IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

IN RE: The Matter of
SONYA LYNN GOSSARD,
Petitioner,
and
MARY COLLEEN BURNS,
Respondent.
_______________________________/

FAMILY DIVISION
CASE NO. 502015DR001070NB FI

RESPONSE TO COURT AND MOTION FOR IMMEDIATE RULING ON THE MOTION FOR DECLARATORY RELIEF CONTAINED IN THE VERIFIED PETITION

In response to the Petitioner's motion for status conference, this Court has ordered the issue of this Court's Jurisdiction to dissolve a civil union be briefed. The Verified Petition dated February 4, 2015 contains much law and analysis on that issue, however, it is expanded in this document pursuant to the Order of this Court dated June 19, 2015. The Petitioner, having fully responded to this Court's order, seeks an immediate ruling on the Motion for Declaratory Judgement contained in the Verified Petition filed February 4, 2015. The Petitioner -- and most importantly, the parties' child -- are subject to continuing and irreparable harm without this Court exercising jurisdiction and implementing a parenting plan. This Court is the only forum with the current ability to exercise jurisdiction. Most respectfully, this Court is also required to do so.

The Constitution of the United States and Florida Constitution compel this Court to exercise jurisdiction over this case. The United Supreme Court decision just a few weeks ago makes clear this Court must do so. See *Obergefell* v *Hodges*, 576 U.S. _____, June 26, 2015 (2015), attached as Exhibit A. Should this Court not exercise jurisdiction to dissolve the parties' civil union it will leave them, in practicality, forever bound to each other and without a legal remedy to dissolve their union and the rights and obligations conferred by it. They are not legally

free to remarry while they remain joined by their civil union. Moreover and most critically, the failure to take jurisdiction and address the parties' child custody and property issues damages not only the parties, but their minor child as well.

THE VERMONT CIVIL UNION

1. On March 29, 2005, before having a child together, the parties were joined by a civil union, authorized by the state of Vermont under their domestic relations laws (more detailed facts are set forth below). See Vermont Law Chapter 23, section 3, 15 V.S.A. sec. 1201 et seq. Some of the legislative findings of the general assembly of the state of Vermont, H.847[1] appear in Footnote 1 below.

2. In 2005 civil union was the only form of legal relationship afforded to same sex couples in Vermont. In 2009 Vermont became one of the first states to enact a same sex marriage statute. 2009 Vt. Acts & Resolves p. 33.

3. Vermont civil unions established prior to September 1, 2009 not only remain in full force and effect, but are the legal equivalent of marriage. See Vermont Law Chapter 23, section 3, 15 V.S.A. sec. 1201 et seq.

4. Vermont has by public law conferred all the benefits, obligations and protections of a spouse of marriage on couples who entered into a civil union. See Vermont Law Chapter 23, section 3, 15 V.S.A. sec. 1204[2]. Thus, the Legislature by statute declared that all unions prior to

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(3) legal recognition of civil marriage by the state is the primary, and, in a number of instances, the exclusive source of numerous benefits, responsibilities and protections under the laws of the state for married persons and their children....(7) the state has a strong interest in promoting stable and lasting families, including families based upon a same-sex couple....(11)...Extending the benefits and protections of marriage to same sex couples through a system of civil unions preserves the fundamental constitutional rights of each ....".

[2] That statute provides, in part:

that time were elevated by law to equal legal status of marriage. Under that 2009 law, it is legally unnecessary for parties to a civil union to have another ceremony or certificate issued to be accorded the same rights and obligations as parties to a marriage.

5. There are ramifications of the 2009 statute. An individual who is party to an undissolved Vermont civil union -- now deemed the legal equivalency of marriage -- **cannot marry another person**. Vermont Law Chapter 23, section 3, 15 V.S.A. sec. 1202 and 1203(c). Should the union of these parties not be dissolved, they are not free to marry unless they risk the crime of bigamy.

6. According to Vermont statute sec 1204(*f*):

> **The rights of parties to a civil union, with respect to a child of whom either becomes a natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes a natural parent during the marriage.** (E.S)

To be clear, under the law of the state of Vermont, these parties are the legal equivalent of married. The only difference between the civil union and a marriage is one of nomenclature- not of any substance.

7. Also, indisputably under Vermont law, the Petitioner and Respondent are also both the legal parents of S.B., the parties' minor child. However, this Court's refusal to exercise

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(a) Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.

(b) A party to a civil union shall be included in any definition or use of the terms "spouse," "family," "immediate family," "dependent," "next of kin," and other terms that denote the spousal relationship, as those terms are used throughout the law.

jurisdiction to date has allowed the Respondent to determine- with impunity- the exceedingly limited timesharing rights of the child with Petitioner, the telephonic and other communication of the child and Petitioner and the Respondent has removed the child from the state – all with no recourse for the Petitioner until this Court recognizes its jurisdiction of this case.

8. The Petitioner is not asking this Court for relief that has never before been granted in connection with a civil union. Vermont civil unions have already been recognized as the equivalent of marriage in Florida as well as other states. See e.g., *Brassner v Lade*, Case No. 13-012058 (37) (by Judge Dale C. Cohen: recognizing the validity of the Vermont civil union on December 8, 2014 by Order Granting Petitioner's Motion for Declaratory Judgment and also determining Florida Constitution Article 1, section 27 and Fl. St. 741.212 void and unenforceable as violating due process and equal protection clauses) attached as Exhibit B, *Elia-Warnken v Elia*, 463 Mass. 29 (2012) and *Debra H., v Janice R.*, 930 N.E.2d 184 (NY 2010). See Exhibits C and D.

9. The parties' Vermont civil union is entitled to recognition under the Full Faith and Credit Clause of the Federal Constitution, as the equivalent of marriage. Article IV section I. provides that Full Faith and Credit in each state shall be given to the public acts, records and judicial proceedings of every other State. Certainly the enactment of the Vermont laws cited above, as well as the act of marrying a couple, are both public acts which are entitled to the constitutional protection of full faith and credit and recognition by this state.

10. A refusal to recognize same-sex civil unions performed in other jurisdictions violates the substantive due process rights of the parties to those unions by depriving them of their rights to be joined by a civil union (the legal equivalent of marriage), to remain joined, and

to effectively parent their children. There is no state interest (arguably legitimate or otherwise) which has been argued in this case, let alone an interest sufficient to mandate the continued joinder of the parties to this civil union and which so adversely impacts the right of the child to his "Mommy" and the right of the mother to the child which she helped conceive and raise since birth.

11. The United States Supreme Court in its recent decision of *Obergefell* v *Hodges*, 576 U.S. _____, June 26, 2015, found that the long held attempt to differentiate between same sex couples and exclude them from the fundamental rights (including marriage) which heterosexual couples take for granted does not simply impose a stigma, but constitutes an injury which our federal constitution prohibits. *Obergefell* slip opinion at 18. The Court found it impermissible to demean lesbians and treat them unequally by consigning them to an intolerable instability. *Obergefell* at slip opinion 17. The refusal to recognize the right of access of the parties to this Court results in harm to the Petitioner and her child and relegates the parties and their child to the intolerable instability which the *Obergefell* Court finds unsanctionable. Under the reasoning of *Obergefell*, the parties' civil union, only a nomenclature difference from marriage and the legal equivalent of marriage, must be recognized otherwise this Court is sanctioning the denial of the parties' due process and equal protection rights.

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Florida. Thus denial of jurisdiction in this case effectively leaves the parties and the child in an untenable state of legal limbo.

13. The Circuit Court in Broward County, Judge Dale Cohen, recognized the validity of and dissolved a Vermont civil union – exactly what these parties have- on December 18, 2014. (*Brassner v Lade*, Case No. 13-012058 (37)).

14. Additionally on the basis of comity, the civil union of the parties is entitled to recognition by this Court as a marriage in accordance with Vermont law. See e.g., *Elia-Warnken v Elia*, 463 Mass 29 (2012) and *Debra H. v Janice R.*, 930 N.E.2d 184 (NY 2010).

15. Petitioner understands this Court is not bound by these lower-court decisions. However, respectfully this Court should deem the reasoning of these courts to be persuasive. These decisions should be even more persuasive given the Supreme Court's decision on June 26, 2015. The State of Florida is compelled to dissolve marriages of those gays and lesbians married in another State, and Vermont has held by statute that civil unions prior to 2009 are the legal equivalent of marriage. Florida is bound by *Obergefell* and the Vermont Legislature to treat the parties' union as a marriage.

16. Anticipating any attempted assertion that this Court needs to await the state legislature addressing this issue by statute is not well founded. As the *Obergefell* Court found:

> The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and **even if the legislature refuses to act.** The idea of the Constitution "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal

> principles to be applied by the courts." *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 638 (1943). *Obergefell* slip opinion at 24. (Emphasis supplied)

17. The current status of the law supports the application of chapter 61 and 742 equally to same sex couples joined in marriage or by a civil union such as the parties here which is the legal equivalent of marriage, as explained above. Applying the holding of the United States Supreme Court in *Obergefell*, those Florida's Statutes which attempt to subject same sex couples to unequal treatment are unconstitutional, and impermissibly injurious and must be stricken or those statutes must be construed to be inclusive of individuals such as the parties hereto. To the extent that this Court may interpret those laws as not applying in a gender neutral manner and to the parties herein they would purport to deny Petitioner the legal right to parent her minor child and to obtain a dissolution of her marriage, Article I, section 27 of the Fl. Constitution and Fl. St. 741.212 are unconstitutional and violate the due process and equal protection clauses of the United States Constitution. *Brenner v Scott*, 999 F.Supp. 1278, 1290 (N.D. Fla. 2014), and *Brenner v Scott* 2015 WL 44260 (January 1, 2015), *Maxwell v Stephens Maxwell*, Case # 502014DF010428XXXXMB, division FD, Order Granting Petition to Determine Parenthood and Related Relief Final Judgment Recognizing Marriage of Lisa Marina Maxwell and Christine Stephens-Maxwell and Determining that Lisa Maxwell is the parent of [omitted name of minor child] dated January 21, 2015. Attached as Exhibit 2 to the Verified Petition. To the extent Fl. St. 742.011 would purport to deny the Petitioner the right to bring this action it is unconstitutional, *Maxwell* and *Brassner, supra*.

18. *Brenner* has declared Article I, section 27 of the Fl. Constitution and Fl. St. sec. 741.212 as requiring a gender neutral application. Therefore only should this Court fail to

recognize the validity of the Vermont Civil union with its statutory rights, protections and obligations, as the equivalent of a Florida marriage do they violate the equal protection and due process clauses of the U.S. Constitution, *Brassner v Lade, supra*, as well as the full faith and credit provisions of Article IV, Section 1 of the Constitution of the United States.

FACTUAL BACKGROUND AND APPLICATION OF THE LAW TO THESE FACTS

IN VITRO FERTILIZATION

19. During the union of the parties, they jointly decided to have a child and both consented to the in vitro insemination of the Respondent in writing.

20. The couple tried insemination multiple times in two states.

21. The Respondent became pregnant with S.W.B. by virtue of in vitro fertilization performed at the parties' request and paid for in part by Petitioner.

22. The donor was picked who had similar characteristics to Petitioner.

23. The Petitioner and Respondent were the "commissioning couple" as that term is used in Florida statutes chapter 742.11 and 742.13 and interpreted by *DMT v TMH*, 129 So.3d 320, 342-343 (Fla. 2013) (which deemed as unconstitutional a failure to apply it to same sex couples). To the extent those statutes do not include same sex couples, they are unconstitutional.

24. Petitioner contributed to Respondent's living, medical and birthing expenses before and during the pregnancy.

THE BIRTH OF THE MINOR CHILD

25. In mid-2006 the parties' son, S.W.B. was born to the Respondent.

26. As noted above, under Vermont law there is no question that S.W.B. is the child of the parties since he was born during their union. Vermont Law Chapter 23, section 3, 15

V.S.A. sec. 1204(f). Other states have recognized this premise, see, e.g., *Debra H.* v *Janice R.*, *930 N.E.2d 184 (NY 2010)* (finding the non-biological parent in a same sex Vermont Civil union to be the parent of the parties' child conceived via in vitro fertilization considering a factually analogous situation).

27. S.W.B. is a child born during the wedlock of the parties by in vitro fertilization with the joint written consent of the parties and should be irrefutably presumed to be the child of the parties.

28. During the pregnancy, the parties jointly prepared wills and trusts on or about June 13, 2006, that provided, *inter alia*, in the event of Respondent's death or incapacity the Petitioner would be the guardian for S.W.B. (at that time same sex adoption was not legal in Florida).

29. To the extent that Fl. St. 742.011, 742.11 and 742.13 would fail to accord S.W.B. legitimacy as the child of this married couple and would delegitimize the child, there is no rational basis to do so and those statutes, as applied to this case, are unconstitutional. See, e.g., *Maxwell v Stephens Maxwell*, case # 502014DF010428XXXXMB, division FD, Order Granting Petition to Determine Parenthood and Related Relief Final Judgment Recognizing Marriage of Lisa Marina Maxwell and Christine Stephens-Maxwell and Determining that Lisa Maxwell is the Parent of [child's name] dated January 21, 2015.

30. It is well recognized that the right to parent and to familial association are fundamental. See e.g. *TMH v DMT, supra*.

31. It is also well recognized in accordance with the public policy of the state of Florida that:

> [T]he State would be hard pressed to find a reason why a child would not be better off having two loving parents in [his] life, regardless of whether those parents are of the same sex, than [he] would by having only one parent. D.M.T. v. T.M.H., 129 So. 3d 320, 344 (Fla. 2013), reh'g denied (Dec. 12, 2013).

This same reasoning is adopted by the United States Supreme Court in *Obergefell v. Hodges*. The Court recognized the importance of the removal of the stigma of illegitimacy and safeguards and stability to children provided by the legal recognition of the unions of same sex couples. See *Obergefell* opinion at 14.

FACTS SUPPORTING PARENTAGE, PARENTAL RESPONSIBILITY AND TIMESHARING

32. The parties sent out joint birth announcements welcoming their "Little Slugger". See Exhibit 3 attached to the Verified Petition.

33. The parties jointly picked the child's name.

34. On December 2, 2006 the parties had S.W.B. christened and the Minister certified that he was the child of both parties. See Exhibit 4 attached to the Verified Petition.[3]

35. During S.W.B.'s lifetime, the parties have jointly held themselves out as his parents on medical forms and school related documents.

36. Throughout S.W.B.'s lifetime, both parties have co-parented him and until Respondent left with S.W.B. on or about December 17, 2014, prior thereto his only legal residence has been with both parties.

37. During S.W.B.'s lifetime, Respondent fostered a parent child relationship between S.W.B. and the Petitioner.

38. Petitioner provides and pays for medical insurance for S.W.B. on her policy.

[3] The hospital refused to list Petitioner on the birth certificate.

39. Petitioner provided support to S.W.B. through the date of the parties' separation.

40. Throughout his life S.W.B. has called Petitioner "Mommy" and Respondent "Momma". The child understands the Petitioner and Respondent to be his parents.

41. During his lifetime until separation Petitioner had been S.W.B.'s primary caregiver. Petitioner is the parent who helped S.W.B. with his homework and school projects, cooks the child's meals, packs his school lunches, acts as the room parent (this past school year she was the snack and treasure box parent in school) is a PTA member, volunteered at school events, cuts the child's nails, takes S.W.B. clothes shopping, and attended (with the Respondent) the child's medical appointments.[4]

42. Petitioner has stood *in loco parentis* to S.W.B.

43. Petitioner has demonstrated a full commitment to parent S.W.B., accepting both the rights and obligations of parenthood.

44. Petitioner is anxious to commence overnight equal timesharing and it is in the best interest of the child for him to commence regular timesharing with Petitioner.

45. Petitioner relied on the representations of the Respondent that they would have a child together and raise him together and has changed her position in reliance to her detrimentally.

46. The Verified Petition contains a section regarding detriment to the child which is adopted as if fully set forth herein. However, in addition to the detriment set forth therein, the

[4] On or about February 3, 2015, Petitioner learned that Respondent removed her access to the child's school records. On February 4, 2015 Petitioner was notified that the Respondent terminated her ability to even volunteer in S.W.B.'s classroom, thus terminating her ability to have contact with him without the specific permission of Respondent. Respondent has severely restricted the child's access to Petitioner since the filing and the Petitioner has been without recourse to Court to enforce her legal rights.

child is also being damage since the Respondent has used the Court's declining to hear any aspect of this case to attempt to alienate the child from the "Mommy" with whom he resided for the first eight years of his life (until just before this action was filed).

RELIEF REQUESTED

47. The Petitioner has fully responded to this Court's order of June 19, 2015. It should be noted that neither the Respondent nor the state of Florida, who was notified of this case by Petitioner since its inception, have ever asserted a position that this is not a valid marriage (or its legal equivalent), that this Court does not have jurisdiction to dissolve this union and determine the rights of the parties to their child and their property, nor has there been any allegation that the Petitioner is not the legal parent of the minor child. The continued refusal of this Court to accept jurisdiction and determine these rights is causing continual harm to the parties and their child for all the reasons enunciated herein as well as in the Verified Petition filed February 4, 2015, over four months ago.

48. Accordingly, Petitioner respectfully requests that this Court immediately exercise jurisdiction over the parties and their child, and set this matter for hearing in short order. Petitioner understands this Court's busy docket. But Petitioner also notes this case has been pending in legal limbo without this Court's exercise of jurisdiction since February 4, 2015. The parties' child is the paramount interest of this Court, and he needs the love of both parents, and protection of this Court.

WHEREFORE, having fully complied with this Courts Order of June 19, 2015, the Petitioner Moves this Court for an immediate ruling on her Motion for Declaratory Relief contained in the Verified Petition and such other and further relief as may be proper.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided *via* e-service portal to: [bursie44@aol.com] Ms. Mary Colleen Burns, *Pro Se/Respondent*, 1908 Capeside Circle, Wellington, FL 33414; [ted.miloch7@gmail.com; and mfoster@clearlakebusinesscenter.com] Theodore Miloch, Esquire, *Attorney for Respondent*, 500 S. Australian Avenue, Ste. 600, West Palm Beach, FL 33401-6237; and e-service portal [adam.tanenbaum@myfloridalegal.com] Adam Tanenbaum, Assistant Attorney General for the State of Florida c/o Honorable Pamela Jo Bondi, Attorney General for the State of Florida, PL-01-Capitol Building, Tallahassee, FL 32399-0010, on this the **8 July 2015**.

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By: ______________________
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> The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees **and even if the legislature refuses to act.** The idea of the Constitution "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal

> principles to be applied by the courts." *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 638 (1943). *Obergefell* slip opinion at 24. (Emphasis supplied)

17. The current status of the law supports the application of chapter 61 and 742 equally to same sex couples joined in marriage or by a civil union such as the parties here which is the legal equivalent of marriage, as explained above. Applying the holding of the United States Supreme Court in *Obergefell*, those Florida's Statutes which attempt to subject same sex couples to unequal treatment are unconstitutional, and impermissibly injurious and must be stricken or those statutes must be construed to be inclusive of individuals such as the parties hereto. To the extent that this Court may interpret those laws as not applying in a gender neutral manner and to the parties herein they would purport to deny Petitioner the legal right to parent her minor child and to obtain a dissolution of her marriage, Article I, section 27 of the Fl. Constitution and Fl. St. 741.212 are unconstitutional and violate the due process and equal protection clauses of the United States Constitution. *Brenner v Scott*, 999 F.Supp. 1278, 1290 (N.D. Fla. 2014), and *Brenner v Scott* 2015 WL 44260 (January 1, 2015), *Maxwell v Stephens Maxwell*, Case # 502014DF010428XXXXMB, division FD, Order Granting Petition to Determine Parenthood and Related Relief Final Judgment Recognizing Marriage of Lisa Marina Maxwell and Christine Stephens-Maxwell and Determining that Lisa Maxwell is the parent of [omitted name of minor child[dated January 21, 2015. Attached as Exhibit 2 to the Verified Petition. To the extent Fl. St. 742.011 would purport to deny the Petitioner the right to bring this action it is unconstitutional, *Maxwell* and *Brassner, supra.*

18. *Brenner* has declared Article I, section 27 of the Fl. Constitution and Fl. St. sec. 741.212 as requiring a gender neutral application. Therefore only should this Court fail to

recognize the validity of the Vermont Civil union with its statutory rights, protections and obligations, as the equivalent of a Florida marriage do they violate the equal protection and due process clauses of the U.S. Constitution, *Brassner v Lade, supra,* as well as the full faith and credit provisions of Article IV, Section 1 of the Constitution of the United States.

FACTUAL BACKGROUND AND APPLICATION OF THE LAW TO THESE FACTS

IN VITRO FERTILIZATION

19. During the union of the parties, they jointly decided to have a child and both consented to the in vitro insemination of the Respondent in writing.

20. The couple tried insemination multiple times in two states.

21. The Respondent became pregnant with S.W.B. by virtue of in vitro fertilization performed at the parties' request and paid for in part by Petitioner.

22. The donor was picked who had similar characteristics to Petitioner.

23. The Petitioner and Respondent were the "commissioning couple" as that term is used in Florida statutes chapter 742.11 and 742.13 and interpreted by *DMT v TMH*, 129 So.3d 320, 342-343 (Fla. 2013) (which deemed as unconstitutional a failure to apply it to same sex couples). To the extent those statutes do not include same sex couples, they are unconstitutional.

24. Petitioner contributed to Respondent's living, medical and birthing expenses before and during the pregnancy.

THE BIRTH OF THE MINOR CHILD

25. In mid-2006 the parties' son, S.W.B. was born to the Respondent.

26. As noted above, under Vermont law there is no question that S.W.B. is the child of the parties since he was born during their union. Vermont Law Chapter 23, section 3, 15

V.S.A. sec. 1204(f). Other states have recognized this premise, see, e.g., *Debra H. v Janice R.*, *930 N.E.2d 184 (NY 2010)* (finding the non-biological parent in a same sex Vermont Civil union to be the parent of the parties' child conceived via in vitro fertilization considering a factually analogous situation).

27. S.W.B. is a child born during the wedlock of the parties by in vitro fertilization with the joint written consent of the parties and should be irrefutably presumed to be the child of the parties.

28. During the pregnancy, the parties jointly prepared wills and trusts on or about June 13, 2006, that provided, *inter alia*, in the event of Respondent's death or incapacity the Petitioner would be the guardian for S.W.B. (at that time same sex adoption was not legal in Florida).

29. To the extent that Fl. St. 742.011, 742.11 and 742.13 would fail to accord S.W.B. legitimacy as the child of this married couple and would delegitimize the child, there is no rational basis to do so and those statutes, as applied to this case, are unconstitutional. See, e.g., *Maxwell v Stephens Maxwell*, case # 502014DF010428XXXXMB, division FD, Order Granting Petition to Determine Parenthood and Related Relief Final Judgment Recognizing Marriage of Lisa Marina Maxwell and Christine Stephens-Maxwell and Determining that Lisa Maxwell is the Parent of [child's name] dated January 21, 2015.

30. It is well recognized that the right to parent and to familial association are fundamental. See e.g. *TMH v DMT, supra.*

31. It is also well recognized in accordance with the public policy of the state of Florida that:

> [T]he State would be hard pressed to find a reason why a child would not be better off having two loving parents in [his] life, regardless of whether those parents are of the same sex, than [he] would by having only one parent. D.M.T. v. T.M.H., 129 So. 3d 320, 344 (Fla. 2013), reh'g denied (Dec. 12, 2013).

This same reasoning is adopted by the United States Supreme Court in *Obergefell v Hodges*. The Court recognized the importance of the removal of the stigma of illegitimacy and safeguards and stability to children provided by the legal recognition of the unions of same sex couples. See *Obergefell* opinion at 14.

**FACTS SUPPORTING PARENTAGE,
PARENTAL RESPONSIBILITY AND TIMESHARING**

32. The parties sent out joint birth announcements welcoming their "Little Slugger". See Exhibit 3 attached to the Verified Petition.

33. The parties jointly picked the child's name.

34. On December 2, 2006 the parties had S.W.B. christened and the Minister certified that he was the child of both parties. See Exhibit 4 attached to the Verified Petition.[3]

35. During S.W.B.'s lifetime, the parties have jointly held themselves out as his parents on medical forms and school related documents.

36. Throughout S.W.B.'s lifetime, both parties have co-parented him and until Respondent left with S.W.B. on or about December 17, 2014, prior thereto his only legal residence has been with both parties.

37. During S.W.B.'s lifetime, Respondent fostered a parent child relationship between S.W.B. and the Petitioner.

38. Petitioner provides and pays for medical insurance for S.W.B. on her policy.

[3] The hospital refused to list Petitioner on the birth certificate.

39. Petitioner provided support to S.W.B. through the date of the parties' separation.

40. Throughout his life S.W.B. has called Petitioner "Mommy" and Respondent "Momma". The child understands the Petitioner and Respondent to be his parents.

41. During his lifetime until separation Petitioner had been S.W.B.'s primary caregiver. Petitioner is the parent who helped S.W.B. with his homework and school projects, cooks the child's meals, packs his school lunches, acts as the room parent (this past school year she was the snack and treasure box parent in school) is a PTA member, volunteered at school events, cuts the child's nails, takes S.W.B. clothes shopping, and attended (with the Respondent) the child's medical appointments.[4]

42. Petitioner has stood *in loco parentis* to S.W.B.

43. Petitioner has demonstrated a full commitment to parent S.W.B., accepting both the rights and obligations of parenthood.

44. Petitioner is anxious to commence overnight equal timesharing and it is in the best interest of the child for him to commence regular timesharing with Petitioner.

45. Petitioner relied on the representations of the Respondent that they would have a child together and raise him together and has changed her position in reliance to her detrimentally.

46. The Verified Petition contains a section regarding detriment to the child which is adopted as if fully set forth herein. However, in addition to the detriment set forth therein, the

[4] On or about February 3, 2015, Petitioner learned that Respondent removed her access to the child's school records. On February 4, 2015 Petitioner was notified that the Respondent terminated her ability to even volunteer in S.W.B.'s classroom, thus terminating her ability to have contact with him without the specific permission of Respondent. Respondent has severely restricted the child's access to Petitioner since the filing and the Petitioner has been without recourse to Court to enforce her legal rights.

child is also being damage since the Respondent has used the Court's declining to hear any aspect of this case to attempt to alienate the child from the "Mommy" with whom he resided for the first eight years of his life (until just before this action was filed).

