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## The Freedom to Marry for Same-Sex Couples: The Opening Appellate Brief of Plaintiffs Stan Baker Et Al. In *Baker Et Al. V. State of Vermont*

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THE FREEDOM TO MARRY FOR SAME-SEX  
COUPLES: THE REPLY BRIEF OF PLAINTIFFS  
STAN BAKER ET AL. IN  
BAKER ET AL. V. STATE OF VERMONT †

*Mary Bonauto\**  
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## INTRODUCTION

*As the first state to prohibit slavery by constitution, and one of the few states which, from its inception, extended the vote to male citizens who did not own land, the State of Vermont has long been at the forefront of this nation's march toward full equality for all of its citizens. In July 1997, three same-sex couples challenged Vermont to act as a leader yet again, this time in affording full civil rights to the State's gay and lesbian citizens. Stan Baker and Peter Harrigan, Nina Beck and Stacy Jolles, and Holly Puterbaugh and Lois Farnham were denied marriage licenses by their respective town clerks in the summer of 1997. They sued the State of Vermont and the towns, arguing that the marriage statutes allowed them to marry, and that if the law did purport to limit marriage to different sex unions it would be unconstitutional. The trial court dismissed their claims in December 1997, and the couples appealed to the Vermont Supreme Court. The court heard oral arguments on the case on November 18, 1998.*

*The Appellants' primary constitutional claim is based on the "Common Benefits Clause" of the Vermont Constitution, which prohibits the State from passing laws for the particular "emolument or advantage" of a "part only of [the] community."<sup>1</sup> The Vermont Supreme Court has used an analytical framework similar to federal equal protection law in applying the Common Benefits Clause, although in some cases that court has scrutinized classifications more closely than might be required under federal law.*

*In contrast to the State of Hawaii in Baehr v. Lewin,<sup>2</sup> where the State argued that its laws did not discriminate, the State of Vermont*

1. VT. CONST. ch. I, art. 7.

2. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

*articulated its rationales in support of the discriminatory marriage laws at the outset of the Baker v. State litigation, affording the couples the first real opportunity to flesh out in some depth not only the appropriate level of scrutiny, but also the State's lack of an adequate justification under any standard. The couples' opening brief, published in the Michigan Journal of Gender & Law, Volume 5, Issue 2, delves into the State's explanations for its discriminatory laws in some depth, arguing that even absent heightened scrutiny, the State could not justify its discriminatory marriage laws. The opening brief also lays out three arguments for heightened scrutiny, based on the State's gender discrimination, sexual orientation discrimination, and impingement on a fundamental right—the right to marry.*

*In their reply brief, the couples expand on their heightened scrutiny arguments and focus on some of the key issues raised in the State's brief, including the relationship between procreation and marriage, the impact on law and society of recognizing the couples' marriages, and the role of the courts in this highly charged debate.*

*Susan Murray and Beth Robinson of Langrock Sperry & Wool in Middlebury, Vermont, and Mary Bonauto of Gay & Lesbian Advocates & Defenders in Boston, Massachusetts, represented the three couples.*

## I. THIS IS A HEIGHTENED SCRUTINY CASE

Appellants Nina Beck and Stacy Jolles, Holly Puterbaugh and Lois Farnham, and Stan Baker and Peter Harrigan have upheld their end of the Social Compact. They abide by the laws; they live with integrity; they volunteer in their communities; they work hard at their jobs; and, above all else, they value their commitments to their families. All they seek for themselves and their families is the same security and respect under Vermont's laws and constitution that their heterosexual neighbors enjoy.

The disability the State has imposed on Appellants touches one of the most personal and fundamental aspects of their lives, implicating their very dignity and identities, and the State has unabashedly based its preference on invidious classifications—gender and sexual orientation. Contrary to the State's suggestion, this *is* a heightened scrutiny case.

### A. *The Right to Marry Is Fundamental to All Individuals*

Appellants, Appellants' amici, the State, and the State's amici all seem to agree on one thing: marriage and family are profoundly important associations and institutions in our society. What the State and its amici ignore is that these institutions are profoundly important to *everyone*, whether gay, lesbian, or heterosexual.<sup>3</sup> This case does not present a conflict between *gay and lesbian relationships*, on the one hand, and *families*, on the other; like their heterosexual counterparts, gay and lesbian couples, with or without children, *are families*. Those aspects of the institution of civil marriage that render it "fundamental" for heterosexual couples—both in the legal sense and in the vernacular—apply with equal force to same-sex couples.

No one denies that the right to marry has long been deemed fundamental in Vermont and throughout the United States.<sup>4</sup> However, the State focuses on the fundamental right to marry at the most specific level, concluding that because cases affirming the fundamental right to marry have always involved different-sex couples, the right is *limited* to such couples. If courts defined historical "fundamental rights" at the level of specificity urged by the State, privacy would not include rights to contraception, abortion, or interracial marriage.<sup>5</sup>

3. The State is wrong to assert that this is not "a benefits case." State's Brief at 2. As set forth in Appellants' Brief at 3–5 and the Brief Amicus Curiae of Parents and Friends of Lesbians and Gays et al., civil marriage opens the door to hundreds of legal protections, supports, and obligations, the vast majority of which are simply out of reach for Appellants because they cannot marry. Cumulatively, these laws provide a singular measure of security and recognition to families formed by married partners.

However, this is not *just* a benefits case. Through civil marriage, the State confers a *status*, see State's Brief at 2, which plugs into a common social vocabulary and carries powerful personal and cultural weight. Only the State can provide access to that legal status. In discharging its gatekeeper role, the State must comply with its own constitutional limitations.

4. For the reasons set forth in Appellants' Brief at 6–15, Vermont's existing marriage laws authorize Appellants to marry, and Appellees' interpretation of those laws is wrong. The State's references to the legislative debates surrounding Vermont's ERA (which did not pass), a 1975 Attorney General Opinion, and legislative testimony relating to a proposed amendment to the marriage laws (which was tabled by a single committee of one branch of the legislature) do not undermine Appellants' statutory claims. See Appellants' Brief, *supra* note 3, at 6–15. For a full discussion of these arguments, not addressed in Appellants' Brief, see Plaintiffs' Memorandum of Law ("Plaintiffs' Memorandum"), Printed Case ("PC") at 133–36.

5. Moreover, the State evaluates Appellants' fundamental rights claim under the Common Benefits Clause with reference to federal "substantive due process"

In determining the appropriate level of specificity with respect to defining the fundamental right to marry, this Court should consider the core values that animate courts' definitions of marriage and family, and which elevate those institutions to the level of "fundamental rights."

This Court has previously recognized that the organizing principle of family is care, support, and love.<sup>6</sup>

Similarly, the New York Court of Appeals rejected "fictitious legal distinctions or genetic history" in defining "family" for the purposes of a rent control law, instead concluding that "two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence" comprised a family.<sup>7</sup>

The United States Supreme Court has described in some detail the core values that define and give significance to family in general, and marriage in particular:

[W]e have noted that certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State. Moreover,

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jurisprudence, failing to recognize that "fundamental rights" may have different content in an equal protection-type analysis than a due process analysis. See Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988)(contrasting history-bound nature of due process analysis with history-defying nature of equal protection analysis).

6. See *In re B.L.V.B.*, 160 Vt. 368, 375, 376 (1993)(noting that "the advancement of reproductive technologies and society's recognition of alternative lifestyles . . . have produced families in which a biological, and therefore a legal, connection is no longer the sole organizing principle," and pointing to provision of nutrition, schooling, shelter, love, nurture, and a secure partnership between parents as among the incidents of parenthood); see also *MacCallum v. Seymour's Adm'r*, 165 Vt. 452, 462 (1996)(rejecting suggestion that adopted child could be presumed a "second-class" member of the family).
7. *Braschi v. Stahl Associates*, 544 N.Y.S.2d 784, 788-89 (Ct. App. 1989)(concluding that two gay males in a committed relationship constituted a family); see also *In re Guardianship of Sharon Kowalski*, 478 N.W.2d 790, 797 (Minn. App. 1991)(recognizing long term lesbian partners as "a family of affinity, which ought to be accorded respect"); *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, slip op. at 4 (Alaska Super. Ct. Feb. 27, 1998)(Appellant's Appendix Tab 2)("[T]he choice of a life partner is personal, intimate, and subject to the protection of the right to privacy.").

the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.

The personal affiliations that exemplify these considerations . . . are those that attend the creation and sustenance of a family—marriage, childbirth, the raising and education of children, and cohabitation with one's relatives. Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.<sup>8</sup>

Moreover, that Court has recognized that such values are not limited to families made up of a husband, wife, and children, rejecting an invitation to "cut[] off any protection of family rights at the first convenient, if arbitrary boundary—the boundary of the nuclear family," and concluding that the United States Constitution prevents the government from "standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns."<sup>9</sup>

Perhaps the most critical of these "deep attachments and commitments" is that between married partners. The United States Supreme Court has recognized the profound unitive significance of marriage, explaining,

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It

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8. *Roberts v. United States Jaycees*, 468 U.S. 609, 618–20 (1984)(citations omitted)(upholding state law compelling Jaycees to accept women over Jaycees' freedom of association defense).

9. *Moore v. East Cleveland*, 431 U.S. 494, 502, 506 (1977)(striking down housing ordinance prohibiting grandmother from sharing an apartment with two grandsons); *see also Smith v. Organization of Foster Families*, 431 U.S. 816, 844 (1977)(acknowledging that "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in . . . [raising] children").

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. Yet it is an association for as noble a purpose as any involved in our prior decisions.<sup>10</sup>

The Court's vision of companionate marriage embraces those couples who procreate as well as those who do not.<sup>11</sup>

In short, marriage is a fundamental right because the profound mutual love, respect, commitment, and intimacy that define that relationship are essential for human dignity and happiness,<sup>12</sup> and are valuable to society as a whole.<sup>13</sup>

The State expresses reverence for the institution of marriage, but then trivializes Appellants' aspirations to participate in that institution, comparing families formed by same-sex couples to two male college roommates seeking housing or other benefits.<sup>14</sup> Likewise, the

10. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

11. See *infra* Section III.A; see also *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."). The landmark case of *Loving v. Virginia* firmly established a federal constitutional fundamental right to marry the partner of one's choice. 388 U.S. at 12. Subsequent United States Supreme Court decisions have confirmed that this fundamental right to marry has implications far beyond the specific facts of *Loving*. See *Turner v. Safley*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978).

12. The Vermont Constitution recognizes the fundamental importance of every person's natural, inherent, and unalienable right to, among other things, "pursu[e] and obtain[] happiness and safety." VT. CONST. ch. I, art. 1. The inherent, inalienable right to marry supports Appellants' claims independent of the Common Benefits Clause. See Appellants' Brief, *supra* note 3, at 66, Plaintiffs' Memorandum, PC, *supra* note 4, at 209–17, and Brief Amicus Curiae of Vermont Human Rights Commission.

13. Even the legal scholars relied upon by the State and its amici recognize that the core values and functions of marriage are to promote individual dignity and happiness, as well as more cohesive communities, by providing clear legal rules and support for loving, respectful, and committed relationships between married partners. See, e.g., Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship and Sexual Privacy*, 81 MICH. L. REV. 463, 486 (1983) ("The willingness to marry permits important legal and personal assumptions to arise about one's intentions. Marriage, like adoption, carries with it a commitment toward permanence that places it in a different category of relational interests than if it were temporary."); Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 506 (1992) ("The institution of marriage . . . attempts to induce in spouses a sense of an obligation to treat each other well—to love and honor each other.").

14. See State's Brief, *supra* note 3, at 6; see also Brief Amicus Curiae of Professors of Law and Jurisprudence at 17 [hereinafter "State's Scholars' Brief<sup>9</sup>"] (comparing family formed by same-sex couple to a men's or women's doubles team in tennis).



State acknowledges that limitations on the right to marry are subject to heightened scrutiny, *except* when same sex couples are involved. What the State fails to recognize is that Appellants' relationships serve all the same core values as those of their heterosexual neighbors, providing them individual fulfillment, and enabling them to participate in and contribute to the larger community as families. Like Mildred and Richard Loving, and Estelle Griswold, Appellants stand before this Court seeking protection for their most intimate of relationships—fundamental to their very happiness and dignity.

### B. *The State's Gender Classification Is Impermissible at All Levels*<sup>15</sup>

The State attempts to diminish the common ground between same-sex partners and different-sex partners by seizing on the one characteristic that could plausibly distinguish same-sex and different sex relationships: the genders of the parties involved. The State claims that the very essence of marriage is not simply love, respect, trust, mutual commitment and intimacy. Rather, the State and amici argue that what elevates marriage to the status of a basic fundamental right, to the exclusion of gay and lesbian couples, is the gender difference between the married partners. This claim brazenly defies the constitutional prohibition of gender classifications.

