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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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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."[1] *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.*[2]

In contrast to the State of Hawaii in Baehr v. Lewin,[3] *where the State argued that its laws did not discriminate, the State of Vermont 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 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, to be published in the Michigan Journal of Gender & Law, *Volume 6, Issue 1, 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.

STATEMENT OF THE CASE

Holly Puterbaugh and Lois Farnham celebrated their 25th anniversary in October 1997. They reside with their adopted teenage daughter in Milton, where they run a Christmas tree farm together. Holly is a college instructor; Lois, who was born in Jay and raised on a farm in Rutland County, is the superintendent of school nurses in a Vermont school district.

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1. VT. CONST. ch. I, art. 7.
2. *See infra* note 87.
3. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

Nina Beck and Stacy Jolles live in South Burlington. Nina is a physical therapist, and Stacy works as a director of a transitional living program for teenagers; they have been together as a committed couple for nearly eight years, and raised their son Noah together until he died of heart failure last year at age two and a half.

Peter Harrigan is a college professor and Stan Baker is a department director in a county mental health agency; they live together in Shelburne, and have been in a committed relationship for over four years.

Each of these couples seeks to marry for the same mix of reasons as many heterosexual couples choose to marry. They wish to declare their love and commitment; their lives are joined in every respect, from merged families, to joint home ownership, to mutual economic and emotional support; they want the legal responsibilities and protections that accompany civil marriage, and, in some cases, they hope to promote a stable environment for raising children.

These couples (collectively "Appellants") have duly applied for marriage licenses from their respective town clerks. All three of the clerks refused to issue a license, claiming that same-gender couples[4] are not entitled to legally marry in Vermont. Other than the fact that each Appellant wants to marry a person of the same sex, each of the couples is qualified under the laws of the State of Vermont to apply for a license to marry and to contract for such marriage.

The Appellants filed suit against the State of Vermont and their respective towns in July 1997, seeking a Declaratory Judgment providing that Appellees' refusals to issue them marriage licenses violate Vermont's marriage statutes and Constitution, and an injunction prohibiting Appellees from denying Appellants the requested marriage licenses.

On December 19, 1997, the Chittenden Superior Court granted the Motion to Dismiss filed by the State of Vermont, the Town of Shelburne, and the City of South Burlington, and denied Appellants' Motion for Judgment on the Pleadings. On January 22, 1998, the trial court also granted Judgment on the Pleadings to the Town of Milton and entered a final Judgment in the case. Appellants filed a timely Notice of Appeal to this Court.

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4. A prohibition of marriages for same-gender couples is, by definition, a prohibition of marriages by gay and lesbian couples. For purposes of this Brief, the terms "same-gender couples," "same-sex couples," and "gay and lesbian couples" are used interchangeably.

On appeal, Appellants contend that the superior court erred in concluding that Vermont's marriage statutes do not permit marriages between partners of the same gender,[5] and in concluding that the Vermont Constitution allows the State to deny Appellants the freedom to marry their chosen partners.[6]

Issues Presented for Review

(1) Do Vermont's marriage statutes, construed in light of their purposes and constitutional limitations, require Appellee towns to issue marriage licenses to the Appellants?

(2) Does the Vermont Constitution permit the State to deny Appellants the freedom to marry their respective chosen partners?

Argument[7]

This case involves one of the most fundamental of all our human and civil rights: the right to marry the person we love, the person with whom we want to share our lives. At stake is far more than a mere certificate. Civil marriage,[8] recognized by the State, gives rise to a broad panoply of legal, economic and social protections and supports for married couples and their families, and imposes legal responsibilities on married couples in addition to the moral obligations they have assumed by virtue of their mutual commitment. In fact, Vermont's laws contain hundreds of provisions relating to marriage or marital status, assigning dozens of protections, supports and obligations to married individuals and couples.

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5. *See* Opinion and Order at 4–7; Appellant's Printed Case [hereinafter PC] at 257–60.
6. *See* PC, *supra* note 5, at 260–70.
7. In reviewing the superior court's dismissal of Appellants' claims, this Court must assume that the factual allegations in the Complaint, *see* PC, *supra* note 5, at 1, are true. *See* Vt. R. Civ. P. 12(b)(6); Association of Haystack Property Owners, Inc. v. Sprague, 145 Vt. 443 (1985). The trial court's dismissal must be reversed if this Court determines that the Appellants have stated any conceivable claim for relief under Vermont law.
8. We use the term "civil marriage" to emphasize that Appellants are not seeking to require any religious communities or denominations to bless their unions if they do not wish to do so.

Some of these laws acknowledge the primacy of one's legal spouse. For instance, Vermont's inheritance laws provide numerous protections for the surviving spouse of a decedent.[9] If a patient becomes incapacitated, physicians routinely defer to the wishes of a patient's spouse concerning medical care and treatment, the patient's spouse enjoys presumptive visiting privileges in the hospital, and a legal spouse is more likely to be appointed guardian.[10] A surviving spouse has the legal right to control his or her spouse's bodily remains.[11]

The laws respect the marital relationship by protecting confidential marital communications,[12] allowing spouses to own real property as tenants by the entirety,[13] exempting transfers between spouses from property transfer tax liability,[14] and guaranteeing work leave to care for a seriously ill spouse.[15]

The law also seeks to keep married couples together by providing that they cannot terminate a marriage on demand, but rather must overcome legal and practical roadblocks to divorce.[16] When married couples do part ways, they have recourse to a special family court,[17] and that court applies specific procedures and rules of law designed to deal with marital breakups.[18] Among other things, these family courts apply laws which impose legal obligations on an economically stronger spouse, and help to protect an economically vulnerable spouse upon dissolution of a marriage.[19]

The laws recognize the economic interdependence of married partners by treating them as an economic unit. While marriage offers

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9. For example, a surviving spouse is entitled to at least one-third of the decedent's personal estate, *see* VT. STAT. ANN. tit. 14, § 401 (1989); may keep the household goods and furnishings after the decedent's death, *see* VT. STAT. ANN. tit. 14, § 403 (1989); can receive financial support from the decedent's estate pending settlement of the estate, *see* VT. STAT. ANN. tit. 14, § 404 (1989); is entitled to at least one-third of the value of decedent's real estate, *see* VT. STAT. ANN. tit. 14, §§ 461, 474 (1989); may occupy the decedent's real estate pending the necessary divisions, *see* VT. STAT. ANN. tit. 14, § 470 (1989); and is entitled to intestate succession, *see* VT. STAT. ANN. tit. 14, § 551(2) (1989).
10. *See* VT. STAT. ANN. tit. 14, § 3072 (1989).
11. *See* Nichols v. Central Vt. Ry. Co., 94 Vt. 14, 16 (1919).
12. *See* VT. R. EVID. § 504; VT. STAT. ANN. tit. 12, § 1605 (1973).
13. *See* Bellows Falls Trust Co. v. Gibbs, 148 Vt. 633 (1987).
14. *See* VT. STAT. ANN. tit. 32, § 9603(5) (1991).
15. *See* VT. STAT. ANN. tit. 21, §§ 471–473 (1987 & Supp. 1998).
16. *See, e.g.*, VT. STAT. ANN. tit. 15, § 551 (1989) (listing grounds for divorce).
17. *See* VT. STAT. ANN. tit. 15, § 451 (1988).
18. *See* VT. STAT. ANN. tit. 15, §§ 511–594 (1989 & Supp. 1998).
19. *See* VT. STAT. ANN. tit. 15, §§ 751–752 (1989).

some couples tax benefits, the combined income tax liability of many couples rises, rather than falls, as a result of their marriage.[20] Moreover, a married person who might otherwise qualify may be disqualified from receiving certain means-tested government benefits, such as ANFC[21] or General Assistance, due to his or her spouse's income.[22]

Finally, the individual and collective social value of state-recognized civil marriage should not be minimized.[23]

The suggestion that two adults who love one another and wish to assume the commitment and responsibilities of civil marriage can be denied the right to do so undermines the purpose and the very mission of Vermont's marriage laws. As set forth more fully below, Vermont's marriage laws, properly construed in light of their underlying purposes and in a manner that avoids constitutional problems, do permit marriages between partners of the same gender.[24]

Moreover, if Vermont's marriage laws are construed to deny Appellants the right to marry, those laws fly in the face of the guarantees of inclusion and freedom embodied in the Vermont Constitution. In particular, the "Common Benefits Clause" of the Vermont Constitution provides powerful protection against unjustified discrimination.[25] The State's purported justifications for its discrimination do not even satisfy the most deferential review of discriminatory classifications,[26] let alone the more stringent scrutiny applicable in this case.[27]

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20. *See* CONGRESSIONAL BUDGET OFF., FOR BETTER OR FOR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX 1 (June 1997).
21. Aid for Needy Families With Children.
22. *See, e.g.*, VERMONT DEP'T OF SOC. WELFARE, BULLETIN NO. 96-39F; 13 VT. CODE R. 170 at 003-58 to 003-60.1 (1996).
23. This Court has noted the psychic importance of the State's recognizing meaningful family relationships, and the damage that flows from the State's refusal to do so. Rejecting a law placing adopted children on different footing from their non-adopted siblings, the Court wrote, "The message of [the law] is invidious and discriminatory: He is a member of the family, yet he is not, and the realization of this fact by him and other members of the family leaves an area of rejection which is, in many instances, more important psychologically than is concern over material values." MacCallum v. Seymour's Admin., 165 Vt. 452, 460 (1996) (internal quotations omitted).
24. *See infra* Section I.
25. *See infra* Section II.
26. *See infra* Section III.
27. *See infra* Section IV.

I. VERMONT'S MARRIAGE STATUTES ALLOW MARRIAGES BETWEEN PERSONS OF THE SAME GENDER

The trial court concluded that Vermont's marriage statutes limit marriage to different sex couples. In so construing the marriage statutes, the trial court failed to interpret those laws in light of their underlying purposes, and in a manner that avoids constitutional difficulties. As shown below, the primary purposes of Vermont's marriage laws are to protect, encourage, and support the unions of committed couples, and thereby also provide a stable environment for those couples to raise children, if they have them. Since those purposes apply equally to all committed couples, whether they are of the same sex or different sexes, Vermont's marriage statutes must be interpreted to allow the Appellants to marry.

A. The Marriage Laws Must Be Construed to Promote Their Underlying Purposes

This Court has repeatedly recognized that in construing a statute a court must consider the language of the statute in light of the statute's underlying purposes. Even the "plain meaning rule," like all other rules of statutory construction, must be applied in the context of determining the underlying *purpose* of the law.[28]

Thus, in interpreting a statute a court must "analyz[e] not only its language, but also its purpose, effects and consequences."[29] The fundamental goal is to ascertain the law's underlying purpose—its "reason and spirit."[30]

In fact, this Court has explicitly ruled that when the literal words or apparent "plain meaning" of a statute conflict with its underlying purpose, the "plain meaning" cannot be applied.[31]

For example, in 1993 this Court held that, despite the literal words in the statute, a woman who was co-parenting two children with her same-sex partner should be allowed to adopt the children as a "step-

28. *See* Lubinsky v. Fair Haven Zoning Bd., 148 Vt. 47, 50 (1987) ("all rules of construction rely on a determination of legislative . . . purpose").

29. Estate of Frant v. Haystack Group, Inc., 162 Vt. 11, 14 (1994).

30. Merkel v. Nationwide Ins. Co., 166 Vt. 311, 314 (1997) (quoting Lane v. Town of Grafton, 166 Vt. 148, 151 (1997)).

31. *See* State v. Therrien, 161 Vt. 26, 31 (1993) ("'the letter of a statute or its literal sense must yield where it conflicts with legislative purpose.'") (quoting *Lubinsky*, 148 Vt. at 49–50).

parent" in order to create a legal relationship between the children and both of the adults.[32] In reaching its decision, this Court acknowledged that it was unlikely that the legislature had ever contemplated the prospect of adoptions by same-gender couples when it enacted the adoption laws at issue in the 1940s.[33] Rather than simply rule that the laws prohibited such adoptions, however, this Court decided that they were neither "specifically prohibited [n]or specifically allowed,"[34] and that the underlying purposes of the adoption laws must therefore be examined to determine what the laws were "designed to accomplish."[35]

This Court then found that the underlying purpose of the adoption law was not to prohibit certain combinations of individuals (such as lesbian couples) from adopting, but rather was to provide legal security for children. Since the requested adoptions were "entirely consistent" with the functional purpose of the adoption laws, this Court ruled that they were permitted under the adoption statute.[36]

In the present case, the trial court concluded that the "plain meaning" rule of statutory construction requires the prohibition of marriages between partners of the same gender. In support of its conclusion, the trial court cited historical dictionary definitions; the one subsection in Vermont's detailed marriage licensing scheme which contains some gender-based language;[37] sections in Title 15 prohibiting

32. *See In re* B.L.V.B., 160 Vt. 368 (1993).
33. *See In re* B.L.V.B., 160 Vt. at 372.
34. *In re* B.L.V.B., 160 Vt. at 372.
35. *Id.*
36. *In re* B.L.V.B., 160 Vt. at 372–73.
37. Vermont's statutory scheme for marriage is contained in Chapter 1 of Title 15 of the Vermont Statutes Annotated, which determines the requisites of a valid marriage and the eligibility of individuals to marry, and Chapter 105 of Title 18 of the Vermont Statutes Annotated, which prescribes the forms and procedures for obtaining a license and solemnizing a marriage. Chapter 105 of Title 18 of the Vermont Statutes Annotated contains fourteen sections and numerous subsections. One of those subsections requires a couple to obtain a marriage license from the clerk in the town where either the "bride or groom" resides. *See* VT. STAT. ANN. tit. 18, § 5131(a) (1987). With the exception of this subsection (and its companion section, VT. STAT. ANN. tit. 18, § 5005 (1987), relating to issuance of licenses to residents of unorganized towns or gores) and the consanguinity statutes (VT. STAT. ANN. tit. 15, §§ 1–3 (1989)) all other sections of Vermont's marriage statutes are gender neutral, referring only to "person," "party," or "applicant" rather than to the specific gender of the individual.

consanguineous marriages which are gender-based;[38] and references to "husband" and "wife" in various other Vermont laws.[39]

Appellants do not deny that some statutes establishing legal protections, supports and obligations for married persons contain gender-based references.[40] Moreover, Appellants readily acknowledge that, historically, marriage in Vermont has been assumed to be between a man and a woman, and, until the filing of this lawsuit, no Vermont couple had ever challenged that assumption.[41]

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38. Appellants recognize that when enacting the consanguinity statutes (VT. STAT. ANN. tit. 15 §§ 1–3 (1989)), the legislature did not expressly consider the possibility of marriages between same-gender partners, so the consanguinity laws do not expressly prohibit marriages between, for example, a mother and her daughter. The policy which underlies the consanguinity statutes, however, applies equally to same and different gender couples: the maintenance of a bright line distinction between filial relationships and sexually intimate ones. *See Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1267 (1980) (restrictions on consanguineous marriages discourage family members from viewing each other as sexual partners and thereby "prevent the exploitation of the family relationship as an opportunity for sex without meaningful consent"). Presumably, the legislature would amend the consanguinity statutes upon legal recognition of marriages between partners of the same gender to remedy the statutory idiosyncracy.