RELIEF REQUESTED

47. The Petitioner has fully responded to this Court's order of June 19, 2015. It should be noted that neither the Respondent nor the state of Florida, who was notified of this case by Petitioner since its inception, have ever asserted a position that this is not a valid marriage (or its legal equivalent), that this Court does not have jurisdiction to dissolve this union and determine the rights of the parties to their child and their property, nor has there been any allegation that the Petitioner is not the legal parent of the minor child. The continued refusal of this Court to accept jurisdiction and determine these rights is causing continual harm to the parties and their child for all the reasons enunciated herein as well as in the Verified Petition filed February 4, 2015, over four months ago.

48. Accordingly, Petitioner respectfully requests that this Court immediately exercise jurisdiction over the parties and their child, and set this matter for hearing in short order. Petitioner understands this Court's busy docket. But Petitioner also notes this case has been pending in legal limbo without this Court's exercise of jurisdiction since February 4, 2015. The parties' child is the paramount interest of this Court, and he needs the love of both parents, and protection of this Court.

WHEREFORE, having fully complied with this Courts Order of June 19, 2015, the Petitioner Moves this Court for an immediate ruling on her Motion for Declaratory Relief contained in the Verified Petition and such other and further relief as may be proper.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided *via* e-service portal to: [bursie44@aol.com] Ms. Mary Colleen Burns, *Pro Se/Respondent*, 1908 Capeside Circle, Wellington, FL 33414; [ted.miloch2@gmail.com; and mfinster@clearlakebusinesscenter.com] Theodore Miloch, Esquire, *Attorney for Respondent*, 500 S. Australian Avenue, Ste. 600, West Palm Beach, FL 33401-6237; and e-service portal [adam.tanenbaum@myfloridalegal.com] Adam Tanenbaum, Assistant Attorney General for the State of Florida c/o Honorable Pamela Jo Bondi, Attorney General for the State of Florida, PL-01-Capitol Building, Tallahassee, FL 32399-0010, on this the 8 July 2015.

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

OBERGEFELL ET AL. *v.* HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 14–556. Argued April 28, 2015—Decided June 26, 2015*

Michigan, Kentucky, Ohio, and Tennessee define marriage as a union between one man and one woman. The petitioners, 14 same-sex couples and two men whose same-sex partners are deceased, filed suits in Federal District Courts in their home States, claiming that respondent state officials violate the Fourteenth Amendment by denying them the right to marry or to have marriages lawfully performed in another State given full recognition. Each District Court ruled in petitioners' favor, but the Sixth Circuit consolidated the cases and reversed.

Held: The Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State. Pp. 3–28.

(a) Before turning to the governing principles and precedents, it is appropriate to note the history of the subject now before the Court. Pp. 3–10.

(1) The history of marriage as a union between two persons of the opposite sex marks the beginning of these cases. To the respondents, it would demean a timeless institution if marriage were extended to same-sex couples. But the petitioners, far from seeking to devalue marriage, seek it for themselves because of their respect—and need—for its privileges and responsibilities, as illustrated by the pe-

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* Together with No. 14–562, *Tanco et al.* v. *Haslam, Governor of Tennessee, et al.*, No. 14–571, *DeBoer et al.* v. *Snyder, Governor of Michigan, et al.*, and No. 14–574, *Bourke et al.* v. *Beshear, Governor of Kentucky*, also on certiorari to the same court.

titioners' own experiences. Pp. 3–6.

(2) The history of marriage is one of both continuity and change. Changes, such as the decline of arranged marriages and the abandonment of the law of coverture, have worked deep transformations in the structure of marriage, affecting aspects of marriage once viewed as essential. These new insights have strengthened, not weakened, the institution. Changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations.

This dynamic can be seen in the Nation's experience with gay and lesbian rights. Well into the 20th century, many States condemned same-sex intimacy as immoral, and homosexuality was treated as an illness. Later in the century, cultural and political developments allowed same-sex couples to lead more open and public lives. Extensive public and private dialogue followed, along with shifts in public attitudes. Questions about the legal treatment of gays and lesbians soon reached the courts, where they could be discussed in the formal discourse of the law. In 2003, this Court overruled its 1986 decision in *Bowers* v. *Hardwick*, 478 U. S. 186, which upheld a Georgia law that criminalized certain homosexual acts, concluding laws making same-sex intimacy a crime "demean[n] the lives of homosexual persons." *Lawrence* v. *Texas*, 539 U. S. 558, 575. In 2012, the federal Defense of Marriage Act was also struck down. *United States* v. *Windsor*, 570 U. S. ___. Numerous same-sex marriage cases reaching the federal courts and state supreme courts have added to the dialogue. Pp. 6–10.

(b) The Fourteenth Amendment requires a State to license a marriage between two people of the same sex. Pp. 10–27.

(1) The fundamental liberties protected by the Fourteenth Amendment's Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs. See, *e.g.*, *Eisenstadt* v. *Baird*, 405 U. S. 438, 453; *Griswold* v. *Connecticut*, 381 U. S. 479, 484–486. Courts must exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. History and tradition guide and discipline the inquiry but do not set its outer boundaries. When new insight reveals discord between the Constitution's central protections and a received legal structure, a claim to liberty must be addressed.

Applying these tenets, the Court has long held the right to marry is protected by the Constitution. For example, *Loving* v. *Virginia*, 388 U. S. 1, 12, invalidated bans on interracial unions, and *Turner* v. *Safley*, 482 U. S. 78, 95, held that prisoners could not be denied the right to marry. To be sure, these cases presumed a relationship in-

volving opposite-sex partners, as did *Baker* v. *Nelson*, 409 U. S. 810, a one-line summary decision issued in 1972, holding that the exclusion of same-sex couples from marriage did not present a substantial federal question. But other, more instructive precedents have expressed broader principles. See, *e.g.*, *Lawrence*, *supra*, at 574. In assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected. See, *e.g.*, *Eisenstadt*, *supra*, at 453–454. This analysis compels the conclusion that same-sex couples may exercise the right to marry. Pp. 10–12.

(2) Four principles and traditions demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples. The first premise of this Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. See 388 U. S., at 12. Decisions about marriage are among the most intimate that an individual can make. See *Lawrence*, *supra*, at 574. This is true for all persons, whatever their sexual orientation.

A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. The intimate association protected by this right was central to *Griswold* v. *Connecticut*, which held the Constitution protects the right of married couples to use contraception, 381 U. S., at 485, and was acknowledged in *Turner*, *supra*, at 95. Same-sex couples have the same right as opposite-sex couples to enjoy intimate association, a right extending beyond mere freedom from laws making same-sex intimacy a criminal offense. See *Lawrence*, *supra*, at 567.

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See, *e.g.*, *Pierce* v. *Society of Sisters*, 268 U. S. 510. Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life. The marriage laws at issue thus harm and humiliate the children of same-sex couples. See *Windsor*, *supra*, at ___. This does not mean that the right to marry is less meaningful for those who do not or cannot have children. Precedent protects the right of a married couple not to procreate, so the right to marry cannot be conditioned on the capacity or commitment to procreate.

Finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of the Nation's social order. See *Maynard* v. *Hill*, 125 U. S. 190, 211. States have contributed to the fundamental character of marriage by placing it at the center of many facets of the legal and social order. There is no difference between same- and opposite-sex couples with respect to this principle, yet same-sex couples are denied the constellation of benefits that the States have linked to marriage and are consigned to an instability many opposite-sex couples would find intolerable. It is demeaning to lock same-sex couples out of a central institution of the Nation's society, for they too may aspire to the transcendent purposes of marriage.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. Pp. 12–18.

(3) The right of same-sex couples to marry is also derived from the Fourteenth Amendment's guarantee of equal protection. The Due Process Clause and the Equal Protection Clause are connected in a profound way. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet each may be instructive as to the meaning and reach of the other. This dynamic is reflected in *Loving*, where the Court invoked both the Equal Protection Clause and the Due Process Clause; and in *Zablocki* v. *Redhail*, 434 U. S. 374, where the Court invalidated a law barring fathers delinquent on child-support payments from marrying. Indeed, recognizing that new insights and societal understandings can reveal unjustified inequality within fundamental institutions that once passed unnoticed and unchallenged, this Court has invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage, see, *e.g.*, *Kirchberg* v. *Feenstra*, 450 U. S. 455, 460–461, and confirmed the relation between liberty and equality, see, *e.g.*, *M. L. B.* v. *S. L. J.*, 519 U. S. 102, 120–121.

The Court has acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. See *Lawrence*, 539 U. S., at 575. This dynamic also applies to same-sex marriage. The challenged laws burden the liberty of same-sex couples, and they abridge central precepts of equality. The marriage laws at issue are in essence unequal: Same-sex couples are denied benefits afforded opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial works a grave and continuing harm, serving to disrespect and subordinate gays and lesbians. Pp. 18–22.

(4) The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protec-

tion Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. Same-sex couples may exercise the fundamental right to marry. *Baker* v. *Nelson* is overruled. The State laws challenged by the petitioners in these cases are held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples. Pp. 22–23.

(5) There may be an initial inclination to await further legislation, litigation, and debate, but referenda, legislative debates, and grassroots campaigns; studies and other writings; and extensive litigation in state and federal courts have led to an enhanced understanding of the issue. While the Constitution contemplates that democracy is the appropriate process for change, individuals who are harmed need not await legislative action before asserting a fundamental right. *Bowers*, in effect, upheld state action that denied gays and lesbians a fundamental right. Though it was eventually repudiated, men and women suffered pain and humiliation in the interim, and the effects of these injuries no doubt lingered long after *Bowers* was overruled. A ruling against same-sex couples would have the same effect and would be unjustified under the Fourteenth Amendment. The petitioners' stories show the urgency of the issue they present to the Court, which has a duty to address these claims and answer these questions. Respondents' argument that allowing same-sex couples to wed will harm marriage as an institution rests on a counterintuitive view of opposite-sex couples' decisions about marriage and parenthood. Finally, the First Amendment ensures that religions, those who adhere to religious doctrines, and others have protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths. Pp. 23–27.

(c) The Fourteenth Amendment requires States to recognize same-sex marriages validly performed out of State. Since same-sex couples may now exercise the fundamental right to marry in all States, there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character. Pp. 27–28.

772 F. 3d 388, reversed.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined. ALITO, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 14–556, 14-562, 14-571 and 14–574

JAMES OBERGEFELL, ET AL., PETITIONERS
14–556 *v.*
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL.;

VALERIA TANCO, ET AL., PETITIONERS
14–562 *v.*
BILL HASLAM, GOVERNOR OF TENNESSEE, ET AL.;

APRIL DEBOER, ET AL., PETITIONERS
14–571 *v.*
RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL.; AND

GREGORY BOURKE, ET AL., PETITIONERS
14–574 *v.*
STEVE BESHEAR, GOVERNOR OF KENTUCKY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 26, 2015]

JUSTICE KENNEDY delivered the opinion of the Court.

The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow

persons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.

I

These cases come from Michigan, Kentucky, Ohio, and Tennessee, States that define marriage as a union between one man and one woman. See, *e.g.*, Mich. Const., Art. I, §25; Ky. Const. §233A; Ohio Rev. Code Ann. §3101.01 (Lexis 2008); Tenn. Const., Art. XI, §18. The petitioners are 14 same-sex couples and two men whose same-sex partners are deceased. The respondents are state officials responsible for enforcing the laws in question. The petitioners claim the respondents violate the Fourteenth Amendment by denying them the right to marry or to have their marriages, lawfully performed in another State, given full recognition.

Petitioners filed these suits in United States District Courts in their home States. Each District Court ruled in their favor. Citations to those cases are in Appendix A, *infra*. The respondents appealed the decisions against them to the United States Court of Appeals for the Sixth Circuit. It consolidated the cases and reversed the judgments of the District Courts. *DeBoer* v. *Snyder*, 772 F. 3d 388 (2014). The Court of Appeals held that a State has no constitutional obligation to license same-sex marriages or to recognize same-sex marriages performed out of State.

The petitioners sought certiorari. This Court granted review, limited to two questions. 574 U. S. ___ (2015). The first, presented by the cases from Michigan and Kentucky, is whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex. The second, presented by the cases from Ohio,

Tennessee, and, again, Kentucky, is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.

II

Before addressing the principles and precedents that govern these cases, it is appropriate to note the history of the subject now before the Court.

A

From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.

The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together. Confucius taught that marriage lies at the foundation of government. 2 Li Chi: Book of Rites 266 (C. Chai & W. Chai eds., J. Legge transl. 1967). This wisdom was echoed centuries later and half a world away by Cicero, who wrote, "The first bond of society is marriage; next, children; and then the family." See De Officiis 57 (W. Miller transl. 1913). There are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures,

and faiths, as well as in art and literature in all their forms. It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.

That history is the beginning of these cases. The respondents say it should be the end as well. To them, it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.

The petitioners acknowledge this history but contend that these cases cannot end there. Were their intent to demean the revered idea and reality of marriage, the petitioners' claims would be of a different order. But that is neither their purpose nor their submission. To the contrary, it is the enduring importance of marriage that underlies the petitioners' contentions. This, they say, is their whole point. Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.

Recounting the circumstances of three of these cases illustrates the urgency of the petitioners' cause from their perspective. Petitioner James Obergefell, a plaintiff in the Ohio case, met John Arthur over two decades ago. They fell in love and started a life together, establishing a lasting, committed relation. In 2011, however, Arthur was diagnosed with amyotrophic lateral sclerosis, or ALS. This debilitating disease is progressive, with no known cure. Two years ago, Obergefell and Arthur decided to commit to one another, resolving to marry before Arthur died. To fulfill their mutual promise, they traveled from

Ohio to Maryland, where same-sex marriage was legal. It was difficult for Arthur to move, and so the couple were wed inside a medical transport plane as it remained on the tarmac in Baltimore. Three months later, Arthur died. Ohio law does not permit Obergefell to be listed as the surviving spouse on Arthur's death certificate. By statute, they must remain strangers even in death, a state-imposed separation Obergefell deems "hurtful for the rest of time." App. in No. 14–556 etc., p. 38. He brought suit to be shown as the surviving spouse on Arthur's death certificate.

April DeBoer and Jayne Rowse are co-plaintiffs in the case from Michigan. They celebrated a commitment ceremony to honor their permanent relation in 2007. They both work as nurses, DeBoer in a neonatal unit and Rowse in an emergency unit. In 2009, DeBoer and Rowse fostered and then adopted a baby boy. Later that same year, they welcomed another son into their family. The new baby, born prematurely and abandoned by his biological mother, required around-the-clock care. The next year, a baby girl with special needs joined their family. Michigan, however, permits only opposite-sex married couples or single individuals to adopt, so each child can have only one woman as his or her legal parent. If an emergency were to arise, schools and hospitals may treat the three children as if they had only one parent. And, were tragedy to befall either DeBoer or Rowse, the other would have no legal rights over the children she had not been permitted to adopt. This couple seeks relief from the continuing uncertainty their unmarried status creates in their lives.

Army Reserve Sergeant First Class Ijpe DeKoe and his partner Thomas Kostura, co-plaintiffs in the Tennessee case, fell in love. In 2011, DeKoe received orders to deploy to Afghanistan. Before leaving, he and Kostura married in New York. A week later, DeKoe began his deployment, which lasted for almost a year. When he returned, the two

settled in Tennessee, where DeKoe works full-time for the Army Reserve. Their lawful marriage is stripped from them whenever they reside in Tennessee, returning and disappearing as they travel across state lines. DeKoe, who served this Nation to preserve the freedom the Constitution protects, must endure a substantial burden.

The cases now before the Court involve other petitioners as well, each with their own experiences. Their stories reveal that they seek not to denigrate marriage but rather to live their lives, or honor their spouses' memory, joined by its bond.

B

The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time.

For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract between a man and a woman. See N. Cott, Public Vows: A History of Marriage and the Nation 9–17 (2000); S. Coontz, Marriage, A History 15–16 (2005). As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. See 1 W. Blackstone, Commentaries on the Laws of England 430 (1765). As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned. See Brief for Historians of Marriage et al. as *Amici Curiae* 16–19. These and other developments in the institution of marriage over the past centuries were not mere superficial changes.

Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential. See generally N. Cott, Public Vows; S. Coontz, Marriage; H. Hartog, Man & Wife in America: A History (2000).

These new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.

This dynamic can be seen in the Nation's experiences with the rights of gays and lesbians. Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate. See Brief for Organization of American Historians as *Amicus Curiae* 5–28.

For much of the 20th century, moreover, homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973. See Position Statement on Homosexuality and Civil

Rights, 1973, in 131 Am. J. Psychiatry 497 (1974). Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable. See Brief for American Psychological Association et al. as *Amici Curiae* 7–17.

In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance. As a result, questions about the rights of gays and lesbians soon reached the courts, where the issue could be discussed in the formal discourse of the law.

This Court first gave detailed consideration to the legal status of homosexuals in *Bowers* v. *Hardwick*, 478 U. S. 186 (1986). There it upheld the constitutionality of a Georgia law deemed to criminalize certain homosexual acts. Ten years later, in *Romer* v. *Evans*, 517 U. S. 620 (1996), the Court invalidated an amendment to Colorado's Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation. Then, in 2003, the Court overruled *Bowers*, holding that laws making same-sex intimacy a crime "demea[n] the lives of homosexual persons." *Lawrence* v. *Texas*, 539 U. S. 558, 575.

Against this background, the legal question of same-sex marriage arose. In 1993, the Hawaii Supreme Court held Hawaii's law restricting marriage to opposite-sex couples constituted a classification on the basis of sex and was therefore subject to strict scrutiny under the Hawaii Constitution. *Baehr* v. *Lewin*, 74 Haw. 530, 852 P. 2d 44. Although this decision did not mandate that same-sex marriage be allowed, some States were concerned by its implications and reaffirmed in their laws that marriage is

defined as a union between opposite-sex partners. So too in 1996, Congress passed the Defense of Marriage Act (DOMA), 110 Stat. 2419, defining marriage for all federal-law purposes as "only a legal union between one man and one woman as husband and wife." 1 U. S. C. §7.

The new and widespread discussion of the subject led other States to a different conclusion. In 2003, the Supreme Judicial Court of Massachusetts held the State's Constitution guaranteed same-sex couples the right to marry. See *Goodridge* v. *Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941 (2003). After that ruling, some additional States granted marriage rights to same-sex couples, either through judicial or legislative processes. These decisions and statutes are cited in Appendix B, *infra*. Two Terms ago, in *United States* v. *Windsor*, 570 U. S. ___ (2013), this Court invalidated DOMA to the extent it barred the Federal Government from treating same-sex marriages as valid even when they were lawful in the State where they were licensed. DOMA, the Court held, impermissibly disparaged those same-sex couples "who wanted to affirm their commitment to one another before their children, their family, their friends, and their community." *Id.*, at ___ (slip op., at 14).

Numerous cases about same-sex marriage have reached the United States Courts of Appeals in recent years. In accordance with the judicial duty to base their decisions on principled reasons and neutral discussions, without scornful or disparaging commentary, courts have written a substantial body of law considering all sides of these issues. That case law helps to explain and formulate the underlying principles this Court now must consider. With the exception of the opinion here under review and one other, see *Citizens for Equal Protection* v. *Bruning*, 455 F. 3d 859, 864–868 (CA8 2006), the Courts of Appeals have held that excluding same-sex couples from marriage violates the Constitution. There also have been many

thoughtful District Court decisions addressing same-sex marriage—and most of them, too, have concluded same-sex couples must be allowed to marry. In addition the highest courts of many States have contributed to this ongoing dialogue in decisions interpreting their own State Constitutions. These state and federal judicial opinions are cited in Appendix A, *infra*.

After years of litigation, legislation, referenda, and the discussions that attended these public acts, the States are now divided on the issue of same-sex marriage. See Office of the Atty. Gen. of Maryland, The State of Marriage Equality in America, State-by-State Supp. (2015).

III

Under the Due Process Clause of the Fourteenth Amendment, no State shall "deprive any person of life, liberty, or property, without due process of law." The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. See *Duncan* v. *Louisiana*, 391 U. S. 145, 147–149 (1968). In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. See, *e.g.*, *Eisenstadt* v. *Baird*, 405 U. S. 438, 453 (1972); *Griswold* v. *Connecticut*, 381 U. S. 479, 484–486 (1965).

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, "has not been reduced to any formula." *Poe* v. *Ullman*, 367 U. S. 497, 542 (1961) (Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. See *ibid.* That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradi-

tion guide and discipline this inquiry but do not set its outer boundaries. See *Lawrence*, *supra*, at 572. That method respects our history and learns from it without allowing the past alone to rule the present.

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these established tenets, the Court has long held the right to marry is protected by the Constitution. In *Loving* v. *Virginia*, 388 U. S. 1, 12 (1967), which invalidated bans on interracial unions, a unanimous Court held marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men." The Court reaffirmed that holding in *Zablocki* v. *Redhail*, 434 U. S. 374, 384 (1978), which held the right to marry was burdened by a law prohibiting fathers who were behind on child support from marrying. The Court again applied this principle in *Turner* v. *Safley*, 482 U. S. 78, 95 (1987), which held the right to marry was abridged by regulations limiting the privilege of prison inmates to marry. Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause. See, *e.g.*, *M. L. B.* v. *S. L. J.*, 519 U. S. 102, 116 (1996); *Cleveland Bd. of Ed.* v. *LaFleur*, 414 U. S. 632, 639–640 (1974); *Griswold*, *supra*, at 486; *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942); *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923).

It cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners. The Court, like many institutions,

has made assumptions defined by the world and time of which it is a part. This was evident in *Baker* v. *Nelson*, 409 U. S. 810, a one-line summary decision issued in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question.

Still, there are other, more instructive precedents. This Court's cases have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond. See, *e.g., Lawrence*, 539 U. S., at 574; *Turner*, *supra*, at 95; *Zablocki*, *supra*, at 384; *Loving*, *supra*, at 12; *Griswold*, *supra*, at 486. And in assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected. See, *e.g., Eisenstadt*, *supra*, at 453–454; *Poe*, *supra*, at 542–553 (Harlan, J., dissenting).

This analysis compels the conclusion that same-sex couples may exercise the right to marry. The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.

A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. See 388 U. S., at 12; see also *Zablocki*, *supra*, at 384 (observing *Loving* held "the right to marry is of fundamental importance for all individuals"). Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. See *Lawrence*, *supra*, at 574. Indeed, the Court has noted it would

be contradictory "to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society." *Zablocki*, *supra*, at 386.

Choices about marriage shape an individual's destiny. As the Supreme Judicial Court of Massachusetts has explained, because "it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition." *Goodridge*, 440 Mass., at 322, 798 N. E. 2d, at 955.

The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. See *Windsor*, 570 U. S., at ___ – ___ (slip op., at 22–23). There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices. Cf. *Loving*, *supra*, at 12 ("[T]he freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State").

A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. This point was central to *Griswold* v. *Connecticut*, which held the Constitution protects the right of married couples to use contraception. 381 U. S., at 485. Suggesting that marriage is a right "older than the Bill of Rights," *Griswold* described marriage this way:

> "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." *Id.*, at 486.

And in *Turner*, the Court again acknowledged the intimate association protected by this right, holding prisoners could not be denied the right to marry because their committed relationships satisfied the basic reasons why marriage is a fundamental right. See 482 U. S., at 95–96. The right to marry thus dignifies couples who "wish to define themselves by their commitment to each other." *Windsor*, *supra*, at ___ (slip op., at 14). Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.

As this Court held in *Lawrence*, same-sex couples have the same right as opposite-sex couples to enjoy intimate association. *Lawrence* invalidated laws that made same-sex intimacy a criminal act. And it acknowledged that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." 539 U. S., at 567. But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Meyer*, 262 U. S., at 399. The Court has recognized these connections by describing the varied rights as a unified whole: "[T]he right to 'marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause." *Zablocki*, 434 U. S., at 384

(quoting *Meyer*, *supra*, at 399). Under the laws of the several States, some of marriage's protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents' relationship, marriage allows children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, *supra*, at ___ (slip op., at 23). Marriage also affords the permanency and stability important to children's best interests. See Brief for Scholars of the Constitutional Rights of Children as *Amici Curiae* 22–27.

As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. See Brief for Gary J. Gates as *Amicus Curiae* 4. Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents, see *id.*, at 5. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.

Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples. See *Windsor*, *supra*, at ___ (slip op., at 23).

That is not to say the right to marry is less meaningful for those who do not or cannot have children. An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of

precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one.

Fourth and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order. Alexis de Tocqueville recognized this truth on his travels through the United States almost two centuries ago:

> "There is certainly no country in the world where the tie of marriage is so much respected as in America . . . [W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace . . . . [H]e afterwards carries [that image] with him into public affairs." 1 Democracy in America 309 (H. Reeve transl., rev. ed. 1990).

In *Maynard* v. *Hill*, 125 U. S. 190, 211 (1888), the Court echoed de Tocqueville, explaining that marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress." Marriage, the *Maynard* Court said, has long been "'a great public institution, giving character to our whole civil polity.'" *Id.*, at 213. This idea has been reiterated even as the institution has evolved in substantial ways over time, superseding rules related to parental consent, gender, and race once thought by many to be essential. See generally N. Cott, Public Vows. Marriage remains a building block of our national community.

For that reason, just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the

basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. See Brief for United States as *Amicus Curiae* 6–9; Brief for American Bar Association as *Amicus Curiae* 8–29. Valid marriage under state law is also a significant status for over a thousand provisions of federal law. See *Windsor*, 570 U. S., at ___ – ___ (slip op., at 15–16). The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.

There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come

the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.

Objecting that this does not reflect an appropriate framing of the issue, the respondents refer to *Washington* v. *Glucksberg*, 521 U. S. 702, 721 (1997), which called for a "'careful description'" of fundamental rights. They assert the petitioners do not seek to exercise the right to marry but rather a new and nonexistent "right to same-sex marriage." Brief for Respondent in No. 14–556, p. 8. *Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. *Loving* did not ask about a "right to interracial marriage"; *Turner* did not ask about a "right of inmates to marry"; and *Zablocki* did not ask about a "right of fathers with unpaid child support duties to marry." Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right. See also *Glucksberg*, 521 U. S., at 752–773 (Souter, J., concurring in judgment); *id.*, at 789–792 (BREYER, J., concurring in judgments).

That principle applies here. If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians. See *Loving* 388 U. S., at 12; *Lawrence*, 539 U. S., at 566–567.

The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources

alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era. Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.