#### 1. The State, Not Divine Providence, Defines *Civil* Marriage

The State appears to be of two sharply-divided minds with respect to its own role in defining civil marriage. In insisting that the legislature is empowered to define marriage however it wants, the State asserts that "marriage is a creature of legislation and . . . within constitutional bounds, the Legislature retains control over its regulation."<sup>16</sup> Yet in an effort to deny the State's complicity in the gender classifications it imposes, the State argues, "Vermont's marriage laws do not discriminate on the basis of gender. Rather, they simply accept

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15. For the reasons set forth in Appellants' Brief, the State's classifications also impermissibly discriminate on the basis of sexual orientation. See Appellants' Brief, *supra* note 3, at 60–64; Brief Amicus Curiae of Vermont Coalition for Lesbian and Gay Rights et al.; see also Note, *The Constitutional Status of Sexual Orientation: Homosexuality As A Suspect Classification*, 98 HARV. L. REV. 1285 (1985).

16. State's Brief, *supra* note 3, at 67.

the premise that a marriage is a unique institution in society that is comprised of one member from each sex. *Its composition was determined before statutes were ever enacted.*<sup>17</sup> In relying on such a “definitional preclusion” argument,<sup>18</sup> the State is invoking some unnamed higher authority which imposes a gender requirement on marriage, and from whose definition of marriage the legislature is powerless to stray. As one leading commentator has observed:

When the *Hallaban* court [which upheld Kentucky’s different gender requirement in marriage in 1973] asserted that appellants could not marry because they were unable to meet the definitional requirements, the court implied that the legislature was not itself responsible for the legal definition of marriage, as if the legislature were subject to the commands of some Higher Power. . . .

Legislatures are not prevented from recognizing same-sex marriages because of some externally imposed definition of the term, and courts must stop implying that legislative bodies are not responsible for the definitions they create.<sup>19</sup>

In short, the State is either offering a hopelessly circular argument, or it is improperly invoking some theological or natural law definition of marriage.<sup>20</sup> The State should be wary of relying on

17. State’s Brief, *supra* note 3, at 79 (emphasis added).

18. State’s Brief, *supra* note 3, at 79–81.

19. Mark A. Strasser, *Domestic Relations Jurisprudence and the Great, Slumbering Baehr: On Definitional Preclusion, Equal Protection, and Fundamental Interests*, 64 *FORDHAM L. REV.* 921, 923–24, 926 (1995).

20. Appellants cannot emphasize enough that religious marriage exists apart from the civil law. Civil law has absolutely no role in establishing what constitutes marriage for any faith, and vice versa. Thus, the State can recognize as valid the second marriage of a divorced Catholic even when the Catholic Church, as a matter of its own doctrine, would not. See *Epperson v. Arkansas*, 393 U.S. 97, 103–07, 109 (1968) (striking down state law prohibiting teaching of evolution when it was not justified by any secular purpose but only by a desire to support religious views of some of its citizens).

Convoluting the institutions of civil and religious marriage, the scholars relied upon by the State and its amici have identified the source of the “Higher Authority” which they believe defines marriage for the State. See, e.g., Lynn Marie Kohm, *Liberty and Marriage Baehr and Beyond: Due Process in 1998*, 12 *B.Y.U. J. PUBLIC LAW* 253, 266 & n.83 (1998) (State’s Appendix # 10) (“Marriage is above and beyond the Bill of Rights . . . . Marriage . . . was originally designed by a Supreme Being before codification of the law of marriage.”); Richard F. Duncan, *Homosexual Marriage and the*

perceived theological imperative or natural law mandate in restricting the opportunities of men and women on the basis of sex.<sup>21</sup>

Indeed, the State's invocation of a higher authority to justify discriminatory classifications in the marriage laws is nothing new.<sup>22</sup>

In short, the State cannot simply deny the sex discrimination built into its marriage statutes by asserting that the discrimination

*Myth of Tolerance: Is Cardinal O'Connor A "Homophobe"?*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 587, 592 (1996) ("I write as an academic lawyer and as a Christian. My views are informed and animated by what I consider to be the best public policy arguments, as well as by my belief in the created order as revealed in the Old and New Testaments. To the extent that my "secular" views and "religious" views can be distinguished, they each affirm the heterosexual ideal for marriage. Indeed, *religious reasoning and secular reasoning should always reach identical conclusions . . .*" (emphasis added)) (other works by Duncan cited in State's Brief, *supra* note 3, at 49, 50, 54, 82); Teresa Stanton Collett, *Marriage, Family and the Positive Law*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 467, 476 n.36 (1996) (citing Pope John Paul II and a book on Jewish religious thought, which she quotes for the proposition that "[s]ince woman was created from man's rib (*Gen. 2:21-24*), the unification of their bodies in marriage is a result of a natural tendency to make complete that which was originally sundered apart") (Brief of Amici Curiae Hon. Peter Brady et al. [hereinafter "Brady Brief"] at 26; David Orgon Coolidge, *Same-Sex Marriage? Baehr v. Miike and the Meaning of Marriage*, 38 S. TEX. L. REV. 1, 44-55 (1997) (author of Brady Brief, and cited therein) (citing "Neo-Calvinism," "Classical Thomism," and "New Natural Law," and discussing other religious bases for a model of marriage based on "sexual complementarity").

Many of the amici who support the State are similarly up-front about the theological foundation of their arguments. See *Statement on Same Sex Marriage* by Roman Catholic Church, Brief Amicus Curiae of The Roman Catholic Diocese et al. [hereinafter "Roman Catholic Brief"] at Appendix I ("[Marriage] was established by God with its own proper laws . . . [and] the natural institution of marriage has been blessed and elevated by Christ to the dignity of a sacrament."); *Statement of Interest of Burlington Vermont Stake of the Church of Jesus Christ of Latter-Day Saints*, Roman Catholic Brief at Appendix II ("The Church teaches that marriage between man and woman is ordained of God . . ."); statements of various Vermont community churches, Brief Amicus Curiae of Christian Legal Society et al. [hereinafter "Christian Legal Society Brief"] at 2a-9a (asserting that marriage is limited to heterosexual unions by virtue of the Bible, God, or the "Holy Scripture").

21. See, e.g., *Bradwell v. Illinois*, 83 U.S. 130, 141-42 (1872) (Bradley, J., concurring) ("[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman . . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. *This is the law of the Creator*. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases." (emphasis added)) (upholding exclusion of women from the practice of law).
22. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 3 (1967) ("Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix." (quoting trial court decision upholding interracial marriage ban)).

flows inexorably from some transcendent definition of marriage. If, as the State has argued in other contexts, the Vermont legislature has chosen to incorporate gender-based limitations in its “entrance requirements” for marriage, then those gender-based limitations must survive heightened constitutional scrutiny.

## 2. Constitutional Rights Are *Personal*, Not Group-Based

The State contends that its gender-based classification is not discriminatory because it restricts the marital choices of men and women even-handedly.<sup>23</sup> This argument shifts the inquiry from whether the marriage laws improperly limit *an individual's* marital choice on the basis of a gender-based classification to whether those laws limit (on the basis of gender) the choices of men as a group to the same extent as they limit the choices of women as a group.

In 1948, the California Supreme Court rejected such an “equal application” theory, becoming the first state supreme court to strike down race-based marriage laws, almost 20 years before the United States Supreme Court decided *Loving v. Virginia*:

The decisive question . . . is not whether different races, each considered as a group, are equally treated. The right to marry is the right of individuals, not of racial groups. The equal protection clause of the United States Constitution does not refer to rights of [particular races], but to the rights of individuals. . . . Since the essence of the right to marry is freedom to join in marriage with the person of one's choice, a segregation statute for marriage necessarily impairs the right to marry.<sup>24</sup>

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23. State's Brief, *supra* note 3, at 81.

24. *Perez v. Lippold*, 198 P.2d 17, 20–21 (Cal. 1948). Significantly, the State does not even cite the *Perez* decision, let alone attempt to distinguish it from the case at bar, even though the plaintiffs in that case invoked constitutional equality protections to overturn a longstanding and widely embraced, but nonetheless discriminatory, “definition” of marriage. See also *Loving*, 388 U.S. at 9 (“In the case at bar . . . we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.”).

The State attempts to avoid the force of the miscegenation analogy by noting that the Virginia law in *Loving* did not restrict the choices of Black and White persons equally; rather, the law allowed a Black person to marry any non-White, but allowed a White person to marry only another White person.<sup>25</sup> Such a distinction, in and of itself, carries little weight. Surely the State is not suggesting that it would be constitutional to limit the marital choices of Black and White citizens to the same degree by prohibiting *any* person from marrying outside of his or her race.<sup>26</sup> Just as racial classifications in marriage are subject to strict scrutiny even if they limit the choices of black and white citizens, as groups, to the same degree, the gender classifications in Vermont's marriage laws are subject to heightened scrutiny.

### 3. The State Cannot Lock Individuals into Presumed Gender Roles

The State further tries to distinguish *Loving* by arguing that the anti-miscegenation laws were not only facially discriminatory, but reflected a deep-seated philosophy of White Supremacy.<sup>27</sup> In striking down Virginia's restrictions on marital choice, the United States Supreme Court recognized that the *purpose* and *effect* of the anti-miscegenation laws was to reflect and perpetuate attitudes about the

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The United States Supreme Court has acknowledged a "long line of cases understanding equal protection as a personal right." *Adarand Constructors v. Peña*, 515 U.S. 200, 230 (1995)("[Constitution] protects *persons*, not *groups*").

25. See State's Brief, *supra* note 3, at 84; see also State's Scholars' Brief, *supra* note 14, at 18; Brief Amicus Curiae of American Center for Law and Justice at 13 [hereinafter ACLJ Brief].
26. The State's reliance on Kohm is troubling because central features of the author's legal analysis are so plainly wrong. See Kohm, *supra* note 20; State's Brief, *supra* note 3, at 64. For example, she ignores the profound and deeply-seated nature of racial prejudice in this nation when she argues that "nothing about *Loving* was contrary to history, nor did such an assertion require any new clear description of marriage." Kohm, *supra* note 20, at 266. *But see* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 497 (1985)("The Southern states did not tolerate miscegenation, as one might expect. But neither did some Western and Northern states . . .")(Appellants' Reply Brief Appendix Tab 1); MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA 127 (1985)(in the nineteenth century, 38 states and commonwealths banned interracial marriages; social prejudice accomplished the same result in the remaining states)(Appellants' Reply Brief Appendix Tab 2).
27. See State's Brief, *supra* note 3, at 84.

roles, social standing, and fundamental differences between and among the races.

In fact, the very justifications the State proffers in support of its discriminatory laws—premised on broad generalizations about presumed inherent differences between men and women—similarly reflect, and perpetuate, deep-seated and constitutionally impermissible gender stereotyping.<sup>28</sup> Rather than deny that its laws are premised on broad generalizations about the natures of men and women, the State embraces such generalizations as grounds for maintaining sex discrimination in marriage, asserting that heterosexual marriage is “a union of differences (biological, cultural, and psychological)” and pointing to “the rich physical and psychological differences between the sexes that exist to this very day.”<sup>29</sup> The State asserts that, because of these unspecified differences,<sup>30</sup> a marriage is only “complete” when it includes both a man and a woman.<sup>31</sup> In essence, the State argues that its sex-based classifications are permissible because the generalizations about the psychological and cultural differences between men and women upon which the classifications rest are *true*.

Courts have long recognized that legal restrictions pigeonholing individuals on the basis of broad generalizations about gender roles, including gender roles within the family—even when those stereotypes

28. Consistent with its equal protection analysis generally, the United States Supreme Court has expressly rejected the suggestion that generalizations about women and men as *groups* could be used to limit *individual* choice on the basis of gender. *See* *United States v. Virginia* (“VMI”), 116 S. Ct. 2264, 2268 (1996) (“[G]eneralizations about ‘the way women are,’ estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description.”).

29. State’s Brief, *supra* note 3, at 51.

30. Although the State unabashedly embraces generalized claims of “difference” to support its gender-based classifications, the State resists the invitation to actually specify the nature of the “psychological” and “cultural” differences upon which it relies. One amicus in support of the State has offered its view of the missing details:

By divine design, fathers are to preside over their families in love and righteousness and are responsible to provide the necessities of life and protection for their families. Mothers are primarily responsible for the nurture of their children.

*The Family: A Proclamation to the World*, Roman Catholic Brief at Appendix II.