39. *See* PC, *supra* note 5, at 257–60. The State has also argued that legislative intent to deny the Appellants the right to marry can somehow be inferred from the fact that in 1787 Vermont adopted the English common law, which in turn was based on ecclesiastical law, which the State claims did not allow marriages between same-sex couples. *See* State of Vermont's Motion to Dismiss [hereinafter State's Motion] at 18; PC, *supra* note 5, at 24. The State's argument is puzzling, given our strong constitutional tradition against state establishment of religion, the fact that the Appellants are not seeking to force any particular religions to approve or celebrate their marriages, and the fact that common law is not frozen in time, but evolves with changing social conditions. *See* R. & E. Builders, Inc. v. Chandler, 144 Vt. 302 (1984) (recognizing evolution of common law with respect to rights and roles of marriage partners).

40. However, the trial court's reliance on gendered terms in the statutes ignores the legislature's direction that Vermont's statutes should be interpreted in a gender-neutral way. In particular, the legislature has directed that "words importing the masculine may extend and be applied to the persons of the feminine gender." VT. STAT. ANN. tit. 1, § 175 (1995).

41. The Appellants also point out, however, that the word "marriage" is not defined anywhere in our statutes. Further, colloquial use of the word "marriage" to describe relationships between same-sex partners has become increasingly common in our society, as indicated by Vermont newspaper editorials and commentators who have written on the topic, many before the instant lawsuit was filed. *See, e.g.*, Andy Kirkaldy, *Marriage Bill is Indefensible*, ADDISON COUNTY INDEP., July 18, 1996, at 4A; Nicholas Fersen, *Where is the Threat from Same-Sex Marriages?*, BENNINGTON BANNER, Jan. 27, 1997, at 14; Editorial, *Hawaii Leads the Way*, BRATTLEBORO REFORMER, Dec. 9, 1996, at 4; Steve Cusik, *State Should Recognize Same-Sex Marriages*, (FRANKLIN) COUNTY COURIER, July 31, 1997, at 10; Cathleen Palumbo, *Separate-*

However, nothing in Vermont's statutory scheme explicitly prohibits couples of the same gender from marrying.[42] In fact, the Vermont legislature probably never contemplated unions between same-gender partners, since the basic structure of Vermont's marriage laws was created even before Vermont became a state in 1791. Under these circumstances, *In re B.L.V.B.* compels the conclusion that such marriages are "[n]either specifically prohibited [n]or specifically allowed,"[43] and requires this Court to examine the underlying purposes of the marriage statutes—what they were "designed to accomplish."[44] If the marriages being requested by the Appellants are consistent with the underlying purposes of the marriage laws, then this Court must allow them to take place.[45]

B. The Purpose of the Marriage Laws Is to Regulate, Protect, and Support Committed Couples and Their Families

No one would deny that marriage is "a vitally important human institution" and "one of the oldest forms of social organization."[46] Even

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But-Equal, MANCHESTER J., Nov. 13, 1997, at 8; Paul Bortz, *Legalize Gay Marriages*, RUTLAND HERALD, May 20, 1997, at 11; Emerson Lynn, *Same-Sex Union Should Not Be Issue in Vermont*, ST. ALBANS MESSENGER, July 23, 1997, at 4; Editorial, *The Right to Marry*, VERMONT TIMES, Aug. 20, 1997, at 8.

42. Nothing in Title 15 or Title 18 expressly prohibits marriages between people of the same gender. In the absence of such an explicit prohibition, the rules of statutory construction do not allow such a disqualification to be implied. *See In re* Henry, 135 Bankr. Rep. 6 (Bankr. D. Vt. 1991); Grenafege v. Department of Employment Sec., 134 Vt. 288, 290, (1976)(holding that in interpreting statutes, the rule of statutory construction entitled "expressio unius est exclusio alterius"—inclusion of one thing implies the exclusion of others—must apply).
43. *In re* B.L.V.B., 160 Vt. 368 (1993).
44. *In re* B.L.V.B., 160 Vt. at 372.
45. *See* State v. Eckhardt, 165 Vt. 606, 606 n.2 (1996) (driveway considered "highway" for purposes of DUI laws, even though "highway" defined in statute as "place . . . open to . . . public or general circulation of vehicles"; broad construction of word "highway" appropriate given fact that purpose of DUI laws is to prevent injury to public by drunk drivers); State v. Begins, 148 Vt. 186 (1987) (DUI statute interpreted to allow prosecution in absence of police request for breath or blood test, even though statutory language mandated such request; Court held that literal language contravenes underlying purpose of law, which is to protect public from drunk drivers).
46. Samuel Green & John V. Long, MARRIAGE AND FAMILY LAW AGREEMENTS §1.01 (1984).

in the early eighteenth century, this Court recognized that "[t]o marry is one of the natural rights of human nature."[47]

The State confers legal status on the institution of marriage through statutory enactments. The purposes of those statutes have changed, however, as the institution itself has evolved in American society. For example, during colonial and frontier times, marriage functioned as an economic producing unit of society with responsibilities for child rearing and training.[48]

In other words, when America was an agrarian society, one of the central goals of marriage was "procreation," as this "was important for survival and economic progress" of the family and the larger society.[49]

Over the last century, however, the institution of marriage has evolved as America has developed from a largely agrarian and rural society to a more modern, urban one.[50] The fact that married women can now own property and enter into contracts is reflective of that changing conception of marriage and the purposes of marriage.[51]

As our society has become more modern and complex, marriage has come to serve a multiplicity of purposes. For many people, including Appellants Nina Beck and Stacy Jolles, and Holly Puterbaugh and Lois Farnham, marriage serves the purpose of creating a legally recognized family unit in which to raise children.[52] The many benefits

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47. Overseers of the Poor of Newbury v. Overseers of the Poor of Brunswick, 2 Vt. 151, 159 (1829).

48. *See* STEVEN MINTZ & SUSAN KELLOGG, DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE xviii (1988) (during colonial times, the family was largely "an interdependent unit of labor in which all family members contributed to a collective 'family economy.'").

49. WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 130 (1996) [hereinafter ESKRIDGE, SAME-SEX MARRIAGE].

50. *See* ESKRIDGE, SAME-SEX MARRIAGE, *supra* note 49, at 130.

51. *See* R.& E. Builders, Inc. v. Chandler, 144 Vt. 302, 304 (1984) (noting that historically a married woman's "legal existence" was suspended and merged into that of her husband's, and citing modern day changes to those old laws); MINTZ & KELLOGG, *supra* note 48, at xix (a major force for familial change lies in transformation of women's roles).

52. Creating a legally recognized family structure in which to raise children is a purpose of marriage which in past days was commonly expressed simply as "procreation." Such a shorthand notion to describe the process of raising children was expedient during a time when virtually all couples became parents by conceiving a child together. However, given the advancements in modern reproductive technologies and the evolution of adoption as an open, accepted, and commonplace event in our society, many couples today, both heterosexual and gay and lesbian, become parents

and protections accorded to the status of civil marriage by the State assist in making marriage a desirable context for child rearing.[53]

Another key purpose of marriage has come to be its emphasis on commitment and sharing between married partners.[54] Thus, in 1965 the United States Supreme Court declared that

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[55]

More recently, in a case affirming a prison inmate's right to marry, the United States Supreme Court affirmed that marriage serves many important purposes, and, without mentioning procreation, stated that one of those key purposes is emotional sharing and mutual commitment:

> Many important attributes of marriage remain . . . after taking into account the limitations imposed by prison life. First, *inmate marriages, like others, are expressions of emotional support and public commitment.* These elements are an important and significant aspect of the marital relationship. In addition, . . . the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. . . . Finally, marital status often is a precondition to the receipt of government benefits . . . property rights . . . and other, less tangible benefits . . . .[56]

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without actually conceiving the child together. *See* MacCallum v. Seymour's Adm'r, 165 Vt. 452, 455–56 (1996); Section III.A.4.

53. *See* Baehr v. Miike, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct., Dec. 3, 1996)(concluding that civil marriage licenses should be available to couples of the same gender because, among other things, marriage would be beneficial to children being reared by same-gender couples).

54. *See* MINTZ & KELLOGG, *supra* note 48, at xv–xvi (by early 20th century the new ideal of family life became "companionate" marriage in which relations were based on "affection and mutual interest").

55. Griswold v. Connecticut, 381 U.S. 479, 487 (1965)(upholding married couple's right *not* to procreate through use of contraceptives).

56. Turner v. Safley, 482 U.S. 78, 95–96 (1987) (emphasis added).

As the institution of marriage has evolved from one simply focused on producing sufficient numbers of children to ensure economic survival, to one concerned with supporting the emotional, associational, and familial goals of marriage, marriage laws have likewise evolved to mirror the change. Thus, for example, duties of support have been modified, property rights have changed, and no-fault divorce laws have made it much easier for spouses to dissolve their relationships.[57]

In contrast to earlier times, the primary purpose of our late-20th-century marriage laws is to recognize, protect, and support those couples who are willing to make a mutual commitment to share their lives together. The marriage laws promote this purpose by providing a variety of statutory benefits, supports and protections, and by imposing legal obligations on married couples.[58] In short, Vermont's marriage laws, like the adoption laws at issue in *In re B.L.V.B.*, are intended to "protect the security of [existing] family units" by delineating the legal rights and responsibilities of the parties to that marriage.[59]

C. Marriages between Same-Gender Couples Are Entirely Consistent with the Purposes of the Marriage Statutes

Given the underlying purposes of our marriage laws, there is no reason or justification for denying legal marriage to same-gender couples who want to marry. In fact, allowing committed same-sex couples to legally marry is "entirely consistent" with the "general intent and spirit" of Vermont's marriage laws.[60] On the other hand, to deny Appellants (and other same-gender couples who are willing to make a mutual commitment to support, share, and care for one another as a family) the legal protections and obligations derived from civil marriage, is contrary to the intent and spirit of those laws.

The fact that no same-gender couples have heretofore been provided the protections and supports of Vermont's marriage laws does not mean that this prohibition should continue any longer. This Court has admonished that "[w]hen social mores change, governing statutes

57. *See* GLENDA RILEY, DIVORCE: AN AMERICAN TRADITION 161–68 (1991).
58. *See* RILEY, *supra* note 57, at 3–5.
59. *See In re* B.L.V.B., 160 Vt. 368, 373 (1993).
60. *In re* B.L.V.B., 160 Vt. at 373.

must be interpreted to allow for those changes in a manner that does not frustrate the purposes behind their enactment."[61]

Here in Vermont, social mores *have* changed. Gay men and lesbian women have become increasingly more integrated into the larger society and "its spheres of business, religion, recreation, and education,"[62] and various Vermont laws reflect the fact that our community no longer permits either discrimination or violence against gay men and lesbian women.[63]

In light of the changing social mores in the State of Vermont, it would be unjust and unreasonable to construe Vermont's marriage statutes to exclude same-sex couples. As this Court proclaimed in *In re B.L.V.B.*, "This is not a matter which arises in a vacuum. Social fragmentation and the myriad configurations of modern families have presented us with new problems and complexities that can not be solved by idealizing the past."[64]

D. The Trial Court's Interpretation of the Marriage Laws Raises Serious Constitutional Problems

Finally, "[A] statute should, if it reasonably can, be so construed as to avoid any conflict with the constitution."[65] This Court should interpret Vermont's marriage statutes to permit Appellants to marry because a contrary interpretation would raise serious constitutional problems.[66]

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61. *In re* B.L.V.B., 160 Vt. at 375.
62. ESKRIDGE, SAME-SEX MARRIAGE, *supra* note 49, at 8.
63. Thus, for example, the Vermont legislature has enacted laws prohibiting discrimination on the basis of sexual orientation in employment, *see* VT. STAT. ANN. tit. 21, § 495 (1987); housing, *see* VT. STAT. ANN. tit. 9, § 4503(a) (1993); public accommodations, *see* VT. STAT. ANN. tit. 9, § 4502(a) (1993); insurance, credit services, *see* VT. STAT. ANN. tit. 8, § 1211 (1984); agricultural finance leases, *see* VT. STAT. ANN. tit. 9, § 2488 (1993); and retail installment contracts, *see* VT. STAT. ANN. tit. 9, §§ 2410–2362 (1993). The legislature has also increased penalties for hate crimes motivated by the victim's actual or perceived sexual orientation, *see* VT. STAT. ANN. tit. 13, § 1455 (1974); and has allowed same-gender partners to adopt children, *see* VT. STAT. ANN. tit. 15A, § 1–102(b) (1989).
64. *In re* B.L.V.B., 160 Vt. at 375 (quoting In the Matter of the Adoption of Evan, 583 N.Y.S.2d 997, 1002 (N.Y. Sup. Ct. 1992)).
65. State v. Catsam, 148 Vt. 366, 373 (1987)(citing Central Vermont Ry. v. Department of Taxes, 144 Vt. 601, 604 (1984)).
66. *See infra* Sections II–IV.

II. VERMONT HAS DEVELOPED AN INDEPENDENT CONSTITUTIONAL JURISPRUDENCE WHICH PROVIDES POWERFUL PROTECTION AGAINST UNJUSTIFIED DISCRIMINATION

If, as Appellees argue, Vermont's marriage laws do not allow civil marriages between partners of the same gender, those laws are unconstitutional.

Vermont's laws and people have long embraced the values of freedom, equality and inclusion.[67] Vermont's deep commitment to protecting every Vermonter's inclusion in the protections of the law is reflected in Chapter I, Article 7 of the Vermont Constitution ("the Common Benefits Clause"), which provides in part: "That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community . . . ."[68]

The provisions of the Vermont Constitution do not offer "mathematical formulas having their essence in their form."[69] To the contrary, as this Court has noted:

> [T]hey are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.[70]

Accordingly, in determining the contemporary effect of the Common Benefits Clause, this Court considers, among other things, not merely the raw text of the constitutional provision, but the

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67. Vermont enjoys the distinction of being the first state to prohibit slavery. *See* VT. CONST., art. I (1777); Windsor v. Jacob, 2 Tyl. 192 (1802). Unlike many states, Vermont has never prohibited interracial marriages. Similarly, in contrast to its colonial neighbors, even prior to its admission to the union, the territory of Vermont extended suffrage to every adult male—not just property owners or those who paid a specific tax. *See* WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS 196 (1980). As one Vermont legal historian has noted, "That the 1791 Bill of Rights was appended, as an afterthought to the Nation's Constitution, contrasts sharply to Vermont's Declaration of Rights which stands at the forefront of its Constitution." Charles S. Martin, *The Vermont Constitution: Past, Present and Future—Part I*, VT. B.J. & L. DIG., April 1991, at 7, 9.