The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. See *M. L. B.*, 519 U. S., at 120–121; *id.*, at 128–129 (KENNEDY, J., concurring in judgment); *Bearden* v. *Georgia*, 461 U. S. 660, 665 (1983). This interrelation of the two principles furthers our understanding of what freedom is and must become.

The Court's cases touching upon the right to marry reflect this dynamic. In *Loving* the Court invalidated a prohibition on interracial marriage under both the Equal Protection Clause and the Due Process Clause. The Court

first declared the prohibition invalid because of its unequal treatment of interracial couples. It stated: "There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." 388 U. S., at 12. With this link to equal protection the Court proceeded to hold the prohibition offended central precepts of liberty: "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law." *Ibid.* The reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions.

The synergy between the two protections is illustrated further in *Zablocki*. There the Court invoked the Equal Protection Clause as its basis for invalidating the challenged law, which, as already noted, barred fathers who were behind on child-support payments from marrying without judicial approval. The equal protection analysis depended in central part on the Court's holding that the law burdened a right "of fundamental importance." 434 U. S., at 383. It was the essential nature of the marriage right, discussed at length in *Zablocki*, see *id.*, at 383–387, that made apparent the law's incompatibility with requirements of equality. Each concept—liberty and equal protection—leads to a stronger understanding of the other.

Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged. To take but one period, this occurred with respect to marriage in the 1970's and 1980's. Notwithstanding the gradual erosion of the doctrine of cover-

ture, see *supra*, at 6, invidious sex-based classifications in marriage remained common through the mid-20th century. See App. to Brief for Appellant in *Reed* v. *Reed*, O. T. 1971, No. 70–4, pp. 69–88 (an extensive reference to laws extant as of 1971 treating women as unequal to men in marriage). These classifications denied the equal dignity of men and women. One State's law, for example, provided in 1971 that "the husband is the head of the family and the wife is subject to him; her legal civil existence is merged in the husband, except so far as the law recognizes her separately, either for her own protection, or for her benefit." Ga. Code Ann. §53–501 (1935). Responding to a new awareness, the Court invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage. See, *e.g.*, *Kirchberg* v. *Feenstra*, 450 U. S. 455 (1981); *Wengler* v. *Druggists Mut. Ins. Co.*, 446 U. S. 142 (1980); *Califano* v. *Westcott*, 443 U. S. 76 (1979); *Orr* v. *Orr*, 440 U. S. 268 (1979); *Califano* v. *Goldfarb*, 430 U. S. 199 (1977) (plurality opinion); *Weinberger* v. *Wiesenfeld*, 420 U. S. 636 (1975); *Frontiero* v. *Richardson*, 411 U. S. 677 (1973). Like *Loving* and *Zablocki*, these precedents show the Equal Protection Clause can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution.

Other cases confirm this relation between liberty and equality. In *M. L. B.* v. *S. L. J.*, the Court invalidated under due process and equal protection principles a statute requiring indigent mothers to pay a fee in order to appeal the termination of their parental rights. See 519 U. S., at 119–124. In *Eisenstadt* v. *Baird*, the Court invoked both principles to invalidate a prohibition on the distribution of contraceptives to unmarried persons but not married persons. See 405 U. S., at 446–454. And in *Skinner* v. *Oklahoma ex rel. Williamson*, the Court invalidated under both principles a law that allowed steriliza-

tion of habitual criminals. See 316 U. S., at 538–543.

In *Lawrence* the Court acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. See 539 U. S., at 575. Although *Lawrence* elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State. See *ibid*. *Lawrence* therefore drew upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State "cannot demean their existence or control their destiny by making their private sexual conduct a crime." *Id*., at 578.

This dynamic also applies to same-sex marriage. It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry. See, *e.g.*, *Zablocki*, *supra*, at 383–388; *Skinner*, 316 U. S., at 541.

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No

longer may this liberty be denied to them. *Baker* v. *Nelson* must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

IV

There may be an initial inclination in these cases to proceed with caution—to await further legislation, litigation, and debate. The respondents warn there has been insufficient democratic discourse before deciding an issue so basic as the definition of marriage. In its ruling on the cases now before this Court, the majority opinion for the Court of Appeals made a cogent argument that it would be appropriate for the respondents' States to await further public discussion and political measures before licensing same-sex marriages. See *DeBoer*, 772 F. 3d, at 409.

Yet there has been far more deliberation than this argument acknowledges. There have been referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts. See Appendix A, *infra*. Judicial opinions addressing the issue have been informed by the contentions of parties and counsel, which, in turn, reflect the more general, societal discussion of same-sex marriage and its meaning that has occurred over the past decades. As more than 100 *amici* make clear in their filings, many of the central institutions in American life—state and local governments, the military, large and small businesses, labor unions, religious organizations, law enforcement, civic groups, professional organizations, and universities—have devoted substantial attention to the question. This has led to an enhanced understanding of the issue—an understanding reflected in the arguments now presented

for resolution as a matter of constitutional law.

Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. Last Term, a plurality of this Court reaffirmed the importance of the democratic principle in *Schuette* v. *BAMN*, 572 U. S. ___ (2014), noting the "right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times." *Id.*, at ___ – ___ (slip op., at 15–16). Indeed, it is most often through democracy that liberty is preserved and protected in our lives. But as *Schuette* also said, "[t]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power." *Id.*, at ___ (slip op., at 15). Thus, when the rights of persons are violated, "the Constitution requires redress by the courts," notwithstanding the more general value of democratic decisionmaking. *Id.*, at ___ (slip op., at 17). This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.

The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 638 (1943). This is why "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." *Ibid.*

It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process. The issue before the Court here is the legal question whether the Constitution protects the right of same-sex couples to marry.

This is not the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights. In *Bowers*, a bare majority upheld a law criminalizing same-sex intimacy. See 478 U. S., at 186, 190–195. That approach might have been viewed as a cautious endorsement of the democratic process, which had only just begun to consider the rights of gays and lesbians. Yet, in effect, *Bowers* upheld state action that denied gays and lesbians a fundamental right and caused them pain and humiliation. As evidenced by the dissents in that case, the facts and principles necessary to a correct holding were known to the *Bowers* Court. See *id.*, at 199 (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting); *id.*, at 214 (Stevens, J., joined by Brennan and Marshall, JJ., dissenting). That is why *Lawrence* held *Bowers* was "not correct when it was decided." 539 U. S., at 578. Although *Bowers* was eventually repudiated in *Lawrence*, men and women were harmed in the interim, and the substantial effects of these injuries no doubt lingered long after *Bowers* was overruled. Dignitary wounds cannot always be healed with the stroke of a pen.

A ruling against same-sex couples would have the same effect—and, like *Bowers*, would be unjustified under the Fourteenth Amendment. The petitioners' stories make clear the urgency of the issue they present to the Court. James Obergefell now asks whether Ohio can erase his marriage to John Arthur for all time. April DeBoer and Jayne Rowse now ask whether Michigan may continue to deny them the certainty and stability all mothers desire to protect their children, and for them and their children the childhood years will pass all too soon. Ijpe DeKoe and

Thomas Kostura now ask whether Tennessee can deny to one who has served this Nation the basic dignity of recognizing his New York marriage. Properly presented with the petitioners' cases, the Court has a duty to address these claims and answer these questions.

Indeed, faced with a disagreement among the Courts of Appeals—a disagreement that caused impermissible geographic variation in the meaning of federal law—the Court granted review to determine whether same-sex couples may exercise the right to marry. Were the Court to uphold the challenged laws as constitutional, it would teach the Nation that these laws are in accord with our society's most basic compact. Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage.

The respondents also argue allowing same-sex couples to wed will harm marriage as an institution by leading to fewer opposite-sex marriages. This may occur, the respondents contend, because licensing same-sex marriage severs the connection between natural procreation and marriage. That argument, however, rests on a counterintuitive view of opposite-sex couple's decisionmaking processes regarding marriage and parenthood. Decisions about whether to marry and raise children are based on many personal, romantic, and practical considerations; and it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so. See *Kitchen* v. *Herbert*, 755 F. 3d 1193, 1223 (CA10 2014) ("[I]t is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples"). The respondents have not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they

describe. Indeed, with respect to this asserted basis for excluding same-sex couples from the right to marry, it is appropriate to observe these cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

V

These cases also present the question whether the Constitution requires States to recognize same-sex marriages validly performed out of State. As made clear by the case of Obergefell and Arthur, and by that of DeKoe and Kostura, the recognition bans inflict substantial and continuing harm on same-sex couples.

Being married in one State but having that valid marriage denied in another is one of "the most perplexing and distressing complication[s]" in the law of domestic relations. *Williams* v. *North Carolina*, 317 U. S. 287, 299 (1942) (internal quotation marks omitted). Leaving the current state of affairs in place would maintain and pro-

mote instability and uncertainty. For some couples, even an ordinary drive into a neighboring State to visit family or friends risks causing severe hardship in the event of a spouse's hospitalization while across state lines. In light of the fact that many States already allow same-sex marriage—and hundreds of thousands of these marriages already have occurred—the disruption caused by the recognition bans is significant and ever-growing.

As counsel for the respondents acknowledged at argument, if States are required by the Constitution to issue marriage licenses to same-sex couples, the justifications for refusing to recognize those marriages performed elsewhere are undermined. See Tr. of Oral Arg. on Question 2, p. 44. The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

* * *

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

The judgment of the Court of Appeals for the Sixth Circuit is reversed.

It is so ordered.

APPENDICES

A

State and Federal Judicial Decisions Addressing Same-Sex Marriage

United States Courts of Appeals Decisions

Adams v. *Howerton*, 673 F. 2d 1036 (CA9 1982)
Smelt v. *County of Orange*, 447 F. 3d 673 (CA9 2006)
Citizens for Equal Protection v. *Bruning*, 455 F. 3d 859 (CA8 2006)
Windsor v. *United States*, 699 F. 3d 169 (CA2 2012)
Massachusetts v. *Department of Health and Human Services*, 682 F. 3d 1 (CA1 2012)
Perry v. *Brown*, 671 F. 3d 1052 (CA9 2012)
Latta v. *Otter*, 771 F. 3d 456 (CA9 2014)
Baskin v. *Bogan*, 766 F. 3d 648 (CA7 2014)
Bishop v. *Smith*, 760 F. 3d 1070 (CA10 2014)
Bostic v. *Schaefer*, 760 F. 3d 352 (CA4 2014)
Kitchen v. *Herbert*, 755 F. 3d 1193 (CA10 2014)
DeBoer v. *Snyder*, 772 F. 3d 388 (CA6 2014)
Latta v. *Otter*, 779 F. 3d 902 (CA9 2015) (O'Scannlain, J., dissenting from the denial of rehearing en banc)

United States District Court Decisions

Adams v. *Howerton*, 486 F. Supp. 1119 (CD Cal. 1980)
Citizens for Equal Protection, Inc. v. *Bruning*, 290 F. Supp. 2d 1004 (Neb. 2003)
Citizens for Equal Protection v. *Bruning*, 368 F. Supp. 2d 980 (Neb. 2005)
Wilson v. *Ake*, 354 F. Supp. 2d 1298 (MD Fla. 2005)
Smelt v. *County of Orange*, 374 F. Supp. 2d 861 (CD Cal. 2005)
Bishop v. *Oklahoma ex rel. Edmondson*, 447 F. Supp. 2d 1239 (ND Okla. 2006)

Appendix A to opinion of the Court

Massachusetts v. *Department of Health and Human Services*, 698 F. Supp. 2d 234 (Mass. 2010)

Gill v. *Office of Personnel Management*, 699 F. Supp. 2d 374 (Mass. 2010)

Perry v. *Schwarzenegger*, 704 F. Supp. 2d 921 (ND Cal. 2010)

Dragovich v. *Department of Treasury*, 764 F. Supp. 2d 1178 (ND Cal. 2011)

Golinski v. *Office of Personnel Management*, 824 F. Supp. 2d 968 (ND Cal. 2012)

Dragovich v. *Department of Treasury*, 872 F. Supp. 2d 944 (ND Cal. 2012)

Windsor v. *United States*, 833 F. Supp. 2d 394 (SDNY 2012)

Pedersen v. *Office of Personnel Management*, 881 F. Supp. 2d 294 (Conn. 2012)

Jackson v. *Abercrombie*, 884 F. Supp. 2d 1065 (Haw. 2012)

Sevcik v. *Sandoval*, 911 F. Supp. 2d 996 (Nev. 2012)

Merritt v. *Attorney General*, 2013 WL 6044329 (MD La., Nov. 14, 2013)

Gray v. *Orr*, 4 F. Supp. 3d 984 (ND Ill. 2013)

Lee v. *Orr*, 2013 WL 6490577 (ND Ill., Dec. 10, 2013)

Kitchen v. *Herbert*, 961 F. Supp. 2d 1181 (Utah 2013)

Obergefell v. *Wymyslo*, 962 F. Supp. 2d 968 (SD Ohio 2013)

Bishop v. *United States ex rel. Holder*, 962 F. Supp. 2d 1252 (ND Okla. 2014)

Bourke v. *Beshear*, 996 F. Supp. 2d 542 (WD Ky. 2014)

Lee v. *Orr*, 2014 WL 683680 (ND Ill., Feb. 21, 2014)

Bostic v. *Rainey*, 970 F. Supp. 2d 456 (ED Va. 2014)

De Leon v. *Perry*, 975 F. Supp. 2d 632 (WD Tex. 2014)

Tanco v. *Haslam*, 7 F. Supp. 3d 759 (MD Tenn. 2014)

DeBoer v. *Snyder*, 973 F. Supp. 2d 757 (ED Mich. 2014)

Henry v. *Himes*, 14 F. Supp. 3d 1036 (SD Ohio 2014)

Latta v. *Otter*, 19 F. Supp. 3d 1054 (Idaho 2014)

Geiger v. *Kitzhaber*, 994 F. Supp. 2d 1128 (Ore. 2014)
Evans v. *Utah*, 21 F. Supp. 3d 1192 (Utah 2014)
Whitewood v. *Wolf*, 992 F. Supp. 2d 410 (MD Pa. 2014)
Wolf v. *Walker*, 986 F. Supp. 2d 982 (WD Wis. 2014)
Baskin v. *Bogan*, 12 F. Supp. 3d 1144 (SD Ind. 2014)
Love v. *Beshear*, 989 F. Supp. 2d 536 (WD Ky. 2014)
Burns v. *Hickenlooper*, 2014 WL 3634834 (Colo., July 23, 2014)
Bowling v. *Pence*, 39 F. Supp. 3d 1025 (SD Ind. 2014)
Brenner v. *Scott*, 999 F. Supp. 2d 1278 (ND Fla. 2014)
Robicheaux v. *Caldwell*, 2 F. Supp. 3d 910 (ED La. 2014)
General Synod of the United Church of Christ v. *Resinger*, 12 F. Supp. 3d 790 (WDNC 2014)
Hamby v. *Parnell*, 56 F. Supp. 3d 1056 (Alaska 2014)
Fisher-Borne v. *Smith*, 14 F. Supp. 3d 695 (MDNC 2014)
Majors v. *Horne*, 14 F. Supp. 3d 1313 (Ariz. 2014)
Connolly v. *Jeanes*, ___ F. Supp. 3d ___, 2014 WL 5320642 (Ariz., Oct. 17, 2014)
Guzzo v. *Mead*, 2014 WL 5317797 (Wyo., Oct. 17, 2014)
Conde-Vidal v. *Garcia-Padilla*, 54 F. Supp. 3d 157 (PR 2014)
Marie v. *Moser*, ___ F. Supp. 3d ___, 2014 WL 5598128 (Kan., Nov. 4, 2014)
Lawson v. *Kelly*, 58 F. Supp. 3d 923 (WD Mo. 2014)
McGee v. *Cole*, ___ F. Supp. 3d ___, 2014 WL 5802665 (SD W. Va., Nov. 7, 2014)
Condon v. *Haley*, 21 F. Supp. 3d 572 (S.C. 2014)
Bradacs v. *Haley*, 58 F. Supp. 3d 514 (S.C. 2014)
Rolando v. *Fox*, 23 F. Supp. 3d 1227 (Mont. 2014)
Jernigan v. *Crane*, ___ F. Supp. 3d ___, 2014 WL 6685391 (ED Ark., Nov. 25, 2014)
Campaign for Southern Equality v. *Bryant*, ___ F. Supp. 3d ___, 2014 WL 6680570 (SD Miss., Nov. 25, 2014)
Inniss v. *Aderhold*, ___ F. Supp. 3d ___, 2015 WL 300593 (ND Ga., Jan. 8, 2015)

Rosenbrahn v. *Daugaard*, 61 F. Supp. 3d 862 (S. D., 2015)

Caspar v. *Snyder*, ___ F. Supp. 3d ___, 2015 WL 224741 (ED Mich., Jan. 15, 2015)

Searcey v. *Strange*, 2015 U. S. Dist. LEXIS 7776 (SD Ala., Jan. 23, 2015)

Strawser v. *Strange*, 44 F. Supp. 3d 1206 (SD Ala. 2015)

Waters v. *Ricketts*, 48 F. Supp. 3d 1271 (Neb. 2015)

State Highest Court Decisions

Baker v. *Nelson*, 291 Minn. 310, 191 N. W. 2d 185 (1971)

Jones v. *Hallahan*, 501 S. W. 2d 588 (Ky. 1973)

Baehr v. *Lewin*, 74 Haw. 530, 852 P. 2d 44 (1993)

Dean v. *District of Columbia*, 653 A. 2d 307 (D. C. 1995)

Baker v. *State*, 170 Vt. 194, 744 A. 2d 864 (1999)

Brause v. *State*, 21 P. 3d 357 (Alaska 2001) (ripeness)

Goodridge v. *Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941 (2003)

In re Opinions of the Justices to the Senate, 440 Mass. 1201, 802 N. E. 2d 565 (2004)

Li v. *State*, 338 Or. 376, 110 P. 3d 91 (2005)

Cote-Whitacre v. *Department of Public Health*, 446 Mass. 350, 844 N. E. 2d 623 (2006)

Lewis v. *Harris*, 188 N. J. 415, 908 A. 2d 196 (2006)

Andersen v. *King County*, 158 Wash. 2d 1, 138 P. 3d 963 (2006)

Hernandez v. *Robles*, 7 N. Y. 3d 338, 855 N. E. 2d 1 (2006)

Conaway v. *Deane*, 401 Md. 219, 932 A. 2d 571 (2007)

In re Marriage Cases, 43 Cal. 4th 757, 183 P. 3d 384 (2008)

Kerrigan v. *Commissioner of Public Health*, 289 Conn. 135, 957 A. 2d 407 (2008)

Strauss v. *Horton*, 46 Cal. 4th 364, 207 P. 3d 48 (2009)

Varnum v. *Brien*, 763 N. W. 2d 862 (Iowa 2009)

Griego v. *Oliver*, 2014–NMSC–003, ___ N. M. ___, 316 P. 3d 865 (2013)

Garden State Equality v. *Dow*, 216 N. J. 314, 79 A. 3d 1036 (2013)

Ex parte State ex rel. Alabama Policy Institute, ___ So. 3d ___, 2015 WL 892752 (Ala., Mar. 3, 2015)

B
State Legislation and Judicial Decisions Legalizing Same-Sex Marriage

Legislation

Del. Code Ann., Tit. 13, §129 (Cum. Supp. 2014)
D. C. Act No. 18–248, 57 D. C. Reg. 27 (2010)
Haw. Rev. Stat. §572–1 (2006) and 2013 Cum. Supp.)
Ill. Pub. Act No. 98–597
Me. Rev. Stat. Ann., Tit. 19, §650–A (Cum. Supp. 2014)
2012 Md. Laws p. 9
2013 Minn Laws p. 404
2009 N. H. Laws p. 60
2011 N. Y Laws p. 749
2013 R. I. Laws p. 7
2009 Vt. Acts & Resolves p. 33
2012 Wash. Sess. Laws p. 199

Judicial Decisions

Goodridge v. *Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941 (2003)

Kerrigan v. *Commissioner of Public Health*, 289 Conn. 135, 957 A. 2d 407 (2008)

Varnum v. *Brien*, 763 N. W. 2d 862 (Iowa 2009)

Griego v. *Oliver*, 2014–NMSC–003, ___ N. M. ___, 316 P. 3d 865 (2013)

Garden State Equality v. *Dow*, 216 N. J. 314, 79 A. 3d 1036 (2013)

SUPREME COURT OF THE UNITED STATES

Nos. 14–556, 14-562, 14-571 and 14–574

JAMES OBERGEFELL, ET AL., PETITIONERS
14–556 v.
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL.;

VALERIA TANCO, ET AL., PETITIONERS
14–562 v.
BILL HASLAM, GOVERNOR OF TENNESSEE, ET AL.;

APRIL DEBOER, ET AL., PETITIONERS
14–571 v.
RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL.; AND

GREGORY BOURKE, ET AL., PETITIONERS
14–574 v.
STEVE BESHEAR, GOVERNOR OF KENTUCKY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 26, 2015]

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

Petitioners make strong arguments rooted in social policy and considerations of fairness. They contend that same-sex couples should be allowed to affirm their love and commitment through marriage, just like opposite-sex couples. That position has undeniable appeal; over the

past six years, voters and legislators in eleven States and the District of Columbia have revised their laws to allow marriage between two people of the same sex.

But this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be. The people who ratified the Constitution authorized courts to exercise "neither force nor will but merely judgment." The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (capitalization altered).

Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not. The fundamental right to marry does not include a right to make a State change its definition of marriage. And a State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational. In short, our Constitution does not enact any one theory of marriage. The people of a State are free to expand marriage to include same-sex couples, or to retain the historic definition.

Today, however, the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage. Many people will rejoice at this decision, and I begrudge none their celebration. But for those who believe in a government of laws, not of men, the majority's approach is deeply disheartening. Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.

The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent. The majority expressly disclaims judicial "caution" and omits even a pretense of humility, openly relying on its desire to remake society according to its own "new insight" into the "nature of injustice." *Ante*, at 11, 23. As a result, the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?

It can be tempting for judges to confuse our own preferences with the requirements of the law. But as this Court has been reminded throughout our history, the Constitution "is made for people of fundamentally differing views." *Lochner* v. *New York*, 198 U. S. 45, 76 (1905) (Holmes, J., dissenting). Accordingly, "courts are not concerned with the wisdom or policy of legislation." *Id.*, at 69 (Harlan, J., dissenting). The majority today neglects that restrained conception of the judicial role. It seizes for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question. And it answers that question based not on neutral principles of constitutional law, but on its own "understanding of what freedom is and must become." *Ante*, at 19. I have no choice but to dissent.

Understand well what this dissent is about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law. The Constitution leaves no doubt about the answer.

I

Petitioners and their *amici* base their arguments on the "right to marry" and the imperative of "marriage equality." There is no serious dispute that, under our precedents, the Constitution protects a right to marry and requires States to apply their marriage laws equally. The real question in these cases is what constitutes "marriage," or—more precisely—*who decides* what constitutes "marriage"?

The majority largely ignores these questions, relegating ages of human experience with marriage to a paragraph or two. Even if history and precedent are not "the end" of these cases, *ante*, at 4, I would not "sweep away what has so long been settled" without showing greater respect for all that preceded us. *Town of Greece* v. *Galloway*, 572 U. S. ___, ___ (2014) (slip op., at 8).

A

As the majority acknowledges, marriage "has existed for millennia and across civilizations." *Ante*, at 3. For all those millennia, across all those civilizations, "marriage" referred to only one relationship: the union of a man and a woman. See *ante*, at 4; Tr. of Oral Arg. on Question 1, p. 12 (petitioners conceding that they are not aware of any society that permitted same-sex marriage before 2001). As the Court explained two Terms ago, "until recent years, . . . marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *United States* v. *Windsor*, 570 U. S. ___, ___ (2013) (slip op., at 13).

This universal definition of marriage as the union of a man and a woman is no historical coincidence. Marriage did not come about as a result of a political movement, discovery, disease, war, religious doctrine, or any other moving force of world history—and certainly not as a result of a prehistoric decision to exclude gays and lesbi-

ans. It arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship. See G. Quale, A History of Marriage Systems 2 (1988); cf. M. Cicero, De Officiis 57 (W. Miller transl. 1913) ("For since the reproductive instinct is by nature's gift the common possession of all living creatures, the first bond of union is that between husband and wife; the next, that between parents and children; then we find one home, with everything in common.").

The premises supporting this concept of marriage are so fundamental that they rarely require articulation. The human race must procreate to survive. Procreation occurs through sexual relations between a man and a woman. When sexual relations result in the conception of a child, that child's prospects are generally better if the mother and father stay together rather than going their separate ways. Therefore, for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond.

Society has recognized that bond as marriage. And by bestowing a respected status and material benefits on married couples, society encourages men and women to conduct sexual relations within marriage rather than without. As one prominent scholar put it, "Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve." J. Q. Wilson, The Marriage Problem 41 (2002).

This singular understanding of marriage has prevailed in the United States throughout our history. The majority accepts that at "the time of the Nation's founding [marriage] was understood to be a voluntary contract between

a man and a woman." *Ante*, at 6. Early Americans drew heavily on legal scholars like William Blackstone, who regarded marriage between "husband and wife" as one of the "great relations in private life," and philosophers like John Locke, who described marriage as "a voluntary compact between man and woman" centered on "its chief end, procreation" and the "nourishment and support" of children. 1 W. Blackstone, Commentaries *410; J. Locke, Second Treatise of Civil Government §§78–79, p. 39 (J. Gough ed. 1947). To those who drafted and ratified the Constitution, this conception of marriage and family "was a given: its structure, its stability, roles, and values accepted by all." Forte, The Framers' Idea of Marriage and Family, in The Meaning of Marriage 100, 102 (R. George & J. Elshtain eds. 2006).

The Constitution itself says nothing about marriage, and the Framers thereby entrusted the States with "[t]he whole subject of the domestic relations of husband and wife." *Windsor*, 570 U. S., at ___ (slip op., at 17) (quoting *In re Burrus*, 136 U. S. 586, 593–594 (1890)). There is no dispute that every State at the founding—and every State throughout our history until a dozen years ago—defined marriage in the traditional, biologically rooted way. The four States in these cases are typical. Their laws, before and after statehood, have treated marriage as the union of a man and a woman. See *DeBoer* v. *Snyder*, 772 F. 3d 388, 396–399 (CA6 2014). Even when state laws did not specify this definition expressly, no one doubted what they meant. See *Jones* v. *Hallahan*, 501 S. W. 2d 588, 589 (Ky. App. 1973). The meaning of "marriage" went without saying.