31. *See* State’s Brief, *supra* note 3, at 50–51. The State also argues that the State has an interest in ensuring that children can observe, and presumably learn the unspecified gender differences the State asserts, even while admitting that there is no evidence that “children raised by same-sex couples will develop differently in any measurable psychological way.” State’s Brief, *supra* note 3, at 55.

are, to some extent, rooted in empirical observation—are constitutionally impermissible.<sup>32</sup> In fact, the United States Supreme Court has rejected the mirror image of the State's argument; in *Roberts v. Jaycees*, an organization seeking to maintain gender *segregation* argued, like the State here, that men and women are different, and that an association which included *both* sexes would thus be fundamentally different from the gender-segregated community the Jaycees desired.<sup>33</sup> The Court castigated the Jaycees for relying "solely on unsupported generalizations about the relative interests and perspectives of men and women," and emphasized, "Although such generalizations may or may not have statistical basis in fact with respect to the particular positions adopted by the Jaycees, we have repeatedly condemned legal decisionmaking that relies uncritically on such assumptions."<sup>34</sup>

Indeed, some scholars have argued that laws which so steadfastly insist on strong differentiation between the sexes by prohibiting same-gender sexual intimacy, or limiting marriage to different-sex couples, not only constrain men and women to limited gender roles, but actually perpetuate the subordination of women in the same way that the anti-miscegenation laws reflected and entrenched an ideology of White Supremacy.<sup>35</sup>

The State cannot justify the gender-role stereotyping inherent in its reasoning by selectively relying on certain feminist scholarship. Professor Carol Gilligan, a psychologist whose work forms the foun-

32. See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 729–30 (1982)(Mississippi's exclusion of males from admission to the school of nursing "tends to perpetuate the stereotyped view of nursing as an exclusively woman's job[,] . . . lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy."); *Orr v. Orr*, 440 U.S. 268, 279 (1979)(alimony statute providing that only husband may be liable for alimony impermissibly reflected and reinforced Alabama's "preference for an allocation of family responsibilities under which the wife plays a dependent role"); *Stanton v. Stanton*, 421 U.S. 7, 14 (1975)(striking down Utah's different ages of majority for men and women, even while acknowledging that "[i]t may be true, as the Utah court observed and as is argued here, that it is the man's primary responsibility to provide a home and that it is salutary for him to have education and training before he assumes that responsibility; that girls tend to mature earlier than boys; and that females tend to marry earlier than males.").

33. See *Roberts v. United States Jaycees*, 468 U.S. 609, 627–29 (1984).

34. *Jaycees*, 468 U.S. at 628.

35. See, e.g., Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197 (1994); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187 (1988). See also Brief Amicus Curiae of Vermont NOW et al. at 30–33.

dation of the State's "complementarity of the sexes" argument,<sup>36</sup> took great pains to caution that her work should not be used to support broad generalizations about the natures of the sexes:

The different voice I describe is characterized not by gender but theme. Its association with women is an empirical observation, and it is primarily through women's voices that I trace its development. But this association is not absolute, and the contrasts between male and female voices are presented here to highlight a distinction between two modes of thought and to focus a problem of interpretation rather than to represent a generalization about either sex.<sup>37</sup>

Similarly, Carrie Menkel-Meadow, also cited by the State in support of its broad assertions about the natures of men and women, has similarly cautioned against overgeneralization:

I, like Carol [Gilligan], want to say that although I am speaking of male and female voices, I am simply using those terms as a code for what she observed to exist empirically in those two genders. All of us have elements of both of those voices. Those men who see themselves fitting the description of the female voice should know that that is probably who they are, and vice versa for women. I use that as an easy way to talk about this material, but one that is not necessarily accurate for each one of you individually.<sup>38</sup>

The State has turned the scholarship of Carol Gilligan and Carrie Menkel-Meadow on its ear, arguing that claimed *generalized* differences between men and women as *groups* support the limitation, on the basis of sex, of *individual* freedom of choice with respect to one of the most deeply personal and important choices an individual can make.

Moreover, the State tarnishes the very scholarship it cites by invoking it to justify laws of profound *exclusion*. The scholars upon

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36. See State's Brief, *supra* note 3, at 52–54.

37. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 2 (1982)(Appellants' Reply Brief Appendix Tab 3).

38. *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFF. L. REV. 11, 53 (1985)(published dialogue among several feminist theorists).



whom the State relies have argued that ostensibly neutral laws and conceptions actually reflect a male viewpoint, and have worked to construct a legal and philosophical ethic of *inclusion* to benefit excluded individuals, as well as society as a whole.<sup>39</sup> Their ethic of inclusion is not limited to women, but extends to other historically excluded voices as well:

And what are we already learning from the gay members of our society about the infinite human variations in relationships that demonstrate the impossibility of keeping to our neat legal categories? . . .

[T]hese exclusions tell us that our common exclusions may enable us to see that there is a vision of equality that does not require sameness, that there is glory in diversity and difference, and that there are ways for the law to include, accommodate, and rejoice in the social and cultural differences that both enrich our society as well as threaten to divide it.<sup>40</sup>

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39. See, e.g., Carrie Menkel-Meadow, *Women's Ways of "Knowing" Law: Feminist Legal Epistemology, Pedagogy, and Jurisprudence*, in KNOWLEDGE, DIFFERENCE AND POWER (1996)(State's Appendix Tab 11) [hereinafter Menkel-Meadow, *Women's Ways of Knowing*].

40. Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices In the Law*, 42 U. MIAMI L. REV. 29, 50 (1987)(Appellant's Reply Brief Appendix Tab 18); see also Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 VA. J. SOC. POL'Y & L. 75, 92 (1994)("In my view, this analysis also provides a forceful argument for the inclusion of other groups traditionally excluded from the law, including visible and invisible minorities, the physically challenged, *gays*, and racial and ethnic minorities. Any disruption of conventional and dominant group thinking must improve the quality of legal decision-making." (emphasis added))(Appellants' Reply Brief Appendix Tab 4).

The State's argument may also prove too much. Paralleling the feminist scholarship invoked by the State is a growing field of race analysis documenting generalized differences in experiences and perceptions among the races, and arguing, like the feminist theorists, that ostensibly neutral laws, and modes of legal education, reflect the race-based viewpoints and biases of the white people who constructed them. See Menkel-Meadow, *Women's Ways of Knowing*, *supra* note 39, at 60-66 (discussing empirical research and theories of race theorists in connection with parallel feminist scholarship). Is the State suggesting that, in light of such scholarship, laws restricting marital choice on the basis of race (a) would not constitute invidious race discrimination, and (b) could be justified by the State's interest in acknowledging and promoting the unique community that only a same-race (or different-race) couple can form?

The State cannot simply define away Appellants' fundamental right to marry, or its own reliance on invidious gender and sexual orientation-based classifications and stereotypes; when the fog lifts, all the State is left with is a naked preference for certain families the State esteems over other families the State relegates to second-class citizenship. The State's embrace of families formed by different sex couples, and repudiation of families formed by same-sex couples, reflects precisely the type of state favoritism that requires heightened scrutiny under the Common Benefits Clause.<sup>41</sup>

## II. EVEN MINIMUM SCRUTINY REVIEW HAS REAL "BITE"

The State does not seriously contend that any of its rationales constitute compelling state interests, or that its discrimination is narrowly tailored to promote such interests.<sup>42</sup> Indeed, the State relies heavily on its claim that its classifications must survive only a cursory and superficial review.<sup>43</sup> The State seriously underestimates the vigor of the Common Benefits Clause, which condemns the State's discrimination in marriage even under minimum scrutiny.

First, in dismissing the minimum level of scrutiny as perfunctory, the State fails to recognize that the intensity of this Court's review of state classifications, even under the rubric of the most deferential level of review, appropriately varies depending upon the context of the case.<sup>44</sup> As a result, the State's characterization of minimum scrutiny

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41. The State suggests that Appellants have argued that the Common Benefits Clause embodies "pure socialism." State's Brief, *supra* note 3, at 30. In fact, Appellants argue, and the State agrees, that the Common Benefits Clause is designed to prevent *governmental favoritism*. See Appellant's Brief, *supra* note 3, at 18; State's Brief, *supra* note 3, at 32; Brady Brief, *supra* note 20, at 6.

42. The State does say that if heightened scrutiny were to apply, it might offer additional justifications. See State's Brief, *supra* note 3, at 41 n.26. The implication is that the State has inexplicably held back its more compelling explanations. If the State cannot justify its laws under the most deferential review, then, *a fortiori*, the State cannot satisfy heightened scrutiny.

43. See, e.g., State's Brief, *supra* note 3, at 41 (proffering justifications which it labels "plausible"); State's Brief, *supra* note 3, at 55 (conceding that children raised by same-sex parents do not differ in any "measurable psychological way" but attempting to rely instead on effects which are "intangible," and thus not subject to proof or verification).

44. In contrast to the State, Brady et al. agree with Appellants, acknowledging that rather than adopting federal labels for heightened scrutiny, this Court applies Article 7 "in a nuanced manner, depending on the type of case." Brady Brief, *supra* note 20, at 11.

under the Common Benefits Clause fails to account for a number of this Court's significant, and recent, Common Benefits Clause cases, including *MacCallum v. Seymour's Administrator*,<sup>45</sup> and *Brigham v. State*.<sup>46</sup> Appellants' observation that this Court's evaluation of a statute is much more exacting when a classification implicates an important right or excludes unpopular or historically disadvantaged groups, than when the statute involves a routine tax or regulatory classification, synthesizes *all* of this Court's Article 7 decisions, rather than selectively focusing only on some of those decisions.<sup>47</sup>

Second, the State asserts that Appellants bear the burden of "negat[ing] every conceivable justification for the statute."<sup>48</sup> Even under a minimum scrutiny review, the State cannot elude its obligation to justify its discrimination by shifting the responsibility for proving a negative to others. As this Court has explained in analyzing a Common Benefits challenge to a municipal classification, "Once the classification has been shown to exist, and its effect on the complaining party made clear, the municipality must then justify that

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Unfortunately, Brady et al. then strain to argue that a more exacting review does not apply in this case, essentially asserting that the Vermont Constitution displays greater reverence for the right to an education than the fundamental right to marry, *see* Brady Brief, *supra* note 20, at 11–18, and viewing the Vermont Constitution as frozen in time, rather than a living, forward-looking document. *See* Brady Brief, *supra* note 20, at 3 ("The Common Benefits Clause and the marriage statutes were considered consistent within the original context of the Vermont Constitution."). This Court has repudiated such a stagnant conception of the Vermont Constitution. *See* Appellants' Brief, *supra* note 3, at 19; *see also* Brief of Appellee Virginia, in United States Supreme Court appeal of *Loving v. Virginia* at 9–31 (Appellants' Reply Brief Appendix Tab 5)(arguing that anti-miscegenation laws were consistent with the Fourteenth Amendment when it was adopted).

The Brady Brief also purports to analyze this Court's two most recent cases concerning Article 7, admonishing Appellants for failing to do the same, even though one, *Quesnel v. Town of Middlebury*, 167 Vt. 252 (1997), never even mentioned Article 7 of the Vermont Constitution, and the other, *L'Esperance v. Town of Charlotte*, 167 Vt. 162 (1997), expressly applied a standard of review developed for municipal lease agreements, and is thus of limited applicability here.

45. *See MacCallum v. Seymour's Adm'r*, 165 Vt. 452 (1996).

46. *See Brigham v. State*, 166 Vt. 246 (1997).

47. *See* Appellant's Brief, *supra* note 3, at 24–27. Justice Thurgood Marshall advocated a similar multifactor, sliding-scale approach under federal equal protection law, urging the United States Supreme Court to adopt a balancing test for federal equal protection review, taking into account (1) the "relative importance to individuals . . . of the governmental benefits" involved, (2) the "character of the classification in question," and (3) the asserted state interests. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 318 (1976)(Marshall, J., dissenting).

48. State's Brief, *supra* note 3, at 34.

classification.”<sup>49</sup> As noted above, the State’s burden is particularly meaningful in cases in which the Court has reason to infer improper motive, or when important rights are at stake.<sup>50</sup>

Finally, the State relies heavily on federal equal protection law, which, viewed in its full complement, provides no sanctuary for the State’s discrimination.<sup>51</sup> Like the Common Benefits Clause, the federal Equal Protection Clause requires the State to demonstrate a legitimate justification, independent of the bare desire to disadvantage a particular group, to support its classifications.<sup>52</sup> Even under federal

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49. Colchester Fire Dist. No. 2 v. Sharrow, 145 Vt. 195, 199 (1984); *see also* Lorrain v. Ryan, 160 Vt. 202, 215 (1993)(concluding that the rationales provided in support of statute did not support the discriminatory classifications); State v. Ludlow Supermarkets, 141 Vt. 261, 269 (1982)(“[T]here is a duty on the State to demonstrate that any impingement on the right of citizens . . . is a mere incident, and that the objectives cannot be otherwise reached.” (emphasis added)).