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

69. State v. Jewett, 146 Vt. 221, 225 (1985).

70. *Jewett*, 146 Vt. at 225–26 (internal quotations omitted).

historical context, the approaches adopted by other courts in interpreting comparable provisions of the federal and sibling state constitutions, and economic and sociological materials.[71] Employing such an analysis, this Court has pledged to formulate "a state constitutional jurisprudence that will protect the rights and liberties of our people"[72] and that will protect "not only this generation of Vermonters but those who will come after us in the decades yet to be."[73]

A. The Common Benefits Clause Protects Community Access to "The Fruits of the Common Enterprise"

The Common Benefits Clause was included in the original Vermont Constitution of 1777.[74] The delegates at the 1777 Windsor convention apparently borrowed the text from the Pennsylvania Constitution with no documented discussion or debate,[75] and the text has remained substantially unchanged through the present.[76]

Although the historical record provides few clues about the specific rationale underlying the Common Benefits Clause in particular, historians have studied the prevailing political philosophies of the late 18th century, and the expression of those philosophies in state constitutions. The drafters of the Vermont Constitution, like many of their contemporary counterparts throughout colonial America, apparently embraced what has been characterized as a "radical reading

71. *See Jewett*, 146 Vt. at 226–27.
72. *Jewett*, 146 Vt. at 224.
73. *Jewett*, 146 Vt. at 229.
74. *See* VT. CONST. ch. I, art. 6 (1777). In the 1786 version of the Constitution, the Common Benefits Clause was moved from Chapter I, Article 6 to Chapter I, Article 7, where it has remained to this day.
75. *See* ADAMS, *supra* note 67, at 94; John N. Shaeffer, *A Comparison of the First Constitutions of Vermont and Pennsylvania*, 43 VERMONT HIST. SOC'Y PROC. 33 (Winter 1975).
76. The only difference between the present version of the Common Benefits Clause and the original version is that the original version used the words "man" and "men" rather than the gender-neutral terms "person" and "persons." *See* VT. CONST. ch. I, art. 6 (1777). The language was modified to include the gender-neutral terms in 1994. Art. Amend. 52 (1994). *See* VT. CONST. ch. II § 76. This 1994 revision was not intended to alter the "sense, meaning or effect" of any of the sections of the Constitution. *See* VT. CONST. ch. II § 76.

of the contract theory."[77] At the core of this view is the belief that "[i]f the highest purpose of the social contract was to provide the individual with a better chance to find happiness than the presocial state of nature permitted, it seemed only logical that everybody should have an equal share in the beneficent consequences of the contract."[78] In other words, colonial proponents of this vision of the social contract believed that equality demanded "not only that everyone enjoy equality before the law or have an equal voice in government, but also that everyone have an equal share in the fruits of the common enterprise."[79] The Common Benefits Clause embodies the drafters' promise of such inclusiveness—a pledge which continues to illuminate the proper application of the Common Benefits Clause today.

B. The Common Benefits Clause Responds to Societal Changes through Time

Faithful to that promise of inclusiveness and equality, this Court has consistently emphasized that legislative classifications which may have made perfect sense in a prior era may not make sense in light of modern social and economic relations. As this Court noted recently in evaluating a Common Benefits Clause challenge to Vermont's education financing structure, "Equal protection of the laws cannot be limited by eighteenth-century standards. While history must inform our constitutional analysis, it cannot bind it."[80] This Court explained that the Vermont Constitution was written in a different, less complex era, and that "yesterday's bare [educational] essentials are no longer sufficient to prepare a student to live in today's global marketplace."[81]

Similarly, in recently striking down a law providing that adopted children could not inherit through intestate succession from collateral relatives, this Court noted that the presumption that such a provision

77. ADAMS, *supra* note 67, at 187.

78. ADAMS, *supra* note 67, at 188.

79. ADAMS, *supra* note 67, at 188. *See also* Martin, *supra* note 67, at 7, 8 (identifying social contract theory roots of Vermont Constitution); Frank G. Mahady, *Toward a Theory of State Constitutional Jurisprudence: A Judge's Thoughts*, 13 VT. L. REV. 145, 151–52 (1988) (Common Benefits Clause reflects anti-privileges attitude arising in response to British colonial experience).

80. Brigham v. State, 166 Vt. 246, 267 (1997).

81. *Brigham*, 166 Vt. at 267.

reflected the likely intentions of most decedents was no longer accurate in light of evolving social norms. The Court explained:

> In 1880, or even in 1945, the Legislature might have concluded that collateral kin would expect intestate succession to be limited to the bloodline and exclude adopted persons. That presumption is no longer reasonable in 1996. We no longer rely on antiquated notions of the adoptive relationship as "a civil or contractual, an artificial, as contradistinguished from a natural status." We must acknowledge the vast cultural and social changes that have occurred and their effect on adoption practice and the public attitudes about adoption.[82]

In the *MacCallum* decision, this Court quoted at length from its opinion in *Choquette v. Perrault*,[83] in which this Court considered a state law requiring a landowner of unimproved and unoccupied land adjoining occupied land of another person to pay for a proportional share of a fence between the lands. In striking down the law, this Court explained:

> In the context of the land-use patterns of the nineteenth century, Vermont's fence law served the broad public interest. Though not all Vermonters were engaged in agricultural pursuits, the land was predominantly open and farmed, and most rural landowners were also livestock owners. This is not the case today. . . . As a result of changing land-use patterns, the law more and more often applies to landowners without livestock. In such situations, the fence law is burdensome, arbitrary and confiscatory, and therefore cannot pass constitutional muster.[84]

This Court has recognized that family structures, like land-use patterns, have changed dramatically since the eighteenth century, and has thus construed Vermont's adoption statute to allow the same-gender (and unmarried) partner of a child's legal parent to adopt as a

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82. MacCallum v. Seymour's Adm'r, 165 Vt. 452, 460–61 (quoting *In re* Raymond Estate, 161 Vt. 544, 548 (1994)) (citations omitted).

83. Choquette v. Perrault, 153 Vt. 45 (1989).

84. *Choquette*, 153 Vt. at 53–54.

step-parent.[85] In fact, this Court further suggested that a failure to accommodate changing family structures would raise constitutional concerns: "To deny the children of same-sex partners, as a class, the security of a legally recognized relationship with their second parent serves no legitimate state interest."[86] In this case, the Common Benefits Clause requires sensitivity to societal changes through time, as well as contemporary family structures.

C. This Court's Analysis under the Common Benefits Clause Varies Depending on the Type of Case

In evaluating whether a challenged classification runs afoul of the Common Benefits Clause, this Court has historically recited the analytical framework developed through federal equal protection law.[87]

However, this Court has insisted that Vermont's Common Benefits Clause may provide more extensive civil rights protections than the federal analog.[88]

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85. *See In re* B.L.V.B., 160 Vt. 368, 375 (1993) ("When social mores change, governing statutes must be interpreted to allow for those changes in a manner that does not frustrate the purposes behind their enactment.").

86. *In re* B.L.V.B. 160 Vt. at 375.

87. *See, e.g.*, Brigham v. State, 166 Vt. 246, 265 (1997) ("We have held that the Common Benefits Clause in the Vermont Constitution . . . is generally coextensive with the equivalent guarantee in the United States Constitution and imports similar methods of analysis."); State v. Ludlow Supermarkets, 141 Vt. 261, 268 (1982) (describing the equal protection analysis under the Vermont Constitution as "somewhat similar to the equal protection test of the fourteenth amendment").

88. *See, e.g.*, *Brigham*, 8 166 Vt. at 257, 265 (concluding that the Vermont Constitution proscribed a school funding arrangement similar to one upheld by the United States Supreme Court applying the federal constitution); 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."); State v. Brunelle, 148 Vt. 347, 351 (1987) (citing *Ludlow Supermarkets*, 141 Vt. at 268, for the proposition that the prohibition against preferential legislation in Article 7 is "more stringent than the federal constitutional standard"); *see also* State v. Badger, 141 Vt. 430, 448–49 (1982), in which this Court explained:

> Historically and textually, [the Vermont Constitution] differs from the United States Constitution. It predates the federal counterpart, and it extends back to Vermont's days as an independent republic. It is an independent authority, and Vermont's fundamental law.

1. Classifications Founded on a Suspect Basis, or Implicating a Fundamental Right, Are Subject to Heightened Scrutiny

Under the Common Benefits Clause, certain legislative classifications are subject to "strict," "heightened," or "more searching" scrutiny.[89] In particular, classifications which distinguish among people on a "suspect" basis, or which burden a "fundamental right," are constitutional only if "any discrimination occasioned by the law serves a compelling governmental interest, and is narrowly tailored to serve that objective."[90]

The State's classifications in this case are subject to heightened scrutiny because they are founded on distinctions among classes of people based on "suspect" factors—namely, gender and sexual orientation,[91] and because they implicate a fundamental right.[92] Even if the fundamental right at issue in this case, or the nature of the class disadvantaged by the law, were not respectively and independently sufficient to trigger heightened scrutiny, the *combination* of these two factors would be.[93]

However, this Court need not even reach the question of heightened scrutiny. Presumably to avoid considering constitutional questions which it need not necessarily reach, this Court generally first considers whether a state classification can satisfy even the minimum level of scrutiny before considering whether heightened scrutiny is

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> Although we have frequently treated parallel state and federal provisions in a similar manner . . . we have never intimated that the meaning of the Vermont Constitution is identical to the federal document. Indeed, we have at times interpreted our constitution as protecting rights which were explicitly excluded from federal protection. We are free, of course, to provide more generous protection to rights under the Vermont Constitution than afforded by the federal charter.

Badger, 141 Vt. at 448–49 (citations omitted).

89. *Brigham*, 166 Vt. at 265.

90. *Brigham*, 166 Vt. at 265; *see also* MacCallum v. Seymour's Adm'r, 165 Vt. at 452, 457.

91. *See infra* Section IV.A (gender classifications) and Section IV.B (sexual-orientation discrimination).

92. *See infra* Section IV.C.

93. *See infra* Section IV.D.

appropriate.[94] Likely because this Court's analysis under even the minimum level of review is so exacting,[95] this Court has rarely had occasion to move beyond its minimum level of scrutiny in order to apply heightened scrutiny.

2. At a Minimum, the Common Benefits Clause Requires Both That State Classifications Be Reasonably Related to a Valid Public Purpose, and a Careful Balancing of the State's Interests and the Rights of Disadvantaged Citizens

Under the Vermont Constitution, all legal classifications must, at a bare minimum, be "reasonably related to the promotion of a valid public purpose."[96]

This minimum test requires the Court to consider two distinct questions in evaluating the constitutionality of a state classification: First, is the public purpose offered in support of the classification at issue a valid one? Second, are the classifications at issue reasonably related to that purpose?[97] Even under this minimum level of scrutiny, the Court may uphold a discriminatory classification only if it answers both questions in the affirmative.

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94. *See, e.g., Brigham*, 166 Vt. at 265 (refraining from deciding whether education is a fundamental right and therefore subject to more stringent scrutiny because Vermont's school funding system did not satisfy the minimum test of being reasonably related to any valid public purpose); *MacCallum*, 165 Vt. at 457 n.1 (declining to consider "suspect class" claim because discrimination against adopted children was not even reasonably related to the promotion of a valid public purpose).

95. *See infra* Section II.C.2.

96. Lorrain v. Ryan, 160 Vt. 202, 212 (1993). This Court has used the term "legitimate state purpose" interchangeably with "valid public purpose" in articulating Vermont's minimum level of review under the Common Benefits Clause. *See, e.g.*, Oxx v. Vermont Dep't of Taxes, 159 Vt. 371, 376 (1992).

97. *See Lorrain*, 160 Vt. at 212.

a. In Deciding Whether the State's Claimed Purposes Are Valid, This Court Must Weigh the State's Goals against the Interests of the Citizens Excluded or Disadvantaged by the Discriminatory Laws

Although this Court has not expressly articulated a "balancing test" for determining whether the State's claimed purpose is valid, in practice this Court's analysis reflects a careful and simultaneous "sliding scale" weighing of the interests of the citizens excluded or disadvantaged by the discriminatory laws on the one hand, and the justifications offered by the State, on the other hand.[98]

Accordingly, regardless of whether heightened scrutiny is required, when a state classification limits selected citizens from access to an important right, or excludes unpopular groups from "the fruits of the common enterprise,"[99] this Court's demands of the State are much more exacting than when a state classification draws distinctions among unremarkable categories of citizens with respect to less important matters. For example, in the case of *In re Property of One Church Street*,[100] this Court was relatively deferential to government tax classifications, recognizing that economic regulations inevitably have uneven impact.[101]

By way of contrast, in its recent decision in *Brigham*, this Court emphasized the importance of educational opportunity in connection

98. Appellees' claim that this basic level of review requires nearly unrestricted deference to presumed legislative intent is incorrect, *see* State's Motion, *supra* note 39, at 47–51; PC, *supra* note 5, at 53–57, and the trial court's characterization of this level of review as "highly deferential" are inaccurate. *See* PC, *supra* note 5, at 267. In fact, this Court has frequently concluded that state classifications lacking a legitimate purpose were unconstitutional. *See, e.g., Lorrain*, 160 Vt. 202 (1993) (statute barring third party loss of consortium claims by spouses of injured workers while spouses of persons injured outside of work could maintain such claims); Choquette v. Perrault, 153 Vt. 45 (1989)(statute requiring adjoining landowners to share cost of constructing fence to contain livestock); State v. Ludlow Supermarkets, Inc., 141 Vt. 261 (1982) (Sunday closing law containing exceptions for certain small businesses); State v. Cadigan, 73 Vt. 245, 246–47 (1900) (law requiring firms "organized under the laws of another state" to comply with certain requirements not applicable to similar companies and firms organized under Vermont laws).

99. *See supra* note 79 and accompanying text.

100. *In re* Property of One Church Street, 152 Vt. 260 (1989).

101. *Id.* at 264.

with its Common Benefits Clause analysis.[102] Although this Court ultimately applied only the minimum level of scrutiny to the State's school funding system, the Court nonetheless demanded a strong justification to rationalize the State's unequal provision of educational opportunities—opportunities which, while not necessarily "fundamental" in the constitutional sense, were and are clearly quite important. Concluding that the State's justifications were not strong enough to outweigh its burdens on an important right, this Court explained:

> This is not a case . . . that turns on the particular constitutional test to be employed. Labels aside, we are simply unable to fathom a legitimate governmental purpose to justify the gross inequities in educational opportunities evident from the record. The distribution of a resource as precious as educational opportunity may not have as its determining force the mere fortuity of a child's residence. It takes no particular constitutional expertise to recognize the capriciousness of such a system.[103]

By the same token, in the *MacCallum* case, this Court noted that "[a]dopted persons have historically been a target of discrimination."[104] Although this Court applied only the minimum level of scrutiny to the State's discriminatory intestate succession laws, its analysis of the State's two rationales was exacting. Rather than simply defer to the State's claimed justifications—which at least one sibling state supreme court had accepted—this Court examined the State's rationales thoroughly, scrutinizing the assumptions underlying the State's arguments, evaluating the validity of those assumptions, exploring the factual basis for the State's claims, and probing the link between the State's explanations and its discrimination. After reviewing the State's justifications for disadvantaging adopted children much more rigorously than it reviews typical regulatory classifications, this Court concluded, again applying only the minimum level of scrutiny, that the State's claimed justifications did not pass constitutional muster.[105]

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102. *See Brigham*, 166 Vt. at 262 ("[T]he importance of education to self-government and the State's duty to ensure its proper dissemination, have been enduring themes in the political history of Vermont.").

103. *Brigham*, 166 Vt. at 265.