Of course, many did say it. In his first American dictionary, Noah Webster defined marriage as "the legal union of a man and woman for life," which served the purposes of "preventing the promiscuous intercourse of the sexes, . . . promoting domestic felicity, and . . . securing the

maintenance and education of children." 1 An American Dictionary of the English Language (1828). An influential 19th-century treatise defined marriage as "a civil status, existing in one man and one woman legally united for life for those civil and social purposes which are based in the distinction of sex." J. Bishop, Commentaries on the Law of Marriage and Divorce 25 (1852). The first edition of Black's Law Dictionary defined marriage as "the civil status of one man and one woman united in law for life." Black's Law Dictionary 756 (1891) (emphasis deleted). The dictionary maintained essentially that same definition for the next century.

This Court's precedents have repeatedly described marriage in ways that are consistent only with its traditional meaning. Early cases on the subject referred to marriage as "the union for life of one man and one woman," *Murphy* v. *Ramsey*, 114 U. S. 15, 45 (1885), which forms "the foundation of the family and of society, without which there would be neither civilization nor progress," *Maynard* v. *Hill*, 125 U. S. 190, 211 (1888). We later described marriage as "fundamental to our very existence and survival," an understanding that necessarily implies a procreative component. *Loving* v. *Virginia*, 388 U. S. 1, 12 (1967); see *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942). More recent cases have directly connected the right to marry with the "right to procreate." *Zablocki* v. *Redhail*, 434 U. S. 374, 386 (1978).

As the majority notes, some aspects of marriage have changed over time. Arranged marriages have largely given way to pairings based on romantic love. States have replaced coverture, the doctrine by which a married man and woman became a single legal entity, with laws that respect each participant's separate status. Racial restrictions on marriage, which "arose as an incident to slavery" to promote "White Supremacy," were repealed by many States and ultimately struck down by this Court.

Loving, 388 U. S., at 6–7.

The majority observes that these developments "were not mere superficial changes" in marriage, but rather "worked deep transformations in its structure." *Ante*, at 6–7. They did not, however, work any transformation in the core structure of marriage as the union between a man and a woman. If you had asked a person on the street how marriage was defined, no one would ever have said, "Marriage is the union of a man and a woman, where the woman is subject to coverture." The majority may be right that the "history of marriage is one of both continuity and change," but the core meaning of marriage has endured. *Ante*, at 6.

B

Shortly after this Court struck down racial restrictions on marriage in *Loving*, a gay couple in Minnesota sought a marriage license. They argued that the Constitution required States to allow marriage between people of the same sex for the same reasons that it requires States to allow marriage between people of different races. The Minnesota Supreme Court rejected their analogy to *Loving*, and this Court summarily dismissed an appeal. *Baker* v. *Nelson*, 409 U. S. 810 (1972).

In the decades after *Baker*, greater numbers of gays and lesbians began living openly, and many expressed a desire to have their relationships recognized as marriages. Over time, more people came to see marriage in a way that could be extended to such couples. Until recently, this new view of marriage remained a minority position. After the Massachusetts Supreme Judicial Court in 2003 interpreted its State Constitution to require recognition of same-sex marriage, many States—including the four at issue here—enacted constitutional amendments formally adopting the longstanding definition of marriage.

Over the last few years, public opinion on marriage has

shifted rapidly. In 2009, the legislatures of Vermont, New Hampshire, and the District of Columbia became the first in the Nation to enact laws that revised the definition of marriage to include same-sex couples, while also providing accommodations for religious believers. In 2011, the New York Legislature enacted a similar law. In 2012, voters in Maine did the same, reversing the result of a referendum just three years earlier in which they had upheld the traditional definition of marriage.

In all, voters and legislators in eleven States and the District of Columbia have changed their definitions of marriage to include same-sex couples. The highest courts of five States have decreed that same result under their own Constitutions. The remainder of the States retain the traditional definition of marriage.

Petitioners brought lawsuits contending that the Due Process and Equal Protection Clauses of the Fourteenth Amendment compel their States to license and recognize marriages between same-sex couples. In a carefully reasoned decision, the Court of Appeals acknowledged the democratic "momentum" in favor of "expand[ing] the definition of marriage to include gay couples," but concluded that petitioners had not made "the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters." 772 F. 3d, at 396, 403. That decision interpreted the Constitution correctly, and I would affirm.

II

Petitioners first contend that the marriage laws of their States violate the Due Process Clause. The Solicitor General of the United States, appearing in support of petitioners, expressly disowned that position before this Court. See Tr. of Oral Arg. on Question 1, at 38–39. The majority nevertheless resolves these cases for petitioners based

almost entirely on the Due Process Clause.

The majority purports to identify four "principles and traditions" in this Court's due process precedents that support a fundamental right for same-sex couples to marry. *Ante*, at 12. In reality, however, the majority's approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner* v. *New York*, 198 U. S. 45. Stripped of its shiny rhetorical gloss, the majority's argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society. If I were a legislator, I would certainly consider that view as a matter of social policy. But as a judge, I find the majority's position indefensible as a matter of constitutional law.

A

Petitioners' "fundamental right" claim falls into the most sensitive category of constitutional adjudication. Petitioners do not contend that their States' marriage laws violate an *enumerated* constitutional right, such as the freedom of speech protected by the First Amendment. There is, after all, no "Companionship and Understanding" or "Nobility and Dignity" Clause in the Constitution. See *ante*, at 3, 14. They argue instead that the laws violate a right *implied* by the Fourteenth Amendment's requirement that "liberty" may not be deprived without "due process of law."

This Court has interpreted the Due Process Clause to include a "substantive" component that protects certain liberty interests against state deprivation "no matter what process is provided." *Reno* v. *Flores*, 507 U. S. 292, 302 (1993). The theory is that some liberties are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," and therefore cannot be deprived without compelling justification. *Snyder* v. *Massachusetts*, 291

U. S. 97, 105 (1934).

Allowing unelected federal judges to select which unenumerated rights rank as "fundamental"—and to strike down state laws on the basis of that determination—raises obvious concerns about the judicial role. Our precedents have accordingly insisted that judges "exercise the utmost care" in identifying implied fundamental rights, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." *Washington* v. *Glucksberg*, 521 U. S. 702, 720 (1997) (internal quotation marks omitted); see Kennedy, Unenumerated Rights and the Dictates of Judicial Restraint 13 (1986) (Address at Stanford) ("One can conclude that certain essential, or fundamental, rights should exist in any just society. It does not follow that each of those essential rights is one that we as judges can enforce under the written Constitution. The Due Process Clause is not a guarantee of every right that should inhere in an ideal system.").

The need for restraint in administering the strong medicine of substantive due process is a lesson this Court has learned the hard way. The Court first applied substantive due process to strike down a statute in *Dred Scott* v. *Sandford*, 19 How. 393 (1857). There the Court invalidated the Missouri Compromise on the ground that legislation restricting the institution of slavery violated the implied rights of slaveholders. The Court relied on its own conception of liberty and property in doing so. It asserted that "an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States . . . could hardly be dignified with the name of due process of law." *Id.*, at 450. In a dissent that has outlasted the majority opinion, Justice Curtis explained that when the "fixed rules which govern the interpretation of laws [are] abandoned, and the theoretical

opinions of individuals are allowed to control" the Constitution's meaning, "we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean." *Id.*, at 621.

Dred Scott's holding was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox, but its approach to the Due Process Clause reappeared. In a series of early 20th-century cases, most prominently *Lochner* v. *New York*, this Court invalidated state statutes that presented "meddlesome interferences with the rights of the individual," and "undue interference with liberty of person and freedom of contract." 198 U. S., at 60, 61. In *Lochner* itself, the Court struck down a New York law setting maximum hours for bakery employees, because there was "in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law." *Id.*, at 58.

The dissenting Justices in *Lochner* explained that the New York law could be viewed as a reasonable response to legislative concern about the health of bakery employees, an issue on which there was at least "room for debate and for an honest difference of opinion." *Id.*, at 72 (opinion of Harlan, J.). The majority's contrary conclusion required adopting as constitutional law "an economic theory which a large part of the country does not entertain." *Id.*, at 75 (opinion of Holmes, J.). As Justice Holmes memorably put it, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics," a leading work on the philosophy of Social Darwinism. *Ibid.* The Constitution "is not intended to embody a particular economic theory . . . . It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embody-

ing them conflict with the Constitution." *Id.*, at 75–76.

In the decades after *Lochner*, the Court struck down nearly 200 laws as violations of individual liberty, often over strong dissents contending that "[t]he criterion of constitutionality is not whether we believe the law to be for the public good." *Adkins* v. *Children's Hospital of D. C.*, 261 U. S. 525, 570 (1923) (opinion of Holmes, J.). By empowering judges to elevate their own policy judgments to the status of constitutionally protected "liberty," the *Lochner* line of cases left "no alternative to regarding the court as a . . . legislative chamber." L. Hand, The Bill of Rights 42 (1958).

Eventually, the Court recognized its error and vowed not to repeat it. "The doctrine that . . . due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely," we later explained, "has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson* v. *Skrupa*, 372 U. S. 726, 730 (1963); see *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, 423 (1952) ("we do not sit as a super-legislature to weigh the wisdom of legislation"). Thus, it has become an accepted rule that the Court will not hold laws unconstitutional simply because we find them "unwise, improvident, or out of harmony with a particular school of thought." *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483, 488 (1955).

Rejecting *Lochner* does not require disavowing the doctrine of implied fundamental rights, and this Court has not done so. But to avoid repeating *Lochner*'s error of converting personal preferences into constitutional mandates, our modern substantive due process cases have stressed the need for "judicial self-restraint." *Collins* v. *Harker Heights*, 503 U. S. 115, 125 (1992). Our precedents have required that implied fundamental rights be "objec-

tively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U. S., at 720–721 (internal quotation marks omitted).

Although the Court articulated the importance of history and tradition to the fundamental rights inquiry most precisely in *Glucksberg*, many other cases both before and after have adopted the same approach. See, *e.g.*, *District Attorney's Office for Third Judicial Dist.* v. *Osborne*, 557 U. S. 52, 72 (2009); *Flores*, 507 U. S., at 303; *United States* v. *Salerno*, 481 U. S. 739, 751 (1987); *Moore* v. *East Cleveland*, 431 U. S. 494, 503 (1977) (plurality opinion); see also *id.*, at 544 (White, J., dissenting) ("The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution."); *Troxel* v. *Granville*, 530 U. S. 57, 96–101 (2000) (KENNEDY, J., dissenting) (consulting "'[o]ur Nation's history, legal traditions, and practices'" and concluding that "[w]e owe it to the Nation's domestic relations legal structure . . . to proceed with caution" (quoting *Glucksberg*, 521 U. S., at 721)).

Proper reliance on history and tradition of course requires looking beyond the individual law being challenged, so that every restriction on liberty does not supply its own constitutional justification. The Court is right about that. *Ante*, at 18. But given the few "guideposts for responsible decisionmaking in this unchartered area," *Collins*, 503 U. S., at 125, "an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on [an] abstract formula," *Moore*, 431 U. S., at 504, n. 12 (plurality opinion). Expanding a right suddenly and dramatically is likely to require tearing it up from its roots. Even a sincere profession of "discipline" in identify-

ing fundamental rights, *ante*, at 10–11, does not provide a meaningful constraint on a judge, for "what he is really likely to be 'discovering,' whether or not he is fully aware of it, are his own values," J. Ely, Democracy and Distrust 44 (1980). The only way to ensure restraint in this delicate enterprise is "continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles [of] the doctrines of federalism and separation of powers." *Griswold* v. *Connecticut*, 381 U. S. 479, 501 (1965) (Harlan, J., concurring in judgment).

B

The majority acknowledges none of this doctrinal background, and it is easy to see why: Its aggressive application of substantive due process breaks sharply with decades of precedent and returns the Court to the unprincipled approach of *Lochner*.

1

The majority's driving themes are that marriage is desirable and petitioners desire it. The opinion describes the "transcendent importance" of marriage and repeatedly insists that petitioners do not seek to "demean," "devalue," "denigrate," or "disrespect" the institution. *Ante*, at 3, 4, 6, 28. Nobody disputes those points. Indeed, the compelling personal accounts of petitioners and others like them are likely a primary reason why many Americans have changed their minds about whether same-sex couples should be allowed to marry. As a matter of constitutional law, however, the sincerity of petitioners' wishes is not relevant.

When the majority turns to the law, it relies primarily on precedents discussing the fundamental "right to marry." *Turner* v. *Safley*, 482 U. S. 78, 95 (1987); *Zablocki*, 434 U. S., at 383; see *Loving*, 388 U. S., at 12. These cases

do not hold, of course, that anyone who wants to get married has a constitutional right to do so. They instead require a State to justify barriers to marriage as that institution has always been understood. In *Loving*, the Court held that racial restrictions on the right to marry lacked a compelling justification. In *Zablocki*, restrictions based on child support debts did not suffice. In *Turner*, restrictions based on status as a prisoner were deemed impermissible.

None of the laws at issue in those cases purported to change the core definition of marriage as the union of a man and a woman. The laws challenged in *Zablocki* and *Turner* did not define marriage as "the union of a man and a woman, *where neither party owes child support or is in prison*." Nor did the interracial marriage ban at issue in *Loving* define marriage as "the union of a man and a woman *of the same race*." See Tragen, Comment, Statutory Prohibitions Against Interracial Marriage, 32 Cal. L. Rev. 269 (1944) ("at common law there was no ban on interracial marriage"); *post*, at 11–12, n. 5 (THOMAS, J., dissenting). Removing racial barriers to marriage therefore did not change what a marriage was any more than integrating schools changed what a school was. As the majority admits, the institution of "marriage" discussed in every one of these cases "presumed a relationship involving opposite-sex partners." *Ante*, at 11.

In short, the "right to marry" cases stand for the important but limited proposition that particular restrictions on access to marriage *as traditionally defined* violate due process. These precedents say nothing at all about a right to make a State change its definition of marriage, which is the right petitioners actually seek here. See *Windsor*, 570 U. S., at ___ (ALITO, J., dissenting) (slip op., at 8) ("What Windsor and the United States seek . . . is not the protection of a deeply rooted right but the recognition of a very new right."). Neither petitioners nor the majority cites a

single case or other legal source providing any basis for such a constitutional right. None exists, and that is enough to foreclose their claim.

2

The majority suggests that "there are other, more instructive precedents" informing the right to marry. *Ante*, at 12. Although not entirely clear, this reference seems to correspond to a line of cases discussing an implied fundamental "right of privacy." *Griswold*, 381 U. S., at 486. In the first of those cases, the Court invalidated a criminal law that banned the use of contraceptives. *Id.*, at 485–486. The Court stressed the invasive nature of the ban, which threatened the intrusion of "the police to search the sacred precincts of marital bedrooms." *Id.*, at 485. In the Court's view, such laws infringed the right to privacy in its most basic sense: the "right to be let alone." *Eisenstadt* v. *Baird*, 405 U. S. 438, 453–454, n. 10 (1972) (internal quotation marks omitted); see *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting).

The Court also invoked the right to privacy in *Lawrence* v. *Texas*, 539 U. S. 558 (2003), which struck down a Texas statute criminalizing homosexual sodomy. *Lawrence* relied on the position that criminal sodomy laws, like bans on contraceptives, invaded privacy by inviting "unwarranted government intrusions" that "touc[h] upon the most private human conduct, sexual behavior . . . in the most private of places, the home." *Id.*, at 562, 567.

Neither *Lawrence* nor any other precedent in the privacy line of cases supports the right that petitioners assert here. Unlike criminal laws banning contraceptives and sodomy, the marriage laws at issue here involve no government intrusion. They create no crime and impose no punishment. Same-sex couples remain free to live together, to engage in intimate conduct, and to raise their families as they see fit. No one is "condemned to live in loneli-

ness" by the laws challenged in these cases—no one. *Ante*, at 28. At the same time, the laws in no way interfere with the "right to be let alone."

The majority also relies on Justice Harlan's influential dissenting opinion in *Poe* v. *Ullman*, 367 U. S. 497 (1961). As the majority recounts, that opinion states that "[d]ue process has not been reduced to any formula." *Id.*, at 542. But far from conferring the broad interpretive discretion that the majority discerns, Justice Harlan's opinion makes clear that courts implying fundamental rights are not "free to roam where unguided speculation might take them." *Ibid.* They must instead have "regard to what history teaches" and exercise not only "judgment" but "restraint." *Ibid.* Of particular relevance, Justice Harlan explained that "laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up . . . form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis." *Id.*, at 546.

In sum, the privacy cases provide no support for the majority's position, because petitioners do not seek privacy. Quite the opposite, they seek public recognition of their relationships, along with corresponding government benefits. Our cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State. See *DeShaney* v. *Winnebago County Dept. of Social Servs.*, 489 U. S. 189, 196 (1989); *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 35–37 (1973); *post*, at 9–13 (THOMAS, J., dissenting). Thus, although the right to privacy recognized by our precedents certainly plays a role in protecting the intimate conduct of same-sex couples, it provides no affirmative right to redefine marriage and no basis for striking down the laws at issue here.

3

Perhaps recognizing how little support it can derive from precedent, the majority goes out of its way to jettison the "careful" approach to implied fundamental rights taken by this Court in *Glucksberg*. *Ante*, at 18 (quoting 521 U. S., at 721). It is revealing that the majority's position requires it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of substantive due process. At least this part of the majority opinion has the virtue of candor. Nobody could rightly accuse the majority of taking a careful approach.

Ultimately, only one precedent offers any support for the majority's methodology: *Lochner* v. *New York*, 198 U. S. 45. The majority opens its opinion by announcing petitioners' right to "define and express their identity." *Ante*, at 1–2. The majority later explains that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy." *Ante*, at 12. This freewheeling notion of individual autonomy echoes nothing so much as "the general right of an individual to be *free in his person* and in his power to contract in relation to his own labor." *Lochner*, 198 U. S., at 58 (emphasis added).

To be fair, the majority does not suggest that its individual autonomy right is entirely unconstrained. The constraints it sets are precisely those that accord with its own "reasoned judgment," informed by its "new insight" into the "nature of injustice," which was invisible to all who came before but has become clear "as we learn [the] meaning" of liberty. *Ante*, at 10, 11. The truth is that today's decision rests on nothing more than the majority's own conviction that same-sex couples should be allowed to marry because they want to, and that "it would disparage their choices and diminish their personhood to deny them this right." *Ante*, at 19. Whatever force that belief may have as a matter of moral philosophy, it has no more basis in the Constitution than did the naked policy preferences

adopted in *Lochner*. See 198 U. S., at 61 ("We do not believe in the soundness of the views which uphold this law," which "is an illegal interference with the rights of individuals . . . to make contracts regarding labor upon such terms as they may think best").

The majority recognizes that today's cases do not mark "the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights." *Ante*, at 25. On that much, we agree. The Court was "asked"—and it agreed—to "adopt a cautious approach" to implying fundamental rights after the debacle of the *Lochner* era. Today, the majority casts caution aside and revives the grave errors of that period.

One immediate question invited by the majority's position is whether States may retain the definition of marriage as a union of two people. Cf. *Brown* v. *Buhman*, 947 F. Supp. 2d 1170 (Utah 2013), appeal pending, No. 14-4117 (CA10). Although the majority randomly inserts the adjective "two" in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not. Indeed, from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world. If the majority is willing to take the big leap, it is hard to see how it can say no to the shorter one.

It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If "[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices," *ante*, at 13, why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? If a same-sex couple has the constitutional right to marry because their

children would otherwise "suffer the stigma of knowing their families are somehow lesser," *ante*, at 15, why wouldn't the same reasoning apply to a family of three or more persons raising children? If not having the opportunity to marry "serves to disrespect and subordinate" gay and lesbian couples, why wouldn't the same "imposition of this disability," *ante*, at 22, serve to disrespect and subordinate people who find fulfillment in polyamorous relationships? See Bennett, Polyamory: The Next Sexual Revolution? Newsweek, July 28, 2009 (estimating 500,000 polyamorous families in the United States); Li, Married Lesbian "Throuple" Expecting First Child, N. Y. Post, Apr. 23, 2014; Otter, Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage, 64 Emory L. J. 1977 (2015).

I do not mean to equate marriage between same-sex couples with plural marriages in all respects. There may well be relevant differences that compel different legal analysis. But if there are, petitioners have not pointed to any. When asked about a plural marital union at oral argument, petitioners asserted that a State "doesn't have such an institution." Tr. of Oral Arg. on Question 2, p. 6. But that is exactly the point: the States at issue here do not have an institution of same-sex marriage, either.

4

Near the end of its opinion, the majority offers perhaps the clearest insight into its decision. Expanding marriage to include same-sex couples, the majority insists, would "pose no risk of harm to themselves or third parties." *Ante*, at 27. This argument again echoes *Lochner*, which relied on its assessment that "we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act." 198 U. S., at 57.

Then and now, this assertion of the "harm principle" sounds more in philosophy than law. The elevation of the fullest individual self-realization over the constraints that society has expressed in law may or may not be attractive moral philosophy. But a Justice's commission does not confer any special moral, philosophical, or social insight sufficient to justify imposing those perceptions on fellow citizens under the pretense of "due process." There is indeed a process due the people on issues of this sort—the democratic process. Respecting that understanding requires the Court to be guided by law, not any particular school of social thought. As Judge Henry Friendly once put it, echoing Justice Holmes's dissent in *Lochner*, the Fourteenth Amendment does not enact John Stuart Mill's On Liberty any more than it enacts Herbert Spencer's Social Statics. See Randolph, Before *Roe v. Wade*: Judge Friendly's Draft Abortion Opinion, 29 Harv. J. L. & Pub. Pol'y 1035, 1036–1037, 1058 (2006). And it certainly does not enact any one concept of marriage.

The majority's understanding of due process lays out a tantalizing vision of the future for Members of this Court: If an unvarying social institution enduring over all of recorded history cannot inhibit judicial policymaking, what can? But this approach is dangerous for the rule of law. The purpose of insisting that implied fundamental rights have roots in the history and tradition of our people is to ensure that when unelected judges strike down democratically enacted laws, they do so based on something more than their own beliefs. The Court today not only overlooks our country's entire history and tradition but actively repudiates it, preferring to live only in the heady days of the here and now. I agree with the majority that the "nature of injustice is that we may not always see it in our own times." *Ante*, at 11. As petitioners put it, "times can blind." Tr. of Oral Arg. on Question 1, at 9, 10. But to blind yourself to history is both prideful and unwise. "The

past is never dead. It's not even past." W. Faulkner, Requiem for a Nun 92 (1951).

III

In addition to their due process argument, petitioners contend that the Equal Protection Clause requires their States to license and recognize same-sex marriages. The majority does not seriously engage with this claim. Its discussion is, quite frankly, difficult to follow. The central point seems to be that there is a "synergy between" the Equal Protection Clause and the Due Process Clause, and that some precedents relying on one Clause have also relied on the other. *Ante*, at 20. Absent from this portion of the opinion, however, is anything resembling our usual framework for deciding equal protection cases. It is casebook doctrine that the "modern Supreme Court's treatment of equal protection claims has used a means-ends methodology in which judges ask whether the classification the government is using is sufficiently related to the goals it is pursuing." G. Stone, L. Seidman, C. Sunstein, M. Tushnet, & P. Karlan, Constitutional Law 453 (7th ed. 2013). The majority's approach today is different:

> "Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right." *Ante*, at 19.

The majority goes on to assert in conclusory fashion that the Equal Protection Clause provides an alternative basis for its holding. *Ante*, at 22. Yet the majority fails to provide even a single sentence explaining how the Equal

Protection Clause supplies independent weight for its position, nor does it attempt to justify its gratuitous violation of the canon against unnecessarily resolving constitutional questions. See *Northwest Austin Municipal Util. Dist. No. One* v. *Holder*, 557 U. S. 193, 197 (2009). In any event, the marriage laws at issue here do not violate the Equal Protection Clause, because distinguishing between opposite-sex and same-sex couples is rationally related to the States' "legitimate state interest" in "preserving the traditional institution of marriage." *Lawrence*, 539 U. S., at 585 (O'Connor, J., concurring in judgment).

It is important to note with precision which laws petitioners have challenged. Although they discuss some of the ancillary legal benefits that accompany marriage, such as hospital visitation rights and recognition of spousal status on official documents, petitioners' lawsuits target the laws defining marriage generally rather than those allocating benefits specifically. The equal protection analysis might be different, in my view, if we were confronted with a more focused challenge to the denial of certain tangible benefits. Of course, those more selective claims will not arise now that the Court has taken the drastic step of requiring every State to license and recognize marriages between same-sex couples.

IV

The legitimacy of this Court ultimately rests "upon the respect accorded to its judgments." *Republican Party of Minn.* v. *White*, 536 U. S. 765, 793 (2002) (KENNEDY, J., concurring). That respect flows from the perception—and reality—that we exercise humility and restraint in deciding cases according to the Constitution and law. The role of the Court envisioned by the majority today, however, is anything but humble or restrained. Over and over, the majority exalts the role of the judiciary in delivering social change. In the majority's telling, it is the courts, not the

people, who are responsible for making "new dimensions of freedom . . . apparent to new generations," for providing "formal discourse" on social issues, and for ensuring "neutral discussions, without scornful or disparaging commentary." *Ante*, at 7–9.

Nowhere is the majority's extravagant conception of judicial supremacy more evident than in its description—and dismissal—of the public debate regarding same-sex marriage. Yes, the majority concedes, on one side are thousands of years of human history in every society known to have populated the planet. But on the other side, there has been "extensive litigation," "many thoughtful District Court decisions," "countless studies, papers, books, and other popular and scholarly writings," and "more than 100" *amicus* briefs in these cases alone. *Ante*, at 9, 10, 23. What would be the point of allowing the democratic process to go on? It is high time for the Court to decide the meaning of marriage, based on five lawyers' "better informed understanding" of "a liberty that remains urgent in our own era." *Ante*, at 19. The answer is surely there in one of those *amicus* briefs or studies.

