the provisions of R.S.37:1-4 and all other applicable provisions of law.

8. Partners in a civil union couple who enter into marriage with each other on or after October 21, 2013 shall be deemed to have been married beginning on the date they entered into their civil union.

9. R.S.37:1-4 is amended to read as follows:

37:1-4. Issuance of marriage or civil union license, emergencies, validity.

a. Except as provided in R.S.37:1-6 and subsection b. of this section, the marriage [or civil union] license shall not be issued by a licensing officer sooner than 72 hours after the application therefor has been made; provided, however, that the Superior Court may, by order, waive all or any part of said 72-hour period in cases of emergency, upon satisfactory proof being shown to it. Said order shall be filed with the licensing officer and attached to the application for the license.

b. The licensing officer shall issue a marriage license immediately to partners in a civil union established pursuant to P.L.2006, c.103 (C.37:1-28 et al.) who apply for such license.

c. A marriage [or civil union] license, when properly issued as provided in this article, shall be good and valid only for 30 days after the date of the issuance thereof.

(cf: P.L.2006, c.103, s.9)

10. (New section) For a period of one year following the effective date of P.L. , c. (C.) (pending before the Legislature as this bill), partners in a civil union established pursuant to P.L.2006, c.103 (C.37:1-28 et al.) who apply for a marriage license pursuant to subsection b. of R.S.37:1-4 shall not be required to pay any fees for the issuance of such license, including but not limited to the fees imposed by R.S.37:1-12 and section 1 of P.L. 1981, c.382 (C.37:1-12.1).

11. R.S.37:1-13 is amended to read as follows:

37:1-13. Authorization to solemnize marriages [and civil unions].

Each judge of the United States Court of Appeals for the Third Circuit, each judge of a federal district court, United States magistrate, judge of a municipal court, judge of the Superior Court, judge of a tax court, retired judge of the Superior Court or Tax

DRAFT

Court, or judge of the Superior Court or Tax Court, the former County Court, the former County Juvenile and Domestic Relations Court, or the former County District Court who has resigned in good standing, surrogate of any county, county clerk and any mayor or the deputy mayor when authorized by the mayor, or chairman of any township committee or village president of this State, and every [minister] <u>member of the clergy</u> of every religion, are hereby authorized to solemnize marriages [or civil unions] between such persons as may lawfully enter into the matrimonial relation [or civil union]; and every religious society, institution or organization in this State may join together in marriage [or civil union] such persons according to the rules and customs of the society, institution or organization.
(cf: P.L.2006, c.103, s.17)

12. Section 94 of P.L.2006, c.103 (C.37:1-36) is repealed.

13. (New section) The Commissioner of Health, pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1) shall adopt rules and regulations to effectuate the purposes of this amendatory and supplementary act.

14. This act shall take effect on the 60th day following enactment, except that the Commissioner of Health may take such anticipatory administrative action in advance as shall be necessary for the implementation of this act. Section 10 of this act shall expire one year following the date of enactment.

STATEMENT

This bill, the "Marriage Equality Act," would codify same-sex marriage, which was recently authorized in New Jersey by a judicial ruling.

Findings and Declarations

The bill's findings and declarations provide in part that:

a. On June 26, 2013 the United States Supreme Court ruled in <u>U.S.</u> v. <u>Windsor</u>, No. 12-307, 133 S. Ct. 2675; 186 L. Ed. 2d 808; 2013 U.S. LEXIS 4921 that the federal government must grant federal benefits to same-sex couples who are lawfully married in states that have granted these couples the right to marry.

b. On September 27, 2013 a judge of the New Jersey Superior Court ruled in <u>Garden State Equality et al.</u> v. <u>Dow</u>, Docket No. L-1729-11, 2013 N.J. Super. LEXIS 169, that same-sex couples would have the right to marry in New Jersey beginning on October 21, 2013.

c. On October 18, 2013 the New Jersey Supreme Court unanimously refused to issue a stay of the Superior Court order,

D R A F T

holding that "the State has not shown a reasonable probability it will succeed on the merits." On October 21, 2013 the State withdrew its appeal.

d. The first same-sex marriages in the State took place on October 21, 2013, pursuant to the Superior Court order.

e. Including New Jersey, 16 states and the District of Columbia currently allow same-sex couples to marry.