104. MacCallum v. Seymour's Adm'r, 165 Vt. 452, 459 (1996).

105. *See MacCallum*, 165 Vt. at 459–62.

In the present case, the State's discrimination does not simply award one set of persons an advantageous tax status, or regulate some facets of someone's business. In balancing the State's claimed justifications against Appellants' interests, this Court must give due weight to the fact that the State's classification in this case implicates one of the most profound and personal decisions that a person can make—to marry the life partner of one's choice. The legal disadvantages faced by the Appellants and their families are extensive and substantial. Moreover, the State is not merely drawing lines among citizens along innocuous lines; this Court must be extremely wary of State law distinctions among citizens on the bases of sex and sexual orientation. In short, in order to survive even the minimum level of scrutiny, the State's justifications for discriminating against Appellants must be strong, and this Court must carefully analyze the validity of and factual basis for the various assumptions underlying the State's arguments.

b. This Court Requires a Real Connection between the State's Justifications and Its Discriminatory Classifications

Even if the State identifies a legitimate purpose, it must also establish that the link, or relationship, between its goal and its discriminatory classification is *reasonable.* This Court has not hesitated to strike down classifications which were not truly reasonably related to the State's purposes. In the *Ludlow Supermarkets* case, for example, this Court insisted that the link between the stated legislative purpose and the law in question must be scrutinized carefully: "[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."[106] The Court emphasized the primacy of "the test of common sense" in evaluating the relationship between a stated end and the means chosen to that end.[107]

106. State v. Ludlow Supermarkets, Inc., 141 Vt. 261, 266 (1982).

107. *Ludlow Supermarkets*, 141 Vt. at 266. *See also* Oxx v. Department of Taxes, 159 Vt. 371, 377 (1992) (acknowledging that a state tax provision generally served the State's end of matching the timing of the tax with the realization of income, but concluding

In short, a decision to apply the most basic level of review under the Common Benefits Clause is by no means tantamount to a decision to uphold the statute in question. In the present case, the State has drawn significant distinctions between families formed by same-gender couples and those formed by different gender couples. In order to justify its refusal to allow these couples equal access to the family protections that flow from civil marriage, the State must demonstrate two things: first, it must show a *valid public purpose* sufficiently weighty to justify the State's exclusion of an unpopular group from an extremely important personal choice and human right; second, it must demonstrate that its exclusion of families formed by same-gender couples from the protections, supports and obligations of civil marriage is *reasonably related* to that purpose.

Appellants respectfully urge that, as in the *MacCallum* and *Brigham* cases,[108] this Court need not even reach the question of heightened scrutiny because the State cannot even show that its discrimination is (1) reasonably related to the promotion of (2) a valid public purpose.[109] Given the fact that the State cannot overcome even the minimum level of scrutiny, *a fortiori* the State's classifications cannot survive heightened scrutiny.[110]

III. The State's Exclusion of Appellants from Civil Marriage is Not Reasonably Related to a Valid Public Purpose[111]

Even applying the minimum level of scrutiny, the State's justifications for denying Appellants the important right to marry their

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that when applied to a federal recapture where the taxpayer had not derived any state income tax benefit, the law lost its reasonable relation to its purpose).

108. *See supra* notes 102–05 and accompanying text.

109. *See infra* Section III.

110. For the reasons set forth below, Appellants submit that under existing legal standards the justifications articulated by the State, on their face and as a matter of logic and common sense, do not satisfy even the minimum level of scrutiny, let alone the more stringent review applicable in this case. Even if this Court concluded that the State could *articulate* a rationale satisfying the applicable standard, which Appellants submit the State has not done and cannot do, the State would not be entitled to dismissal on the pleadings based on the bare record; rather, the State would have the obligation to then establish the facts, if any, upon which such rationale is predicated.

111. For the purposes of this constitutional analysis, Appellants assume, *arguendo*, that Vermont's marriage laws prohibit same-gender couples from marrying.

chosen partners on the basis of questionable classifications like sex and sexual orientation must be strong and closely linked to its discrimination. The trial court correctly concluded that nearly all of the State's claimed justifications were invalid, "difficult to grasp," or "without common sense or logical basis," but erred in concluding that one of the State's proffered rationales does survive minimum scrutiny under the Common Benefits Clause.[112]

In evaluating the State's various rationales, this Court should bear in mind that the Common Benefits Clause of the Vermont Constitution specifically protects "families," as well as individuals, from statutory classifications that are not reasonably related to a valid public purpose.[113] Thus, the Vermont Constitution expressly requires Vermont to share "the fruits of the common enterprise" with diverse families, and this Court should be particularly wary of rationales premised on a bald preference for certain families absent sufficient justification.

For the reasons set forth below, none of the State's claimed justifications for denying the protections, supports and obligations of civil marriage to Nina and Stacy, Holly and Lois, and Stan and Peter and their families can survive even the most deferential Common Benefits Clause analysis.[114]

A. The Superior Court Erred in Concluding That the State's Interest in Promoting the Connection between Procreation and Child-Rearing Justifies Its Discrimination

Of all the reasons proffered by the State in support of its discriminatory marriage laws, the only one the trial court concluded satisfied even the minimum level of review (which the trial court mistakenly described as "highly deferential") was the State's asserted interest in furthering the link between procreation and child rearing.[115]

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112. *See* PC, *supra* note 5, at 267–70.

113. *See* VT. CONST., ch. I, art. 7 (1786) ("government is . . . instituted for the common benefit . . . of the people, . . . and not for . . . any single person, *family*, or set of persons . . .") (emphasis added).

114. Many of the arguments set forth in response to a specific rationale proffered by the State apply with equal force to most if not all of the State's claimed justifications and are hereby incorporated into each of Appellants' responses.

115. *See* PC, *supra* note 5, at 267, 270.

Even if the State could identify a genuinely valid purpose under the "procreation" umbrella, there is no reasonable connection between any of the State's conceivable purposes and its discrimination against Appellants.[116] Moreover, it is difficult to discern precisely what the court, or the State, means. If the legitimate purpose underlying the marriage laws is to ensure a link between procreation and *marriage*, the State's purpose is not valid, and its discrimination does not reasonably relate to its purpose.[117] If the State truly seeks to promote responsible parenting, two parent families, and maximum support for children, Appellants respectfully submit that the State's discrimination does not bear a reasonable relationship to—and, indeed, undermines—that purpose.[118] If the State's goal is to ensure a biological connection between parents and their children, such a purpose flies in the face of the legislature's own actions and is not reasonably related to the State's discrimination.[119] If the State's unspoken assumption is that children are better off being raised by a father and a mother, the State's assumption is contrary to the virtual consensus among mainstream mental health professionals.[120]

1. There is No Logical Link between the State's Discrimination and Any of Its Arguable Purposes Relating to Procreation

At the outset, it must be emphasized that even if the State could articulate a valid public purpose relating to procreation, the State would not be able to satisfy the second requirement of the Common Benefits Clause analysis: demonstrating a reasonable relationship between the State's purpose and its discrimination against same-gender couples. To say that different sex marriage is in harmony with the State's purported purpose is not enough; rather, the State must further demonstrate that the *exclusion* of same-gender couples from marriage promotes the State's purpose. The State cannot establish such a link. There is simply no basis for the implicit assumption that marriage is a

116. *See infra* Section III.A.1.
117. *See infra* Section III.A.2.
118. *See infra* Section III.A.3.
119. *See infra* Section III.A.4.
120. *See infra* Section III.A.5.

zero-sum game such that allowing same-gender couples to marry will somehow harm different sex marriages or result in a decrease in the number of such marriages, particularly those involving procreation or parenting; nor can the State logically explain how the exclusion of same-gender couples from the protections of civil marriage helps different sex marriages or results in more such marriages involving procreation and parenting. Absent any reasonable relationship to the State's discrimination, any conceivable formulation of the State's "procreation" explanation fails. Moreover, as set forth below, "procreation" cannot constitute a truly valid public purpose.

2. Married Couples Do Not Necessarily Procreate, and Parents Do Not Necessarily Marry

To the extent that the Superior Court and Appellees are suggesting that same-sex couples should not marry because they do not procreate genetically from their union, that fact is neither a legitimate basis for, nor reasonably related to, the State's discrimination. In particular, the State's rationale distorts the connection between marriage and procreation.

Vermont certainly does not require that married couples be able to procreate, or even that they be interested in procreating or otherwise having and raising children. In fact, the United States Supreme Court has insisted that married couples have a constitutional right *not* to procreate if they do not wish to have children,[121] and has held that the ability to "consummate" a marriage through sexual intercourse is not essential to the fundamental right to marry.[122]

Vermont allows infertile couples,[123] couples beyond child-bearing age, couples who do not want to have children, couples who adopt

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

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

123. The trial court mistakenly relies on outdated Vermont caselaw to suggest that the ability to procreate is essential to marriage in Vermont. *See* PC, *supra* note 5, at 263. First of all, "physical incapacity" renders a marriage in Vermont voidable, not void. *See* VT. STAT. ANN. tit. 15, §§ 512, 515 (1989). Only one of the parties to a marriage, and not the State, may seek to nullify such a marriage. Second, the caselaw cited by the trial court, and the laws those cases interpret, provide that *physical incapacity,* not *inability to procreate,* renders a marriage voidable. *See* VT. STAT. ANN. tit. 15, §§ 512, 515 (1989). The "physical incapacity" statutes protect a partner's

rather than conceive their own child, and couples who utilize reproductive technologies to marry, as long as they are different sex couples.[124] In fact, even if it wished to do so, the State could not constitutionally prohibit any such marriages.

Nor does Vermont prohibit unmarried couples from conceiving and raising children together. Many parents, including same-gender couples who cannot marry, are raising children in a committed family structure outside of the context of a legal marriage, and will continue to do so regardless of whether they can marry. For example, Nina and Stacy conceived a child through donor insemination,[125] and Holly and Lois are raising an adopted teenage daughter. Estimates of the number of children who are being raised in gay or lesbian families in the United States range from six million to fourteen million.[126]

Finally, any attempt to control parenting matters through the marriage laws penalizes classes of people who are in no way relevant to the State's stated rationale—namely, same-gender couples who do not wish to have children, and children of same-sex parents who are denied protections by laws which forbid their parents from marrying.

3. Discriminatory Marriage Laws *Undermine* the State's Interest in Protecting Children

Although the State purports to have an abiding interest in children, precluding same-gender couples from providing their children with the protections that flow from legal marriage certainly does not serve the well-being of those children. Nina and Stacy sought to marry in part to provide their son with the security that flows from having legally married parents. The children of parents like Nina and Stacy would benefit as much as the children of different gender parents from

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expectation of physical intimacy, not necessarily procreation. *See, e.g.*, 1 MASSACHUSETTS PRACTICE: FAMILY LAW AND PRACTICE § 352 n.1 (1990).

124. Not surprisingly, the United States Census Bureau has confirmed that many married couples do not have children. *See* SAM ROBERTS, WHO ARE WE: A PORTRAIT OF AMERICA BASED ON THE LATEST U.S. CENSUS (1993)(in 1990, 26.3% of households consisted of married couples with children, while 29.8% of households consisted of married couples without children).

125. Nina gave birth to their son, Noah, and Stacy adopted him as a second parent in June of 1996.

126. *See* Charlotte Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025, 1026 (1992).

the stability that may flow from having two married parents. Discriminatory marriage laws make no sense unless the State prefers that children of same-gender parents *not* enjoy the same measure of security enjoyed by children of married, different gender parents. Providing the children of same-gender parents with the protections that would flow from their parents' marriages can only help those children. The State's discriminatory marriage laws actually *undermine* the State's claimed goal of promoting responsible parenting and two parent families.

4. The State's Emphasis on Biological Parenting Is Misplaced

If the State's underlying, true goal is to promote responsible parenting, two parent families, and maximum support for children, its emphasis on *biological procreation* is invalid, inconsistent with the legislature's own actions, and not reasonably related to the State's goals.

There is no logic to the State's implicit suggestion that the well-considered decisions of many conscientious committed couples, whether gay or non-gay, to adopt children or conceive children with the assistance of reproductive technologies are in some way responsible for the growth of single parent families and widespread social abdication of parental responsibility.[127]

The Vermont legislature certainly has never enacted any laws prohibiting adoption or the use of reproductive technologies in order to preserve "the link between procreation and child-rearing." In fact, in 1993, this Court expressly authorized second parent adoption by the same-sex partner of a child conceived through donor sperm.[128] The legislature had an opportunity to and did reconsider this Court's decision when it recodified the State's adoption laws in 1996. The

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127. *See* State's Motion, *supra* note 39, at 55; PC, *supra* note 5, at 61. For an account of the history of such stigmatization of infertile couples in our society, see ELAINE TYLER MAY, BARREN IN THE PROMISED LAND: CHILDLESS AMERICANS AND THE PURSUIT OF HAPPINESS (1995). For same-gender couples, as for different gender couples who have difficulty conceiving a child without medical intervention, the decision to have a child—whether through adoption or technology—is, by necessity, "a carefully orchestrated undertaking, with focused attention to the personal, social, psychological, ethical and practical considerations." Cheri Pies, *Lesbians and the Choice to Parent*, 14 MARRIAGE AND FAM. REV., nos. 3/4, 1989, at 137, 139. As a consequence, children born to such parents, or adopted by such parents, are among the most wanted children in the world.

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

legislature not only left the *B.L.V.B.* decision in place, it actually *codified* the Court's holding, expressly allowing for stepparent adoption by a parent's unmarried partner, without any limitations with respect to the sex of the parents.[129]

If the legislature had any misgivings about lesbian couples raising children conceived with donor sperm, terminating the legal relationship between the donor and the child, that would have been the time and place for the legislature to express its qualms. The legislature did not do so. Instead, it took steps to help secure the legal relationships between non-biological lesbian and gay parents and their children. In light of that fact, any suggestion that the legislature intended to somehow preserve a biological link between both parents and their children by preventing same-gender couples from marrying, regardless of whether they intend to raise children, simply makes no sense.

Furthermore, the relationship between this asserted goal and the State's refusal to allow same-gender couples to marry is not reasonable. Same-gender couples are not the only people who cannot conceive children together. In fact, one in eight married couples in the United States suffers from infertility, and many of those couples adopt children or turn to physicians for help in forming families through reproductive technologies.[130] The vast majority of couples seeking to adopt children, or to conceive through reproductive technologies, are married, different sex couples.[131] If the State truly wanted to discourage non-biological parenting, it would prohibit adoption and the use of reproductive technologies for same-gender *and* different-gender couples. It has done neither. This Court should not accept as underpinning for a law any such purpose that is demonstrated to be a "sham or deceit."[132]

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129. *See* VT. STAT. ANN., tit. 15A, § 1-102(b) (Supp. 1998).

130. *See* John A. Robertson, *Assisted Reproductive Technology and the Family*, 47 HASTINGS L.J. 911 (1996); Felicia R. Lee, *Infertile Couples Forge Ties Within Society of Their Own*, N.Y. TIMES, Jan. 9, 1996, at A1; NATIONAL CENTER FOR HEALTH STAT., U.S. DEP'T OF HEALTH AND HUMAN SERVICES, PUB. NO. 87-1990, FECUNDITY, INFERTILITY, AND REPRODUCTIVE HEALTH IN THE UNITED STATES 1 (1982) (finding that 34% of American married couples, excluding those who had been surgically sterilized, were infertile).