Those who founded our country would not recognize the majority's conception of the judicial role. They after all risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges. And they certainly would not have been satisfied by a system empowering judges to override policy judgments so long as they do so after "a quite extensive discussion." *Ante*, at 8. In our democracy, debate about the content of the law is not an exhaustion requirement to be checked off before courts can impose their will. "Surely the Constitution does not put either the legislative branch or the executive branch in the position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unre-

solved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution." Rehnquist, The Notion of a Living Constitution, 54 Texas L. Rev. 693, 700 (1976). As a plurality of this Court explained just last year, "It is demeaning to the democratic process to presume that voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Schuette* v. *BAMN*, 572 U. S. ___, ___ –___ (2014) (slip op., at 16–17).

The Court's accumulation of power does not occur in a vacuum. It comes at the expense of the people. And they know it. Here and abroad, people are in the midst of a serious and thoughtful public debate on the issue of same-sex marriage. They see voters carefully considering same-sex marriage, casting ballots in favor or opposed, and sometimes changing their minds. They see political leaders similarly reexamining their positions, and either reversing course or explaining adherence to old convictions confirmed anew. They see governments and businesses modifying policies and practices with respect to same-sex couples, and participating actively in the civic discourse. They see countries overseas democratically accepting profound social change, or declining to do so. This deliberative process is making people take seriously questions that they may not have even regarded as questions before.

When decisions are reached through democratic means, some people will inevitably be disappointed with the results. But those whose views do not prevail at least know that they have had their say, and accordingly are—in the tradition of our political culture—reconciled to the result of a fair and honest debate. In addition, they can gear up to raise the issue later, hoping to persuade enough on the winning side to think again. "That is exactly how our system of government is supposed to work." *Post*, at 2–3 (SCALIA, J., dissenting).

But today the Court puts a stop to all that. By deciding

this question under the Constitution, the Court removes it from the realm of democratic decision. There will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide. As a thoughtful commentator observed about another issue, "The political process was moving . . . , not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict." Ginsburg, Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*, 63 N. C. L. Rev. 375, 385–386 (1985) (footnote omitted). Indeed, however heartened the proponents of same-sex marriage might be on this day, it is worth acknowledging what they have lost, and lost forever: the opportunity to win the true acceptance that comes from persuading their fellow citizens of the justice of their cause. And they lose this just when the winds of change were freshening at their backs.

Federal courts are blunt instruments when it comes to creating rights. They have constitutional power only to resolve concrete cases or controversies; they do not have the flexibility of legislatures to address concerns of parties not before the court or to anticipate problems that may arise from the exercise of a new right. Today's decision, for example, creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution. Amdt. 1.

Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for

religious practice. The majority's decision imposing same-sex marriage cannot, of course, create any such accommodations. The majority graciously suggests that religious believers may continue to "advocate" and "teach" their views of marriage. *Ante*, at 27. The First Amendment guarantees, however, the freedom to "*exercise*" religion. Ominously, that is not a word the majority uses.

Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. See Tr. of Oral Arg. on Question 1, at 36–38. There is little doubt that these and similar questions will soon be before this Court. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.

Perhaps the most discouraging aspect of today's decision is the extent to which the majority feels compelled to sully those on the other side of the debate. The majority offers a cursory assurance that it does not intend to disparage people who, as a matter of conscience, cannot accept same-sex marriage. *Ante*, at 19. That disclaimer is hard to square with the very next sentence, in which the majority explains that "the necessary consequence" of laws codifying the traditional definition of marriage is to "demea[n] or stigmatiz[e]" same-sex couples. *Ante*, at 19. The majority reiterates such characterizations over and over. By the majority's account, Americans who did nothing more than follow the understanding of marriage that has existed for our entire history—in particular, the tens of millions of people who voted to reaffirm their States' enduring defini-

tion of marriage—have acted to "lock . . . out," "disparage," "disrespect and subordinate," and inflict "[d]ignitary wounds" upon their gay and lesbian neighbors. *Ante*, at 17, 19, 22, 25. These apparent assaults on the character of fairminded people will have an effect, in society and in court. See *post*, at 6–7 (ALITO, J., dissenting). Moreover, they are entirely gratuitous. It is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority's "better informed understanding" as bigoted. *Ante*, at 19.

In the face of all this, a much different view of the Court's role is possible. That view is more modest and restrained. It is more skeptical that the legal abilities of judges also reflect insight into moral and philosophical issues. It is more sensitive to the fact that judges are unelected and unaccountable, and that the legitimacy of their power depends on confining it to the exercise of legal judgment. It is more attuned to the lessons of history, and what it has meant for the country and Court when Justices have exceeded their proper bounds. And it is less pretentious than to suppose that while people around the world have viewed an institution in a particular way for thousands of years, the present generation and the present Court are the ones chosen to burst the bonds of that history and tradition.

* * *

If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.

I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

Nos. 14–556, 14-562, 14-571 and 14–574

JAMES OBERGEFELL, ET AL., PETITIONERS
14–556 *v.*
RICHARD HODGES, DIRECTOR, OHIO
DEPARTMENT OF HEALTH, ET AL.;

VALERIA TANCO, ET AL., PETITIONERS
14–562 *v.*
BILL HASLAM, GOVERNOR OF
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14–571 *v.*
RICK SNYDER, GOVERNOR OF MICHIGAN,
ET AL.; AND

GREGORY BOURKE, ET AL., PETITIONERS
14–574 *v.*
STEVE BESHEAR, GOVERNOR OF
KENTUCKY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 26, 2015]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

I join THE CHIEF JUSTICE's opinion in full. I write separately to call attention to this Court's threat to American democracy.

The substance of today's decree is not of immense personal importance to me. The law can recognize as marriage whatever sexual attachments and living arrangements it wishes, and can accord them favorable civil consequences, from tax treatment to rights of inheritance.

Those civil consequences—and the public approval that conferring the name of marriage evidences—can perhaps have adverse social effects, but no more adverse than the effects of many other controversial laws. So it is not of special importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me. Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court's claimed power to create "liberties" that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.

I

Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views. Americans considered the arguments and put the question to a vote. The electorates of 11 States, either directly or through their representatives, chose to expand the traditional definition of marriage. Many more decided not to.[1] Win or lose, advocates for both sides continued pressing their cases, secure in the knowledge that an electoral loss can be negated by a later electoral win. That is exactly how our system of govern-

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[1] Brief for Respondents in No. 14–571, p. 14.

ment is supposed to work.[2]

The Constitution places some constraints on self-rule—constraints adopted *by the People themselves* when they ratified the Constitution and its Amendments. Forbidden are laws "impairing the Obligation of Contracts,"[3] denying "Full Faith and Credit" to the "public Acts" of other States,[4] prohibiting the free exercise of religion,[5] abridging the freedom of speech,[6] infringing the right to keep and bear arms,[7] authorizing unreasonable searches and seizures,[8] and so forth. Aside from these limitations, those powers "reserved to the States respectively, or to the people"[9] can be exercised as the States or the People desire. These cases ask us to decide whether the Fourteenth Amendment contains a limitation that requires the States to license and recognize marriages between two people of the same sex. Does it *remove that* issue from the political process?

Of course not. It would be surprising to find a prescription regarding marriage in the Federal Constitution since, as the author of today's opinion reminded us only two years ago (in an opinion joined by the same Justices who join him today):

> "[R]egulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States."[10]

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[2] Accord, *Schuette* v. *BAMN*, 572 U. S. ___, ___–___ (2014) (plurality opinion) (slip op., at 15–17).

[3] U. S. Const., Art. I, §10.

[4] Art. IV, §1.

[5] Amdt. 1.

[6] *Ibid.*

[7] Amdt. 2.

[8] Amdt. 4.

[9] Amdt. 10.

[10] *United States* v. *Windsor*, 570 U. S. ___, ___ (2013) (slip op., at 16) (internal quotation marks and citation omitted).

> "[T]he Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations."[11]

But we need not speculate. When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases. When it comes to determining the meaning of a vague constitutional provision—such as "due process of law" or "equal protection of the laws"—it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification.[12] We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment's text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment's ratification. Since there is no doubt whatever that the People never decided to prohibit the limitation of marriage to opposite-sex couples, the public debate over same-sex marriage must be allowed to continue.

But the Court ends this debate, in an opinion lacking even a thin veneer of law. Buried beneath the mummeries and straining-to-be-memorable passages of the opinion is a candid and startling assertion: No matter *what* it was the People ratified, the Fourteenth Amendment protects those rights that the Judiciary, in its "reasoned judgment," thinks the Fourteenth Amendment ought to protect.[13] That is so because "[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its

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[11] *Id.*, at ___ (slip op., at 17).

[12] See *Town of Greece* v. *Galloway*, 572 U. S. ___, ___–___ (2014) (slip op., at 7–8).

[13] *Ante*, at 10.

dimensions . . . ."[14] One would think that sentence would continue: ". . . and therefore they provided for a means by which the People could amend the Constitution," or perhaps ". . . and therefore they left the creation of additional liberties, such as the freedom to marry someone of the same sex, to the People, through the never-ending process of legislation." But no. What logically follows, in the majority's judge-empowering estimation, is: "and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."[15] The "we," needless to say, is the nine of us. "History and tradition guide and discipline [our] inquiry but do not set its outer boundaries."[16] Thus, rather than focusing on *the People's* understanding of "liberty"—at the time of ratification or even today—the majority focuses on four "principles and traditions" that, *in the majority's view*, prohibit States from defining marriage as an institution consisting of one man and one woman.[17]

This is a naked judicial claim to legislative—indeed, *super*-legislative—power; a claim fundamentally at odds with our system of government. Except as limited by a constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those that offend the esteemed Justices' "reasoned judgment." A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.

Judges are selected precisely for their skill as lawyers; whether they reflect the policy views of a particular constituency is not (or should not be) relevant. Not surprisingly then, the Federal Judiciary is hardly a cross-section

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[14] *Ante*, at 11.
[15] *Ibid.*
[16] *Ante*, at 10–11.
[17] *Ante*, at 12–18.

of America. Take, for example, this Court, which consists of only nine men and women, all of them successful lawyers[18] who studied at Harvard or Yale Law School. Four of the nine are natives of New York City. Eight of them grew up in east- and west-coast States. Only one hails from the vast expanse in-between. Not a single Southwesterner or even, to tell the truth, a genuine Westerner (California does not count). Not a single evangelical Christian (a group that comprises about one quarter of Americans[19]), or even a Protestant of any denomination. The strikingly unrepresentative character of the body voting on today's social upheaval would be irrelevant if they were functioning as *judges*, answering the legal question whether the American people had ever ratified a constitutional provision that was understood to proscribe the traditional definition of marriage. But of course the Justices in today's majority are not voting on that basis; *they say they are not*. And to allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation.

II

But what really astounds is the hubris reflected in today's judicial Putsch. The five Justices who compose today's majority are entirely comfortable concluding that

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[18]The predominant attitude of tall-building lawyers with respect to the questions presented in these cases is suggested by the fact that the American Bar Association deemed it in accord with the wishes of its members to file a brief in support of the petitioners. See Brief for American Bar Association as *Amicus Curiae* in Nos. 14–571 and 14–574, pp. 1–5.

[19]See Pew Research Center, America's Changing Religious Landscape 4 (May 12, 2015).

every State violated the Constitution for all of the 135 years between the Fourteenth Amendment's ratification and Massachusetts' permitting of same-sex marriages in 2003.[20] They have discovered in the Fourteenth Amendment a "fundamental right" overlooked by every person alive at the time of ratification, and almost everyone else in the time since. They see what lesser legal minds—minds like Thomas Cooley, John Marshall Harlan, Oliver Wendell Holmes, Jr., Learned Hand, Louis Brandeis, William Howard Taft, Benjamin Cardozo, Hugo Black, Felix Frankfurter, Robert Jackson, and Henry Friendly—could not. They are certain that the People ratified the Fourteenth Amendment to bestow on them the power to remove questions from the democratic process when that is called for by their "reasoned judgment." These Justices *know* that limiting marriage to one man and one woman is contrary to reason; they *know* that an institution as old as government itself, and accepted by every nation in history until 15 years ago,[21] cannot possibly be supported by anything other than ignorance or bigotry. And they are willing to say that any citizen who does not agree with that, who adheres to what was, until 15 years ago, the unanimous judgment of all generations and all societies, stands against the Constitution.

The opinion is couched in a style that is as pretentious as its content is egotistic. It is one thing for separate concurring or dissenting opinions to contain extravagances, even silly extravagances, of thought and expression; it is something else for the official opinion of the Court to do so.[22] Of course the opinion's showy profundities are often

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[20] *Goodridge* v. *Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941 (2003).

[21] *Windsor*, 570 U. S., at ___ (ALITO, J., dissenting) (slip op., at 7).

[22] If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that

profoundly incoherent. "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality."[23] (Really? Who ever thought that intimacy and spirituality [whatever that means] were freedoms? And if intimacy is, one would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie. Expression, sure enough, *is* a freedom, but anyone in a long-lasting marriage will attest that that happy state constricts, rather than expands, what one can prudently say.) Rights, we are told, can "rise . . . from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."[24] (Huh? How can a better informed understanding of how constitutional imperatives [whatever that means] define [whatever that means] an urgent liberty [never mind], give birth to a right?) And we are told that, "[i]n any particular case," either the Equal Protection or Due Process Clause "may be thought to capture the essence of [a] right in a more accurate and comprehensive way," than the other, "even as the two Clauses may converge in the identification and definition of the right."[25] (What say? What possible "essence" does substantive due process "capture" in an "accurate and comprehensive way"? It stands for nothing whatever, except those freedoms and entitlements that this Court *really* likes. And the Equal Protection Clause, as employed today, identifies nothing except a difference in treatment that this Court

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allow persons, within a lawful realm, to define and express their identity," I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.

[23] *Ante*, at 13.

[24] *Ante*, at 19.

[25] *Ibid.*

really dislikes. Hardly a distillation of essence. If the opinion is correct that the two clauses "converge in the identification and definition of [a] right," that is only because the majority's likes and dislikes are predictably compatible.) I could go on. The world does not expect logic and precision in poetry or inspirational pop-philosophy; it demands them in the law. The stuff contained in today's opinion has to diminish this Court's reputation for clear thinking and sober analysis.

* * *

Hubris is sometimes defined as o'erweening pride; and pride, we know, goeth before a fall. The Judiciary is the "least dangerous" of the federal branches because it has "neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm" and the States, "even for the efficacy of its judgments."[23] With each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the "reasoned judgment" of a bare majority of this Court—we move one step closer to being reminded of our impotence.

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[23] The Federalist No. 78, pp. 522, 523 (J. Cooke ed. 1961) (A. Hamilton).

SUPREME COURT OF THE UNITED STATES

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KENTUCKY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 26, 2015]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

The Court's decision today is at odds not only with the Constitution, but with the principles upon which our Nation was built. Since well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits. The Framers created our

Constitution to preserve that understanding of liberty. Yet the majority invokes our Constitution in the name of a "liberty" that the Framers would not have recognized, to the detriment of the liberty they sought to protect. Along the way, it rejects the idea—captured in our Declaration of Independence—that human dignity is innate and suggests instead that it comes from the Government. This distortion of our Constitution not only ignores the text, it inverts the relationship between the individual and the state in our Republic. I cannot agree with it.

I

The majority's decision today will require States to issue marriage licenses to same-sex couples and to recognize same-sex marriages entered in other States largely based on a constitutional provision guaranteeing "due process" before a person is deprived of his "life, liberty, or property." I have elsewhere explained the dangerous fiction of treating the Due Process Clause as a font of substantive rights. *McDonald* v. *Chicago*, 561 U. S. 742, 811–812 (2010) (THOMAS, J., concurring in part and concurring in judgment). It distorts the constitutional text, which guarantees only whatever "process" is "due" before a person is deprived of life, liberty, and property. U. S. Const., Amdt. 14, §1. Worse, it invites judges to do exactly what the majority has done here—"'roa[m] at large in the constitutional field' guided only by their personal views" as to the "'fundamental rights'" protected by that document. *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 953, 965 (1992) (Rehnquist, C. J., concurring in judgment in part and dissenting in part) (quoting *Griswold* v. *Connecticut*, 381 U. S. 479, 502 (1965) (Harlan, J., concurring in judgment)).

By straying from the text of the Constitution, substantive due process exalts judges at the expense of the People from whom they derive their authority. Petitioners argue

that by enshrining the traditional definition of marriage in their State Constitutions through voter-approved amendments, the States have put the issue "beyond the reach of the normal democratic process." Brief for Petitioners in No. 14–562, p. 54. But the result petitioners seek is far less democratic. They ask nine judges on this Court to enshrine their definition of marriage in the Federal Constitution and thus put it beyond the reach of the normal democratic process for the entire Nation. That a "bare majority" of this Court, *ante*, at 25, is able to grant this wish, wiping out with a stroke of the keyboard the results of the political process in over 30 States, based on a provision that guarantees only "due process" is but further evidence of the danger of substantive due process.[1]

II

Even if the doctrine of substantive due process were somehow defensible—it is not—petitioners still would not have a claim. To invoke the protection of the Due Process Clause at all—whether under a theory of "substantive" or "procedural" due process—a party must first identify a deprivation of "life, liberty, or property." The majority claims these state laws deprive petitioners of "liberty," but the concept of "liberty" it conjures up bears no resemblance to any plausible meaning of that word as it is used in the Due Process Clauses.

[1] The majority states that the right it believes is "part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws." *Ante*, at 19. Despite the "synergy" it finds "between th[ose] two protections," *ante*, at 20, the majority clearly uses equal protection only to shore up its substantive due process analysis, an analysis both based on an imaginary constitutional protection and revisionist view of our history and tradition.

A

1

As used in the Due Process Clauses, "liberty" most likely refers to "the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." 1 W. Blackstone, Commentaries on the Laws of England 130 (1769) (Blackstone). That definition is drawn from the historical roots of the Clauses and is consistent with our Constitution's text and structure.

Both of the Constitution's Due Process Clauses reach back to Magna Carta. See *Davidson* v. *New Orleans*, 96 U. S. 97, 101–102 (1878). Chapter 39 of the original Magna Carta provided, "No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." Magna Carta, ch. 39, in A. Howard, Magna Carta: Text and Commentary 43 (1964). Although the 1215 version of Magna Carta was in effect for only a few weeks, this provision was later reissued in 1225 with modest changes to its wording as follows: "No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers or by the law of the land." 1 E. Coke, The Second Part of the Institutes of the Laws of England 45 (1797). In his influential commentary on the provision many years later, Sir Edward Coke interpreted the words "by the law of the land" to mean the same thing as "by due proces of the common law." *Id.*, at 50.

After Magna Carta became subject to renewed interest in the 17th century, see, *e.g.*, *ibid.*, William Blackstone referred to this provision as protecting the "absolute rights

of every Englishman." 1 Blackstone 123. And he formulated those absolute rights as "the right of personal security," which included the right to life; "the right of personal liberty"; and "the right of private property." *Id.*, at 125. He defined "the right of personal liberty" as "the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." *Id.*, at 125, 130.[2]

The Framers drew heavily upon Blackstone's formulation, adopting provisions in early State Constitutions that replicated Magna Carta's language, but were modified to refer specifically to "life, liberty, or property."[3] State

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[2] The seeds of this articulation can also be found in Henry Care's influential treatise, English Liberties. First published in America in 1721, it described the "three things, which the Law of *England* . . . principally regards and taketh Care of," as "*Life, Liberty* and *Estate*," and described habeas corpus as the means by which one could procure one's "Liberty" from imprisonment. The Habeas Corpus Act, comment., in English Liberties, or the Free-born Subject's Inheritance 185 (H. Care comp. 5th ed. 1721). Though he used the word "Liberties" by itself more broadly, see, *e.g.*, *id.*, at 7, 34, 56, 58, 60, he used "Liberty" in a narrow sense when placed alongside the words "Life" or "Estate," see, *e.g.*, *id.*, at 185, 200.

[3] Maryland, North Carolina, and South Carolina adopted the phrase "life, liberty, or property" in provisions otherwise tracking Magna Carta: "That no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land." Md. Const., Declaration of Rights, Art. XXI (1776), in 3 Federal and State Constitutions, Colonial Charters, and Other Organic Laws 1688 (F. Thorpe ed. 1909); see also S. C. Const., Art. XLI (1778), in 6 *id.*, at 3257; N. C. Const., Declaration of Rights, Art. XII (1776), in 5 *id.*, at 2788. Massachusetts and New Hampshire did the same, albeit with some alterations to Magna Carta's framework: "[N]o subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." Mass. Const., pt. I, Art. XII (1780), in 3 *id.*, at 1891; see also

decisions interpreting these provisions between the founding and the ratification of the Fourteenth Amendment almost uniformly construed the word "liberty" to refer only to freedom from physical restraint. See Warren, The New "Liberty" Under the Fourteenth Amendment, 39 Harv. L. Rev. 431, 441–445 (1926). Even one case that has been identified as a possible exception to that view merely used broad language about liberty in the context of a habeas corpus proceeding—a proceeding classically associated with obtaining freedom from physical restraint. Cf. *id.*, at 444–445.

In enacting the Fifth Amendment's Due Process Clause, the Framers similarly chose to employ the "life, liberty, or property" formulation, though they otherwise deviated substantially from the States' use of Magna Carta's language in the Clause. See Shattuck, The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property," 4 Harv. L. Rev. 365, 382 (1890). When read in light of the history of that formulation, it is hard to see how the "liberty" protected by the Clause could be interpreted to include anything broader than freedom from physical restraint. That was the consistent usage of the time when "liberty" was paired with "life" and "property." See *id.*, at 375. And that usage avoids rendering superfluous those protections for "life" and "property."

If the Fifth Amendment uses "liberty" in this narrow sense, then the Fourteenth Amendment likely does as well. See *Hurtado* v. *California*, 110 U. S. 516, 534–535 (1884). Indeed, this Court has previously commented, "The conclusion is . . . irresistible, that when the same phrase was employed in the Fourteenth Amendment [as was used in the Fifth Amendment], it was used in the same sense and with no greater extent." *Ibid.* And this

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N. H. Const., pt. 1, Art. XV (1784), in 4 *id.*, at 2455.

Court's earliest Fourteenth Amendment decisions appear to interpret the Clause as using "liberty" to mean freedom from physical restraint. In *Munn* v. *Illinois*, 94 U. S. 113 (1877), for example, the Court recognized the relationship between the two Due Process Clauses and Magna Carta, see *id.*, at 123–124, and implicitly rejected the dissent's argument that "'liberty'" encompassed "something more . . . than mere freedom from physical restraint or the bounds of a prison," *id.*, at 142 (Field, J., dissenting). That the Court appears to have lost its way in more recent years does not justify deviating from the original meaning of the Clauses.

2

Even assuming that the "liberty" in those Clauses encompasses something more than freedom from physical restraint, it would not include the types of rights claimed by the majority. In the American legal tradition, liberty has long been understood as individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement.

The founding-era understanding of liberty was heavily influenced by John Locke, whose writings "on natural rights and on the social and governmental contract" were cited "[i]n pamphlet after pamphlet" by American writers. B. Bailyn, The Ideological Origins of the American Revolution 27 (1967). Locke described men as existing in a state of nature, possessed of the "perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man." J. Locke, Second Treatise of Civil Government, §4, p. 4 (J. Gough ed. 1947) (Locke). Because that state of nature left men insecure in their persons and property, they entered civil society, trading a portion of their natural liberty for an increase in their security. See

Id., §97, at 49. Upon consenting to that order, men obtained civil liberty, or the freedom "to be under no other legislative power but that established by consent in the commonwealth; nor under the dominion of any will or restraint of any law, but what that legislative shall enact according to the trust put in it." *Id.*, §22, at 13.[4]

This philosophy permeated the 18th-century political scene in America. A 1756 editorial in the Boston Gazette, for example, declared that "Liberty in the *State of Nature*" was the "inherent natural Right" "of each Man" "to make a free Use of his Reason and Understanding, and to chuse that Action which he thinks he can give the best Account of," but that, "in Society, every Man parts with a Small Share of his *natural* Liberty, or lodges it in the publick Stock, that he may possess the Remainder without Controul." Boston Gazette and Country Journal, No. 58, May 10, 1756, p. 1. Similar sentiments were expressed in public speeches, sermons, and letters of the time. See 1 C.

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[4] Locke's theories heavily influenced other prominent writers of the 17th and 18th centuries. Blackstone, for one, agreed that "natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature" and described civil liberty as that "which leaves the subject entire master of his own conduct," except as "restrained by human laws." 1 Blackstone 121–122. And in a "treatise routinely cited by the Founders," *Zivotofsky* v. *Kerry*, *ante*, at 5 (THOMAS, J., concurring in judgment in part and dissenting in part), Thomas Rutherforth wrote, "By liberty we mean the power, which a man has to act as he thinks fit, where no law restrains him; it may therefore be called a mans right over his own actions." 1 T. Rutherforth, Institutes of Natural Law 146 (1754). Rutherforth explained that "[t]he only restraint, which a mans right over his own actions is originally under, is the obligation of governing himself by the law of nature, and the law of God," and that "[w]hatever right those of our own species may have . . . to restrain [those actions] within certain bounds, beyond what the law of nature has prescribed, arises from some after-act of our own, from some consent either express or tacit, by which we have alienated our liberty, or transferred the right of directing our actions from ourselves to them." *Id.*, at 147–148.

Hyneman & D. Lutz, American Political Writing During the Founding Era 1760–1805, pp. 100, 308, 385 (1983).

The founding-era idea of civil liberty as natural liberty constrained by human law necessarily involved only those freedoms that existed *outside of* government. See Hamburger, Natural Rights, Natural Law, and American Constitutions, 102 Yale L. J. 907, 918–919 (1993). As one later commentator observed, "[L]iberty in the eighteenth century was thought of much more in relation to 'negative liberty'; that is, freedom *from*, not freedom *to*, freedom from a number of social and political evils, including arbitrary government power." J. Reid, The Concept of Liberty in the Age of the American Revolution 56 (1988). Or as one scholar put it in 1776, "[T]he common idea of liberty is merely negative, and is only the *absence of restraint*." R. Hey, Observations on the Nature of Civil Liberty and the Principles of Government §13, p. 8 (1776) (Hey). When the colonists described laws that would infringe their liberties, they discussed laws that would prohibit individuals "from walking in the streets and highways on certain saints days, or from being abroad after a certain time in the evening, or . . . restrain [them] from working up and manufacturing materials of [their] own growth." Downer, A Discourse at the Dedication of the Tree of Liberty, in 1 Hyneman, *supra*, at 101. Each of those examples involved freedoms that existed outside of government.

B

Whether we define "liberty" as locomotion or freedom from governmental action more broadly, petitioners have in no way been deprived of it.