f. Same-sex marriage in this State would have been authorized by Senate Bill No. 1 of 2012-2013, which passed both Houses of the Legislature in February 2012 and was conditionally vetoed by the Governor. The conditional veto would have eliminated the same-sex marriage provision and instead create a new State office to increase awareness and enforcement of the civil union law.

g. However, increased awareness and enforcement of the civil union law are inferior to marriage equality. Civil unions were established by the Legislature by P.L.2006, c.103, in response to a 2006 decision of the New Jersey Supreme Court. In Lewis v. Harris, 188 N.J. 415 (2006), the court had ruled 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. The court held that to comply with this constitutional mandate, the Legislature must either amend the marriage statutes to include those couples or create a parallel statutory structure to attempt to provide the rights and benefits enjoyed by, and burdens and obligations borne by, married couples. The civil union law was the Legislature's attempt to create this "parallel statutory structure."

h. The New Jersey Civil Union Review Commission was established by P.L.2006, c.103 to investigate whether "provid[ing] civil unions rather than marriage" to same-sex couples afforded them equality.

i. The commission unanimously concluded that the civil union law, instead of ending discrimination against same-sex couples, "invite[d] and encourage[d] unequal treatment." The commission found that employers had denied civil union partners equal benefits and hospitals had denied civil union partners equal rights to visitation and medical decision-making. The commission also found that the children of same-sex couples would benefit by society's recognition that their parents are married, because the separate and inferior label of civil union stigmatized these children.

j. Because civil unions are available only to same-sex couples, the civil union enactment invades their privacy and invites discrimination when these couples are forced to disclose their civil union status on forms, in job interviews, and in other settings.

k. Civil marriage is a legal institution recognized by the State in order to encourage stable relationships and to protect individuals from discrimination, and the State has an interest in encouraging stable relationships and protecting individuals from discrimination.

DRAFT

l. In enacting this bill to grant same-sex marriage statutory recognition, it is the intent of the Legislature to codify the ruling of the Superior Court in Garden State Equality et al. v. Dow and the public policy of this State.

m. It is also the intent of the Legislature in enacting this bill to leave decisions about religious marriage to religions, and to uphold the free exercise of religion guaranteed by the First Amendment to the United States Constitution and by Article I, paragraph 4 of the New Jersey Constitution.

Marriage

Under the bill, "marriage" would be defined as the legally recognized union of two consenting persons in a committed relationship. The bill provides that whenever the term "marriage," "man," "woman," "husband" or "wife" occurs or any reference is made thereto in any law, statute, rule, regulation or order, the same shall be deemed to mean or refer to the union of two persons pursuant to the bill.

Religious Exemptions

The bill provides that it is the intent of the Legislature that the bill be interpreted consistently with the guarantees of the First Amendment to the United States Constitution and of Article I, paragraph 4 of the New Jersey Constitution.

The bill specifically provides that no member of the clergy of any religion authorized to solemnize marriage and no religious society, institution or organization in this State would be required to solemnize any marriage in violation of the free exercise of religion guaranteed by the First Amendment to the United States Constitution or by Article I, paragraph 4 of the New Jersey Constitution. The bill also provides that no religious society, institution or organization in this State shall, other than when providing a place of public accommodation as defined in the Law Against Discrimination (section 5 of P.L.1945, c.169 (C.10:5-5)), be compelled to provide space, services, advantages, goods, or privileges related to the solemnization, celebration or promotion of marriage if such solemnization, celebration or promotion of marriage is in violation of the beliefs of such religious society, institution or organization.

In addition, the bill provides that no civil claim or cause of action against any religious society, institution or organization, or any employee thereof, would arise out of any refusal to provide space, services, advantages, goods, or privileges pursuant to the bill, other than when providing a place of public accommodation as defined in the Law Against Discrimination. Under the bill no State action to penalize or withhold benefits from any such religious society, institution or organization, or any employee thereof, would result from any refusal to provide space, services, advantages, goods, or privileges.

D R A F T

"Member of the Clergy" Language

In addition, the bill updates language in current law concerning the authority to solemnize marriages, set out in R.S.37:1-13. Currently, this section of law authorizes "every minister of every religion" to solemnize marriages. The bill would change the word "minister" to "member of the clergy." This change is intended only to modernize the language of the statute and not to have any substantive effect.

Civil Unions

The bill also provides that on and after its effective date, no new civil unions could be established. Existing civil unions would not be affected by the bill and would continue unless dissolved by the parties.