131. *See* MAY, *supra* note 127, at 242 (although sperm donor insemination procedures are now available to single women, "its most common use is among married couples").

132. State v. Ludlow Supermarkets, Inc., 141 Vt. 261, 266 (1982).

5. Social Science Research Belies the Assumption That Children Are Better Off in a Home with a Father and a Mother

As set forth above, there is no reasonable basis for precluding same-gender couples from marrying on the ground that the State wishes to promote procreation, responsible parenting, or child-rearing by biological parents, and there is no connection between the State's discrimination and the above goals. Moreover, the unspoken but implicit assumption that children are better off when raised by a father and a mother as opposed to two fathers or two mothers is unsupported by contemporary social science research.

Numerous researchers in the past two decades have studied the psychological health, social adjustment, peer relationships, self-esteem, moral development, personal development, gender-role behavior, and sexual orientation of children raised in lesbian and gay households. Summarizing these studies, the American Psychological Association has concluded:

> Not a single study has found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents. Indeed, the evidence to date suggests that home environments provided by gay and lesbian parents are as likely as those provided by heterosexual parents to support and enable children's psychosocial growth.[133]

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133. LESBIAN AND GAY PARENTING: A RESOURCE FOR PSYCHOLOGISTS 8 (American Psychol. Ass'n, 1995). To review every pertinent study regarding the children of gay and lesbian parents would require an entire brief. For examples of recent studies of children raised from birth by lesbian couples, see A. Brewaeys et al., *Donor Insemination: Child Development and Family Functioning in Lesbian Mother Families*, 12 HUM. REPROD. 1349 (1997) (finding development in lesbian mother families is similar to that of heterosexual families with regard to psychological, emotional, behavioral and gender role development); Raymond W. Chan et al., *Psychosocial Adjustment Among Children Conceived Via Donor Insemination by Lesbian and Heterosexual Mothers*, 69 CHILD DEV. 443 (Apr. 1998) ("Our results are consistent with the general hypothesis that children's well-being is more a function of parenting and relationship processes within the family . . . than it is a function of household composition or demographic factors."); David K. Flaks et al., *Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and Their Children*, 31 DEVELOPMENTAL PSYCHOL. 105, 109 (1995) (finding remarkable similarity between group of children

If the State is implying that children raised by two parents of the same sex experience difficulties regarding issues of gender,[134] researchers have debunked the myth that children raised by gay or lesbian parents have unhealthy or even atypical gender identities or sexual orientations.[135]

These findings are not surprising, as studies have consistently confirmed that the parenting skills of gay and lesbian parents are essentially the same as those of their heterosexual counterparts, and that the "home environments of lesbian and gay persons [are] as moral and as physically and psychologically healthy as those of non-gays."[136]

As a New York court recognized in authorizing a stepparent adoption by the same-sex partner of a child's natural parent, the security and love in a child's home, not the genders of the child's parents, are what matters:

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raised from birth by lesbian couples and matched group of children raised by heterosexual parents with respect to behavioral adjustment); Charlotte J. Patterson, *Children of the Lesbian Baby Boom: Behavioral Adjustment, Self-Concept, and Sex Role Identity, in* LESBIAN AND GAY PSYCHOL. 156 (Beverly Greene & Gregory M. Herek eds., 1994) (administering standard psychological tests to parents and children in lesbian-headed families and finding that the children's social competence and behavior matched accepted norms for the general population).

On the basis of such studies a Hawaii trial court rejected the very argument now proffered by the Attorney General: "[The State of Hawaii] has failed to present sufficient credible evidence which demonstrates that the public interest in the well-being of children and families, or the optimal development of children would be adversely affected by same-sex marriage." *Baehr v. Miike*, CIV. No. 91-1394, 1996 WL 694235, (Haw. Cir. Ct. Dec. 3, 1996).

134. *See* State's Motion, *supra* note 39, at 54; PC, *supra* note 5, at 60. Appellants note that the legislature has affirmatively determined that a parent's gender is not even a *factor* bearing on a child's best interests. *See* VT. STAT. ANN. tit. 15, § 665(c) (1989); *see also infra* Section III.C.1.

135. A thorough 1996 literature review of four studies concerning the gender identity, eight studies concerning the gender-role behavior, and thirteen studies concerning the sexual orientation of children of gay and lesbian parents concluded that:

> Although studies have assessed over 300 offspring of lesbian or gay parents in many different samples, no evidence has been found for disturbances in the development of sexual identity among these individuals. Fears about difficulties with sexual identity among children of gay and lesbian parents have not been supported by the results of empirical research.

Charlotte J. Patterson & Richard E. Redding, *Lesbian and Gay Families with Children: Implications of Social Science Research for Policy*, 52 J. OF SOC. ISSUES, Fall 1996, at 29, 41.

136. G. Dorsey Green & Frederick W. Bozett, *Lesbian Mothers and Gay Fathers, in* HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY 197, 211 (John C. Gonsiorek & James D. Weinrich eds., 1991).

> Today a child who receives proper nutrition, adequate schooling and supportive sustaining shelter is among the fortunate, whatever the source. A child who also receives the love and nurture of even a single parent can be counted among the blessed. Here this Court finds a child who has all of the above benefits and *two* adults dedicated to his welfare, secure in their loving partnership, and determined to raise him to the very best of their considerable abilities. There is no reason in law, logic or social philosophy to obstruct such a favorable situation.[137]

B. The Superior Court Correctly Rejected the State's Claimed Interest in Discouraging Technologically Assisted Conception As a Justification for Its Discrimination

As the trial court concluded in this case, "[T]he State's argument that the exclusion of same-sex couples from marriage is rationally related to minimizing the use of modern fertility treatments in order to avoid increased child custody and visitation disputes is without any common sense or logical basis."[138]

The State's claimed goal of discouraging parents from raising children to whom they are not biologically linked fails for all of the reasons set forth above,[139] and the trial court correctly rejected the claimed link between the use of reproductive technology and litigation as illogical.[140]

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137. *In re* Evan, 583 N.Y.S.2d 997, 1002 (Sur. Ct. 1992), *aff'd*, 86 N.Y.2d 651 (1995) (emphasis added).

138. PC, *supra* note 5, at 269.

139. *See supra* Section III.A.

140. *See supra* Section III.A. Moreover, the State's heavy focus on "surrogacy arrangements" is misplaced, given that most such arrangements, like all of the surrogacy cases cited by the State, involve heterosexual couples. *See* State's Motion, *supra* note 39, at 64 n.32; PC, *supra* note 5, at 70.

C. The Superior Court Correctly Concluded That the State's Claimed Interest in Promoting Child-Rearing in a Setting with Male and Female Role Models Is Invalid

The State asserted below that children raised by a male and female parent have the distinct advantage of seeing and experiencing "the innate and unique abilities and characteristics that each sex possesses and contributes to their combined endeavor."[141] The trial court rightly rejected that argument, noting that it was premised on improper presumptions about the roles of men and women.[142]

1. The Legislature Has Rejected the Claim That the Interests of Children Depend on their Parents' Genders

The Vermont legislature has affirmatively acted to codify this Court's decision in *B.L.V.B.* to protect the legal relationship between two same-gender parents and their children,[143] and has denounced broad generalizations about the effects on children of living with an adult of the same or different sex.[144] In the face of this clear expression of legislative policy, the State cannot infer a legislative intent to penalize families formed by two parents of the same sex.

2. The State's Goal Does Not Reasonably Relate to Its Discriminatory Laws

Even if the State could credibly claim a legislative policy favoring parenting by different sex parents, and even if such a policy were constitutionally valid, the State cannot show any reasonable relationship

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141. State's Motion, *supra* note 39, at 54; PC, *supra* note 5, at 60.

142. *See* PC, *supra* note 5, at 268. For a discussion of improper gender role stereotyping, see *infra* Section III.D. For a discussion of the psychological research about children raised by two parents of the same sex, see *supra* Section III.A.5.

143. *See supra* Section III.A.4.

144. *See* VT. STAT. ANN. tit. 15, § 665(c) (1989) (courts should *not* consider the sex of the child or the sex of the proposed custodial parent in determining the best interests of the child); Hubbell v. Hubbell, 8 VT. L. WK. 249 (Sept. 19, 1997) (reversing custody order improperly premised on consideration of parent's and child's gender).

between its discriminatory marriage laws and that goal. As noted above, allowing same-gender couples to marry, will not reduce the number of different gender couples who marry nor the number of different gender couples who have children. The State's discrimination against same-gender couples, accordingly, does not reasonably relate to its claimed purpose.

Moreover, dozens, if not hundreds, of same-gender couples in this State are currently raising children together. Allowing these couples to marry would not decrease their children's access to role models of both genders, and prohibiting a child's same-gender parents from marrying one another does not increase that child's access to role models of both genders. In fact, declining to allow a child's same-sex parents to marry only burdens rather than benefits that child.

D. The Superior Court Correctly Rejected the State's Claimed Goal of Bridging Gaps between Women and Men

The trial court rightly concluded that the State's proclaimed interest in uniting men and women to "bridge their differences" is invalid insofar as it is "clearly premised upon improper presumptions about the roles of men and women."[145] Moreover, even if the State's goal were valid, the State's exclusion of families headed by same-sex couples from civil marriage is not reasonably related to its goal. In short, ending discrimination against same-gender couples would take nothing away from different sex marriages or the values on which they are premised.

1. The State's Purpose Is Not Valid Because It Is Premised on Improper Presumptions about the Roles of Women and Men

The State has attempted to justify its discrimination by conclusorily asserting that men and women (apparently without exception) bring different (albeit unidentified) qualities to the institution of

145. PC, *supra* note 5, at 268.

marriage.[146] Few things are more clearly intolerable under both the Vermont and federal Constitutions than broad-brush generalizations about the differing qualities or characteristics of the sexes codified into law.

As United States Supreme Court Justice Ginsberg has recently noted, "State actors controlling gates to opportunity . . . may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.' "[147] The Court recoiled at a state classification based on "overbroad generalizations about the different talents, capacities, or preferences of males and females."[148] Such generalizations about the "essential natures" and characteristics of men and women have, in the past, been invoked to justify the exclusion of women from a wide variety of vocations, ranging from the practice of law and medicine to careers in policing.[149] As Justice Ginsburg explained, " 'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex *or for artificial constraints on an individual's opportunity.*"[150]

Notwithstanding this clear constitutional mandate—one which Appellants submit this Court should embrace in applying Vermont's Constitution—and notwithstanding the Vermont legislature's conscientious efforts through recent decades to eliminate state-sponsored discrimination between the sexes,[151] the State has now asserted in this case that men and women are essentially different. The State contends that these differences, which are not simply physical, but also psychological and cultural, create a chasm that must be bridged by civil marriage.[152] (Perhaps wisely, Appellees have not ventured to delineate

146. *See* State's Motion, *supra* note 39, at 53; PC, *supra* note 5, at 59.

147. United States v. Virginia ("VMI"), 116 S. Ct. 2264, 2280 (1996) (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982)) (invalidating Virginia Military Institute's men-only policy).

148. VMI, 116 S. Ct. at 2275.

149. *See* VMI, 116 S. Ct. at 2280–81.

150. VMI, 116 S. Ct. at 2276 (emphasis added).

151. *See, e.g.,* VT. CONST., Ch. II, § 76 (amending constitution to substitute gender-neutral terms).

152. The State's reference to supposed inherent differences between the sexes to justify marriage laws prohibiting intra-sex marriage hearkens back to a prior era's reliance on claimed inherent differences between the races to justify laws prohibiting interracial marriage: "The color line is evidence of an attempt, based on instinctive choice, to preserve those distinctive values which a racial group has come to regard as of the

what those differences might be, and which qualities and contributions men bring to marriage, and which women bring.) Such a purpose, premised on undefined, antiquated generalizations about the essential natures of the respective sexes, cannot be valid.[153]

2. The State's Discrimination Is Not Reasonably Related to the State's Claimed Goal of Uniting Men and Women

Once again, the State's claimed goal, even if it were valid, is logically disconnected from its discrimination. To say that different sex marriage is in harmony with the State's purpose does not in and of itself answer the constitutional question; rather, the State must explain how its exclusion of same-gender couples from the myriad protections of marriage reasonably promotes its goal of encouraging heterosexual marriages. The State cannot do so. Appellants' marriages would take nothing away from different sex marriages, but would simply provide for their own families the same legal protections and obligations enjoyed by other families in the State of Vermont.

3. The State's Discrimination Does Not Reasonably Relate to the Goal of Bridging Differences and Working Together

To the extent that the State truly wants to help people "bridge differences" and work together, the exclusion of Appellants from marriage

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highest moment to itself." Perez v. Lippold, 198 P.2d 17, 44 (Cal. 1948) (Shenk, J., dissenting) (arguing in favor of preservation of ban on interracial marriage).

153. This argument also reflects the sex discrimination built into the State's prescription of the genders of marital partners, and demonstrates that the State's sex-based restriction on marital choice reinforces sexism and furthers sex discrimination. *See infra* Section IV.A.

Moreover, the State has singled out one axis of differences—presumed gender differences—and designated it as the paramount divide in our society. If, as the State argues, its goal is to "bridge differences" between people and encourage "working together," State's Motion, *supra* note 39, at 53; PC, *supra* note 5, at 59, why not authorize marriages only between rich and poor, or only between persons of different races? The State cannot merely rely on claimed differences between men and women to justify its discrimination; it must explain why those differences are constitutionally material.

does not reasonably relate to that interest. Ending discrimination against same-gender couples will not sway—let alone burn—any bridges between men and women. To the contrary, marriage is another way to strengthen the bridges lesbian and gay Vermonters build with each other to the detriment of no one.

Like their non-gay counterparts, lesbian and gay Vermonters contribute to Vermont's businesses, civic organizations, schools and religious groups.[154] Moreover, lesbian and gay Vermonters frequently form relationships, with and without children, comparable in every way to their non-gay neighbors.[155]

Individuals in such same-gender couples, like their different sex counterparts, often celebrate and bridge a variety of deeply ingrained differences between self and other—differences in outlook, taste, values, class, race, education, religion and background, to name but a few. If the institution of marriage serves an important unitive purpose, benefitting not just those who marry, but society as a whole, then certainly individuals and society are best served by recognition of long-term committed partnerships—and legal support of "bridges"—regardless of the sex or sexual orientation of the individual partners.

E. The Superior Court Rightly Rejected the State's Assertion That Allowing Appellants to Marry Will Fundamentally Change and Destabilize the Institution of Marriage

The trial court correctly concluded that "the State's interest in preserving the institution of marriage for no other reason than to preserve a time honored institution is invalid."[156] As the trial court explained, "A bare desire to preserve tradition and resist change is not a valid public purpose."[157]

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154. *See* ESKRIDGE, SAME-SEX MARRIAGE, *supra* note 49, at 8.