50. *See, e.g., Brigham*, 166 Vt. at 246 (“The State has not provided a persuasive rationale for the undisputed inequities in the current educational funding system.” (emphasis added)); *MacCallum*, 165 Vt. at 453 (considering and rejecting two rationales proffered by state in support of statute). The State also claims that the factual assumptions underlying its asserted justifications are exempt from any judicial reality-check. *See* State’s Brief, *supra* note 3, at 34 (“The Court is not even permitted to take evidence on the matter.”); State’s Brief, *supra* note 3, at 37 (“The connection (and the statute) will be upheld where the assumptions are unprovable and subjective.”). Appellants do not believe the State has even articulated a sufficiently compelling or legitimate justification to survive Appellants’ Motion for Judgment on the Pleadings; even if it had, this Court certainly could not uphold the State’s discrimination without reviewing the “factual assumptions” the State has drawn out of thin air. *See* Appellant’s Brief, *supra* note 3, at 27–28.

51. As Appellants have noted, federal equal protection law establishes minimum constitutional protections—a lowest common denominator—above and beyond which the Vermont Supreme Court can and often has built. *See Hodgeman v. Jard Co.*, 157 Vt. 461, 464 (1991)(“[T]he Vermont Constitution is freestanding and may require this Court to examine more closely distinctions drawn by state government than would the Fourteenth Amendment.”). Although the federal law cases that the State cites may offer persuasive reasoning for this Court to consider, they do not, in any event, govern this case.

52. *See, e.g., Romer v. Evans*, 517 U.S. 620, 633 (1996)(“By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.”). *See also Zobel v. Williams*, 457 U.S. 55, 63–65 (1982)(purpose of favoring established residents over new residents, underlying dividend program which paid more to long term residents than others, was improper); *U.S.D.A. v. Moreno*, 413 U.S. 528, 534–38 (1973)(“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group [in this case “hippies”] cannot constitute a legitimate governmental interest.”). *Cf. State v. Ludlow Supermarkets*, 141 Vt. 261, 269 (1982)(“[The] objective of favoring one part of the

equal protection principles, the State cannot justify its gender-based classifications by merely asserting presumed gender roles, or justify its burdens on gay and lesbian citizens by merely asserting that it prefers heterosexuals; in so doing, the State demonstrates an improper purpose.

Moreover, just as this Court has looked at the State's justifications much more closely when classifications appear to be based on improper purposes, the United States Supreme Court has done the same. For example, in *Cleburne v. Cleburne Living Center*,<sup>53</sup> that Court considered a city's differential zoning treatment of a group home for the mentally retarded. The Court insisted that the city's "vague . . . fears" of harm from the group home,<sup>54</sup> where no such fears arise with regard to other similarly situated persons, and "the negative attitude of the majority" of neighbors,<sup>55</sup> were not legitimate bases for its discrimination.<sup>56</sup>

Similarly, the United States Supreme Court invalidated a law that imposed such a "broad and undifferentiated disability" on gay and lesbian citizens that the State of Colorado's proffered justifications made little sense, and the inference of animus was inescapable.<sup>57</sup> In *Romer*, as in *Cleburne*, the high court did not try to invent a hypothetical "conceivable justification" to justify the discriminatory classifications, or reflexively embrace the ostensibly legitimate purposes proffered in support of the laws, but actually subjected the proffered justifications to a bona fide reality check and struck down the laws in question under a rational basis review.<sup>58</sup>

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community over another is totally irreconcilable with the Vermont Constitution. . . . The purpose of the preferential legislation must be to further a goal independent of the preference awarded, sufficient to withstand constitutional scrutiny.").

53. *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448-50 (1985).

54. *Cleburne*, 473 U.S. at 449.

55. *Cleburne*, 473 U.S. at 448.

56. *Cleburne*, 473 U.S. at 449-50. Cf. *MacCallum v. Seymour's Adm'r*, 165 Vt. 452, 459-62 (1996)(carefully evaluating and rejecting justifications for classification disadvantaging adopted children). Indeed, under the federal rational basis test, even when there is *no* suggestion of an improper purpose, the state's justification "must find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 321 (1993).

57. *Romer v. Evans*, 517 U.S. 620, 635 (1996)(state cannot "deem a class of persons a stranger to its laws" by enacting laws making gay and lesbian citizens "unequal to everyone else").

58. It is ironic that the State and its amici make such an effort to criticize and distinguish *Romer*. The Court in *Romer* held what this Court has held all along: a state cannot merely assert a bald preference or favoritism for a portion of its citizenry, rendering

The United States Supreme Court's careful examination of government justifications, and the link between those justifications and its discrimination, in *Cleburne* and *Romer*, contrasts with the more cursory review that Court has applied to more benign classifications, and to justifications that do not suggest any particular improper motive.<sup>59</sup>

Like this Court's Common Benefits Clause minimum scrutiny analysis, the United States Supreme Court's rational basis review is nuanced. Federal rational basis analysis law is not entirely reflected in *Beach*, *Romer*, *Cleburne*, or any other individual case, and it would be inaccurate to suggest otherwise;<sup>60</sup> these federal cases are all part of the constellation of federal cases that collectively embody federal rational basis review. Regardless of whether this Court turns to federal case law for guidance, or relies exclusively on its own Common Benefits Clause jurisprudence, the State cannot in this case satisfy even the minimum level of scrutiny because it cannot demonstrate any legitimate public purpose, but rather relies on a bare desire to privilege different-sex couples and the families they form together over same-sex couples and their families.

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those outside of the preferred class second-class citizens. See *State v. Ludlow Supermarkets*, 141 Vt. 261, 269 (1982). For a thoughtful analysis and defense of *Romer*, see Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203 (1996).

59. See, e.g., *F.C.C. v. Beach Communications*, 508 U.S. 317 (1993) (upholding distinction between cable television facilities that served buildings under common ownership or management and those facilities that served separately owned and managed properties). The United States Supreme Court has embraced the one-step-at-a-time approach to justifying governmental classifications in cases like *Beach*, involving tax, economic, and cash benefit programs which depend on blunt classifications to operate in an efficient and viable manner. Contrary to the State's suggestion that it may act in a "step-by-step" manner in this case, State's Brief, *supra* note 3, at 35, the United States Supreme Court does *not* tolerate ill-fitting means and ends in those cases meriting a more skeptical scrutiny, such as *Cleburne* and *Romer*.
60. See State's Brief, *supra* note 3, at 33-37; see also State's Scholars' Brief, *supra* note 14, at 23-25 (describing federal equal protection rational basis analysis as that reflected in *Beach* and *Heller*, but failing to acknowledge role of *Romer* and *Cleburne* in guiding that analysis).

### III. THE STATE CANNOT DEFEND THE PROFOUND DISABILITY IT HAS IMPOSED ON APPELLANTS

#### A. "Procreation" Is a Post Hoc Rationalization Designed to Exclude Appellants from Marriage

The State relies heavily on the biological differences between men and women to support its discrimination. By pointing to "procreation," the State seeks to imbue those biological differences with a legal significance, suggesting that procreation is a defining attribute of marriage, and that State policies concerning procreation justify the discriminatory marriage laws. The State's resort to "procreation" is not surprising, given that it is the *only* basis upon which the State can even *try* to distinguish committed same-sex couples from committed different sex couples. As a Justice of New Zealand's highest court noted:

[C]ohabitation, commitment, intimacy, and financial interdependence—are not unique to heterosexual relationships. Nor are a number of other qualities such as companionship, mutuality, empathy, devotion, sharing, supportiveness, and sensitivity peculiarly the province of heterosexual couples. . . . [U]nless procreation is pressed to predominate over all other attributes of the marriage relationship, the *raison d'être* . . . for perceiving marriage as necessarily and exclusively heterosexual in its essential composition must fail.<sup>61</sup>

An analysis of the marriage laws belies the State's suggestion that the defining attribute of marriage is procreation. Moreover, the State's discrimination is not narrowly tailored to achieve a compelling gov-

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61. *Quilter v. Attorney General*, No. 200/96, slip op. at 18 (N.Z. Ct. App. Dec. 17, 1997)(Thomas, J.)(State's Appendix Tab 7). In the *Quilter* decision, the court upheld New Zealand's different-sex restriction in marriage on statutory grounds. In New Zealand, in contrast to Vermont, the Bill of Rights is not a supreme law, and cannot be invoked to invalidate a statute. *See Quilter*, No. 200/96, slip op. at 29 (Thomas, J.)(State's Appendix Tab 7). Accordingly, although several Justices (on both sides of the issue) addressed the effect of New Zealand's Bill of Rights on that nation's gender restriction in marriage, resolution of the "constitutional" question was not necessary for disposition of the case.

ernment purpose relating to procreation and reproduction; indeed, it is not even reasonably related to a valid public purpose.

### 1. "Procreation" Is Not Essential to Marriage

The State dismisses Appellants' view that the primary purpose of marriage is to protect and encourage committed relationships as "conjecture," and asserts instead that procreation, or the ability to procreate, is the defining feature of marriage. However, the marriage laws reinforce Appellants' view, and provide no support for the State's: in exchange for allowing two people to legally marry, the State requires that they make a legally-enforceable *commitment to one another* which obligates them to remain married unless and until the State decrees otherwise. The State emphatically does *not* require the applicants to agree to procreate, or even to be able to procreate. Indeed, the State does not even require, as a condition of a valid marriage, that the two intend to, and have the ability to, engage in sexual relations.

The State asserts that this glaring omission of any "procreation" requirement in the marriage laws "speaks more to notions of privacy than to qualifications to marry."<sup>62</sup> However, an analysis of Vermont's divorce and annulment laws undercuts the State's assertion. As one commentator has explained,

[T]he law has rarely shrunk from impractical or intrusive inquiries when a marriage is terminated. The legally recognized grounds for ending a marriage logically should refer to the conditions under which a marriage fails to live up to its legally recognized purposes. If a central purpose of marriage is procreation, then surely this purpose will be reflected in the law of divorce and annulment . . . .<sup>63</sup>

Although Vermont's divorce and annulment laws do reflect a solicitude for the unitive aspects of the marital relationship (for example, listing wilful desertion, intolerable severity, nonsupport, and separation with no reasonable probability of resumption of marital relations

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62. State's Brief, *supra* note 3, at 68.

63. William M. Hohengarten, *Same-Sex Marriage and the Right of Privacy*, 103 YALE L.J. 1495, 1514 (1994).



as grounds for divorce)<sup>64</sup> nothing in those laws supports the suggestion that procreation, or even the ability to procreate, is an essential component of marriage.

This Court's 19th century decisions in *Ryder v. Ryder*,<sup>65</sup> and *LeBarron v. LeBarron*,<sup>66</sup> both granting annulments on the ground of "physical incapacity," do not suggest otherwise.<sup>67</sup> Courts have been very clear that the historical "physical capacity" requirement does not relate to procreation at all but, rather, is designed to ensure satisfactory intimate sexual relations within marriage. As a New York court explained in refusing to annul the marriage of a woman whose ovaries had been surgically removed:

It is a fact well known to medical science, and familiar in our common experience, that every woman passes through a climacteric period . . . after which she is incapable of conception, and yet it has never been suggested that a woman who has undergone this experience is incapable of entering the marriage state . . . . It seems to us clear, therefore, that it cannot be held, as a matter of law, that the possession of the organs necessary to conception are essential to entrance to the marriage state, so long as there is no impediment to the indulgence of the passions incident to this state.<sup>68</sup>

In fact, "consummation" is not, as the State suggests, a necessary element to a valid marriage.<sup>69</sup> Once parties fulfill the statutory

64. VT. STAT. ANN. tit. XV, § 551 (1989).

65. *Ryder v. Ryder*, 66 Vt. 158 (1894).

66. *LeBarron v. LeBarron*, 35 Vt. 365 (1862).

67. See State's Brief, *supra* note 3, at 17–18.

68. *Wendel v. Wendel*, 52 N.Y.S. 72, 74 (N.Y. App. Div. 1898). See also *Schroter v. Schroter*, 107 N.Y. Supp. 1065–66 (N.Y. Sup. Ct. 1907) (barrenness alone not ground for annulment); *Kirschbaum v. Kirschbaum*, 111 A. 697, 699 (N.J. 1920) (mere sterility does not constitute impotence); *Hohengarten*, *supra* note 63, at 1516–17 (the law of divorce and annulment "draws a sharp line between sexual activity as such and the ability to procreate.").