Petitioners cannot claim, under the most plausible definition of "liberty," that they have been imprisoned or physically restrained by the States for participating in same-sex relationships. To the contrary, they have been able to cohabitate and raise their children in peace. They

have been able to hold civil marriage ceremonies in States that recognize same-sex marriages and private religious ceremonies in all States. They have been able to travel freely around the country, making their homes where they please. Far from being incarcerated or physically restrained, petitioners have been left alone to order their lives as they see fit.

Nor, under the broader definition, can they claim that the States have restricted their ability to go about their daily lives as they would be able to absent governmental restrictions. Petitioners do not ask this Court to order the States to stop restricting their ability to enter same-sex relationships, to engage in intimate behavior, to make vows to their partners in public ceremonies, to engage in religious wedding ceremonies, to hold themselves out as married, or to raise children. The States have imposed no such restrictions. Nor have the States prevented petitioners from approximating a number of incidents of marriage through private legal means, such as wills, trusts, and powers of attorney.

Instead, the States have refused to grant them governmental entitlements. Petitioners claim that as a matter of "liberty," they are entitled to access privileges and benefits that exist solely *because of* the government. They want, for example, to receive the State's *imprimatur* on their marriages—on state issued marriage licenses, death certificates, or other official forms. And they want to receive various monetary benefits, including reduced inheritance taxes upon the death of a spouse, compensation if a spouse dies as a result of a work-related injury, or loss of consortium damages in tort suits. But receiving governmental recognition and benefits has nothing to do with any understanding of "liberty" that the Framers would have recognized.

To the extent that the Framers would have recognized a natural right to marriage that fell within the broader

definition of liberty, it would not have included a right to governmental recognition and benefits. Instead, it would have included a right to engage in the very same activities that petitioners have been left free to engage in—making vows, holding religious ceremonies celebrating those vows, raising children, and otherwise enjoying the society of one's spouse—without governmental interference. At the founding, such conduct was understood to predate government, not to flow from it. As Locke had explained many years earlier, "The first society was between man and wife, which gave beginning to that between parents and children." Locke §77, at 39; see also J. Wilson, Lectures on Law, in 2 Collected Works of James Wilson 1068 (K. Hall and M. Hall eds. 2007) (concluding "that to the institution of marriage the true origin of society must be traced"). Petitioners misunderstand the institution of marriage when they say that it would "mean little" absent governmental recognition. Brief for Petitioners in No. 14–556, p. 33.

Petitioners' misconception of liberty carries over into their discussion of our precedents identifying a right to marry, not one of which has expanded the concept of "liberty" beyond the concept of negative liberty. Those precedents all involved absolute prohibitions on private actions associated with marriage. *Loving* v. *Virginia*, 388 U. S. 1 (1967), for example, involved a couple who was criminally prosecuted for marrying in the District of Columbia and cohabiting in Virginia, *id.*, at 2–3.[5] They were each sen-

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[5] The suggestion of petitioners and their *amici* that antimiscegenation laws are akin to laws defining marriage as between one man and one woman is both offensive and inaccurate. "America's earliest laws against interracial sex and marriage were spawned by slavery." P. Pascoe, What Comes Naturally: Miscegenation Law and the Making of Race in America 19 (2009). For instance, Maryland's 1664 law prohibiting marriages between "'freeborne English women'" and "'Negro Sla[v]es'" was passed as part of the very act that authorized lifelong

tenced to a year of imprisonment, suspended for a term of 25 years on the condition that they not reenter the Commonwealth together during that time. *Id.*, at 3.[6] In a similar vein, *Zablocki* v. *Redhail*, 434 U. S. 374 (1978), involved a man who was prohibited, on pain of criminal penalty, from "marry[ing] in Wisconsin or elsewhere" because of his outstanding child-support obligations, *id.*, at 387; see *id.*, at 377–378. And *Turner* v. *Safley*, 482 U. S. 78 (1987), involved state inmates who were prohibited from entering marriages without the permission of the superintendent of the prison, permission that could not be granted absent compelling reasons, *id.*, at 82. In *none* of those cases were individuals denied solely governmental

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slavery in the colony. *Id.*, at 19–20. Virginia's antimiscegenation laws likewise were passed in a 1691 resolution entitled "An act for suppressing outlying Slaves." Act of Apr. 1691, Ch. XVI, 3 Va. Stat. 86 (W. Hening ed. 1823) (reprint 1969) (italics deleted). "It was not until the Civil War threw the future of slavery into doubt that lawyers, legislators, and judges began to develop the elaborate justifications that signified the emergence of miscegenation law and made restrictions on interracial marriage the foundation of post-Civil War white supremacy." Pascoe, *supra*, at 27–28.

Laws defining marriage as between one man and one woman do not share this sordid history. The traditional definition of marriage has prevailed in every society that has recognized marriage throughout history. Brief for Scholars of History and Related Disciplines as *Amici Curiae* 1. It arose not out of a desire to shore up an invidious institution like slavery, but out of a desire "to increase the likelihood that children will be born and raised in stable and enduring family units by both the mothers and the fathers who brought them into this world." *Id.*, at 8. And it has existed in civilizations containing all manner of views on homosexuality. See Brief for Ryan T. Anderson as *Amicus Curiae* 11–12 (explaining that several famous ancient Greeks wrote approvingly of the traditional definition of marriage, though same-sex sexual relations were common in Greece at the time).

[6] The prohibition extended so far as to forbid even religious ceremonies, thus raising a serious question under the First Amendment's Free Exercise Clause, as at least one *amicus* brief at the time pointed out. Brief for John J. Russell et al. as *Amici Curiae* in *Loving* v. *Virginia*, O.T. 1966, No. 395, pp. 12–16.

recognition and benefits associated with marriage.

In a concession to petitioners' misconception of liberty, the majority characterizes petitioners' suit as a quest to "find . . . liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex." *Ante*, at 2. But "liberty" is not lost, nor can it be found in the way petitioners seek. As a philosophical matter, liberty is only freedom from governmental action, not an entitlement to governmental benefits. And as a constitutional matter, it is likely even narrower than that, encompassing only freedom from physical restraint and imprisonment. The majority's "better informed understanding of how constitutional imperatives define . . . liberty," *ante*, at 19,—better informed, we must assume, than that of the people who ratified the Fourteenth Amendment—runs headlong into the reality that our Constitution is a "collection of 'Thou shalt nots,'" *Reid* v. *Covert*, 354 U. S. 1, 9 (1957) (plurality opinion), not "Thou shalt provides."

III

The majority's inversion of the original meaning of liberty will likely cause collateral damage to other aspects of our constitutional order that protect liberty.

A

The majority apparently disregards the political process as a protection for liberty. Although men, in forming a civil society, "give up all the power necessary to the ends for which they unite into society, to the majority of the community," Locke §99, at 49, they reserve the authority to exercise natural liberty within the bounds of laws established by that society, *id.*, §22, at 13; see also Hey §§52, 54, at 30–32. To protect that liberty from arbitrary interference, they establish a process by which that society can

adopt and enforce its laws. In our country, that process is primarily representative government at the state level, with the Federal Constitution serving as a backstop for that process. As a general matter, when the States act through their representative governments or by popular vote, the liberty of their residents is fully vindicated. This is no less true when some residents disagree with the result; indeed, it seems difficult to imagine *any* law on which all residents of a State would agree. See Locke §98, at 49 (suggesting that society would cease to function if it required unanimous consent to laws). What matters is that the process established by those who created the society has been honored.

That process has been honored here. The definition of marriage has been the subject of heated debate in the States. Legislatures have repeatedly taken up the matter on behalf of the People, and 35 States have put the question to the People themselves. In 32 of those 35 States, the People have opted to retain the traditional definition of marriage. Brief for Respondents in No. 14–571, pp. 1a–7a. That petitioners disagree with the result of that process does not make it any less legitimate. Their civil liberty has been vindicated.

B

Aside from undermining the political processes that protect our liberty, the majority's decision threatens the religious liberty our Nation has long sought to protect.

The history of religious liberty in our country is familiar: Many of the earliest immigrants to America came seeking freedom to practice their religion without restraint. See McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1422–1425 (1990). When they arrived, they created their own havens for religious practice. *Ibid.* Many of these havens were initially homogenous communities with established

religions. *Ibid.* By the 1780's, however, "America was in the wake of a great religious revival" marked by a move toward free exercise of religion. *Id.*, at 1437. Every State save Connecticut adopted protections for religious freedom in their State Constitutions by 1789, *id.*, at 1455, and, of course, the First Amendment enshrined protection for the free exercise of religion in the U. S. Constitution. But that protection was far from the last word on religious liberty in this country, as the Federal Government and the States have reaffirmed their commitment to religious liberty by codifying protections for religious practice. See, *e.g.*, Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U. S. C. §2000bb *et seq.*; Conn. Gen. Stat. §52–571b (2015).

Numerous *amici*—even some not supporting the States—have cautioned the Court that its decision here will "have unavoidable and wide-ranging implications for religious liberty." Brief for General Conference of Seventh-Day Adventists et al. as *Amici Curiae* 5. In our society, marriage is not simply a governmental institution; it is a religious institution as well. *Id.*, at 7. Today's decision might change the former, but it cannot change the latter. It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples.

The majority appears unmoved by that inevitability. It makes only a weak gesture toward religious liberty in a single paragraph, *ante*, at 27. And even that gesture indicates a misunderstanding of religious liberty in our Nation's tradition. Religious liberty is about more than just the protection for "religious organizations and persons . . . as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." *Ibid.* Religious liberty is about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious

practice.[7]

Although our Constitution provides some protection against such governmental restrictions on religious practices, the People have long elected to afford broader protections than this Court's constitutional precedents mandate. Had the majority allowed the definition of marriage to be left to the political process—as the Constitution requires—the People could have considered the religious liberty implications of deviating from the traditional definition as part of their deliberative process. Instead, the majority's decision short-circuits that process, with potentially ruinous consequences for religious liberty.

IV

Perhaps recognizing that these cases do not actually involve liberty as it has been understood, the majority goes to great lengths to assert that its decision will advance the "dignity" of same-sex couples. *Ante*, at 3, 13, 26, 28.[8] The flaw in that reasoning, of course, is that the Constitution contains no "dignity" Clause, and even if it did, the government would be incapable of bestowing dignity.

Human dignity has long been understood in this country to be innate. When the Framers proclaimed in the Declaration of Independence that "all men are created equal"

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[7] Concerns about threats to religious liberty in this context are not unfounded. During the hey-day of antimiscegenation laws in this country, for instance, Virginia imposed criminal penalties on ministers who performed marriage in violation of those laws, though their religions would have permitted them to perform such ceremonies. Va. Code Ann. §20–60 (1960).

[8] The majority also suggests that marriage confers "nobility" on individuals. *Ante*, at 3. I am unsure what that means. People may choose to marry or not to marry. The decision to do so does not make one person more "noble" than another. And the suggestion that Americans who choose not to marry are inferior to those who decide to enter such relationships is specious.

and "endowed by their Creator with certain unalienable Rights," they referred to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth. That vision is the foundation upon which this Nation was built.

The corollary of that principle is that human dignity cannot be taken away by the government. Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them. And those denied governmental benefits certainly do not lose their dignity because the government denies them those benefits. The government cannot bestow dignity, and it cannot take it away.

The majority's musings are thus deeply misguided, but at least those musings can have no effect on the dignity of the persons the majority demeans. Its mischaracterization of the arguments presented by the States and their *amici* can have no effect on the dignity of those litigants. Its rejection of laws preserving the traditional definition of marriage can have no effect on the dignity of the people who voted for them. Its invalidation of those laws can have no effect on the dignity of the people who continue to adhere to the traditional definition of marriage. And its disdain for the understandings of liberty and dignity upon which this Nation was founded can have no effect on the dignity of Americans who continue to believe in them.

* * *

Our Constitution—like the Declaration of Independence before it—was predicated on a simple truth: One's liberty, not to mention one's dignity, was something to be shielded from—not provided by—the State. Today's decision casts that truth aside. In its haste to reach a desired result, the majority misapplies a clause focused on "due process" to afford substantive rights, disregards the most plausible

understanding of the "liberty" protected by that clause, and distorts the principles on which this Nation was founded. Its decision will have inestimable consequences for our Constitution and our society. I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

Nos. 14–556, 14-562, 14–571 and 14–574

JAMES OBERGEFELL, ET AL., PETITIONERS
14–556 v.
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL.;

VALERIA TANCO, ET AL., PETITIONERS
14–562 v.
BILL HASLAM, GOVERNOR OF TENNESSEE, ET AL.;

APRIL DEBOER, ET AL., PETITIONERS
14–571 v.
RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL.; AND

GREGORY BOURKE, ET AL., PETITIONERS
14–574 v.
STEVE BESHEAR, GOVERNOR OF KENTUCKY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 26, 2015]

JUSTICE ALITO, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

Until the federal courts intervened, the American people were engaged in a debate about whether their States should recognize same-sex marriage.[1] The question in

[1] I use the phrase "recognize marriage" as shorthand for issuing mar-

these cases, however, is not what States *should* do about same-sex marriage but whether the Constitution answers that question for them. It does not. The Constitution leaves that question to be decided by the people of each State.

I

The Constitution says nothing about a right to same-sex marriage, but the Court holds that the term "liberty" in the Due Process Clause of the Fourteenth Amendment encompasses this right. Our Nation was founded upon the principle that every person has the unalienable right to liberty, but liberty is a term of many meanings. For classical liberals, it may include economic rights now limited by government regulation. For social democrats, it may include the right to a variety of government benefits. For today's majority, it has a distinctively postmodern meaning.

To prevent five unelected Justices from imposing their personal vision of liberty upon the American people, the Court has held that "liberty" under the Due Process Clause should be understood to protect only those rights that are "'deeply rooted in this Nation's history and tradition.'" *Washington* v. *Glucksberg*, 521 U. S. 701, 720–721 (1997). And it is beyond dispute that the right to same-sex marriage is not among those rights. See *United States* v. *Windsor*, 570 U. S. ___, ___ (2013) (ALITO, J., dissenting) (slip op., at 7). Indeed:

> "In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution. See *Goodridge* v. *Department of Public Health*, 440 Mass.

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riage licenses and conferring those special benefits and obligations provided under state law for married persons.

309, 798 N. E. 2d 941. Nor is the right to same-sex marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000.

> "What [those arguing in favor of a constitutional right to same sex marriage] seek, therefore, is not the protection of a deeply rooted right but the recognition of a very new right, and they seek this innovation not from a legislative body elected by the people, but from unelected judges. Faced with such a request, judges have cause for both caution and humility." *Id.*, at ___ (slip op., at 7–8) (footnote omitted).

For today's majority, it does not matter that the right to same-sex marriage lacks deep roots or even that it is contrary to long-established tradition. The Justices in the majority claim the authority to confer constitutional protection upon that right simply because they believe that it is fundamental.

II

Attempting to circumvent the problem presented by the newness of the right found in these cases, the majority claims that the issue is the right to equal treatment. Noting that marriage is a fundamental right, the majority argues that a State has no valid reason for denying that right to same-sex couples. This reasoning is dependent upon a particular understanding of the purpose of civil marriage. Although the Court expresses the point in loftier terms, its argument is that the fundamental purpose of marriage is to promote the well-being of those who choose to marry. Marriage provides emotional fulfillment and the promise of support in times of need. And by benefiting persons who choose to wed, marriage indirectly benefits society because persons who live in stable, fulfilling, and supportive relationships make better citizens. It is for these reasons, the argument goes, that States

encourage and formalize marriage, confer special benefits on married persons, and also impose some special obligations. This understanding of the States' reasons for recognizing marriage enables the majority to argue that same-sex marriage serves the States' objectives in the same way as opposite-sex marriage.

This understanding of marriage, which focuses almost entirely on the happiness of persons who choose to marry, is shared by many people today, but it is not the traditional one. For millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate.

Adherents to different schools of philosophy use different terms to explain why society should formalize marriage and attach special benefits and obligations to persons who marry. Here, the States defending their adherence to the traditional understanding of marriage have explained their position using the pragmatic vocabulary that characterizes most American political discourse. Their basic argument is that States formalize and promote marriage, unlike other fulfilling human relationships, in order to encourage potentially procreative conduct to take place within a lasting unit that has long been thought to provide the best atmosphere for raising children. They thus argue that there are reasonable secular grounds for restricting marriage to opposite-sex couples.

If this traditional understanding of the purpose of marriage does not ring true to all ears today, that is probably because the tie between marriage and procreation has frayed. Today, for instance, more than 40% of all children in this country are born to unmarried women.[2] This de-

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[2] See, e.g., Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, J. Martin, B. Hamilton, M. Osterman, S. Curtin, & T. Mathews, Births: Final Data for 2013, 64 National Vital Statistics Reports, No. 1, p. 2 (Jan. 15, 2015), online at http://www.cdc.gov/nchs/data/nvsr/nvsr64/

velopment undoubtedly is both a cause and a result of changes in our society's understanding of marriage.

While, for many, the attributes of marriage in 21st-century America have changed, those States that do not want to recognize same-sex marriage have not yet given up on the traditional understanding. They worry that by officially abandoning the older understanding, they may contribute to marriage's further decay. It is far beyond the outer reaches of this Court's authority to say that a State may not adhere to the understanding of marriage that has long prevailed, not just in this country and others with similar cultural roots, but also in a great variety of countries and cultures all around the globe.

As I wrote in *Windsor*:

> "The family is an ancient and universal human institution. Family structure reflects the characteristics of a civilization, and changes in family structure and in the popular understanding of marriage and the family can have profound effects. Past changes in the understanding of marriage—for example, the gradual ascendance of the idea that romantic love is a prerequisite to marriage—have had far-reaching consequences. But the process by which such consequences come about is complex, involving the interaction of numerous factors, and tends to occur over an extended period of time.
>
> "We can expect something similar to take place if same-sex marriage becomes widely accepted. The long-term consequences of this change are not now known and are unlikely to be ascertainable for some

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nvsr64_01.pdf (all Internet materials as visited June 24, 2015, and available in Clerk of Court's case file); cf. Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics (NCHS), S. Ventura, Changing Patterns of Nonmartial Childbearing in the United States, NCHS Data Brief, No. 18 (May 2009), online at http://www.cdc.gov/nchs/data/databriefs/db18.pdf.

time to come. There are those who think that allowing same-sex marriage will seriously undermine the institution of marriage. Others think that recognition of same-sex marriage will fortify a now-shaky institution.

"At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be. And judges are certainly not equipped to make such an assessment. The Members of this Court have the authority and the responsibility to interpret and apply the Constitution. Thus, if the Constitution contained a provision guaranteeing the right to marry a person of the same sex, it would be our duty to enforce that right. But the Constitution simply does not speak to the issue of same-sex marriage. In our system of government, ultimate sovereignty rests with the people, and the people have the right to control their own destiny. Any change on a question so fundamental should be made by the people through their elected officials." 570 U. S., at ___ (dissenting opinion) (slip op., at 8–10) (citations and footnotes omitted).

III

Today's decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage. The decision will also have other important consequences.

It will be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women. *E.g., ante*, at 11–13. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.

Perhaps recognizing how its reasoning may be used, the majority attempts, toward the end of its opinion, to reassure those who oppose same-sex marriage that their rights of conscience will be protected. *Ante*, at 26–27. We will soon see whether this proves to be true. I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.

The system of federalism established by our Constitution provides a way for people with different beliefs to live together in a single nation. If the issue of same-sex marriage had been left to the people of the States, it is likely that some States would recognize same-sex marriage and others would not. It is also possible that some States would tie recognition to protection for conscience rights. The majority today makes that impossible. By imposing its own views on the entire country, the majority facilitates the marginalization of the many Americans who have traditional ideas. Recalling the harsh treatment of gays and lesbians in the past, some may think that turnabout is fair play. But if that sentiment prevails, the Nation will experience bitter and lasting wounds.

Today's decision will also have a fundamental effect on this Court and its ability to uphold the rule of law. If a bare majority of Justices can invent a new right and impose that right on the rest of the country, the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate. Even enthusiastic supporters of same-sex marriage should worry about the scope of the power that today's majority claims.

Today's decision shows that decades of attempts to restrain this Court's abuse of its authority have failed. A lesson that some will take from today's decision is that

preaching about the proper method of interpreting the Constitution or the virtues of judicial self-restraint and humility cannot compete with the temptation to achieve what is viewed as a noble end by any practicable means. I do not doubt that my colleagues in the majority sincerely see in the Constitution a vision of liberty that happens to coincide with their own. But this sincerity is cause for concern, not comfort. What it evidences is the deep and perhaps irremediable corruption of our legal culture's conception of constitutional interpretation.

Most Americans—understandably—will cheer or lament today's decision because of their views on the issue of same-sex marriage. But all Americans, whatever their thinking on that issue, should worry about what the majority's claim of power portends.

IN THE CIRCUIT COURT OF THE SEVENTEENTH
JUDICIAL CIRCUIT IN AND FOR BROWARD
COUNTY, FLORIDA

IN RE THE MARRIAGE OF: CASE NO. 13-012058 (37)

HEATHER BRASSNER,
Petitioner

And

MEGAN E. LADE,
Respondent.

______________________________/

ORDER GRANTING PETITIONER'S MOTION FOR DECLARATORY JUDGMENT

This cause came before this Court on Petitioner's Motion For Declaratory Judgment. The Court, having reviewed the motion, having considered the arguments of counsel and The State of Florida, and being otherwise fully advised in the premises, hereby finds as follows:

I. Introduction

Petitioner, who entered into a civil union in the State of Vermont in 2002, now seeks to have that union dissolved in Broward County Florida where she currently resides. This Court can only grant that petition were the law of the State of Florida to recognize out-of-state same-sex civil unions. As a result, Petitioner challenges Florida's prohibition on same-sex marriage, as set forth in Article I, § 27 of the Florida Constitution and Florida Statute § 741.212. The Petitioner contends that Florida's ban on

same-sex marriage, or refusal to recognize her out-of-state union, violates her rights to due process and equal protection under the law as required by the Fourteenth Amendment of the Constitution.

The Supreme Court in United States v. Windsor, U.S. , 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013), recently held that the federal government cannot refuse to recognize a valid state-sanctioned same-sex marriage with regard to federal legislation. This Court is now called upon to decide whether the Windsor decision applies to state law that prohibits same-sex marriage or civil unions. The issue before this Court is thus whether the State of Florida's definition of marriage is in violation of the United States Constitution. After applying the law and considering all the issues, this Court finds that Florida's ban on same-sex marriage violates the guarantees of due process and equal protection under the laws. Florida's prohibition on same-sex marriage denies some citizens, based on their sexual orientation, the fundamental right to marry, and does so without a legitimate state purpose. This Court finds these laws are unconstitutional and GRANTS the Petitioner's Motion For Declaratory Relief, declaring Florida's ban on same-sex marriage unconstitutional.

With a full understanding of the politically and emotionally charged sentiments behind the issue of same-sex marriage, this Court's analysis of the law and its ruling is based solely on the law, independent of bias, personal feelings or beliefs, which is the role of the judiciary. Judges are bound to rule with impartially and neutrality, while applying the law to the facts in any controversy before them. Protecting citizens from unequal treatment under the law is constitutionally mandated and is the cornerstone of our Constitution and this Nation.

II. Petitioner

Petitioner, Heather Brassner, and Respondent, Megan E. Lade, were joined by civil union in Vermont on July 6, 2002. At that time, civil union was the only form of legal relationship afforded same-sex couples in Vermont. The law changed in Vermont in 2009 when same-sex marriage was sanctioned. Vermont law provides for dissolving civil unions, which requires both parties to agree and execute requisite forms. Petitioner sought to locate Respondent in order to execute the forms but has been unable to locate her after a diligent search, which included employing a private investigator.

Petitioner seeks to dissolve the Vermont civil union and has filed a Petition For Dissolution of Marriage in this Court. As a result Petitioner seeks to have this Court recognize her out-of-state civil union. She seeks to marry her current partner, but cannot do so without the legal dissolution of her civil union with Respondent. Petitioner has been a resident of the State of Florida for 14 years.

III. Petitioner's Right To Relief

The State correctly points that Petitioner must show a bona fide, actual and present practical need for declaratory relief. Martinez v. Scanlan, 582 So. 2d 1167, 1170 (Fla. 1991). The State also argues that the respondent is absent and that all adverse parties interests must appear before the court, that the petitioner cannot seek relief without the presence of the respondent. Id. at 1170. Petitioner finds herself in court in Florida and not in Vermont because the respondent is unavailable and not locatable. She is seeking relief for a dissolution of her civil union with a partner she has not had contact with in many years. Petitioner seeks this Court declare Florida's ban on same-sex marriage unconstitutional so that she can avail herself of the same rights that all citizens

in Florida have with regard to recognizing their out of state marriages. She has a bona fide, actual and present practical need to have the ban on same-sex marriage declared unconstitutional so that she can have her civil union dissolved in Florida.

IV. Recognition of Out-Of-State Marriage or Civil Union

Petitioner is seeking that this Court dissolves her out-of-state civil union so that she can legally marry her new partner. In a case cited by Petitioner, the Massachusetts Supreme Court held that a civil union is the equivalent of marriage, and that the state must recognize the legal union pursuant to full faith and credit, just as other out-of-state and foreign marriages are recognized. Elia-Warnken v. Elia, 463 Mass. 29 (2012). The State of Florida, in its memorandum in opposition, argues that no Florida court has ruled that a civil union is the same as a marriage. The State is correct in stating the obvious, that no court in Florida has held as such, however, no appellate court has ruled that a civil union is not the equivalent of a marriage, rendering this issue one of first impression. Cases of first impression occur with regularity in courts all over the State of Florida and the United States.

This issue is analogous to Florida's recognition of common law marriage from other states. In Florida, a common law marriage occurring after 1968 is not recognized. Anderson v. Anderson, 577 So. 2d 658, 660 (Fla. 1st DCA 1991). However, out-of-state common law marriages that are sanctioned in the states where the marriages were formed are recognized. Smith v. Anderson, 821 So. 2d 323, 325 (Fla. 2d DCA 2002). Out-of-state marriages are recognized in Florida pursuant to the full faith and credit clause of the Constitution. Petitioner seeks to avail herself of the same legal rights that opposite-sex married couples have in the recognition of their out-of-state marriages or civil unions.