In addition, the bill repeals section 94 of P.L.2006, c.103 (C.37:1-36), which had established the now-defunct New Jersey Civil Union Review Commission. The function of the commission was to evaluate the operation and effectiveness of the civil union enactment.

Under the bill, civil union partners who wish to apply for a marriage license would receive the license immediately upon application, without the statutory 72-hour waiting period. For a period of one year following the effective date of the bill, civil union partners would not be charged a fee for the issuance of a marriage license. After expiration of the one-year period, civil union partners who wish to marry would be charged the usual fees, which currently total $28. Marriage license fees are set out in R.S.37:1-12 and section 1 of P.L. 1981, c.382 (C.37:1-12.1).

Retroactivity for Civil Union Partners

Finally, the bill grants retroactivity for civil union partners who wish to enter into marriage. Under the bill, partners in a civil union couple who enter into marriage with each other on or after October 21, 2013 would be retroactively deemed to have been married as of the date they entered into their civil union.

The "Marriage Equality Act"; recognizes same-sex marriage.

D R A F T

Who Gets the Credit for Marriage Equality in New Jersey?

The people who deserved the credit for marriage equality are those who stepped forward in 2007 and bared their souls in front of microphones as a standing-room audience hung on every word of their gripping anguish. These same-sex couples and their families made the political movement into a force just by being their authentic selves, by sharing their stories of suffering, harm, and discrimination.

Addressing the members of the New Jersey State Bar Association (NJSBA) Family Law Section at their annual retreat in late March, I discussed how New Jersey laws and courts have treated (more often negatively than not) the LGBT community over the past seventy-five years. One particular focus of my remarks was the political and legal strategy behind the battle for marriage equality over the past two decades - how recognition of the relationships of committed same-sex couples migrated from an idea to case law to a codified statute.

What a long, strange, trip it's been that brought us to the moment on January 10, 2022, when Governor Murphy signed A5367/S3416 to codify marriage equality as a statutory right for committed same-sex couples. The legislation also requires that all laws concerning marriage and civil union are to be read with gender neutral intent. Over nineteen years earlier, Lambda Legal, a national LGBTQ legal advocacy organization, joined Larry Lustberg, Jennifer Ching and the strike team at the Gibbons law firm to file the October 8, 2002 Complaint that commenced *Lewis v. Harris*, 188 N.J. 415 (October 25, 2006), the first of New Jersey's two marriage equality lawsuits.

In *Lewis*, the New Jersey Supreme Court held that the state violated the equal protection guarantee of Article I, paragraph 1 of the State Constitution by denying rights and benefits to committed same-sex couples which were statutorily given to their heterosexual counterparts. They ruled unanimously that same-sex are entitled to all of the same rights, privileges and obligations of marriage as different sex couples, stating that the "unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated under our State Constitution." *Lewis* at 423.

The High Court split on the remedy, with a slim majority stating that 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." *Lewis* at 463. The New Jersey Legislature chose to create a parallel statutory structure for the relationships of committed same-sex couples and their families that was intended to be separate, but equal. That separate relationship status, the Civil Unions Act, N.J.S. 37:1-28 et seq., took effect on February 19, 2007.

Thereafter, the Act's Civil Unions Review Commission (CURC) was formed, held hearings, took testimony, and issued findings, as discussed below. As a result of those findings along with the ensuing three years of continuing inequality and discrimination that Civil Unions exacerbated, on March 18, 2010, the Lewis plaintiffs approached the Supreme Court on a Motion in Aid of Litigants' Rights. Unfortunately, just like present day, the Court was strained by political turmoil in its co-equal branches of government and did not have a full complement of

Justices. As a result, the Motion failed by a 3-3 tie vote and the plaintiffs were turned away to continue to suffer inequality.

On June 29, 2011, the LGBT civil rights advocacy organization Garden State Equality filed a new litigation seeking equal marriage rights for committed same-sex couples and to remove the label of inferiority affixed to gay and lesbian relationships under Civil Unions. On September 27, 2013, the Honorable Mary C. Jacobson, A.J.S.C., ruled in *Garden State Equality et al. v. Dow, et al.*, 82 A. 3d 336 (N.J. Super. Ct. Law Div. 2013) that, consistent with the United States Supreme Court holding in *United States v. Windsor*, 570 U.S. 744 (2013), limiting same-sex couples to civil unions violated the rights of same-sex couples to equal protection under the New Jersey Constitution. Judge Jacobson held that civil unions were not equivalent to marriage because same-sex couples did not have access to federal benefits available to married couples. The trial court, Appellate Division and Supreme Court each declined the State's request for a stay of the trial court's decision and the ruling took effect on October 21, 2013.