69. See State's Brief, *supra* note 3, at 11. Some of the State's amici argue that only one particular act of different-sex sexual intimacy achieves unitive significance, and all other sexual relations, whether between different-sex couples or same sex couples, are qualitatively inferior, thereby justifying the State's discriminatory laws. See ACLJ Brief, *supra* note 25, at 5–12. See also Brady Brief, *supra* note 20, at 24. This moral argument is nothing more than a fundamentally theological claim posing as "natural law." See Andrew H. Friedman, *Same Sex Marriage and the Right to Privacy: Abandoning Scriptural, Canonical, and Natural Law Based Definitions of Marriage*, 35

requirements for solemnizing a marriage, they are married, regardless of whether they share any form of sexual intimacy at all.<sup>70</sup> The inability of one of the marital partners to perform sexually has never prevented a Vermont couple from validly marrying and remaining married; physical incapacity renders a marriage “voidable” at the instance of the aggrieved party, not “*void ab initio*” even if both parties wish to be married.<sup>71</sup>

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HOWARD L.J. 173, 179–87 (1992)(tracing position here articulated by ACLJ through St. Augustine, Gratian, and Aquinas, and explaining the intersection between “natural law,” canon law, and religious thought); WILLIAM ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE* 98 (1996)(“The new natural law advocates are essentially dressing up a sectarian religious argument in philosophical garb.”).

Moreover, “natural law” itself is subject to widely-ranging interpretations. For example, Richard Duncan, relied upon by the State, embraces the view that “homosexual conduct . . . is ‘intrinsically shameful, immoral, and indeed depraved or depraving,’” or, at a minimum, that “it lacks sufficient goodness to qualify for access to a governmentally-endorsed and specially-preferred status such as marriage.” Duncan, *supra* note 20, at 594 (quoting John Finnis). John Finnis, also heavily cited by the amici in support of the State, concurs that same-sex intimacy is “depraved,” and indeed condemns as immoral all non-procreative sexual activity, including “deliberately contracepted” sex within marriage. See Michael J. Perry, *The Morality of Homosexual Conduct: A Response to John Finnis*, 9 NOTRE DAME J.L. ETHICS & PUB. POL’Y 41, 45, 54–61 (1995). On the other hand, other philosophers assert that same-sex unions partake of the same elements as other moral sexual activity. See, e.g., Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 269 (1995)(refuting John Finnis’ natural law theory that non-procreative sexual intimacy is immoral).

The State has wisely dropped any such “morality”-based defense on appeal. Cf. P.C., *supra* note 4, at 65. This Court should not embrace unadorned preferences for one segment of the community over another under the guise of “morality.” See *Romer v. Evans*, 517 U.S. 620, 620 (1996)(rejecting claim that personal or religious objections to homosexuality of some members of the community can justify discrimination against gay and lesbian citizens).

70. See *In re Marriage of Burnside*, 777 S.W.2d 660, 663 (Mo. Ct. App. 1989)(“consummation” not necessary to validate a marriage); *Anderson v. Anderson*, 219 N.E.2d 317, 329 (Ohio C. P. 1966); see also *Beck v. Beck*, 246 So. 2d 420 (Ala. 1971)(sexual activity not essential for valid common law marriage).
71. VT. STAT. ANN. tit. XV, § 512 (1989). In fact, a party who wanted to void a marriage due to the other’s physical incapacity to perform sexually could not historically do so if that party was aware of the limitations at the time of the marriage. See, e.g., *Jarzem v. Bierhaus*, 415 So. 2d 88, 90 (Fla. Dist. Ct. App. 1982)(“[I]f the wife’s claim for annulment or divorce had been based upon the fact that the husband was impotent, it would have been unavailing if she had knowledge of such a fact before the marriage.”); *Rickards v. Rickards*, 166 A.2d 425, 427 (Del. 1960); *Fehr v. Fehr*, 112 A. 486, 486 (N.J. Ch. 1920). Certainly same gender couples would be well aware, prior to marriage, of the limitations on their ability to procreate.

Nor do the United States Supreme Court decisions quoted by the State imply that procreation is essential to marriage. In its most recent detailed analysis of the purposes of marriage, and the nature of the fundamental right to marry, that Court listed mutual emotional support, public commitment, legal and economic benefits, spiritual significance, and consummation as the primary attributes of marriage.<sup>72</sup> Significantly, the Court did *not* include conceiving or raising children together on its list.<sup>73</sup>

Moreover, in relying on the United States Supreme Court's discussion in *Zablocki v. Redhail*,<sup>74</sup> the State leaps from that Court's preference for *child-rearing* by *married* couples (a policy directly undermined by the State's discrimination in this case, since many same-sex couples raise children) to the State's purported view that *procreation* is a defining attribute of *marriage*. In the discussion quoted by the State, the United States Supreme Court made it clear that the decision to marry, in and of itself, enjoys the *same* level of constitutional importance as "decisions relating to procreation, childbirth, child rearing, and family relationships,"<sup>75</sup> and is not merely instrumental to any of the other protected rights.

In fact, the United States Supreme Court made that distinction clear in the case of *Michael H. v. Gerald D.*,<sup>76</sup> upholding a state statute which denied a child's biological father standing to assert his parentage when the child's mother was married to another man. In that case, the state's solicitude for the integrity of the mother's existing marriage, as well as its preference for parenting by two married parents, was so strong that the state essentially cut off the biological father's parental rights. In other words, the state invoked the existence of a marriage to actually *sever* the link between procreation and child-rearing.

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72. See *Turner v. Safley*, 482 U.S. 78, 95-96 (1987)(upholding prison inmate's right to marry).

73. The State seizes on the Court's inclusion of "consummation" as an element of marriage in its *Turner* decision. See State's Brief, *supra* note 3, at 69 n.56. However, in concluding that *most* prison inmate marriages are celebrated with the expectation that they will ultimately be consummated, the United States Supreme Court conceded that *some* such marriages are never "consummated." See *Turner*, 482 U.S. at 96. The Court's recognition of a constitutional right to marry is not limited to the former set of marriages.

74. See State's Brief, *supra* note 3, at 69.

75. *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).

76. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

The State's effort to confine marriage to procreative relationships resurrects a fierce debate regarding the morality of sexual intimacy without procreation and the role of women within our society. Throughout much of our nation's history, many states have prohibited artificial birth control.<sup>77</sup> Among the more vocal defenders of such laws were Roman Catholic moralists, who "stressed the origins of the doctrine on contraception in natural law:"

God intended marital intercourse primarily for the purpose of procreation. . . . Certain secondary purposes of intercourse in marriage—such as the relief of concupiscent desires or the expression of connubial affection—were morally licit, but to frustrate unnaturally the primary purpose of intercourse while pursuing its secondary ones perverted the divinely ordained nature of the act.<sup>78</sup>

Although the moral debate continues, the United States Supreme Court ended the legal debate once and for all in *Griswold v. Connecticut*,<sup>79</sup> upholding a married couple's right to use contraceptives—that is, the right *not* to procreate.<sup>80</sup>

In sum, the State's effort to define away the constitutional issue in this case by equating marriage with procreation, or the ability to procreate, is totally unavailing. The State has always licensed marriages between elderly, sterile, and even impotent parties. Indeed, the Vermont and United States Constitutions would not likely countenance restrictions on the marriage rights of the elderly or infertile.<sup>81</sup> The *only* people upon whom the State seeks to impose a "procreation" requirement are same-sex couples. The State cannot simply define

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77. See generally DAVID M. KENNEDY, *BIRTH CONTROL IN AMERICA* (1970) (chronicling history of laws restricting contraception in the United States).

78. KENNEDY, *supra* note 77, at 145 (Appellants' Reply Brief Appendix Tab 6).

79. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

80. See also *Eisenstadt v. Baird*, 405 U.S. 438, 453–55 (1972) (acknowledging "right of the individual, married or single . . . [to decide] whether to bear or beget a child" and upholding unmarried persons' right of access to contraceptives).

81. See Mark Strasser, *Family, Definitions, and the Constitution: On The Antimiscegenation Analogy*, 25 SUFFOLK U.L. REV. 981, 1012 (1991) ("One of the more disappointing aspects surrounding this 'procreation argument' is that numerous courts accept it, conveniently forgetting that they would never allow a statute to stand that prohibited infertile heterosexuals from marrying." (citation omitted)).

away its discrimination by referring to procreation; it must justify that discrimination.<sup>82</sup>

## 2. The State Confuses the Relationships Between Procreation, Child-Rearing, and Marriage

The State attempts to justify its discrimination with reference to three concepts: (1) the act of conceiving a child through sexual relations ("procreation") (which it knows same-sex couples cannot accomplish without the use of reproductive technology); (2) the responsibility of raising a child ("child-rearing") (which many same-sex couples, including two of the Appellant couples, have assumed); and (3) civil marriage.

The nexus between the *latter* two concepts might well constitute an important state interest (that is, the State may have an interest in promoting two-parent families, or families in which a child's parents are married to one another),<sup>83</sup> but the State does not, and could not, rely on such an interest in this case because the State's discrimination runs directly counter to such an interest. The State simply could not plausibly argue that preventing Holly and Lois from marrying somehow promotes child-rearing by married parents or benefits the daughter they are raising together. Moreover, significantly, the State has properly conceded that there is no evidence that "children raised by same-sex couples will develop differently in any measurable psychological way," acknowledging that such an argument would be "an easy target to shoot down."<sup>84</sup> Accordingly, in evaluating the State's argument, this Court must first peel away any claims relating to the

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82. See also *Quilter v. Attorney General*, No. 200/96, slip op. at 18 (N.Z. Ct. App. Dec. 17, 1997)(Thomas, J.)("I do not apprehend that in this day and age the notion that procreation is the sole or major purpose of marriage commands significant support.") (State's Appendix Tab 7); Barbara A. Robb, *The Constitutionality of the DOMA in the Wake of Romer v. Evans*, 32 NEW ENG. L. REV. 263, 317 (1997)(noting that procreation is not cited as an underpinning of marriage unless gay people are seeking marriage).

83. The State's assertion that Appellants have conceded that furthering the link between procreation and child rearing is a valid public purpose is a gross distortion of the record. See State's Brief, *supra* note 3, at 44. Appellants argued below, as they argue now, that promoting *parental responsibility* and *two parent families* are valid purposes, but that the State's discrimination against them does not in any way promote those purposes and, in fact, undermines them. See PC, *supra* note 4, at 166.

84. State's Brief, *supra* note 3, at 55.

State's interest in responsible parenting, or its interest in parenting by married (as opposed to unmarried) parents, since those interests do not distinguish Appellants from any different sex couples who might seek to marry and possibly raise children.<sup>85</sup>

What is left is the State's asserted interest in the nexus between the first two categories, procreation and child-rearing, and its claim that its discriminatory marriage laws somehow fortify that nexus. Appellants have already argued that the State's emphasis on biological parenting is misplaced.<sup>86</sup>

Moreover, the relationship between the State's discrimination and its claimed interest is highly speculative and strained. The parentage laws, not the marriage laws, regulate and reinforce the relationship between procreation and child-rearing. In Vermont a married man is free to prove that he did not father his wife's child, and thus has no parental responsibilities with respect to that child, and a putative biological father is free to invoke the parentage laws to establish his parental rights and responsibilities with respect to a child whose mother is married to another man.<sup>87</sup>

The State's invocation of the presumption that a child born during a marriage is the child of the mother's husband to support its position is surprising.<sup>88</sup> To the extent the presumption of parentage impacts the procreation-child rearing link at all, in cases in which a child is conceived through extra-marital sex, the presumption actually *undermines* the link between procreation (the act of conception) and child-rearing in an effort to promote the link between child-rearing and marriage (again, a link which *supports* Appellants' claims in this case). In particular, the presumption reflects a policy preference for child-rearing by the married couple rather than the actual biological father who conceived the child.<sup>89</sup>

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85. For example, Appellants agree with the State's recognition that single parent families do not have all of the benefits of families with two parents. See State's Brief, *supra* note 3, at 43. Appellants concur that "It is in the family that a child first learns about honesty, trustworthiness, obedience, sacrifice, selflessness, and reverence for the basic freedoms we all enjoy." Roman Catholic Brief, *supra* note 20, at 8. Appellants also agree that the institution of marriage should be strengthened in a manner that promotes a sense of responsibility to children. See Brief Amicus Curiae of Agudath Israel at 1-2.

86. See Appellants' Brief, *supra* note 3, at 34.

87. VT. STAT. ANN. tit. XV § 308 (Supp. 1998).

88. See State's Brief, *supra* note 3, at 42.

89. Empirical observation supports the conclusion that a marital relationship frequently *severs* the link between procreation and child-rearing. Physicians who do tissue typing

Finally, the State here asserts an interest in promoting the link between procreation and child-rearing but fails to explain why, rather than making all biological parents marry each other, or requiring all married couples to conceive and raise children, or licensing procreation rather than marriage, the State imposes legal disabilities on one, and only one, class of couples. The State responds to these points by denying the applicability of the compelling interest test, and eviscerating the force of minimum scrutiny review.<sup>90</sup> The State is wrong on both counts: The compelling interest test does apply in this case,<sup>91</sup> and, even if it did not, the minimum level of scrutiny would not be as toothless as the State argues.<sup>92</sup> The disjuncture between the State's goal and its means in this case does not merely represent some slippage around the edges; it is a chasm miles wide.