155. *See* Lawrence A. Kurdek, *Relationship Outcomes and Their Predictors: Longitudinal Evidence from Heterosexual Married, Gay Cohabiting, and Lesbian Cohabiting Couples*, 60 J. MARRIAGE & FAM. 253 (1998) (finding that gay, lesbian, and heterosexual married couples enjoyed similar levels of love and relationship satisfaction, and similar rate of change in relationship quality over five-year study period).

156. PC, *supra* note 5, at 268.

157. PC, *supra* note 5, at 268.

1. Avoiding Change, Per Se, Is Not a Valid Purpose

The State makes the circular argument that the protections and obligations of civil marriage should be limited to heterosexual marriage *because they always have been so limited.* While a history of discrimination against same-gender couples may *explain* the exclusionary nature of the marriage laws, it does not *justify* such exclusion. Otherwise the State could always argue that the status quo is, by definition, constitutionally permissible. The State may not simply assert and rely upon a purported tradition of discrimination; rather, it must explain *how* adhering to the perceived tradition benefits the public. As United States Supreme Court Justice Holmes wrote, more than 100 years ago:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[158]

Constitutional requirements of equality, by design, often mandate a *departure* from tradition rather than an adherence thereto. As one commentator has explained, with reference to the federal constitution:

> The Equal Protection Clause . . . has been understood as an attempt to protect disadvantaged groups from discriminatory practices, *however deeply ingrained and longstanding.* . . . [T]he Equal Protection Clause looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure.[159]

For these reasons, the State cannot merely assert a tradition of man-woman marriage in defense of its marriage laws: it must justify continuation of that tradition.

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158. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

159. 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) (emphasis added); *see also* MacCallum v. Seymour's Adm'r, 165 Vt. 452, 460 (1996) ("Equal treatment issues are often exacerbated by the passage of time.").

Spurred by evolving notions of justice, our society's concept of what constitutes a "marriage" has changed in many respects since the nation's inception. For instance, when the Fourteenth Amendment was passed by Congress in 1868, most states prohibited marriages between persons of different races.[160] For many years thereafter, the courts upheld race based restrictions in marriage. In 1948, when California became the first state to invalidate state law prohibitions of interracial marriage,[161] thirty of the forty-eight states still prohibited interracial marriage.[162]

Despite this overwhelming tradition of race discrimination in marriage, Vermont, at every stage of its history, allowed interracial marriage. Moreover, as society's understanding of equality evolved, courts in other states recognized that the longstanding practice of prohibiting interracial marriage was odious, and in 1967 the United States Supreme Court outlawed such prohibitions altogether.[163] The Court in *Loving v. Virginia* refused to embrace the view that interracial marriages could be prohibited because they were inconsistent with the common understanding of marriage,[164] and denounced the state's discriminatory marriage laws as "odious to a free people whose institutions are founded upon the doctrine of equality."[165] Recognizing that marriage is a "basic civil right," which is "fundamental to our very existence," the Court concluded, "[t]he Fourteenth Amendment requires that . . . the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."[166]

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160. *See* Edward G. Spitko, *Notes: A Critique of Justice Antonin Scalia's Approach to Fundamental Rights Adjudication*, 1990 DUKE L.J. 1337, 1357 & n.109.

161. *See* Perez v. Lippold, 198 P.2d 17, 29 (Cal. 1948). At the time *Perez* was decided, and for many years thereafter, the concept of interracial marriage was genuinely horrifying—and antithetical to the very definition of marriage—to many people. *See* Eric Zorn, *Marriage Issue Just as Plain as Black and White*, CHI. TRIB., May 19, 1996, § 4, at 1 (noting similarity of arguments against interracial marriage by state legislators from 1823 to 1964 to contemporary arguments against marriages of same-sex couples).

162. *See Perez*, 198 P.2d at 38 (Shenk, J., dissenting). *See generally*, James Trosino, Note, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93 (1993).

163. *See* Loving v. Virginia, 388 U.S. 1 (1967).

164. *Loving*, 388 U.S. at 10.

165. *Loving*, 388 U.S. at 11 (citations omitted).

166. *Loving*, 388 U.S. at 12. The recognition of interracial marriage is by no means the only historical change in American family patterns. "Over the past 300 years, American families have undergone a series of far-reaching revolutions that profoundly

Just as our nation has come to condemn discrimination based on race, so too does it increasingly condemn discrimination based on sex and sexual orientation. In *Baehr v. Lewin*,[167] the Hawaii Supreme Court recognized that this evolution is ongoing, and applied its state equal protection principles and *Loving* to reject the State of Hawaii's attempts to maintain sex discrimination within marriage:

> Analogously to [the State's] argument . . . the Virginia courts declared that interracial marriage simply could not exist because the Deity had deemed such a union intrinsically unnatural, 388 U.S. at 3, 87 S.Ct. at 1819, and, in effect, because it had theretofore never been the "custom" of the state to recognize mixed marriages, marriage "always" having been construed to presuppose a different configuration. With all due respect to the Virginia courts of a bygone era, we do not believe that trial judges are the ultimate authorities on the subject of Divine Will, and, as *Loving* amply demonstrates, constitutional law may mandate, like it or not, that customs change with an evolving social order.[168]

In short, as the trial court recognized, a bare desire to resist change, in and of itself, is not a "valid public purpose."[169]

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altered their family life . . . ." MINTZ & KELLOGG, *supra* note 48, at xiv. "Despite nearly four centuries of fears that the family is decaying the institution has, of course, survived." MINTZ & KELLOGG, *supra* note 48, at xx.

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

168. *Baehr*, 852 P.2d at 63.

169. Nor is there any basis for the State's suggestion that legally recognizing Appellants' deep and abiding mutual commitments would somehow destabilize the institution of marriage. *See* State's Motion, *supra* note 39, at 56; PC, *supra* note 5, at 62.

Allowing same-gender couples to legally marry will not cause any heterosexual couples to dissolve their marriages, but will only increase the number of Vermonters in legally recognized, committed unions. United States Supreme Court Justice Ginsberg has debunked the suggestion that more inclusive policies somehow damage, rather than strengthen, longstanding institutions:

> A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded. . . . There is no reason to believe that the admission of women capable of all the activities required of [Virginia Military Institute] cadets would destroy the Institute rather than enhance its capacity to serve the "more perfect Union."

United States v. Virginia ("VMI"), 116 S. Ct. 2264, 2287 (1996) (citation omitted).

2. The "Change" Appellants Urge Is Not Unique to Vermont or the United States

Legal recognition of same-sex relationships is developing concurrently around the world. The Netherlands, Denmark, Greenland, Finland, Iceland, Norway and Sweden offer same-sex couples all of the rights of legal marriage except for certain protections relating to children and church weddings.[170] Moreover, in 1996, pursuant to a mandate of the constitutional court, Hungary legalized common law marriage between partners of the same sex.[171] In short, legal recognition of marriages between same-gender partners would not be as unprecedented as Appellees suggest.

F. The Superior Court Correctly Rejected the State's Supposed Normative Statement As Justification for Its Discrimination

The State claimed below that the legislature has excluded families formed by same-gender couples from civil marriage and its concomitant protections and obligations in order to make a "normative statement" or to reflect a "value judgment."[172] As the trial court aptly noted in rejecting that argument, the State has neglected to explain exactly what those normative statements and value judgments are.[173]

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170. *See* E.J. Graff, *The Inevitability of Same Sex Marriage*, BOSTON GLOBE, Feb. 12, 1998, at A27.

Vermont already allows a person to adopt his or her same-gender partner's children, and religious and civil marriages are distinct in Vermont, so the few limitations that these countries do place on full marriage rights for same-gender couples are inapposite.

171. *See* Graff, *supra* note 170, at A27. Moreover, recently published historical materials demonstrate that marriages, or marriage-like relationships, have been recognized and supported between people of the same gender throughout human history. *See also* ESKRIDGE, SAME-SEX MARRIAGE, *supra* note 49, ch. 2.; William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993).

172. State's Motion, *supra* note 39, at 59; PC, *supra* note 5, at 65.

173. *See* PC, *supra* note 5, at 268.

1. The Claimed "Normative Statement" Reflects Illegitimate Community Prejudice

This Court has insisted that acquiescing to and reflecting a community prejudice is not a valid public purpose. In fact, in *MacCallum* this Court declared: "The Constitution cannot control [private] prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[174] The United States Supreme Court has similarly held that mere animus toward a class of people—in fact, toward gays and lesbians—does not give rise to a legitimate public purpose.[175] In the *Romer* case the Court considered a Colorado constitutional amendment which barred the enactment of state or local antidiscrimination laws prohibiting discrimination on the basis of sexual orientation. Unpersuaded by the ostensibly legitimate interests in the amendment claimed by the State of Colorado, the Court remarked on "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."[176] The Court responded: "[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 cannot constitute a *legitimate* governmental interest."[177] Applying that principle to the case before it, the Court concluded that the amendment made gay and lesbian people "unequal to everyone else" and prohibited the State of Colorado from "so deem[ing] a class of persons a stranger to its laws."[178]

Like the statutory classification in *Romer*, the State's prohibition of marriages between partners of the same gender places a huge array of legal protections beyond the reach of gay and lesbian Vermonters and their families. The State cannot and does not justify the disabilities with reference to some broad, collective community purpose but,

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174. *See* MacCallum v. Seymour's Adm'r, 165 Vt. 452, 459 (1996) (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984)).

175. *See* Romer v. Evans, 116 S. Ct. 1620, 1629 (1996).

176. *Romer*, 116 S. Ct. at 1628.

177. *Romer*, 116 S. Ct. at 1628 (quoting Department of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

178. *Romer*, 116 S. Ct. at 1629.

rather, essentially relies on community prejudice against gays and lesbians and their families in support of its discrimination.[179]

The State would, no doubt, deny that its claimed "normative statement" is merely an expression of community prejudice. However, one need merely review but a few sentences from the Virginia trial court's decision banishing the interracial couple of Richard and Mildred Loving from the Commonwealth of Virginia for having the audacity to legally marry one another (in another jurisdiction) to appreciate the pitfalls of a state's imbuing its own perceived collective morality (or at least majoritarian view of morality) with the power and authority of the law:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.[180]

This Court should be wary of ever upholding drastic restrictions on individual liberty, or far-reaching discrimination against entire classes of individuals and families, solely on the basis of the State's asserted morality, absent any showing that the State's claimed normative vision in fact promotes the common good.[181] As the Pennsylvania Supreme Court has explained,

> Many issues that are considered to be matters of morals are subject to debate, and no sufficient state interest justifies legislation of norms simply because a particular belief is followed by a number of people, or even a majority. Indeed, what is considered to be "moral" changes with the times and is dependent upon societal background. Spiritual leadership,

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179. The State's reliance on the legislature's supposed disapproval of gay and lesbian Vermonters is also difficult to square with the legislature's efforts to eradicate private discrimination against gay and lesbian Vermonters and their families. *See supra* note 63.

180. Loving v. Virginia, 388 U.S. 1, 3 (1967) (quoting from trial judge's ruling).

181. The State's "normative statement" rationale may prove far too much. If the State can prohibit a person from marrying the partner of his or her choice on the basis of sex or sexual orientation in order to make a "normative statement," then the State could presumably invoke similar value judgments to prohibit a wide range of marriages, including, for example, second marriages by divorced people.

> not the government, has the responsibility for striving to improve the morality of individuals.[182]

This State, too, should avoid legislating or enshrining in its constitutional jurisprudence a discriminatory brand of morality. It must also avoid discrimination premised on (unstated) baseless myths and stereotypes. Although it knows nothing about them personally, the State has concluded on the basis of their sex and sexual orientation that these Appellants, and other same-gender couples, are not worthy of the protections, supports and obligations of marriage. The Vermont Constitution does not allow the State to codify community prejudice in that way.

2. The Bare Desire to Promote One Part of the Community over Another Is Not a Valid State Purpose

Even if the State's admitted desire to favor heterosexual relationships and families, or to disfavor gay and lesbian relationships and families, could be described as something other than reflecting a community prejudice or animus, the State's goal would still be impermissible. This Court has clearly determined that the State's desire to benefit a particular class, or disadvantage a particular group, is not a valid public purpose:

> [T]his objective of favoring one part of the community over another is totally irreconcilable with the Vermont Constitution. It is the very kind of benefit prohibited as an improper purpose by Chapter I, Article 7. The purpose of the preferential legislation must be to further a goal independent of the preference awarded, sufficient to withstand constitutional scrutiny.[183]

In *Ludlow Supermarkets*, this Court struck down a law designed to benefit small businesses to the detriment of large businesses

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182. Commonwealth v. Bonadio, 415 A.2d 47, 50 (1980) (striking down state law prohibiting sex outside of marriage).

183. State v. Ludlow Supermarkets, Inc., 141 Vt. 261, 269 (1982).

notwithstanding the State's argument that small business enterprises were "essential and fundamental to the economy of the State."[184]

In this case, like the *Ludlow Supermarkets* case, the State's justification for its discriminatory laws reflects, on its face, a preference for one segment of the community over another, without any goal independent of the preference awarded. That is, the State prefers families formed by a (heterosexual) man and woman over families formed by two (gay) men or two (lesbian) women, and thus deliberately seeks to advantage the first group and disadvantage the latter two. Such a bare desire to promote and protect families formed by heterosexual couples, or to hinder families formed by gay and lesbian Vermonters, cannot justify the immense disability the State has imposed on the Appellants.

3. The State's Goal Is Not Reasonably Related to Its Chosen Means

As the trial court pointed out, the State has not even attempted to explain the moral vision it claims underlies the vast disparity in legal protections the State is willing to provide families formed by different gender versus same-gender couples. Accordingly, it is difficult to evaluate the connection between the goal and its chosen means even assuming, *arguendo*, the validity of the State's goal.

If the State's goal is to prevent or deter same-gender couples from forming families together because of the State's claimed normative preference for heterosexuality, it is difficult to see how withholding the protections and obligations of civil marriage will accomplish that goal. Nor is there any reason to believe that barring lesbian women and gay men from marrying the partner of their choice will drive them into different sex marriages, let alone happy or productive heterosexual unions.

G. The Superior Court Correctly Rejected the State's Claimed Interest in Ensuring Interstate Recognition of Its Marriages

The trial court rightly recognized that the State's claimed interest in "preserving marriage in a form recognized by all other states,"[185]

184. *Ludlow Supermarkets*, 141 Vt. at 269.

185. State's Motion, *supra* note 39, at 57; PC, *supra* note 5, at 63.

"doesn't appear to even approach a valid purpose."[186] As the trial court explained,

> The State of Vermont does not need the consent of all the other states to guarantee rights ensured by its own Constitution. Vermont has historically licensed marriages which were or are not uniformly licensed by other states.[187] Speculation about possible discrimination should not be used to justify discrimination against same-sex couples in Vermont now.[188]

If maintaining sex and sexual orientation discrimination could be justified by the supposed interest in protecting same-sex Vermont couples who would marry here from discrimination in other states, Vermont could not guarantee rights ensured by its own Constitution unless other states consented to its doing so. Accepting this speculative proposition would both reduce Vermont's constitutional guarantees to the lowest common denominator of acceptability among the states, and render Vermont an accomplice to the (hypothetical) prejudice of others.