Further, in Brenner v. Scott, the federal court, ruling on the validity of out-of state same sex marriages, criticized the State's argument that Florida has a right to invoke their own laws governing marriage, which must be given deference. 999 F. Supp 1278, 1287 (N.D. Fla. 2014). However, where out-of-state marriages are concerned Florida refuses to give deference to those valid and lawful unions entered into in those states. Id.

V. The Merits

The State of Florida, pursuant to Article I, § 27 of the Florida Constitution and §741.212, Fla. Stat., prohibits recognition of same-sex civil unions performed in other states. The United States Supreme Court in Windsor recently addressed the issue of whether the federal government's legislation regarding marriage rights must also recognize same-sex marriages. 133 S. Ct. at 2693. The Windsor Court held that state sanctioned same-sex married couples must be treated the same as opposite-sex married couples with regard to federal legislation such as the Defense of Marriage Act. Id. at 2693. Notably, the Windsor Court held that out-of-state same-sex marriage recognition is a protected right under the Constitution, but fell short of clarifying whether out-of-state marriage recognition is a fundamental right. Id. at 2696.

In Brenner v. Scott, the court, relying on the U.S. Supreme Court's decision in Windsor and other federal decisions interpreting that ruling, held that Florida's refusal to allow same-sex marriages or to recognize same-sex marriages was unconstitutional. 999 F. Supp 2d. 1278 (N.D. Fla. 2014). In its ruling the court stated:

> The Supreme Court struck down part of the federal Defense of Marriage Act last year. *United States v. Windsor*, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013). Since that decision, 19 different federal courts, now including this one, have ruled on the constitutionality of state bans on same-sex marriage. The result: 19 consecutive victories for those challenging the bans. Based on these decisions, gays and lesbians, like all other adults, may choose a life partner and

dignify the relationship through marriage. To paraphrase a civil-rights leader from the age when interracial marriage was first struck down, the arc of history is long, but it bends toward justice.

Id. at 1281. The Brenner court held that marriage is a fundamental right "requiring the Fourteenth Amendment's Due Process and Equal Protection Clauses," and that "Florida's same–sex marriage provisions ... must be reviewed under strict scrutiny, and that, ... the provisions are unconstitutional." Id. at 1281-1282. The court cited several recent Federal Circuit decisions and found those to be controlling. See, Bostic v. Schaefer, 760 F.3d 352 (4th Cir. July 28, 2014); Bishop v. Smith, 760 F.3d 1070 (10th Cir. July 18, 2014); and Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014).

By failing to recognize Petitioner's out-of-state union her constitutional right to due process and equal protection under the law is violated. Florida's refusal to recognize Petitioner's union is tantamount to banning her from marrying someone of the same sex. Accordingly, Florida's ban on same-sex marriage and refusal to recognize out-of-state same-sex marriages violates Petitioner's fundamental right to marry under the due process clause and discriminates based on sexual orientation, which violates the equal protection clause.

VI. Due Process Challenge

1. Fundamental Right To Marry

The due process clause of the Fourteenth Amendment guarantees that all citizens have certain fundamental rights. See, Planned Parenthood v. Casey, 505 U.S. 833, 846-47, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). Petitioner contends that the right to marry is a fundamental right. The United States Supreme Court has held that marriage is a fundamental right protected by the Constitution. Turner v. Safley, 482 U.S. 78, 95,

(1987); Loving v. Virginia, 388 U.S. 1, 12 (1967). The due process clause of the Fourteenth Amendment protects ones liberty, which includes the fundamental right to marry. The Supreme Court has ruled on numerous occasions that the right to marry is a central part of the liberty protected by the due process clause. Meyer v. Nebraska, 262 U.S. 390, 399, (1923). Also see, Turner, 482 U.S. at 95 ("[T]he decision to marry is a fundamental right."); Zablocki v. Redhail, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978) ("[T]he right to marry is of fundamental importance for all individuals."); Cleveland Bd. of Educ. v. La Fleur, 414 U. S. 632, 639-40 (1974) (the Court recognizes freedom of personal choice in matters of marriage and family life as a liberty protected by the due process clause.); United States v. Kras, 409 U. S. 434, 446 (1973); Maynard v. Hill, 125 U. S. 190, 206 and 211 (1888) (marriage is the "most important relation in life" and "the foundation of the family and of society"); Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (the Court lists fundamental rights and marriage is the first one).

2. Standard of Review

The states regulate fundamental rights, such as marriage, however the states cannot violate those protected rights. Windsor, 133 S. Ct. 2675, 2680, 2691 (2013); Loving , 388 U. S. at 7. The Supreme Court has held that when a statutory classification prohibits an individual's fundamental rights, the statute must be supported by an important state interest and must be closely tailored to those interests. Zablocki, 434 U.S. at 388. The Supreme Court has also held that regulating a constitutionally protected decision, such as whom one shall marry, must be predicated on legitimate state concerns. Hodgson v. Minnesota, 497 U.S. 417, 110 S. Ct. 2926, 111 L. Ed. 2d 344 (1990) (marriage is a matter of individual choice); Roberts v. U.S. Jaycees, 468 U.S. 609, 620,

104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984) ("[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse.") Accordingly, the standard of review is strict scrutiny as the ban on same-sex marriage involves a restriction on the fundamental right to marriage.

3. The State of Florida may not infringe on an individual's fundamental rights

The State has argued that the same-sex marriage ban is supported by history and tradition. That is not a legitimate state concern. Many courts have held that tradition alone does not constitute a rational basis for any law. Pareto v. Ruvin, Case No. 14-1661 CA 24 (11th Cir. Ct. July 25, 2014); Brenner v. Scott, 999 F. Supp 2d 1278, 1289 (N.D. Fla. 2014); Lawrence v. Texas, 539 U.S. 558, 602, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003); De Leon v. Perry, 975 F. Supp at 655 (W.D. Texas 2014). The Pareto Court held that denying same-sex couples the right to marry based on history and tradition is neither compelling nor a legitimate governmental interest. Pareto, at 19. Also see, Golinski v. U. S., Office of Pers. Mgmt., 824 F. Supp. 2d 968 (N.D. Cal. 2012) (the argument that marriage as defined is set in stone is not a rational justification); Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 967 (N.D. Cal. 2010) (states must have an interest other than the fact of tradition); Williams v. Illinois, 399 U.S. 235, 239, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970) ("Neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack."); Bostic v. Schaefer, 760 F.3d 352 (4th Cir. July 28, 2014); Bishop v. Smith, 760 F.3d 1070 (10th Cir. July 18, 2014); and Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014).

The State has argued that the ban on same sex marriage protects children. Florida Adoption Law recognizes the right of same-sex couples to adopt and raise children. The court in Fla. Dept. of Children & Families v. Adoption of X.X.G., noted that there was a plethora of research on the issue of childrearing by same-sex couples and the research indicates that there were no differences in the parenting of homosexuals and heterosexuals. 45 So. 3d 79, 86-87 (Fla. 3d DCA 2010). Additionally, the State argues that the same-sex marriage ban furthers responsible and natural procreation. However, all states allow infertile individuals, elderly people, and those who choose not to procreate to get married. Brenner v. Scott, 999 F. Supp at 1289. Pareto, at 21-22; De Leon, 975 F. Supp. 2d at 654. In applying strict scrutiny to this burden on liberty interests, restricting same-sex marriage does not serve a legitimate state interest in promoting procreation or childrearing and therefore is not rationally related to that interest. Perry, 704 F. Supp. 2d at 972. Further, the ban nullifies the legal import of same-sex out-of-state marriages, which can stigmatize the children of same-sex couples. De Leon, 975 F. Supp at 655.

The ban on marriage recognition of same-sex couples denies Petitioner's fundamental right to marry. The ban is not supported by any state interest, and certainly not by any "sufficiently important" interest that would justify the restriction. Zablocki, 434 U. S. at 388. Florida's ban on same-sex marriage is unconstitutional as it violates the due process clause of the Fourteenth Amendment. Every federal court to address this issue since the Supreme Court's decision in Windsor, as well as several recent decisions in the Florida Circuit Courts, has found that denying same-sex couples the fundamental right to marry violates due process. Bostic v. Schaefer, 760 F.3d 352 (4th Cir. July 28,

2014); Bishop v. Smith, 760 F.3d 1070 (10th Cir. July 18, 2014); Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014); Wolf v. Walker, 986 F. Supp. 2d 982 (2014); De Leon v. Perry, 975 F. Supp. 2d 632 (W. D. Tex. 2014); Love v. Beshear, 989 F. Supp 2d 536 (W.D. Ken. 2014); Baskin v. Bogan, 766 F. 3d 648 (7 Cir. 2014); Whitewood v. Wolf, 992 F. Supp 2d 410 (M.D. Penn. 2014); Geiger v. Kitzhaber, 2014 U.S. App. LEXIS 68171 ; Latta v. Otter, 2014 U.S. App. LEXIS 66417; DeBoer v. Snyder, 973 F. Supp 2d 757, 632, 647-49 (W. D. Tex. 2014; Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (S. D. Ohio 2013). Pareto v. Ruvin, Case No. 14-1661 CA 24 (11th Cir. Ct. July 25, 2014); Huntsman v. Heavlin, Case No. 2014-CA-305-K (16th Cir. Ct. July 17, 2014).

4. Equal protection

Just as the states cannot deprive individual liberty pursuant to the Fourteenth Amendment, the states cannot deny any person the equal protection of the laws. The equal protection clause commands that no state laws shall deny any person the equal protection of the laws. See, U. S. Const. amend. XIV, § 1. The equal protection clause requires states to treat all persons equal regardless of his or her status. Essentially, all laws must be equal in operation to all people. City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985); Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261 (1990); Railway Express Agency v. People of State of New York, 336 U.S. 106 (1949). Equal protection under the laws means that all persons similarly situated should be treated alike. City of Cleburne, Tex., 473 U.S. at 439 (1985).

5. Standard of Review

The standard of review for equal protection claims is generally one of rational basis review; however, the Supreme Court has applied a heightened standard of review

for suspect classifications such as race, alienage, and national origin. Massachusetts Board of Retirement v. Murgia, 427 U. S. 307 (1976). When strict scrutiny review applies the government must show that the classification is "narrowly tailored" to further a "compelling" [State] interest. Parents Involved in Community Schools v. Seattle School District 1; 551 U. S. 701, 720 (2007). The Supreme Court has also applied an intermediate scrutiny for certain classifications, such as those based on sex. These are "quasi-suspect" classifications, and the review is an intermediate scrutiny, whereby the classifications must be "substantially related" to the achievement of an "important governmental objective." United States v. Virginia, 518 U. S. 515, 524 (1996).

In the recent decision in Wolf the Federal Court applied a "quasi-suspect" intermediate review pursuant to the Plaintiffs' claims that the ban on same-sex marriage discriminated based on sexual orientation. 986 F. Supp at 86-87. Other federal courts and state courts have applied a heightened level of scrutiny as well. See, Baehr v. Lewin, 852 P. 2d 44, 67 (1993); Golinski, 824 F. Supp. 2d at 985-90; Griego v. Oliver, 316 P. 3d 865, 884 (N.M. 2013); Obergefell, 962 F. Supp at 986-991; SmithKline Beecham Corp., v. Abbott Labs, 740 F. 3d 471, 481 (9th Cir. 2014); Windsor v. U. S., 699 F. 3d 169, 185 (2d Cir. 2012); also see, Kerrigan v. Comm'r of Pub Health, 957 A. 2d 407, 432 (Conn. 2008); Varnum v. Brien, 763 N. W. 2d 862, 885-96 (Iowa 2009).

The Supreme Court in Windsor found that failing to recognize out-of-state marriages and denying federal benefits to same-sex couples married under the laws of states that allow same-sex marriages unfairly discriminates against same-sex couples. 133 S. Ct. 2675. Other courts have interpreted the review standard applied by the Supreme Court in Windsor as one that was "unquestionably higher than rational basis review."

SmithKline Beecham Corp., 740 F. 3d at 481. Some courts found the standard of review to not be heightened, such as De Leon v. Perry, but nonetheless found that the state's interest did not pass even a rational basis test. 975 F. Supp at 652.

Notwithstanding the above analysis, when determining the proper standard for review in this case this Court is bound by the Florida Supreme Court decision in D.M.T. v. T. M. H., which held that under the Florida Constitution gender is recognized as a specific class, but sexual orientation is not. 129 So. 3d 320, 341-342 (Fla. 2013). Accordingly, the Court did not apply a heightened scrutiny to Florida's equal protection clause. Id. As a result this Court is bound to follow Florida law and cannot review the Petitioner's equal protection claim under a "quasi-suspect" standard but must do so under a rational basis review. Also See, Pareto at 28. Notably, in Pareto the court suggested that the question of level of scrutiny to be applied to the claim of equal protection as it applies to sexual orientation should be revisited on appeal, this court agrees. Id. at 31.

6. The State of Florida cannot deny equal protection under the law

In reviewing the previous arguments that have been espoused by the State in other similar cases, and as mentioned previously in this order, even under a rational basis review the same-sex marriage ban and refusal to recognize out-of-state same-sex marriage violates equal protection as it does not rationally further any legitimate state interest. In evaluating the previously stated state interests of protecting children and procreation, this Court finds no rational relation to those interests. Instead the ban discriminates against same-sex couples by questioning their skill in parenting while the law does not question opposite sex couples abilities to parent. See, Perry v. Schwarzenegger, 704 F. Supp. at 967 ("Like opposite-sex couples, same-sex couples

have happy, satisfying relationships and form deep emotional bonds and strong commitments to their partners."); Varnum v. Brien, 763 N.W. 2d at 899 (noting that there is abundant evidence proposing that the interests of children are served equally by same-sex and opposite-sex parents). Further, so long as opposite sex couples can marry without government analysis of their right to procreate, then so can same-sex couples marry without an analysis of their right to procreate. See, Golinski, 824 F. Supp 2d at 993 ("The ability to procreate cannot and has never been a precondition to marriage.").

In the instant case the Petitioner seeks to have her out-of-state civil union recognized. In Windsor, the Supreme Court invalidated the Defense of Marriage Act (DOMA), a law that prohibited federal recognition of same-sex marriages authorized under state law. 133 S. Ct. 2675 (2013). The Court repeatedly emphasized throughout the opinion that DOMA imposes a disability on same-sex couples, is demeaning to same-sex couples and violates their dignity while lowering their status. 133 S. Ct. at 2692, 2695. The Supreme Court held that state-sanctioned same-sex married couples cannot be treated differently than state-sanctioned opposite-sex married couples. 133 S. Ct at 2693.

In Brenner, the Florida Federal Court held that the ban on same-sex marriage in Florida violates Due Process and Equal Protection and held that out-of-state same-sex marriages must be recognized. Also See, De Leon v. Perry, 975 F. Supp 632 (W. D. Tex. 2014) (court held that Texas law, which refuses to recognize out-of-state same-sex marriage, violates due process and the equal protection clause of the Constitution); Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (S. D. Ohio 2013).

There are tangible benefits of being married that same-sex couples can enjoy in the states that recognize their marriage. There are legal, social and financial benefits that

arise from having a marriage license, and these benefits are significant. Denying those tangible benefits to same-sex couples deprives them of the same rights afforded to opposite-sex couples without sufficient grounds to do so. Florida in essence is failing to recognize Petitioner's Vermont civil union and as such she does not have the right to dissolve a legal union that holds her back from marrying another. The same-sex marriage ban denies her the right to dissolve her marriage, a right that is not denied to opposite-sex couples who were married out-of-state.

Florida cannot define marriage in a way that denies its citizens the right to make the choice as to whom to marry, nor may it deny equal status and dignity to each citizen's decision. Windsor, 133 S. Ct. at 2689. As such, this Court finds that Article I, § 27 of the Florida Constitution, and Fla. Sta. § 741.212, which bans same-sex couples from marrying in Florida and fails to recognize out-of-state same-sex unions, violates the due process protections of the Fourteenth Amendment and also violates the federal constitutional guarantee of equal protection. As such, these laws are void and unenforceable.

The State argues that the decision in Baker v. Nelson, 409 U.S. 810 (1972), precludes this Court from ruling that the same-sex ban is unconstitutional. However, several federal courts including the Florida court in Brenner have concluded that intervening doctrinal developments have all but abated the precedence of Baker. Brenner, 999 F. Supp at 1290-91, citing, Hicks v. Miranda, 422 U.S. 332, 344-45 (1975).

Conclusion

This Court's Order in declaring the same-sex marriage ban unconstitutional is the result of legal analysis of the laws of the federal government and the State of Florida. The

decision is a result of applying the United States Constitution and all Florida laws binding on this Court to the facts. The ruling is thus based on the law as applied to the facts. The Court is well aware of the emotionally charged environment behind this important issue. However, politics and emotionality cannot rule, it is the laws of our government that create the free society that we enjoy. The judicial role is to rule by applying the law to the facts with neutrality and impartiality.

This Court finds that the issue here is not whether there is a right to same-sex marriage but instead whether there is a right to marriage from which same-sex couples can be excluded. The State of Florida cannot ignore the status and dignity afforded to opposite-sex couples, who were married out-of-state, and not extend those same rights, dignities and benefits to same-sex couples similarly situated.

The Court's decision does not speak to the views of society on traditional beliefs about marriage, religious beliefs about marriage, or morality. The decision is based on legal precedents regarding whether the State of Florida can intrude without a legitimate purpose on the fundamental right to marry and the right to have an out-of-state same-sex civil union recognized. This Court addresses the issues of liberty and equality and finds that without a rational relation to a legitimate state interest, Florida cannot impose inequality under the Constitution.

Our country has evolved each generation, and the generation before is often baffled at the changes. Setting aside personal biases, feelings, beliefs and anxieties, and embracing change is often difficult but essential to ensuring that all people are treated fairly under our Constitution. Our country has always strived to recognize the rights of all people. Equality is the cornerstone of our nation. In pursuit of that ideal comes the

often-uncomfortable feeling of change. We have learned that over time change becomes apart of what this great nation is all about.

The tides are turning on the issue of same-sex marriage throughout this country. Since the 2013 ruling of the Supreme Court in Windsor, there have been numerous decisions of courts throughout this country and none have found that same-sex marriage bans pass constitutional muster. To deny same-sex couples the right to enjoy the same laws, benefits and protections of opposite-sex couples without a rational governmental interest unduly violates their due process rights and their equal protection under the laws. To discriminate based on sexual orientation, to deny families equality, to stigmatize children and spouses, to hold some couples less worthy of legal benefits then others based on their sexual orientation, to deny individuals tax credits, marital property rights, the ability to dissolve their unions from other jurisdictions is against all that this country holds dear, as it denies equal citizenship. Marriage is a well-recognized fundamental right, all people should be entitled to enjoy its benefits.

Accordingly, it is hereby ORDERED and ADJUDGED that:

1. Florida's same-sex marriage bans violate the Due Process and Equal Protection Clauses of the United States Consitution. The Plaintiff's Motion for Declaratory Judgment is GRANTED.

2. Florida's explicit failure to recognize legal out of state civil unions, without any rational basis, violates the Due Process and Equal Protection Clauses of the United States Consitution.

3. Article I, section 27 of Florida's Constitution is void and unenforceable.

4. Florida Statute 741.212 is void and unenforceable.

DONE and ORDERED in Chambers, Fort Lauderdale, Broward County, Florida on December 8, 2014.

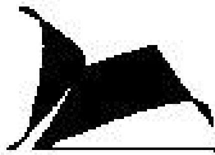
DALE C. COHEN

DEC 0 8 2014

A TRUE COPY

Dale C. Cohen
Circuit Court Judge

Copies to:
Nancy Brodzki, Esq.
Adam Tanenbaum, Esq.



TODD J. ELIA-WARNKEN vs. RICHARD A. ELIA.

463 Mass. 29

April 5, 2012 - July 26, 2012

Court Below: Probate and Family Court Department, Worcester Division

Present: IRELAND, C.J., SPINA, CORDY, BOTSFORD, GANTS, DUFFLY, & LENK, JJ.

Records And Briefs:

- SJC-11023_01_Appellant_Warnken_Brief.pdf
- SJC-11023_02_Appellee_Elia_Brief.pdf
- SJC-11023_03_Amicus_Vermont_Family_Brief.pdf

Oral Arguments:

- 2012/SJC_11023

Marriage. Comity. Statute, Construction.

This court concluded that a civil union entered into in the State of Vermont must be dissolved before either party to that civil union can enter into a valid marriage in Massachusetts to a third party. [31-36]

COMPLAINT for divorce filed in the Worcester Division of the Probate and Family Court Department on April 15, 2009.

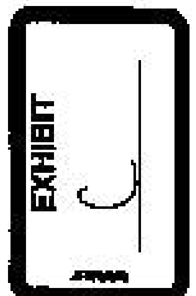
A question of law was reported by Ronald W. King, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Nicholas J. Plante (Russell Schwartz with him) for the plaintiff.

Karen L. Loewy (Bennett H. Klein with her) for the defendant.

Hobart F. Popick, for Susan B. Apel & others, amici curiae, submitted a brief.



IRELAND, C.J. We transferred this case from the Appeals Court to consider a question reported by a judge in the Probate and Family Court: "Whether or not a Vermont civil union must be dissolved before either party to that civil union can enter into a valid marriage in Massachusetts to a third party." The matter came before the judge in the course of divorce proceedings between the plaintiff and the defendant, a same-sex couple who had been married in Massachusetts but where the plaintiff had earlier entered into a civil union in Vermont. Because we recognize the plaintiff's Vermont civil union as the equivalent of marriage in the Commonwealth, we answer the

reported question in the affirmative. [Note 1]

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Facts. The undisputed facts, as reported by the judge and contained in the record, are as follows. On April 19, 2003, the plaintiff, Todd J. Elia-Warnken, entered into a same-sex civil union in the State of Vermont. His Vermont civil union has never been dissolved by any civil authority. [Note 2] Nevertheless, on October 17, 2005, the plaintiff and the defendant, Richard A. Elia, were married in Worcester.

In April, 2009, the plaintiff filed for divorce from the defendant. In his answer, filed on January 12, 2010, the defendant stated that he was married to the plaintiff and counterclaimed for a divorce. At some point, the defendant apparently discovered that the plaintiff had an undissolved civil union. [Note 3] In March, 2010, the defendant moved to dismiss the complaint and counterclaim for divorce on the ground that his Massachusetts marriage was void.

Background. We set forth the relevant law concerning the rights of same-sex couples in Vermont and in the Commonwealth.

In 1999, the Vermont Supreme Court held that, under its Constitution, same-sex couples could not be deprived of statutory benefits and protections given to opposite-sex couples who married. Baker v. State, 170 Vt. 194, 197 (1999). The court left to the Legislature whether to include the rights "within the marriage laws themselves or a parallel 'domestic partnership' system or some equivalent statutory alternative." Id. at 197-198. In 2000, the Vermont Legislature created civil unions that entitled same-sex couples to "all the same benefits, protections, and responsibilities under law . . . as are granted to spouses in a civil marriage." Vt. Stat. Ann. tit. 15, § 1204(a) (LexisNexis 2010). In addition, the statute requires that any terms or definitions "that denote the spousal relationship" (e.g., spouse, family, immediate family, dependent, next of kin) shall include a "party to a civil union." Vt. Stat. Ann. tit. 15, § 1204(b) (LexisNexis 2010). In 2009, the Vermont Legislature repealed portions

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of the civil union statutes and redefined the civil marriage statute allowing same-sex couples to marry. 2009 Vt. Laws 3 (effective Sept. 1, 2009). The statute did not convert existing same-sex civil unions into marriage; civil unions established before September 1, 2009, remain in full legal force and effect. See Summary of the Acts and Resolves of the 2009 Vermont General Assembly, Act 3. Individuals who were parties to a civil union were allowed to marry each other if they so chose. See id. However, an individual who is a party to an undissolved civil union is barred from entering into a marriage with a different party. See Vt. Stat. Ann. tit. 15, §§ 4 & 511 (LexisNexis 2010).

In 2003, we declared that, under various provisions of the Massachusetts Constitution, same-sex couples were entitled to enter into civil marriage, with all its attendant rights and obligations. Goodridge v. Department of Pub. Health, 440 Mass. 309 , 312, 343-344 (2003) (Goodridge). We

also stated that all statutes dealing with polygamy and consanguinity "shall be construed in a gender neutral manner." Id. at 343 n.34. Subsequently, the Senate requested our opinion whether, in lieu of civil marriage, a statute establishing civil unions would be constitutional. Opinions of the Justices, 440 Mass. 1201 , 1201-1202 (2004). We held that it was not constitutional because "it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status." Id. at 1207.

Discussion. Pursuant to Massachusetts law, polygamy is illegal; a marriage is not valid if "either party . . . has a former wife or husband living." G. L. c. 207, § 4. If the polygamy statute applies to the plaintiff's civil union, his subsequent marriage to the defendant was void ab initio. G. L. c. 207, § 8. We apply principles of comity to determine whether the plaintiff's Vermont civil union is the equivalent of marriage in the Commonwealth and, therefore, under the purview of the polygamy statutes.

1. Comity. Comity refers to a State giving "respect and deference to the legislative enactments and public policy pronouncements of other jurisdictions," Cote-Whitacre v. Department of Pub. Health, 446 Mass. 350 , 369 (2006) (Spina, J., concurring)

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(Cote-Whitacre), provided that "the State is careful to see that no wrong or injury is thereby done to its citizens, and that the policy of its own law is in no way contravened or impaired." Pacific Wool Growers v. Commissioner of Corps. & Taxation, 305 Mass. 197 , 209-210 (1940). It is not a "matter of absolute obligation," Cote-Whitacre, supra at 388 (Spina, J., concurring), quoting Perkins v. Perkins, 225 Mass. 82 , 86 (1916), but is instead a "part of the voluntary law of nations." Cote-Whitacre, supra at 369 (Spina, J., concurring), quoting Hilton v. Guyot, 159 U.S. 113, 163-164, 165 (1895). Comity requires us "to concede that . . . our sister States, even when they reach a different decision than we would have, are endowed with an equal measure of wisdom and sympathy." Delk v. Gonzalez, 421 Mass. 525 , 530 (1995).

We follow "the general rule that the validity of a marriage is governed by the law of the State where the marriage is contracted." Cote-Whitacre, supra at 359 (Spina, J., concurring). As such, we ordinarily extend recognition to out-of-State marriages under principles of comity, even if such marriages would be prohibited here, unless the marriage violates Massachusetts public policy, including polygamy, consanguinity and affinity. G. L. c. 207, §§ 1, 2, & 4. Commonwealth v. Lane, 113 Mass. 458 , 463 (1873). See, e.g., Boltz v. Boltz, 325 Mass. 726 (1950) (recognizing New York common-law marriage); Sutton v. Warren, 10 Met. 451 (1845) (recognizing English marriage between man and his mother's sister). Here, the initial question is whether we should extend recognition to the plaintiff's civil union in the same manner as we would an out-of-State marriage under principles of comity.