### 3. The "Reproductive Technology" Argument Is a Sham

One out of every eight heterosexual married couples in the United States is infertile.<sup>93</sup> In pursuit of their goal of raising children together, such couples sometimes turn to donor insemination, which accounts for eight to ten times more births than all other types of reproductive technology combined.<sup>94</sup> The first successful donor insemination in the United States was recorded in 1884, and the number of children born through donor insemination in the United States has risen from about 1,000 per year through the 1940s-1960s, to 30,000 in 1987.<sup>95</sup> Far less common are so-called "surrogacy" arrangements whereby a "surrogate mother" bears a child, either with her own egg or a donor egg, and then relinquishes her parental rights

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for organ donations estimate that between five and twenty percent of children are not actually biologically related to the men who claim fatherhood. See BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN PATRIARCHAL SOCIETY 225 (1989)(Appellants' Reply Brief Appendix Tab 7).

90. See State's Brief, *supra* note 3, at 44-45.

91. See *supra* Section I.

92. See *supra* Section II.

93. See Appellants' Brief, *supra* note 3, at 35.

94. See EDWARD E. WALLACH & HOWARD A. ZACUR, REPRODUCTIVE MEDICINE AND SURGERY 782 (1995)(Appellants' Reply Brief Appendix Tab 8).

95. See WALLACH, *supra* note 94, at 781-82.

to the intended parents (usually the biological father and his wife) upon the birth of the child.<sup>96</sup>

Even though the Vermont legislature has never taken any action to regulate the use of such methods of reproduction—and in fact has codified a decision of this Court protecting the family rights of parents and children in the donor insemination context,<sup>97</sup> the State now contends that the legislature intends to restrict the proliferation of such methods. The State justifies its goal by arguing that the use of such methods of reproduction leads to undesirable litigation regarding parental rights. The State's claim is dubious, as a regime in which legal categories do not match the reality of peoples' lives—such as one in which two adults who have built a family together are considered legal strangers—generates more litigation than one in which the legal rules more closely match the reality of peoples' lives.<sup>98</sup>

Most astonishing, though, is the State's view of the means by which the legislature purportedly seeks to promote its goal. The State takes no action to regulate in any way the conduct of the large majority of the consumers of such methods (infertile heterosexual couples). Instead, the State imposes a unique disability on a small portion of the potential consumers of such methods (some same-sex couples), as well as the much larger category of citizens who do not, and would not use such methods (same-sex couples who bring children into their families through prior relationships or adoption, or who form families without children). The State does not explain why its restrictions are arbitrarily targeted at only a small minority of consumers of donor insemination and surrogacy contracts. If the State's claim were for real, and not a post-hoc rationalization contrived in an attempt to justify its discrimination, the State would not simply ignore the vast

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96. Although statistics are hard to come by, one expert has estimated that between 5,000 and 10,000 surrogate births have occurred in the United States. See HELENA RAGONE, *SURROGATE MOTHERHOOD: CONCEPTION IN THE HEART* 88 (1994) (Appellant's Reply Brief Appendix Tab 9). Belying the State's intimation that gay male couples have been involved in a significant portion of these arrangements, see State's Brief, *supra* note 3, at 57 n.44, all of the surrogacy cases identified by the State as well as the law review articles cited by the State involved infertile heterosexual couples, not gay male couples. In fact, the overwhelming majority of couples who seek the services of surrogates are heterosexual couples.

97. See VT. STAT. ANN. tit. xv § 1-102(b)(1989); *In re B.L.V.B.*, 160 Vt. 368 (1993).

98. See *infra* note 103.



majority of donor insemination and surrogacy consumers and target an unfortunate few.<sup>99</sup>

*B. The State's Doomsday Speculations Cannot Survive  
Constitutional Scrutiny*

Both the State and its amici intimate that if Holly can marry Lois after twenty five years of commitment together, the proverbial Pandora's Box will be opened. The State makes vague predictions of "intractable economic, social and even philosophical problems,"<sup>100</sup> "unpredictable and significant" effects on marriage,<sup>101</sup> and polygamous marriages.<sup>102</sup>

Such alarmist claims are unfounded. Vermont will be the same state after it allows same-sex couples to marry as it is now, but with more family security and peace of mind, and less hardship and discrimination. First, the availability of civil marriage to same-sex couples will create a "bright line" status, giving rise to "reliable expectations that stabilize not only the determination of legal rights and

99. *See State v. Ludlow Supermarkets*, 141 Vt. 261, 266 (1982) ("[W]hatever our duty to give validity and credit to stated legislative purposes, we are not required to accept as underpinning for any law a purpose that, through wide-ranging exceptions or other emasculating devices, the legislature has reduced to a sham or deceit."). Not only does the exclusion of everyone *except* same-sex couples from the State's efforts to discourage its disfavored methods of reproduction render the State's claimed justification a sham, but it raises constitutional red flags of its own. *See Eisenstadt v. Baird*, 405 U.S. 438, 454-55 (1972) ("[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.") (citation omitted).

The State also fails to adequately explain how limiting same-sex couples' *marriage* rights will affect their *reproductive* decisions, especially given that the legislature has already provided for adoption by same-sex partners. The State simply asserts, without support, "The Legislature could reasonably conclude that the increased financial stability and access to legal benefits that accompany marital status would lead to an increase in technologically-assisted conception." State's Brief, *supra* note 3, at 57.

100. State's Brief, *supra* note 3, at 91.

101. State's Brief, *supra* note 3, at 47.

102. *See State's Brief, supra* note 3, at 27 & n.14.

duties, but also the entire social, economic, and political structure."<sup>103</sup> Second, same-sex couples and their children will be free from the tangible legal disadvantages they currently encounter,<sup>104</sup> as well as the stigmatizing badge of second-class citizenship.<sup>105</sup> Third, there is no sound reason to believe that heterosexual couples will cease marrying (and raising children, for that matter), or that their unions will be less stable or valuable just because Stan and Peter are also able to marry.<sup>106</sup>

Indeed, the sky certainly has not fallen in those Scandinavian countries that have extended virtually all rights associated with marriage to same-sex couples. Even detractors "acknowledge their concerns may have been overblown."<sup>107</sup> Nor has the State of Vermont suffered social ill as a result of providing state employees in same-sex relationships with some of the same employee benefits as their heterosexual counterparts.

Neither can the State justify its continuing discrimination against same-sex couples by raising the specter of polygamy. Ending discrimination in marriage against same-sex couples will hardly make legalization of multiple-partner marriages inevitable any more than ending race discrimination did. Appellants do not challenge the

103. Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship and Sexual Privacy*, 81 MICH. L. REV. 463, 485 (1983). This Court has grappled with the sometimes tragic consequences that result when the applicable or available legal categories don't match the reality of peoples' lives. See *Titchenal v. Dexter*, 166 Vt. 373 (1997) (affirming Superior Court's refusal to use equity powers to resolve child custody and visitation claim of child's de facto coparent because coparent had no legal relationship to child). Cf. *Paquette v. Paquette*, 146 Vt. 83 (1985) (acknowledging some legal relationship between stepparent and child by virtue of marriage).

104. See Appellants' Brief, *supra* note 3, at 3-5.

105. See *MacCallum v. Seymour's Adm'r*, 165 Vt. 452, 459-60 (1996) (recognizing psychological harm from legal rules that inflict second class status, especially with respect to family matters).

106. Any suggestion that the State has only a fixed number of marriage licenses such that a license issued to Nina and Stacy will result in one less heterosexual marriage is entirely untethered to reality.

107. Lawrence Ingrassia, *Danes Don't Debate Same-Sex Marriages, They Celebrate Them; Even Opponents Say '89 Law Brought No Social Ills*, WALL STREET J., June 8, 1994, at A1 (Appellants' Reply Brief Appendix Tab 10). As the State has noted, the Scandinavian countries that do extend marital rights to same-sex couples (Sweden, Denmark, and Norway) withhold access to adoption and reproductive technology from such couples. See State's Brief, *supra* note 3, at 57-58 n.47. Given that Vermont already protects the procreative and parenting rights of same-sex couples, this limitation on the marriage rights of same-sex couples in the Scandinavian countries is inapposite. Moreover, Vermont's experience with adoptions by same-sex couples defies doomsday predictions.

fundamental structure of marriage as the union of *two* individuals; rather, the fundamental right upon which they rely is the “freedom to join in marriage with *the person* of one’s choice.”<sup>108</sup> The point is not merely semantic; the exclusivity of marriage flows from the companionate vision of marriage as two people pledging themselves to one another that courts have long embraced.<sup>109</sup> Moreover, even if this Court recognized a fundamental right to marry that was broader than Appellants seek, the State would still be entitled to maintain reasonable restrictions, such as bans on consanguineous or polygamous marriages, that were supported by adequate justifications.<sup>110</sup>

In fact, the State’s repeated allusions to the peril of polygamous marriages echo the arguments of the Commonwealth of Virginia in defending that state’s race requirement in marriage.<sup>111</sup>

In sum, although there is no doubt that an end to discrimination in marriage will profoundly affect the lives of the families presently excluded from that institution, and will benefit the community as a whole, there is simply no basis for the parade of horrors that the State and its amici present.<sup>112</sup>

108. *Perez v. Lippold*, 198 P.2d 17, 21 (Cal. 1948)(emphasis added).

109. Ironically, by seeking to redefine marriage as an instrument for procreation, rather than an institution for fostering and promoting love and commitment between two people, it is the State, not Appellants, that pushes the law toward recognizing polygamous marriages. See State’s Brief, *supra* note 3, at 27, 68 n.54.

110. Commentators across the political spectrum have explained and justified the prohibition of polygamous marriages on a variety of bases. See, e.g., Teresa S. Collett, *Marriage, Family and the Positive Law*, 10 NOTRE DAME J. L. ETHICS & PUB. POL’Y 467, 475 (1996)(polygamous marriages create inequality within companionate marriage); Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501 (1997)(polygamy undermines modern liberal state).

111. See excerpted United States Supreme Court oral argument transcripts from *Loving v. Virginia*, in *MAY IT PLEASE THE COURT* 277, 282–83 (Peter Irons & Stephanie Guitton eds., 1993)(Appellants’ Reply Brief Appendix Tab 11)(“[T]he state’s prohibition of interracial marriage . . . stands on the same footing as the prohibition of polygamous marriage, or incestuous marriage, or the prescription of minimum ages at which people may marry, and the prevention of the marriage of people who are mentally incompetent.”)(quoting Virginia Assistant Attorney General R. D. McIlwaine, arguing for Virginia).

112. The Christian Legal Society argues that allowing same-sex couples to marry will burden the religious freedom of “those who believe homosexual conduct is sinful.” Christian Legal Society Brief, *supra* note 20, at 2. However, those amici’s arguments are actually directed at laws prohibiting discrimination on the basis of sexual orientation in general. All of the hypothetical situations described by these amici could just as easily arise today, under current Vermont law; recognition of civil marriage

### C. *The Former Sodomy Laws Are a Red Herring*

Vermont does not criminalize adult consensual sexual conduct between either same-sex or different-sex couples. Vermont's historical prohibition of sodomy, which the State describes as "an act commonly associated with homosexuality,"<sup>113</sup> is irrelevant. The Vermont Supreme Court held in 1899 that because sodomy was a crime by the common law of England, it was a criminal offense in the State of Vermont.<sup>114</sup> Although the definition of "sodomy" at common law was far from uniform, that such criminal prohibitions applied to different-sex and same-sex sexual intimacy alike was not disputed.<sup>115</sup> Indeed, heterosexual married couples were historically subject to prosecution under the sodomy laws.<sup>116</sup>

By the same token, like the common law prohibition, Vermont's modern "fellation" statute, enacted in 1937 and repealed in 1977, applied by its terms to same-sex and different-sex conduct alike. That statute prohibited sexual conduct practiced by 80% of married heterosexual couples today.<sup>117</sup> If the State's logic is correct, then *heterosexual* couples have no fundamental right to marry since, through much of

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between partners of the same gender will not alter the applicable legal analysis or increase the likelihood of such tensions between Vermont's antidiscrimination laws and some people's religious opposition to gay and lesbian relationships.