From the filing of the initial *Lewis* Complaint in 2002 to Judge Jacobson's *Garden State Equality* 2013 ruling to Governor Murphy affixing his seal to the 2022 legislation, the gay and LGBT community's pursuit of the basic civil right of marriage followed a long, winding trail of political turmoil and legal strategy. On that trek, numerous obstacles and enemies were encountered.

The legal front can be told politely as an inspiring tale of how dedicated lawyers with a nimble, carefully crafted plan of action provoked a seismic shift in law and policy that benefited many lives in a profound and meaningful way. Indeed, many civil rights achievements in our nation's history have been made possible by the dedication by attorneys as they expose prejudices and discrimination to the crucible of legal scrutiny and the rule of law. Such was how the legal battle was won here in New Jersey with gratitude to the skills and strategy of Larry Lustberg and his Gibbons team as well as David Buckel and Hayley Gorenberg at Lambda Legal.

The political battle was less elegant and was where most of those obstacles and enemies were met. For example, my personal experience during this time saw me publicly declared "a practicing homosexual" in front of several hundred people (as I told my accuser and the audience at the time, I had stopped practicing long before and had become quite accomplished at it), and included one red-faced state Senator wagging his finger in my face in the Senate committee room incensed that the NJSBA was supporting marriage equality while another Senator announced to the entire committee and several hundred people in the audience that I had spent three years in law school learning how to lie and I was not lying effectively as I testified in support of marriage equality.

Most of the opponents were eventually overcome, acquiesced, or simply died, though not all. It was telling that the original Senate committee hearing on December 7, 2009, saw an overflowing room of advocates and opponents for 9 hours of testimony, yet the December 16, 2021, Senate committee hearing only had 5 attendees testifying from the public and wrapped in less than an hour with only one "no" vote. Those twelve years were jam-packed with activism, mostly led by Garden State Equality, including statewide town hall meetings and an intentional effort to engage the public and media, and to raise the consciousness of New Jersey residents about same-sex couples and their families.

When New Jersey's marriage equality statute finally became law in 2022 after a nearly twenty-year odyssey, there was no shortage of people stepping forward to claim the mantle of its achievement. Either directly or through their surrogates, several even had the *chutzpah* to claim it

never would have happened without them alone. This included some who were part of the first two failed efforts to adopt it legislatively, failures that were largely due to their tactical missteps and bombast during the political effort.

To understand who gets credit for New Jersey finally achieving marriage equality by statute - if one needs to award credit - we need look no further than the CURC hearings at which hundreds of same-sex couples came forward to hang out their personal laundry and share with the world the harm and discrimination they suffered by the unequal treatment of their relationships.

To see and hear it unfold back then during three CURC hearings in 2007 - first at the New Jersey Law Center in New Brunswick, then at Camden Community College in Gloucester, and finally at the Nutley Town Hall – you knew at the time those moments were destined to be historic.

In December 2008, the 13-member CURC unanimously issued a 79-page report that reflected the raw honestly of the LGBT community they encountered in the CURC hearing, finding that civil unions are "not clear to the general public"; confer "second-class status" on the couples who form them; "invites and encourages unequal treatment of same-sex couples and their children"; and, they concluded, the legislature's adoption of the Civil Unions Act created "[s]eparate treatment [that] was wrong then and it is just as wrong now."

To be there and bear witness at the CURC hearings was to appreciate that the people who deserve the credit for marriage equality are those who stepped forward in 2007 and afterwards and bared their souls in front of microphones as a standing-room audience hung on every word of their gripping anguish. These same-sex couples and their families made the political movement into a force just by being their authentic selves, by sharing their stories of suffering, harm, and discrimination. If someone ever asks how we got marriage equality in New Jersey, know that there was no one person or personality that achieved it. It was a communal project, the work of many in a true "labor of love" that finally got us to the top of the mountain.

Thomas Prol, a partner with Sills Cummis & Gross, is the former president of the New Jersey State Bar Association and a founding executive committee member of Garden State Equality, the largest LGBTQ+ rights organization in New Jersey and an advocate for the LGBT curriculum bill. The opinions in here are his own.