IV. The State's Justifications Also Fail to Satisfy the Heightened Scrutiny Accorded to Laws Which Discriminate Based on Sex and Sexual Orientation and Which Burden the Fundamental Right to Marry

For the reasons set forth above, the State cannot demonstrate a valid public purpose which is reasonably related to the State's prohibiting Stacy and Nina, Stan and Peter, and Holly and Lois from marrying one another. *A fortiori*, the discriminatory marriage laws cannot survive the heightened scrutiny applicable to classifications

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186. PC, *supra* note 5, at 268.

187. For example, during the period of time in our history when the vast majority of states in this country forbade marriages between couples of different races, *see* Perez v. Lippold, 198 P.2d 17, 38 (Cal. 1948), Vermont was one of a minority of states which never imposed such a restriction on interracial couples. Similarly, Vermont permits first cousin marriages, *see* Vt. Stat. Ann. tit. 15, §§ 1–3 (1989), which many states prohibit. *See Developments in the Law: The Constitution and the Family*, 93 Harv. L. Rev. at 1264; *see also In re* B.L.V.B., 160 Vt. 368 (1993); Vt. Stat. Ann. tit. 15A, § 1-102(b) (1989) (allowing adoption by same-sex partner of parent even though most states have yet to grant such adoptions).

188. PC, *supra* note 5, at 268.

which are premised on suspect bases, burden fundamental rights, or both.

A. Precluding Same-Gender Couples from Marrying Impermissibly Discriminates on the Suspect Basis of Sex

Likely due to the fact that this Court has historically subjected state classifications—even those subject only to the most deferential review—to meaningful scrutiny, this Court has never actually analyzed any credible "suspect class" claim, and thus has never provided any guidance about what types of classifications are suspect.[189] Appellants submit that the legislative classifications at issue in this case, preventing a woman from marrying her chosen life partner if her chosen life partner is also a woman, and preventing a man from marrying his chosen life partner if his chosen life partner is also a man, effect state discrimination on the basis of two related suspect categories: gender and sexual orientation. Because the State's marriage laws must satisfy "a more searching scrutiny," they fail because they are not narrowly tailored to promote a compelling state interest.[190]

1. Classifications Based on Gender Are Subject to Heightened Scrutiny

Although this Court has never expressly held that gender-based classifications are suspect,[191] and thus subject to heightened scrutiny under the Common Benefits Clause, it has given every indication that if required to reach the question, it would concur with the trial court's conclusion that gender-based classifications are subject to heightened scrutiny.[192] First, in applying the Common Benefits Clause, the Court has frequently drawn guidance from the United States Supreme

189. *See, e.g.*, MacCallum v. Seymour's Adm'r, 165 Vt. 452, 457 n.1 (1996) (declining to consider whether classifications of adopted children are suspect because case was resolved under minimum scrutiny).

190. *See* Brigham v. State, 166 Vt. 246, 265 (1997). With respect to the scrutiny applicable to sexual-orientation discrimination, see *infra* Section IV.B.

191. *See* State v. George, 157 Vt. 580, 588 (1991) (declining to reach the issue).

192. *See* PC, *supra* note 5, at 265–66.

Court's application of the federal Equal Protection Clause.[193] The United States Supreme Court has clearly and repeatedly insisted that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."[194] In particular, the party seeking to uphold government action based on gender must show "'at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'"[195]

This Court has long emphasized that the Vermont Constitution may afford greater civil rights protections than the United States Constitution.[196] The trial court in this case correctly concluded that "it would be anomalous if the Vermont Constitution did not subject gender-based distinctions to scrutiny as searching as that required under the United States Constitution's Equal Protection Clause of the Fourteenth Amendment."[197]

By the same token, many sibling states subject gender-based classifications to strict scrutiny. For example, the Oregon Supreme Court has concluded:

> [W]e find that classification of one's personal privileges and immunities by one's gender is at least as old as by race, and as much based on unexamined societal stereotypes and prejudices. . . . Accordingly, we hold that when classifications are made on the basis of gender, they are, like racial, alienage, and nationality classifications, inherently suspect.[198]

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193. *See, e.g., Brigham*, 166 Vt. at 265.

194. United States v. Virginia ("VMI"), 116 S. Ct. 2264, 2274 (1996) (quotations omitted).

195. VMI, 116 S. Ct. at 2271 (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

196. *See, e.g.*, Hodgeman v. Jard Co., 157 Vt. 461, 464 (1991) ("Defendant is correct that the Vermont Constitution is freestanding and may require this Court to examine more closely distinctions drawn by state government than would the Fourteenth Amendment."); State v. Morris, 165 Vt. 111 (1996) (search and seizure of opaque trash bag, permissible under federal Constitution, violates Vermont Constitution).

197. PC, *supra* note 5, at 266.

198. Hewitt v. State Accident Ins. Fund, 653 P.2d 970, 977–78 (Or. 1982) (considering worker's compensation benefits to female dependents of male workers, but not to comparable male dependents of female workers); *see also* Darrin v. Gould, 540 P.2d 882 (Wash. 1975) (noting that even before passage of state equal rights amendment, classifications based on sex were subject to strict scrutiny).

Moreover, this Court has in the past suggested that gender-based classifications are analogous to race-based distinctions for constitutional purposes. In the case of *State v. Jenne*,[199] this Court considered a criminal defendant's claim that a county's method of selecting a jury pool produced juries that did not represent a fair cross section of the population. In its discussion, this Court quoted approvingly from a United States Supreme Court decision expressly distinguishing between non-distinctive groups, such as blue-collar workers and less-well-educated individuals, and "*special* groups, like women and blacks, that have been subjected to discrimination and prejudice within the community."[200]

Given Vermont's historic position as a protector of civil rights, and the persuasive authority from sibling state courts and the United States Supreme Court, Appellants respectfully submit that the Common Benefits Clause of the Vermont Constitution requires that gender-based classifications be subjected to heightened scrutiny.

2. Vermont's Marriage Laws, As Interpreted by the Trial Court, Contain Gender-Based Classifications

Vermont's marriage laws, as interpreted by the trial court, contain explicit, facial gender-based classifications. Stan Baker was denied a license to marry Peter Harrigan because both are men. Nina Beck would undoubtedly be able to marry Stacy Jolles if Stacy were a man. If Holly Puterbaugh were a man, she would unquestionably be allowed to marry Lois Farnham. The legislative classifications that prevent each of these committed couples from accessing the right to marry are, on their face, based on gender.

The trial court has attempted to evade the obvious gender-based discrimination built into the marriage laws by arguing that the prohibition of marriage between partners of the same gender flows inevitably from the very definition of marriage.[201] As the Hawaii Supreme Court observed in *Baehr v. Lewin*, such an argument is "circular and unpersuasive."[202] Looking to historic definitions of marriage, the

199. State v. Jenne, 156 Vt. 283 (1991).
200. *Jenne*, 156 Vt. at 291.
201. *See* PC, *supra* note 5, at 266.
202. *Baehr v. Lewin*, 852 P.2d 44, 61 (Haw. 1993).

trial court in this case has concluded that because same-sex couples were not historically allowed to marry, then by definition, marriage is restricted only to different gender couples. But the very issue in this case is not how "marriage" has historically been defined; rather, the issue is whether the prohibition of marriage between partners of the same gender is discriminatory and, if so, whether it is constitutionally permissible.

By way of analogy, in the case of *Loving v. Virginia*, the trial court had concluded that Virginia's anti-miscegenation laws were not unconstitutional because interracial marriage was, by definition, not a true marriage.[203] That circular reasoning in support of the prohibition of mixed-race marriage parallels the specious reasoning the trial court here used to justify sex discrimination in marriage laws.

The United States Supreme Court rejected such reasoning in its *Loving* decision, and the Hawaii Supreme Court, recognizing the analogy, similarly rejected the assertion that Hawaii's marriage laws were not discriminatory because marriage, by definition, requires one man and one woman:

> The facts in *Loving* and the respective reasoning of the Virginia courts, on the one hand, and the United States Supreme Court, on the other, both . . . unmask the tautological and circular nature of [the state of Hawaii's] argument that [Hawaii's prohibition of same-gender marriage] does not implicate [the equal rights provision] of the Hawaii Constitution because same-sex marriage is an innate impossibility.[204]

The Hawaii Supreme Court further dismissed such reasoning as an "exercise in tortured and conclusory sophistry."[205]

By the same token, a trial court in Alaska recently rejected the claim that because the sex discrimination in Alaska's marriage laws flowed from the historical definition of marriage, those laws did not trigger constitutional concerns:

> It is not enough to say that "marriage is marriage" and accept without any scrutiny the law before the court. It is the duty

203. *See* Loving v. Virginia, 388 U.S. 1, 3 (1967).
204. *Baehr*, 852 P.2d at 63.
205. *Baehr*, 852 P.2d at 63.

> of the court to do more than merely assume that marriage is only, and must only be, what most are familiar with. In some parts of our nation mere acceptance of the familiar would have left segregation in place. . . . [T]his court cannot defer to the legislature or familiar notions when addressing this issue.[206]

In addition to the facial gender discrimination reflected in the trial court's interpretation of the marriage laws, those laws also reflect more subtle but nonetheless invidious gender bias. The State's own rationale for its discriminatory marriage laws is premised on the unsupported, broad assertion that men and women each possess unspecified inherent and distinct characteristics such that only male-female relationships can be truly worthy of the protections and supports that marriage provides.[207] At its core, the State has argued, marriage is *defined* by gender differences.

It is impossible to square the trial court's recognition that the above rationale in support of discriminatory marriage laws is "clearly premised upon improper presumptions about the roles of men and women,"[208] with the trial court's conclusion that the discrimination built into the marriage laws is not based on gender but, rather, flows from the definition of marriage itself.[209]

As noted above, the State cannot satisfy even the minimum level of scrutiny, let alone the heightened scrutiny applicable to laws which discriminate on the basis of sex.

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206. Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 at 2 (Alaska Super. Ct. Feb. 27, 1998) (right to marry chosen partner, including same-sex partner, is fundamental right).

207. *See* State's Motion, *supra* note 39, at 45–47, 53; PC, *supra* note 5, at 51–53, 59.

208. PC, *supra* note 5, at 268.

209. *See* PC, *supra* note 5, at 266.

B. Precluding Same-Gender Couples from Marrying Impermissibly Discriminates on the Suspect Basis of Sexual Orientation

1. Vermont's Marriage Laws, As Interpreted by the Trial Court, Classify on the Basis of Sexual Orientation

Closely related to the sex discrimination built into the marriage statutes, as interpreted by the trial court, is the discrimination on the basis of sexual orientation which those statutes embody. By prohibiting a man from marrying a man, and a woman from marrying a woman, the State is essentially barring all gay and lesbian couples—couples formed by two men or by two women—from marrying. In so doing, the State of Vermont is unquestionably discriminating against gay and lesbian families and persons.

The State attempts to sidestep that reality, noting that gay men and lesbian women can marry in Vermont (as long as they marry someone of the proper sex). The State seems to want it both ways. In its attempt to deny that it discriminates on the basis of gender, the State claims that its marriage laws are not based on distinctions between men and women but, rather, are based on distinctions between men and women who want to marry a person of the same sex (that is, those who seek recognition of their committed gay or lesbian relationships) and men and women who want to marry a person of a different sex (that is, those seeking legal recognition of their committed heterosexual relationships).[210] Then, in its attempt to deny that it discriminates on the basis of sexual orientation, the State suggests that its laws do not prohibit gay and lesbian Vermonters from marrying, but simply require that they marry someone of the proper sex.[211] The reality is, the State's restrictions impermissibly discriminate on the basis of sex *and* sexual orientation.[212]

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210. *See* State's Motion, *supra* note 39, at 40–41; PC, *supra* note 5, at 46–47.

211. *See* State's Motion, *supra* note 39, at 37–38; PC, *supra* note 5, at 43–44.

212. In arguing that gay and lesbian Vermonters are free to marry, as long as they marry someone of the "right" sex, the State fails to acknowledge that the essence of the marriage right is the right to marry the partner of one's choice. To a gay man or a lesbian woman, the right to marry only a partner of the opposite sex is no right at all.

2. Classifications Based on Sexual Orientation Are Subject to Heightened Scrutiny

This Court has never considered whether sexual orientation (or any other classification) is a suspect basis for distinguishing among Vermonters under the Common Benefits Clause. Appellants respectfully submit that classifications which are irrelevant to any proper legislative goal, and classifications excluding individuals or groups who have historically been subjected to discrimination, are subject to heightened scrutiny under the Common Benefits Clause.

With respect to the first factor, other courts have recognized the constitutional pitfalls in laws which exclude a group defined by a characteristic that bears no relation to the ability to perform or contribute to society.[213]

Gay and lesbian individuals enrich every aspect of society to the same extent as their heterosexual counterparts. In particular, like others in our society, gay men and lesbian women, including the Appellants in this case, form committed, long-term, and often lifetime relationships. Many lesbian and gay couples raise children together, and gay and lesbian families are woven into the rich fabric of our communities.

Any law which purports to distinguish gay and lesbian families from other families on the basis of generalizations about the ability of gay and lesbian persons to form, nurture, and maintain cohesive families that serve the same functions in our society as other families is as flawed as those laws excluding women from valuable educational opportunities on the basis of women's claimed inferiority, and should be subjected to heightened scrutiny.

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213. *See, e.g.*, United States v. Virginia ("VMI"), 116 S. Ct. 2264, 2280–81 (1996) (noting that ability to withstand rigors of higher education or professional practice does not vary by sex); Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982) ("Classifications treated as suspect tend to be irrelevant to any proper legislative goal."); Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (condemning discrimination which bears no relation to ability to perform or contribute to society); Able v. United States, 968 F. Supp. 850, 862 (E.D.N.Y. 1997) (holding that classifications on the basis of sexual orientation are suspect, and noting that a court should consider "whether the trait which defines the group 'frequently bears no relation to ability to perform or contribute to society'").

With respect to the second factor, the State has conceded,[214] and the trial court concurred,[215] that gay and lesbian citizens have been the subject of historical discrimination.[216]

In light of this history, United States Supreme Court Justice Brennan recognized that discrimination on the basis of sexual orientation should be subjected to strict, or at least heightened, scrutiny:

> [H]omosexuals constitute a significant and insular minority of this country's population. Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena. Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is "likely . . . to reflect deep-seated prejudice rather than . . . rationality."[217]

Nowhere are society's historical stereotypes of and prejudices against gays and lesbians more apparent than with respect to their relationships. The existence of this case in itself demonstrates that fact. Many people who are comfortable supporting the civil rights of gay and lesbian *individuals* do not recognize that present laws relating to marriage deprive gay and lesbian individuals of fundamental civil rights in connection with (for many) the most important sphere of their lives: *their relationships with their life partners.*

For the above reasons, the State's exclusion of Appellants from the advantages and responsibilities of legal marriage should be subjected to heightened scrutiny and stricken.

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214. *See* State's Motion, *supra* note 39, at 35; PC, *supra* note 5, at 41.

215. *See* PC, *supra* note 5, at 264.

216. *See Able*, 968 F. Supp. at 854–55 (recounting a long history of official and private discrimination against gay men and lesbian women, from laws in the Middle Ages imposing death by burning on homosexual men, to extermination in Nazi concentration camps in the 20th century, to widespread hate-based violence and job discrimination in modern times).

217. Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting, along with Justice Marshall, from denial of writ of certiorari in case involving school guidance counselor suspended due to her bisexuality) (quoting Plyler v. Doe, 457 U.S. 202, 216 (1982)) (citation omitted).

C. Precluding Same-Gender Couples from Marrying Impermissibly Burdens Appellants' Fundamental Right to Marry

1. The Freedom to Marry the Partner of One's Choosing Is a Long-Recognized, Well-Established Fundamental Right

More than 150 years ago, this Court eloquently acknowledged the fundamental nature of marriage as a basic human right:

> To marry is one of the natural rights of human nature, instituted in a state of innocence for the protection thereof; and was ordained by the great lawgiver of the universe, and *not to be prohibited by man.* Yet, human forms and regulations in marriages are necessary for the safety and security of community; *but those forms and regulations are to be within the reach of every person wishing to improve them . . . .*[218]

While acknowledging the propriety of some regulations concerning marriage, the Court in *Newbury* emphasized that the freedom to marry should be available to *every person.* This Court's insistence that marriage is a basic human right, and its solicitude for the integrity of the family in the Newbury case, confirm that the freedom to marry has long been considered a fundamental right in Vermont.

This Court has also acknowledged that the right to *terminate* a marital relationship is a core legal right.[219] In *Miserak v. Terrill,* this Court recognized that the State's monopolization of the means to terminate (and enter) a marriage gives rise to a state obligation to protect individuals' access to the right to marry, or to end a marriage, and therefore struck down a statutory filing fee for divorce actions which effectively prevented indigents from divorcing.[220]

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218. Overseers of the Poor of Newbury v. Overseers of the Poor of Brunswick, 2 Vt. 151, 159 (1829) (emphasis added) (declining even to analyze the legality of a long term marriage of questionable validity out of respect for the integrity of the family in question).

219. *See* Miserak v. Terrill, 130 Vt. 7 (1971).

220. In fact, family autonomy more generally has consistently been recognized as a fundamental right in Vermont. *See, e.g., In re* S.B.L., 150 Vt. 294, 303 (1988) (rejecting preference in guardianship proceedings for appointing mother of a child born out of

This reverence for the freedom to marry is by no means unique, but has been matched by federal and state courts in a variety of contexts. The United States Supreme Court has acknowledged that marriage involves a right "older than the Bill of Rights—older than our political parties, older than our school system."[221]

In considering a law which effectively prohibited indigent, noncustodial parents who could not satisfy their child support obligations from marrying, the United States Supreme Court stated, "[O]ur past decisions make clear that the right to marry is of fundamental importance . . . ."[222] Because the statute interfered directly and substantially with the right of a class of people to marry, the Court concluded that it could only be upheld if supported by a sufficiently important state interest, and if narrowly tailored to effectuate that interest.[223] Because the law did not satisfy these requirements, the Court struck it down.

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wedlock over others, but not for biological father who has developed the requisite custodial, personal, or financial relationship with the child); Paquette v. Paquette, 146 Vt. 83, 92 (1985) ("[T]he liberty interests of parents and children to relate to one another in the context of the family, free from governmental interference, are fundamental rights. . . ."; upholding the right of a stepparent and stepchild to a continued relationship after divorce); Guardianship of H.L., 143 Vt. 62, 65 (1983) (reversing trial court's refusal to appoint guardian ad litem for mother in proceeding to appoint grandparents as legal guardians for mother's child).

221. Griswold v. Connecticut, 381 U.S. 479, 486 (1965). The *Griswold* opinion discussed the fundamental right to privacy, rather than the Equal Protection Clause of the Fourteenth Amendment. However, the Court's discussion of the fundamental nature of marriage buttresses the principle that for the purposes of Common Benefits analysis, marriage is unquestionably a fundamental right. For another decision discussing the fundamental nature of the marriage right in the context of due process analyses, see Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (listing marriage among basic privileges "long recognized at common law as essential to the orderly pursuit of happiness" by free citizens; striking down law prohibiting teaching of foreign languages to grade school students).

As Appellants argued at the trial level, *see* PC, *supra* note 5, at 99–107, Vermont's marriage laws not only violate the Common Benefits Clause, but also run afoul of the principle, recognized in the above cases and embodied in Chapter I, Article 1 of the Vermont Constitution, that all persons enjoy certain natural, inherent, and unalienable rights, predating the State, which cannot be infringed upon by the State. By withholding from Appellants the freedom to marry their chosen partners, the State has violated Appellants' inherent rights. *See* Brause v. Bureau of Vital Statistics, No. 3AN-95-6562CI, slip op. at 9 (Alaska Super. Ct. Feb. 27, 1998) ("Here the court finds that the choice of a life partner is personal, intimate, and subject to the protection of the right to privacy.").

222. Zablocki v. Redhail, 434 U.S. 374, 383 (1978).

223. *See Zablocki*, 434 U.S. at 388.

The trial court asserts that "on the federal level, where the right to marry has been found fundamental, the Supreme Court has consistently linked marriage to procreation."[224] This conclusion simply is not true. In fact, in its most recent freedom to marry case, *Turner v. Safley*, the United States Supreme Court explicitly recognized that the ability to procreate is not essential to the fundamental right to marry.[225] The Court in *Turner* struck down a prison regulation limiting prisoner marriages and upheld a prison inmate's constitutional right to marry—even though inmates are incarcerated and thus cannot procreate. As set forth above,[226] the United States Supreme Court reviewed the many purposes and protections of marriage and concluded that "[the various] incidents of marriage, like the religious and personal aspects of the marriage commitment, are unaffected by the fact of confinement or the pursuit of legitimate corrections goals."[227] Unless the State is suggesting that this Court would take a *narrower* view of individual constitutional rights under the Vermont Constitution than the United States Supreme Court has taken under the federal constitution, it must concede that the ability to procreate is not a necessary precondition to the fundamental right to marry.[228]

The Court in *Turner* relied in part on *Loving v. Virginia*.[229] Although the Court in *Loving* focused much of its discussion on the invidious racial classifications built into Virginia's anti-miscegenation laws, the Court emphasized that the statute's impingement on the freedom to marry was independently unconstitutional:

> The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free [people]. . . . Under our Constitution, the freedom to marry, or not marry, a person of another race

224. PC, *supra* note 5, at 262.

225. Turner v. Safley, 482 U.S. 78 (1987).

226. *See supra* note 56 and accompanying text.

227. *Turner*, 482 U.S. at 96; *see also Griswold*, 381 U.S. at 479 (upholding constitutional right of married couples *not* to procreate).

228. Nor do Vermont's marriage laws support the trial court's suggestion that the fundamental marriage right only attaches where procreation is possible. *See* PC, *supra* note 5, at 263; *see also supra* note 123.

229. Loving v. Virginia, 388 U.S. 1 (1967) (striking down prohibition of interracial marriage). *See Turner*, 482 U.S. at 95.

> resides with the individual and cannot be infringed by the State.[230]

Nearly twenty years prior to the *Loving* decision, the California Supreme Court was the first state court in the country to declare unconstitutional a state anti-miscegenation law.[231] In *Perez*, the court recognized that marriage is "a fundamental right of free [people]," and that "[l]egislation infringing such rights must be based upon more than prejudice and must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection of the laws."[232]

Moreover, the court recognized that the "essence of the right to marry is freedom to join in marriage *with the person of one's choice*,"[233] so that a statute that restricts an individual from marrying a member of another race "restricts the scope of [the individual's] choice and thereby restricts [the individual's] right to marry."[234] The court properly dismissed the suggestion that California's anti-miscegenation laws were not discriminatory because they did not prohibit Caucasians or people of color from marrying, but evenly restricted the choices of Caucasians and non-Caucasians concerning whom they could marry. The court noted:

> A member of any of these races may find [himself or herself] barred by law from marrying the person of [his or her] choice and that person to [him or her] may be irreplaceable. Human

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230. *Loving*, 388 U.S. at 12. Some courts have attempted to distinguish the anti-miscegenation laws from laws prohibiting marriage between same-gender couples on the ground that the former involve racial classifications, which are uniquely odious. *See, e.g.*, Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971) (rejecting analogy between challenge to prohibition against same-gender marriage and prohibition of mixed-race marriage). However, the United States Supreme Court has reiterated that its holding in *Loving* does not rest solely on the invidious nature of legal classifications based on race. As the Court noted in *Zablocki*, "Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for *all* individuals." *Zablocki*, 434 U.S. at 384 (emphasis added).

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

232. *Perez*, 198 P.2d at 19.

233. *Perez*, 198 P.2d at 21 (emphasis added).

234. *Id.* at 19.

> beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains.[235]

The various opinions from other state and federal decisions considering the freedom to marry reinforce the conclusion that under Vermont's Common Benefits Clause, classifications regarding access to the freedom to marry burden a fundamental right.[236]

2. The Fundamental Right to Marry the Partner of One's Choice Cannot Be Limited by Sex or Sexual Orientation

Unable to argue that the freedom to marry is less than a fundamental right, the State claims, and the trial court concluded, that the constitutional fundamental right to marry is restricted to opposite sex couples. In short, the State and trial court seek to narrowly define the marriage right in order to avoid Appellants' claim. By recharacterizing the issue, the trial court essentially assumes its conclusion.[237]

For example, had the California Supreme Court in the *Perez* case, or the United States Supreme Court in the *Loving* opinion, begun their analyses by considering whether there was a fundamental, historical right to *miscegenic* or *interracial* marriage, their conclusions would have been very different. If the United States Supreme Court had begun its discussion in *Zablocki* by asking whether there is a fundamental right for "deadbeat dads" to marry, or if it had begun its inquiry in the *Turner* case by determining whether incarcerated criminals have a fundamental right to marry, that Court may not have so clearly enunciated a fundamental right to marry under the United States Constitution. In all of the above cases, only *after* acknowledging the well-

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235. *Perez*, 198 P.2d at 25.

236. The trial court in this case did not attempt to square its conclusion with the *Turner*, *Loving*, and *Perez* decisions. In fact, the trial court did not even cite any of these critical freedom to marry cases in its Opinion and Order.

237. *See* Brause v. Bureau of Vital Statistics, No. 3AN-95-6652CI, slip op. at 9 (Alaska Feb. 27, 1998) ("The relevant question is not whether same-sex marriage is so rooted in our traditions that it is a fundamental right, but whether the freedom to choose one's own life partner is so rooted in our traditions."); *see also* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (Scalia, plurality opinion), 132 (O'Connor, concurring), 139 (Brennan, dissenting) (all but two justices rejecting Justice Scalia's suggestion that courts should define right in question, for purposes of due process analysis, at "the most specific level [that] can be identified").

established and general fundamental right to marry did the courts consider the particular types of marriage to determine whether the States could justify denying a particular class of people the right to marry their chosen partners.[238]

In this case, the Common Benefits Clause protects the fundamental right to marry the partner of one's choice, long pre-dating Vermont's statehood and recognized by the Vermont Supreme Court, the courts of sibling states, and the United States Supreme Court. All of these Appellants have chosen partners to whom they wish to legally commit themselves, and their chosen partners are all "irreplaceable" to them.[239] The State cannot demonstrate that its discrimination against Appellants serves a compelling governmental interest, and is narrowly tailored to serve that objective.[240]

D. Precluding Same-Gender Couples from Marrying Impermissibly Classifies Among Citizens with Respect to an Important Right and on Highly Questionable Bases

Even if this Court concludes that the right to marry is not so fundamental that the State must satisfy a heightened level of scrutiny to justify classifications concerning that right, it cannot be doubted that the freedom to marry one's chosen life partner is a precious one, implicating one of the most personal, intimate and significant choices a person can make. By the same token, even if this Court concludes that classifications drawn on the basis of gender or sexual orientation do

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238. It would certainly be odd if deadbeat dads and convicted rapists were entitled to greater constitutional protections than these Appellants. *See* ESKRIDGE, SAME-SEX MARRIAGE, *supra* note 49, at 104–09 (refuting suggestion that marriage confers a state "stamp of approval" on parties thereto).

239. *See Perez*, 198 P.2d at 25.

240. *See* Brigham v. State, 166 Vt. 246, 265 (1997). Allowing these Appellants to marry would not open the door to any and all forms of marriage which the State might seek to restrict. First, even where there is a fundamental right, the State is free to place narrowly tailored limitations on that right in cases in which it can show a compelling justification. Second, as the California Supreme Court has noted, "[T]he essence of the right to marry is freedom to join in marriage with *the person* of one's choice," *Perez*, 198 P.2d at 21 (emphasis added), and thus would not encompass polygamous marriages, for example. Third, limitations on the fundamental right to marry are particularly troublesome when based upon characteristics such as race, sex, or sexual orientation. *See infra* Section IV.D.

not, in and of themselves, call for heightened scrutiny, there is no doubt that such distinctions create the *types* of classifications about which courts are particularly concerned. If this Court considers the bases for the State's classifications (that is, sex and sexual orientation) and the right that is implicated (the right to marry) each in isolation, the Court might overlook the important fact that in this case *both* the right in question, *and* the bases for the State's classifications, are constitutionally significant. Regardless of whether either factor independently triggers heightened scrutiny in this case, the combination of *both* of these defects in the statutory scheme should.[241] The State cannot satisfy the heightened scrutiny to which such a classification is subject.

CONCLUSION

The right to marry the person we love, the person with whom we want to share our lives, is one of the most fundamental of all our human and civil rights. When two adults make the very intimate and personal decision to commit themselves to one another by marrying, that decision should not be subject to "legislative hearings and debate."[242] Rather, as the trial court recognized,[243] this Court has a duty to "give effect to the Constitution" by invalidating laws which violate Vermonters' constitutional rights.[244]

As one California Supreme Court Justice declared in 1948, when that court stood up to overwhelming majority sentiment, and a shameful historical legacy, distinguishing itself as the first state supreme court to strike down a state law ban on interracial marriage:

> [A] state may [not] legislate to the detriment of a class—a minority who are unable to protect themselves, when such legislation has no valid purpose behind it. Nor may the [legislative] power be used as a guise to cloak prejudice and

241. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11–13 (1967) (striking down law which drew invidious racial distinctions *and* classified with respect to the fundamental right to marry).

242. State's Motion, *supra* note 39, at 3; PC, *supra* note 5, at 9.

243. *See* PC, *supra* note 5, at 256–57.

244. Beecham v. Leahy, 130 Vt. 164, 172 (1972) (invalidating Vermont law which criminalized abortion).

> intolerance. Prejudice and intolerance are the cancers of civilization.[245]

Nina and Stacy, Stan and Peter, and Holly and Lois want to marry. They want to publicly and legally commit themselves to one another, and to secure for their respective families the protections and obligations of civil marriage. Their marriages will take nothing away from anybody else, and can only strengthen the communities in which they live. The only things standing in their way are prejudice and intolerance. Appellants respectfully urge this Court to vindicate their constitutional rights by REVERSING the trial court's judgment for Appellees, entering Judgment for Appellants, and/or granting such other relief as is just and proper.

DATED AT Middlebury, Vermont, this 6th day of March, 1998.

245. *Perez*, 198 P.2d 17, 32 (Calif. 1948) (Carter, J., concurring).