113. State's Brief, *supra* note 1, at 66.

114. See State v. LaForrest, 71 Vt. 311, 312 (1899).

115. See Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073, 1085, 1088 (1988) ("American sodomy laws in force when the Bill of Rights and the Fourteenth Amendment were ratified applied to acts performed by men with women as well as with one another . . . . Although illicit sexual acts were seen as sinful, immoral, criminal, or all three, before the 1870s illicit sexual acts between men were not seen as fundamentally different from, or necessarily worse than, illicit acts between a man and a woman."); Larry Catá Backer, *Raping Sodomy and Sodomizing Rape: A Morality Tale About the Transformation of Modern Sodomy Jurisprudence*, 21 AM. J. CRIM. L. 37, 50-55, 76 (1993) (original sodomy laws were meant to prevent certain sexual practices, "performed by whomever," and were not enacted as anti-homosexual measures).

116. See, e.g., People v. Doggett, 188 P.2d 792 (Cal. App. 1948) (prosecution of heterosexual married couple for "crime against nature").

117. See ROBERT T. MICHAEL ET AL., SEX IN AMERICA: A DEFINITIVE SURVEY 140 (1995) (Appellants' Reply Brief Appendix Tab 12). By the same token, many acts of same-sex intimacy do not fall within *either* the common law definition of sodomy, or Vermont's more recent fellation statute. "Sodomy" is simply not synonymous with same-sex intimacy, any more than it is with different-sex intimacy. See Amar, *supra* note 58, at 231-32.

this State's history, the very acts of sexual intimacy identified by the State ("sodomy") have been proscribed for *different sex* couples, too.<sup>118</sup>

Nor does the United States Supreme Court's decision in *Bowers v. Hardwick*<sup>119</sup> legitimate the State's discrimination.<sup>120</sup> Given that Vermont does not criminalize consensual sexual conduct between different-sex or same-sex couples, and given that this case presents a Common Benefits Clause challenge rather than a federal due process claim, *Hardwick* is irrelevant.

Moreover, the continued vitality of *Hardwick* is doubtful. "Commentators have been virtually unanimous in their criticism of *Hardwick's* reading of the Court's privacy jurisprudence."<sup>121</sup> Justice Lewis Powell, who contributed the decisive fifth vote in that case, has since conceded that, in retrospect, he "probably made a mistake," and that "the dissent had the better of the arguments."<sup>122</sup>

The more recent decision of the United States Supreme Court in *Romer v. Evans*<sup>123</sup> at a minimum confines *Hardwick* to due process and away from equal protection, and, more likely, overrules *Hardwick* altogether.<sup>124</sup>

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118. To be sure, in addition to the common law prohibition of certain sex acts, Vermont's statutes briefly contained the Levitical prohibition of some acts of male-male sexual intimacy (but not lesbian sexual intimacy). See State's Brief, *supra* note 3, at 66. However, by 1808 this prohibition no longer appeared in Vermont's statutes. Moreover, by virtue of this Court's common law-based decision in *LaForrest*, Vermont's actual prohibition of "illicit sexual conduct" was, from this State's inception, broader and more inclusive than the narrower statutes cited by the State.

119. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

120. See State's Brief, *supra* note 3, at 70.

121. *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1523 n.30 (1989).

122. Ruth Marcus, *Powell Regrets Backing Sodomy Law*, WASHINGTON POST, Oct. 26, 1990, at A3 (Appellants' Reply Brief Appendix Tab 13).

123. *Romer v. Evans*, 517 U.S. 620 (1996).

124. See *Romer*, 517 U.S. at 636 (Scalia, J., dissenting)(majority opinion "contradicts" *Hardwick*). Doug Kmiec, a Pepperdine law professor and one of the signatories to the State's Scholars Brief, has conceded, "If *Bowers* remained good law, then [Colorado] would have a rational basis for the constitutional amendment that was at issue in *Romer* . . . [T]he majority has overruled *Bowers* sub silentio." Richard C. Reuben, *Gay Rights Watershed?*, ABA J., July 1996, at 30 (Appellants' Reply Brief Appendix Tab 14).

D. *The State's Pursuit of "Uniform" Laws Undermines Vermont's Autonomy*

Whether denominated as an interest in "uniformity" or in preserving marriage in a form recognized by all other states,<sup>125</sup> the State essentially asks this Court to maintain its discrimination in marriage because other states discriminate, too. Acquiescing in the prejudice of other states by denying Vermont citizens the protections of their own Constitution would render Vermont an accomplice to the prejudice of others and eviscerate the independent significance of the Vermont Constitution.<sup>126</sup> Nor has an interest in conformity been sufficient to convince Vermont to forbid interracial marriages at times when most other states did so, or to forbid first cousin marriages in present times, or to disallow second parent adoption.<sup>127</sup>

The State's push for uniformity ignores the valuable and historic role state courts have played in developing independent family policies and constitutional protections.<sup>128</sup> Indeed, the amici states who have filed an amicus brief in this case assert their respective rights to define their own policies concerning marriage, but would deny Vermont the same opportunity.<sup>129</sup>

Nor does the principle of comity or cooperative federalism support the State's claim.<sup>130</sup> Although states sometimes apply another

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125. See State's Motion to Dismiss at 57; PC, *supra* note 4, at 63.

126. See *MacCallum v. Seymour's Adm'r*, 165 Vt. 452 (1996) (Vermont Constitution cannot indirectly or directly give effect to private biases).

127. See Plaintiffs' Memorandum, PC, *supra* note 4, at 175-76.

128. See *Santosky v. Kramer*, 455 U.S. 745, 773 (1982) (Rehnquist, 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.") (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

129. See Brief Amicus Curiae of State of Nebraska et al. at 10-12 [hereinafter "Nebraska Brief"]. At least one state refused to join the Nebraska Brief because its Attorney General believed that attempting to influence Vermont's interpretation of its marriage laws would undermine that state's own independence in *maintaining* gender-discrimination in marriage. See Frederick Mark Gedicks, *Graham Is Right Not To Join Same-Sex Brief*, DESERET NEWS, May 21, 1998 (Appellants' Reply Brief Appendix Tab 15) (defending refusal of Utah Attorney General to join Nebraska Brief). Interestingly, nine of the eleven states who joined the Nebraska Brief could have made the same argument to the California Supreme Court in 1948, when that court reviewed California's ban on interracial marriages. See *Perez v. Lippold*, 198 P.2d 17, 18 (Cal. 1948).

130. See Nebraska Brief, *supra* note 129, at 4-7.

jurisdiction's law when that law offends no policy of the forum state, the State and its amici have not cited, and Appellants have been unable to locate, any case in which the courtesy of comity superseded a State's application of its own constitutional guarantees, or in which comity was invoked as a sword to prevent a speculative (perhaps illusory) conflict rather than in the context of a specific dispute.<sup>131</sup>

Finally, every permutation of the interstate-recognition argument rests on the feeble assumption that Vermont would long stand alone in ending sex and sexual-orientation discrimination in marriage.<sup>132</sup>

#### IV. THIS COURT HAS A DUTY TO PROTECT APPELLANTS' CONSTITUTIONAL RIGHTS

One century ago, the first Justice Harlan admonished this Court that the Constitution "neither knows nor tolerates classes among citizens." Unheeded then, those words are now understood to state a commitment to the law's neutrality where the rights of persons are at stake.<sup>133</sup>

Beginning with these words, drawn from Justice Harlan's prescient dissent in *Plessy v. Ferguson*,<sup>134</sup> the United States Supreme Court added its voice to the growing contemporary conversation about the role of gay and lesbian citizens in our society, invalidating a popularly-ratified Colorado constitutional amendment which placed legal protections against discrimination outside the reach of that state's gay and lesbian citizens.

131. The notion that maintaining discrimination in marriage will conserve judicial resources is another red herring. See State's Brief, *supra* note 3, at 56. The interstate marriage conflicts cases cited by the State all involved people who evaded Vermont's marriage laws, not those who lawfully married under Vermont's laws, as Appellants seek to do. Moreover, the Nebraska Brief fails to explain or support the inaccurate assertion that ending discrimination against the marriages of same-sex couples in Vermont would have some bearing on international recognition of different-sex marriages performed in Vermont. See Nebraska Brief, *supra* note 129, at 15.

132. Recent court decisions in Alaska and Hawaii, along with international developments in marriage, presage the inevitability of recognition of marriages between same-sex partners throughout this country and the world. Even the federal Defense of Marriage Act anticipates that some states will end discrimination in marriage. See 28 U.S.C. § 1738C (Supp. 1998).

133. *Romer v. Evans*, 517 U.S. 620, 623 (1996)(citations omitted).

134. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

The *Romer* opinion broke new ground in condemning reflexive discrimination against the “otherness” of gay and lesbian Americans. The words of the opinion are clear, and the symbolism is even clearer:<sup>135</sup> Times are changing, and a state may no longer deem gay and lesbian citizens “stranger[s] to its laws.”<sup>136</sup>

Much has changed since the 1970s, when various state courts considered the first round of marriage cases involving same gender couples. This Court has led the nation in recognizing that family forms are not rigid, and that our legal categories ought to respect and protect evolving families—including those formed by same-sex partners.<sup>137</sup> The freedom to marry the partner of one’s choice has become firmly established in the federal constitutional paradigm,<sup>138</sup> and the right of gay and lesbian citizens to marry can no longer be abridged through tautology, speculation, or fear-mongering.<sup>139</sup> State courts have recognized the power of state constitutional guarantees against gender requirements in marriage.<sup>140</sup> Civil marriage for same-sex couples exists in all but name in several Scandinavian countries, and in this country,

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135. Justice Brennan has described Justice Harlan’s dissent as “the quintessential voice crying out in the wilderness.” William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 431–32 (1986) (“In his appeal to the future, Justice Harlan transcended, without slighting, mechanical legal analysis; he sought to announce fundamental constitutional truths as well. He spoke not only to his peers, but to his society, and, more important, across time to later generations. He was, in this sense, a secular prophet, and we continue, long after *Plessy* and long even after *Brown v. Board of Education*, to benefit from his wisdom and courage.”).

136. *Romer*, 517 U.S. at 635.

137. *See In re B.L.V.B.*, 160 Vt. 368 (1993).

138. *See Loving v. Virginia*, 388 U.S. 1 (1967); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Turner v. Safley*, 482 U.S. 78 (1987).

139. *See Baehr v. Lewin*, 852 P.2d 44, 61–63 (Haw. 1993). The Hawaii Supreme Court in *Baehr* distinguished *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972) and *De Santo v. Barnsley*, 476 A.2d 952 (Pa. 1984) on the ground that no state constitutional questions were raised. The same, of course, is true of *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), and *Dean v. District of Columbia*, 653 A.2d 307 (D.C. App. 1995). The *Baehr* majority also condemned the tautological reasoning of *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973) and *Singer v. Hara*, 522 P.2d 1187 (Wash. App. 1974). The other marriage cases cited by the State or its amici have no relevance to this Court, *see Storrs v. Holcomb*, 666 N.Y.S. 2d 835 (N.Y. App. Div. 1997) (dismissing case solely on procedural ground that plaintiffs had failed to join a necessary party), failed to provide any meaningful analysis, or only discussed the marriage issue in dicta. *See also Baehr v. Miiike*, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996) (Appellants’ Appendix Tab 1).

140. *See Baehr*, 852 P.2d at 44; *see also Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI (Alaska Super. Ct. Feb. 27, 1998) (Appellant’s Appendix Tab 2).



some attributes of marriage have been accorded piecemeal to lesbian and gay couples in areas ranging from employee benefits to adoption rights. The right to marry is a pressing constitutional and public policy issue around the world, from right here in Vermont to South Africa to New Zealand to the Netherlands.<sup>141</sup>

As we stand at this crossroads, the State of Vermont asks this Court to turn its back on the Appellants, to allow the State to deem gay and lesbian individuals and same-sex couples strangers to Vermont's laws and constitution. The State clothes its discrimination with improper generalizations about the qualities and roles of men and women; fearful but unfounded speculation about dire consequences; inappropriate resort to unnamed higher authority; post hoc requirements of marriage (i.e., procreation) that apply only to same-sex couples; and reliance on tradition for its own sake. When these layers are peeled away, all the State is left with is a naked and constitutionally unsupportable favoritism for one part of the community over another.

In an effort to shield its bald preference from constitutional scrutiny, the State advances the argument of last resort, imploring this Court to abstain from vindicating Appellants' claims in deference to the legislature.<sup>142</sup> The State offers two rationales in support of its plea. First, the State argues that the legislature, and not the Court, is well-suited to evaluate the "complex" ramifications of Appellants' request for equal treatment in marriage.<sup>143</sup> Second, the State suggests that this Court should defer to the legislature in the name of institutional legitimacy. Neither assertion survives close analysis in light of this Court's historical and constitutional responsibilities.

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141. See E.J. Graff, *The Inevitability of Same Sex Marriage*, BOSTON GLOBE, Feb. 12, 1998 at A27 (Appellant's Appendix Tab 3, at 6).

142. See State's Brief, *supra* note 3, at 88-93.

143. See State's Brief, *supra* note 3, at 88-91. The Commonwealth of Virginia ultimately resorted to the same "legislative deference" argument in urging the United States Supreme Court to uphold its racial classifications in marriage, arguing emphatically in its brief in *Loving v. Virginia* that that Court had no authority to evaluate the wisdom of Virginia's race restriction in marriage, and that the social theories and research surrounding interracial marriage were too complex and controversial for judicial, rather than legislative review. See Brief and Appendix on Behalf of Appellee [Virginia] at 38-50 (Reply Brief Appendix Tab 5). Cf. State's Brief, *supra* note 3, at 93 ("Despite what the Court may think about the sagacity of the Legislature's policy choice, that decision must be respected."); State's Brief, *supra* note 3, at 89 ("Public testimony before legislative committees is the proper avenue for the social scientists to present their materials . . .").

A. *The State Confounds Policy Choices and Constitutional Imperatives*

The State treats Appellants' claim to equal treatment under Vermont's marriage laws as a complex "social policy" issue, requiring legislative factfinding, debate, and decisionmaking. However, the *policy* debate was resolved long ago when the State of Vermont created the institution of civil marriage and adopted various protections and obligations to accompany that status. That "policy" debate reemerges when the legislature modifies a privilege or responsibility of marriage, and is implicit in the legislature's continuing preservation of a civil marriage scheme.

The *constitutional* issue, on the other hand, is whether the legislature has complied with the limitations of the Vermont Constitution in enacting its marriage laws. While this Court may have a limited role in wrestling with complex questions about the wisdom of Vermont's civil marriage scheme, this Court is certainly competent to interpret and enforce the Vermont Constitution. In fact, there is no body in the world more competent to do so.

The State attempts to remove this case from the scope of this Court's ordinary purview by characterizing Appellants' claims as "novel." However, the constitutional protections upon which Appellants rely are nothing new. Appellants merely seek the same constitutional protections taken for granted by their heterosexual neighbors: The right to be free from government classifications and broad and limiting generalizations on the basis of gender is not novel. The right to marry and form a family with the partner of one's choice enjoys a distinguished constitutional pedigree. The right to freedom from State discrimination on the basis of sexual orientation is fully consistent with the anti-favoritism ideals undergirding the Common Benefits Clause. The right to meaningful judicial scrutiny to vindicate a constitutional right dates from this State's founding. Perhaps most important, the right not to be deemed a stranger to the laws, and a second-class citizen, is fundamental to our constitutional democracy.<sup>144</sup>

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144. The State's reliance on *Washington v. Glucksberg*, 117 S.Ct. 2258 (1997), is thus inapposite. See State's Brief, *supra* note 3, at 90. Not only did that case involve a federal due process challenge, rather than a Vermont Common Benefits Clause claim, but in that case the "right" which proponents sought to advance was, in fact, a new right in the constitutional scheme.

In arguing that this is an issue best left to the legislature, then, the State is essentially arguing that the discriminatory marriage laws do not violate Appellants' constitutional rights. (Otherwise, it would be inappropriate for the Court *not* to vindicate those rights.) Whether Vermont's marriage laws, as interpreted by the State, violate the Vermont Constitution is precisely the issue in this case. The "defer to the legislature" argument is not in fact an argument at all—it is a *conclusion*.

### B. *The "Deference" the State Advocates Amounts to Abdication*

In suggesting that this Court should "systematically underenforce" constitutional rights,<sup>145</sup> and ensure that its decisions in difficult cases will meet with "public acceptability,"<sup>146</sup> the State seems to be urging this Court to neglect its constitutional responsibility. This Court has long recognized its obligation to protect and uphold the Vermont Constitution and the individual rights embodied therein against electoral majorities.<sup>147</sup> Indeed, over a century and a half ago the Vermont Council of Censors recognized the importance of strong and independent judicial review:

It is an attribute of the supreme judicial tribunals to judge of the constitutionality of all laws passed by the legislature, when properly brought in review before them. They are always to

145. State's Brief, *supra* note 3, at 91.

146. State's Brief, *supra* note 3, at 92.

147. See *Shields v. Gerhart*, 163 Vt. 219, 223 (1995) ("As the expression of the will of the people, a constitution stands above legislative or judge-made law. . . . The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury.") (quoting *Marbury v. Madison*, 1 U.S. 368, 378 (1803)); *Choquette v. Perrault*, 153 Vt. 45, 51 (1989) (The legislative power "is subject to judicial review to test the reasonableness and appropriateness of the legislation to accomplish the result intended without oppression or discrimination"); *Westover v. Village of Barton Elec. Dep't*, 149 Vt. 356, 359 (1988) ("[T]he power to decide constitutional issues is vested in the courts."); *State v. Shop and Save Food Markets, Inc.*, 138 Vt. 332, 334–35 (1980) (noting Court's obligation to "look carefully to determine that no basic constitutional concern has been transgressed and that no constitutional limitation on sovereignty has been overstepped"); *Beecham v. Leahy*, 130 Vt. 164, 172 (1972) ("It is the function of the judicial branch to pass upon the appropriateness and reasonableness of the legislative exercise of the police power."); *Granai v. Witters et al.*, 123 Vt. 468, 470 (1963) ("It is the function of the courts to maintain constitutional government."); *State v. Quatropiani*, 99 Vt. 360, 363 (1926) ("[T]he validity of any mandate promulgated under [the legislature's police power] is for judicial determination.").

regard the constitution as the fundamental law of the land, and superior to any legislative enactment. Consequently, if the law is not warranted by, or is repugnant to, the provisions of the constitution, as is sometimes the case, the judges are bound to pronounce it inoperative and void.<sup>148</sup>

Indeed, the Vermont Constitution itself recognizes that citizens have a right to legal recourse to redress legal injuries or wrongs.<sup>149</sup>

In discharging its duty, the State essentially argues that this Court should *follow* rather than *lead* electoral majorities in enforcing constitutional rights.<sup>150</sup> History undermines the State's suggestion. Some of the proudest moments for the judiciary have been those in which courts rejected the State's approach, striking down unconstitutionally discriminatory laws without regard to the popularity of their decisions. For example, in 1948, at a time when thirty states prohibited interracial marriage—six by constitutional provision—and social disapprobation of interracial marriages was rampant, the California Supreme Court emphatically rejected the suggestion that majority sentiment was enough to sustain race restrictions in marriage that deprived some California citizens of the opportunity to marry their chosen life partners.<sup>151</sup> Similarly, nine years later, the United States Supreme Court rejected longstanding, widely-embraced, and vehemently-defended state laws requiring racial segregation in public schools.<sup>152</sup> History has vindicated these courts and their courage.

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148. RECORDS OF THE COUNCIL OF CENSORS OF THE STATE OF VERMONT 431 (Paul S. Gillies & D. Gregory Sanford, eds. 1991).

149. VT. CONST., ch. I, art. 4.

150. In so arguing, the State betrays the very scholars upon whom it relies. In describing the strategic benefits of legislated civil rights advances, such as the Civil Rights Act of 1964, Professor Stoddard never suggested for a moment that a court should refrain from vindicating a *constitutional* right out of deference to a legislature; in fact, he acknowledged that the national public conversation which gave rise to the Civil Rights Act of 1964 resulted in large part from the United States Supreme Court's counter-majoritarian constitutional decision in *Brown v. Board of Education*. See Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967, 976, 977 n.21, 984 (1997). By the same token, in urging the United States Supreme Court to refrain from granting certiorari in a marriage case at the present time, Professor Sunstein acknowledged the value of *state* court decisions addressing the marriage issue: "An advantage of a federal system is that it allows successful experiments in constitutional law at the state level." Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 25 n.85 (1994).

151. See *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948).

152. See *Brown v. Board of Education*, 347 U.S. 483 (1954).

By way of contrast, where courts have surrendered their responsibilities, or bowed to political pressure, civil rights and the credibility of the courts themselves have ultimately suffered. For example, yielding to the war-time anti-Japanese hysteria that gripped this nation during World War II, the United States Supreme Court turned its back on Japanese-American citizens, and their constitutional rights.<sup>153</sup>

Indeed, the act of deferring to the legislature in the face of bona fide constitutional claims is a deeply political, non-judicial act:

If the judiciary bows to expediency and puts questions in the "political" rather than in the justiciable category merely because they are troublesome or embarrassing or pregnant with great emotion, the judiciary has become a political instrument itself. Courts sit to determine questions on stormy as well as on calm days. The Constitution is the measure of their duty.<sup>154</sup>

The Ontario Court of Appeal recently championed the same view in rejecting that province's argument that the elected branches of government had the institutional right to address issues of gay and lesbian equality incrementally.<sup>155</sup> Drawing on prior Canadian Supreme Court caselaw, and noting the heavy burden on individual civil rights attendant to the deferential approach advocated by the government, the court in *Rosenberg* wrote:

[G]roups that have historically been the target of discrimination cannot be expected to wait patiently for the protection of their human dignity and equal rights while governments move toward reform one step at a time. If the infringement of the rights and freedoms of these groups is permitted to persist while governments fail to pursue equal-

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153. See *Korematsu v. United States*, 323 U.S. 214 (1944)(upholding forcible confinement of Japanese-American citizens in internment camps); see also *Plessy v. Ferguson*, 163 U.S. 537 (1896).

154. JUSTICE WILLIAM O. DOUGLAS, *THE COURT YEARS 55-56* (1980)(Appellants' Reply Brief Appendix Tab 16).

155. See *Rosenberg v. Canada*, [1998] 158 D.L.R. (4th) 664 (Appellants' Reply Brief Appendix Tab 17)(striking down as violative of the Canadian Charter of Rights and Freedoms a Canadian law providing tax benefits only to private pension plans that restrict survivor benefits to spouses of the opposite sex, thereby excluding same-sex partners).

ity diligently, then the guarantees of the *Charter* will be reduced to little more than empty words.

At what point, after all, can a court conclude that an inequality is sufficiently mature to undergo the metamorphosis from a permissibly delayed expectation to a constitutionally ripe entitlement. Courts do not operate by poll. They are required to make a principled decision about whether a constitutional violation is demonstrably justifiable in a free and democratic society, not whether there might be a more propitious time to remedy it.

Governments necessarily prefer to rely on perceived majoritarian wishes; courts, particularly [sic] in the enforcement of minority rights, are necessarily frequently obliged to override them. Waiting for attitudes to change can be a glacial process, as the sixty years in the United States between *Plessy v. Ferguson*, 163 U.S. 537 (1896) and *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) demonstrated. The intervening years between the denial and the fulfilment of the constitutional rights involved, permitted the gratuitous accumulation of a myriad of social injustices.

The government's reliance in this case on incrementalism cannot succeed. While elected governments may wait for changing attitudes in order to preserve public confidence and credibility, both public confidence and institutional credibility argue in favour of courts being free to make independent judgments notwithstanding those same attitudes.<sup>156</sup>

Appellants appeal to this Court to resist the State's invitation to sidestep its constitutional duties, and urge this Court to maintain its longstanding, principled position as a co-equal branch of government and guardian of constitutional liberties. This Court's thoughtful decisions in *MacCallum* and *Brigham*,<sup>157</sup> among other cases, demonstrate that Justice Underwood's passionate defense of this Court's responsibilities in shaping the common law applies with equal force to its role

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156. *Rosenberg*, [1998] 158 D.L.R. (4th) at 675-76 (internal quotations omitted).

157. See *MacCallum v. Seymour's Adm'r*, 165 Vt. 452 (1996); *Brigham v. State*, 166 Vt. 246 (1997).

in cultivating a Vermont constitutional jurisprudence to protect "not only this generation of Vermonters but those who will come after us in the decades yet to be:"<sup>158</sup>

The argument that . . . the issue is more appropriate for legislative resolution is wholly unpersuasive; such an argument ignores our responsibility to face a difficult legal question and accept judicial responsibility for a needed change in the common law. . . . [T]his Court has frequently met new and difficult problems head-on, using common law principles. Many of these cases have produced change which would have a profound effect on social and business relationships, such as industry-wide insurance patterns, husband-wife relationships, and lessor-lessee obligations, to mention only the most obvious. When confronted with these difficult and complex issues, this Court did not shirk its duty and retreat into the safe haven of deference to the legislature.<sup>159</sup> ❧

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158. *State v. Jewett*, 146 Vt. 221, 229 (1985).

159. *Hay v. Medical Ctr. Hosp. of Vermont*, 145 Vt. 533, 543-44 (1985).