2. Recognition of Vermont civil unions. We define marriage as "the voluntary union of two persons as spouses, to the exclusion of all others." Goodridge, supra at 343. This is the relationship established by Vermont civil unions, as discussed supra. By that definition alone, a Vermont civil union is the functional equivalent of a marriage.

It is true that the law establishing civil unions in Vermont stated that such unions had a "status" different from marriage. 2000 Vt. Laws 91, § 1 (10). However, the intent of the Vermont Legislature "in enacting the civil union laws was to create legal

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equality between relationships based on civil unions and those based on marriage." Miller-Jenkins v. Miller-Jenkins, 180 Vt. 441, 462 (2006), cert. denied, 550 U.S. 918 (2007). A civil union required a legal decree to solemnize, and a legal decree is required to dissolve it, just as in a marriage. Vt. Stat. Ann. tit. 18, §§ 5160-5165, repealed by 2009 Vt. Laws 3 (LexisNexis 2000 & Supp. 2011) (licensing and certification for civil unions). All of the laws concerning divorce, e.g., property division, spousal maintenance, and child custody, apply equally to civil unions. DeLeonardis v. Page, 188 Vt. 94, 101-105 (2010). In addition, as the Vermont Supreme Court stated in Baker v. State, 170 Vt. 194, 197-198 (1999), whether the Legislature chose to allow marriage or some other form of domestic partnership did not violate the State Constitution, as long as the rights conferred were equal to those of marriage.

The plaintiff argues that the fact that, in 2009, Vermont repealed portions of its civil union statutes and amended the marriage statutes to allow same-sex couples to marry, and that civil unions were not automatically converted into marriages, demonstrates that civil unions are not marriages, are different from marriages and are not equal to marriages even in Vermont. Given our discussion of Baker and Miller-Jenkins, supra, we are not persuaded that these facts are determinative whether we recognize civil unions as the equivalent of marriage here, where the rights and obligations procured by those entering in a civil union were functionally identical to those of marriage.

Although the plaintiff does not suggest that Opinions of the Justices, supra, would prevent our recognizing civil unions from other States, the advisory opinion of four of the Justices bears some mention. See id. at 1206-1209 (preventing same-sex couples from marrying, but allowing them to enter into civil union, denies such couples their equal protection and due process rights). Recognizing civil unions solemnized elsewhere is not the same as creating civil unions as an alternative to marriage in the Commonwealth and thus does not run afoul of the conclusion of four Justices in Opinions of the Justices, supra. Rather, it removes any discriminatory treatment of same-sex couples that might flow from a civil union. Indeed, refusing to recognize a civil union would be inconsistent with the core legal and

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public policy concerns articulated in Goodridge and Opinions of the Justices: protection and furtherance of the rights of same-sex couples. See note 4, infra (legislative action to protect nonresident same-sex couples). Refusing to recognize a legal spousal relationship that granted rights equal to those acquired through marriage, in a State that did not allow same-sex couples to marry at the time, would only perpetuate the discrimination against same-sex couples that was the concern expressed in Opinions of the Justices, supra at 1206-1208. See Cote-Whitacre, supra at 412 (Ireland, J., dissenting) (marriage law should not be interpreted to "reconstruct the edifice of

discrimination we dismantled in Goodridge"). It also would be inconsistent for us to refuse to recognize Vermont civil unions, which extended the right of same-sex couples to enter into a legal, spousal relationship, where a plurality of this court concluded that principles of comity should be applied to other States' laws discriminating against same-sex couples by refusing to allow them to marry in the Commonwealth. Id. at 368-370, 382 (Spina, J., concurring). [Note 4]

There is one additional compelling reason to apply the principle of comity to recognize Vermont civil unions: to avoid the uncertainty and chaos that otherwise would result. As one commentator has asserted concerning recognition of same-sex marriages by all States, the "needs of the interstate and international systems are better served by having a single clear answer to the validity of marriage," because nonrecognition allows parties to avoid their obligations or leads to inconsistent legal obligations. Singer, Same-Sex Marriage, Full Faith and Credit, and the Evasion of Obligation, 1 Stan. J. C.R. & C.L. 1, 29, 36, 50 (2005). Here, if we do not recognize the plaintiff's civil union, he would have two legal spouses, each of whom could expect virtually the same obligations from him, such as spousal or child support, inheritance, and healthcare coverage. See, e.g., Vt. Stat. Ann. tit. 15, §§ 1204(d), (e)(1), & 1206 (LexisNexis 2010); Vt. Stat. Ann. tit. 8, § 4063a (LexisNexis 2009). Likewise, the plaintiff could demand the same obligations from each of

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his spouses. Preventing complications such as these is one of the purposes of the polygamy statutes, discussed infra. See generally Commonwealth v. Ross, 248 Mass. 15 , 19 (1924) (purpose of polygamy statute is to "provide against the illegitimacy of children and to protect the public interests").

We shall recognize a Vermont civil union as the equivalent of marriage in the Commonwealth under principles of comity.

3. Application of Massachusetts polygamy statutes. Because we conclude that a Vermont civil union is the equivalent of marriage, the issue is whether, pursuant to the polygamy statutes, the defendant's marriage to the plaintiff was void ab initio. G. L. c. 207, § 8.

The plaintiff argues that the plain language of the statute states that a marriage is void only if one of the parties has a "husband" or "wife." He asserts that, because he did not have a husband or wife at the time he married the defendant, the statutes do not apply to his situation. See G. L. c. 207, § 4 (under Massachusetts law marriage is not valid if "either party . . . has a former wife or husband living").

We are not persuaded. As we stated in Goodridge, the polygamy statutes should be read in a gender-neutral manner. Therefore, we read the words "husband" and "wife" to mean a legal spousal relationship. Goodridge, supra at 343 n.34. In any event, we interpret the language to include the spousal relationship established by a civil union because it ensures that the purposes of the polygamy statutes are carried out, in particular, avoiding the confusion and uncertainty discussed above. See Commonwealth v. Millican, 449 Mass. 298 , 300 (2007), quoting Hanlon v. Rollins, 286 Mass. 444 , 447 (1934) (statute interpreted according to intent of Legislature

ascertained from words "considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished"). Under Massachusetts law, polygamy is against public policy, and there is no good faith exception. [Note 5] Commonwealth v. Mash, 7 Met. 472 (1844) (ignorance of or honest belief about spouse's death no defense to crime of

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polygamy). The plaintiff has a spouse in Vermont; therefore, his marriage to the defendant was void ab initio. [Note 6] G. L. c. 207, § 8.

Conclusion. We answer the reported question in the affirmative: a Vermont civil union must be dissolved prior to either party entering into marriage with a third person in the Commonwealth. [Note 7]

So ordered.

FOOTNOTES

[Note 1] We acknowledge the amicus brief of Susan B. Apel & others, Vermont family law and estate planning attorneys.

[Note 2] The plaintiff has not asserted that his partner from his Vermont civil union is deceased. In his statement of uncontested facts the judge implicitly assumed that the partner was alive.

[Note 3] There is nothing in the record concerning whether the defendant knew about the civil union before he discovered that it was not dissolved. He states in his brief, "upon learning of the existence of [the plaintiff's] undissolved civil union" he filed various motions with the court.

[Note 4] In July, 2008, the Legislature repealed G. L. c. 207, §§ 11, 12, and 13, the provisions at the core of Cote-Whitacre v. Department of Pub. Health, 446 Mass. 350 , 353 (2006), thereby allowing same-sex couples to marry in the Commonwealth, even if the State where the couple resides does not allow same-sex marriage. See St. 2008, c. 216, § 1.

[Note 5] Under certain conditions, a polygamous marriage may be validated if the impediments to the subsequent marriage are removed (e.g., through divorce or death). G. L. c. 207, § 6.

[Note 6] Given our conclusion that a Vermont civil union is the equivalent of marriage in the Commonwealth, there is no merit to the plaintiff's assertion that the fact that his marriage license states that it was his first marriage is relevant.

We also note that the notice of intention of marriage that couples are required to fill out in the Commonwealth asks the parties to state whether they are or were a party to a civil union or domestic partnership and, if so, to identify the State or country in which it took place as well as whether it was dissolved. These questions are part of the section on the form that asks the parties whether they have been married previously and whether it was dissolved by divorce. There is

nothing in the record to indicate whether the plaintiff filled out this part of the form or what the registry of vital records does when an individual states that he or she has an undissolved civil union, but the fact that the form asked this question weakens the plaintiff's argument that whether someone had a spouse is the critical issue concerning whether he could be married here.

[Note 7] Although we decide this case under Massachusetts law, we note that the result would be the same under Vermont law, which prohibits marriage to a third party while one party is still a party in a civil union. Vt. Stat. Ann. tit. 15, §§ 4 & 511 (LexisNexis 2010).

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Debra H., Appellant, v Janice R., Respondent.

No. 47

COURT OF APPEALS OF NEW YORK

14 N.Y.3d 576; 930 N.E.2d 184; 904 N.Y.S.2d 263; 2010 N.Y. LEXIS 620; 2010 NY Slip Op 3755

February 17, 2010, Argued
May 4, 2010, Decided

SUBSEQUENT HISTORY: Reargument denied by *Debra H. v. Janice R., 15 N.Y.3d 767, 933 N.E.2d 210, 2010 N.Y. LEXIS 1410, 906 N.Y.S.2d 811 (2010)*
US Supreme Court certiorari denied by *Janice R. v. Debra H., 131 S. Ct. 908, 178 L. Ed. 2d 749, 2011 U.S. LEXIS 105 (U.S., 2011)*
On remand at, Motion denied by, Motion denied by, Motion denied by *Debra H. v. Janice R., 2012 N.Y. Misc. LEXIS 4727 (N.Y. Sup. Ct., Oct. 1, 2012)*

PRIOR HISTORY: Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered April 9, 2009. The Appellate Division (1) reversed, on the law, an order of the Supreme Court, New York County (Harold B. Beeler, J.), which had (a) granted a hearing to determine whether petitioner stood in loco parentis to respondent's biological child and may therefore invoke the doctrine of equitable estoppel against respondent; (b) granted, if petitioner were determined to stand in loco parentis, a further hearing to determine whether it was in the child's best interests to allow petitioner custodial and visitation rights; and (c) granted that branch of petitioner's motion seeking appointment of an attorney for the child; (2) vacated the order; (3) denied the petition; and (4) dismissed the proceeding.
Debra H. v. Janice R., 61 A.D.3d 460, 877 N.Y.S.2d 259, 2009 N.Y. App. Div. LEXIS 2605 (N.Y. App. Div. 1st Dep't, 2009)

DISPOSITION: Order reversed, with costs, and case remitted to Supreme Court, New York County, for further proceedings in accordance with the opinion herein.

HEADNOTES

Parent and Child - Visitation - Rights of Nonparent

1. *Matter of Alison D. v Virginia M. (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991])*, which held that only a child's biological or adoptive parent has standing to seek visitation under *Domestic Relations Law §70* against the wishes of a fit custodial parent, is still valid law. *Alison D.*, in conjunction with second-parent adoption, creates a bright-line rule that promotes certainty in the wake of domestic breakups otherwise fraught with the risk of disruptive battles over parentage as a prelude to further potential combat over custody and visitation. The Court of Appeals did not implicitly depart from *Alison D.* in *Matter of Shondel J. v Mark D. (7 NY3d 320, 853 NE2d 610, 820 NYS2d 199 [2006])*, which held that a man who has mistakenly represented himself as a child's father may be estopped from denying paternity, and made to pay child support, when the child justifiably relied on the man's representation of paternity, to the child's detriment. There is no inconsistency in applying equitable estoppel to determine filiation for purposes of support, but not to create standing when visitation and custody are sought. The Legislature has drawn that distinction, inasmuch as *Family Court Act §418 (a)* and *§532 (a)* direct the courts to take equitable estoppel into account before ordering paternity testing, while *Domestic Relations Law §70* does not even mention equitable estoppel.

Parent and Child - Visitation - Rights of Nonparent - Civil Union Partner of Biological Parent Deemed Parent under Vermont Law

2. Petitioner, who had entered into a civil union in Vermont with respondent one month before respondent gave birth to a child conceived by artificial insemination,

was the parent of that child under Vermont law. Parties to a civil union in Vermont have all the same benefits, protections and responsibilities under law as are granted to spouses in a marriage, and as a child born by artificial insemination during a marriage is deemed the child of the husband even absent a biological connection, the same result pertains to the partner in a civil union with no biological connection to the child. The Vermont Supreme Court has held that a child born by artificial insemination to one partner of a civil union should be deemed the other partner's child under Vermont law for purposes of determining custodial rights following the civil union's dissolution. Although, unlike the case decided by the Vermont Supreme Court, the child here was conceived prior to the parties' civil union, there would be no reason for the Vermont Supreme Court, which had emphasized how important it was that the child was born during the civil union, to reach a different result about parentage based on that distinction. Entering into a civil union at a time when both partners know that one of them is pregnant by artificial insemination, as the parties did here, might present an even stronger case to support the nonbiological partner's parentage.

Parent and Child - Visitation - Rights of Nonparent - Civil Union Partner of Biological Parent Deemed Parent under Vermont Law - Comity

3. In a visitation and custody proceeding brought by petitioner, who was not the biological or adoptive parent of respondent's child, but who had entered into a civil union with respondent in Vermont before the child was born and was considered to be the child's parent under Vermont law, the principles of comity required the recognition of petitioner as the child's parent under New York law. New York will accord comity to recognize parentage created by an adoption in a foreign nation, and there is no reason to withhold equivalent recognition where someone is a parent under a sister state's law. In light of the availability of second-parent adoption to New Yorkers of the same sex, recognition of parentage based on a Vermont civil union does not conflict with New York's public policy. Nor would comity undermine the certainty afforded to biological and adoptive parents and their children by the bright-line rule set forth in *Matter of Alison D. v Virginia M. (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991])*, which held that only a child's biological or adoptive parent has standing to seek visitation under *Domestic Relations Law §70* against the wishes of a fit custodial parent. Whether there has been a civil union in Vermont is as determinable as whether there has been a second-parent adoption.

COUNSEL: *Lambda Legal Defense and Education Fund, Inc.*, New York City (*Susan L. Sommer* and *Jeremy R. Sanders* of counsel), and *Cohen Hennessey Bienstock & Rabin P.C.* (*Bonnie E. Rabin* and *Orrit Hershkovitz* of counsel), for Debra H., appellant. I. The courts should exercise their common-law, equitable powers to recognize the standing of a nonbiological, nonadoptive parent to preserve an ongoing parent-child relationship in the child's paramount best interests. (*Matter of Alison D. v Virginia M., 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586; Perry-Rogers v Fasano, 276 AD2d 67, 715 NYS2d 19; Matter of Jacob, 86 NY2d 651, 660 NE2d 397, 636 NYS2d 716; Levin v Yeshiva Univ., 96 NY2d 484, 754 NE2d 1099, 730 NYS2d 15; Lawrence v Texas, 539 US 558, 123 S Ct 2472, 156 L Ed 2d 508; Bowers v Hardwick, 478 US 186, 106 S Ct 2841, 92 L Ed 2d 140; Lewis v New York State Dept. of Civ. Serv., 60 AD3d 216, 872 NYS2d 578, 12 NY3d 705, 906 NE2d 1086, 879 NYS2d 52; Martinez v County of Monroe, 50 AD3d 189, 850 NYS2d 740; Matter of Donna S., 23 Misc 3d 338, 871 NYS2d 883; Matter of E.S. v P.D., 8 NY3d 150, 863 NE2d 100, 831 NYS2d 96.*) II. Appellant is further entitled to assert parentage based on M.R.'s conception using an anonymous donor and resulting birth to partners in a civil union. (*Matter of Michael, 166 Misc 2d 973, 636 NYS2d 608; Laura WW. v Peter WW., 51 AD3d 211, 856 NYS2d 258; Matter of Greene County Dept. of Social Servs. v Ward, 8 NY3d 1007, 870 NE2d 1132, 839 NYS2d 702; Matter of Bickford v Bickford, 55 AD2d 719, 389 NYS2d 430; Matter of Karin T. v Michael T., 127 Misc 2d 14, 484 NYS2d 780; Anonymous v Anonymous, 41 Misc 2d 886, 246 NYS2d 835; Matter of H.M. v E.T., 65 AD3d 119, 881 NYS2d 113; State of New York ex rel. H. v P., 90 AD2d 434, 457 NYS2d 488; Beth R. v Donna M., 19 Misc 3d 724, 853 NYS2d 501; Strnad v Strnad, 190 Misc 786, 78 NYS2d 390.*) III. If *Matter of Alison D. v Virginia M. (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991])* is construed to bar Debra H.'s standing to pursue her petition in the best interests of M.R., that decision should be overruled. (*Anonymous v Anonymous, 20 AD3d 333, 797 NYS2d 754; Matter of Multari v Sorrell, 287 AD2d 764, 731 NYS2d 238; Matter of C.M. v C.H., 6 Misc 3d 361, 789 NYS2d 393; Jean Maby H. v Joseph H., 246 AD2d 282, 676 NYS2d 677; Matter of Shondel J. v Mark D., 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199; Beth R. v Donna M., 19 Misc 3d 724, 853 NYS2d 501; Matter of Christopher S. v Ann Marie S., 173 Misc 2d 824, 662 NYS2d 200; People v Bing, 76 NY2d 331, 558 NE2d 1011, 559 NYS2d 474; People v Hobson, 39 NY2d 479, 348 NE2d 894, 384 NYS2d 419; Silver v Great Am. Ins. Co., 29 NY2d 356, 278 NE2d 619, 328 NYS2d 398.*) IV. The facts alleged here warrant application of the extraordinary circumstances doctrine to grant Debra H.'s petition for custody, visitation and obligations of support. (*Matter of Bennett v Jeffreys, 40 NY2d 543, 356 NE2d 277, 387 NYS2d 821; Matter of Ronald FF. v Cindy GG., 70 NY2d 141, 511 NE2d 75, 517 NYS2d 932; Tait v Tait, 44 AD3d 1142, 844 NYS2d*

154; *Matter of Canabush v Wancewicz*, 193 AD2d 260, 603 NYS2d 230; *Matter of Boyles v Boyles*, 95 AD2d 95, 466 NYS2d 762; *Matter of Gilbert A. v Laura A.*, 261 AD2d 886, 689 NYS2d 810; *Matter of Christopher S. v Ann Marie S.*, 173 Misc 2d 824, 662 NYS2d 200; *Matter of Lynda A.H. v Diane T.O.*, 243 AD2d 24, 673 NYS2d 989.) V. The New York and US Constitutions are violated if the rights of Debra H. and M.R. to maintain their parent-child relationship go unenforced. (*Planned Parenthood of Central Mo. v Danforth*, 428 US 52, 96 S Ct 2831, 49 L Ed 2d 788; *Smith v Organization of Foster Families For Equality & Reform*, 431 US 816, 97 S Ct 2094, 53 L Ed 2d 14; *Lehr v Robertson*, 463 US 248, 103 S Ct 2985, 77 L Ed 2d 614; *Michael H. v Gerald D.*, 491 US 110, 109 S Ct 2333, 105 L Ed 2d 91; *Prince v Massachusetts*, 321 US 158, 64 S Ct 438, 88 L Ed 645; *Troxel v Granville*, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49; *Matter of E.S. v P.D.*, 8 NY3d 150, 863 NE2d 100, 831 NYS2d 96; *Gomez v Perez*, 409 US 535, 93 S Ct 872, 35 L Ed 2d 56; *Weber v Aetna Casualty &Surety Co.*, 406 US 164, 92 S Ct 1400, 31 L Ed 2d 768; *Levy v Louisiana*, 391 US 68, 88 S Ct 1509, 20 L Ed 2d 436.)

Fried, Frank, Harris, Shriver & Jacobson LLP, New York City (*Jennifer L. Colyer*, *Adam B. Gottlieb* and *Scott Thompson* of counsel), and *Parisi & Associates* (*Anthony Parisi III* of counsel), for M.R., appellant. I. The facts here strongly support a hearing to determine whether Janice R. should be estopped from now denying Debra H.'s standing to seek custody and visitation. (*Finlay v Finlay*, 240 NY 429, 148 N.E. 624; *Matter of Alison D. v Virginia M.*, 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586; *Matter of Shondel J. v Mark D.*, 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199; *Jean Maby H. v Joseph H.*, 246 AD2d 282, 676 NYS2d 677; *Matter of Sharon GG. v Duane HH.*, 63 NY2d 859, 472 NE2d 46, 482 NYS2d 270; *Langan v St. Vincent's Hosp. of N.Y.*, 196 Misc 2d 440, 25 AD3d 90, 6 NY3d 890; *Matter of Baby Boy C.*, 84 NY2d 91, 638 NE2d 963, 615 NYS2d 318; *Beth R. v Donna M.*, 19 Misc 3d 724, 853 NYS2d 501; *Matter of Charles v Charles*, 296 AD2d 547, 745 NYS2d 572; *Matter of Janis C. v Christine T.*, 294 AD2d 496.) II. In the alternative, the Court should overrule *Matter of Alison D. v Virginia M.* (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991]) and *Matter of Ronald FF. v Cindy GG.* (70 NY2d 141, 511 NE2d 75, 517 NYS2d 932 [1987]). (*Anonymous v Anonymous*, 20 AD3d 333, 797 NYS2d 754; *Matter of Multari v Sorrell*, 287 AD2d 764, 731 NYS2d 238; *Matter of C.M. v C.H.*, 6 Misc 3d 361, 789 NYS2d 393; *Gallagher v St. Raymond's R. C. Church*, 21 NY2d 554, 236 NE2d 632, 289 NYS2d 401; *Caceci v Di Canio Constr. Corp.*, 72 NY2d 52, 526 NE2d 266, 530 NYS2d 771; *Silver v Great Am. Ins. Co.*, 29 NY2d 356, 278 NE2d 619, 328 NYS2d 398; *Gelbman v Gelbman*, 23 NY2d 434, 245 NE2d 192, 297 NYS2d 529; *People v Hobson*, 39 NY2d 479, 348 NE2d 894, 384 NYS2d 419; *People v Epton*, 19 NY2d 496, 227 NE2d 829, 281 NYS2d 9; *Matter of Bennett v Jeffreys*, 40 NY2d 543, 356 NE2d 277, 387 NYS2d 821.) III. The United States and New York constitutional guarantees of due process and equal protection mandate a hearing to determine whether visitation is in M.R.'s best interests (*Young v Young*, 212 AD2d 114, 628 NYS2d 957; *Planned Parenthood of Central Mo. v Danforth*, 428 US 52, 96 S Ct 2831, 49 L Ed 2d 788; *Smith v Organization of Foster Families For Equality & Reform*, 431 US 816; *Cleveland Bd. of Ed. v LaFleur*, 414 US 632, 94 S Ct 791, 39 L Ed 2d 52; *Lehr v Robertson*, 463 US 248, 103 S Ct 2985, 77 L Ed 2d 614; *Michael H. v Gerald D.*, 491 US 110, 109 S Ct 2333, 105 L Ed 2d 91; *Troxel v Granville*, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49; *Weber v Aetna Casualty & Surety Co.*, 406 US 164, 92 S Ct 1400, 31 L Ed 2d 768; *Matter of Burns v Miller Constr.*, 55 NY2d 501, 435 NE2d 390, 450 NYS2d 173; *Gomez v Perez*, 409 US 535, 93 S Ct 872, 35 L Ed 2d 56.)

Reiss Eisenpress LLP, New York City (*Sherri L. Eisenpress*, *Matthew Sheppe* and *Audrey E. Weinberger* of counsel), for respondent. I. The First Department's unanimous decision correctly held that Debra H. does not have standing. (*Matter of Ronald FF. v Cindy GG.*, 70 NY2d 141, 511 NE2d 75, 517 NYS2d 932; *Matter of Alison D. v Virginia M.*, 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586; *Anonymous v Anonymous*, 20 AD3d 333, 797 NYS2d 754; *Perry-Rogers v Fasano*, 276 AD2d 67, 96 NY2d 712; *Matter of Burgess v Ash*, 41 AD3d 473, 838 NYS2d 584; *Bank v White*, 40 AD3d 790, 9 NY3d 1002; *Matter of Behrens v Rimland*, 32 AD3d 929, 8 NY3d 807; *Gulbin v Moss-Gulbin*, 45 AD3d 1230, 846 NYS2d 743; *Matter of Multari v Sorrell*, 287 AD2d 764, 731 NYS2d 238; *Matter of Lynda A.H. v Diane T.O.*, 243 AD2d 24, 92 NY2d 811.) II. Standing is a preliminary hurdle Debra H. cannot meet. (*Caprer v Nussbaum*, 36 AD3d 176, 825 NYS2d 55; *New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 810 NE2d 405, 778 NYS2d 123; *Matter of Dairylea Coop. v Walkley*, 38 NY2d 6, 339 NE2d 865, 377 NYS2d 451; *Matter of Lynda A.H. v Diane T.O.*, 243 AD2d 24, 673 NYS2d 989; *Godfrey v Spano*, 13 NY3d 358, 892 NYS2d 272; *Hernandez v Robles*, 7 NY3d 338, 855 NE2d 1, 821 NYS2d 770; *Gallagher v St. Raymond's R. C. Church*, 21 NY2d 554, 236 NE2d 632, 289 NYS2d 401; *Caceci v Di Canio Constr. Corp.*, 72 NY2d 52, 526 NE2d 266, 530 NYS2d 771; *Gelbman v Gelbman*, 23 NY2d 434, 245 NE2d 192, 297 NYS2d 529; *Silver v Great Am. Ins. Co.*, 29 NY2d 356, 278 NE2d 619, 328 NYS2d 398.) III. Equitable estoppel is not available to establish standing in custody and visitation proceedings. (*Matter of Shondel J. v Mark D.*, 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199; *Matter of Ronald FF. v Cindy GG.*, 70 NY2d 141,

511 NE2d 75, 517 NYS2d 932; Matter of Alison D. v Virginia M., 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586; Jean Maby H. v Joseph H., 246 AD2d 282, 676 NYS2d 677; Matter of Sharon GG. v Duane HH., 63 NY2d 859, 472 NE2d 46, 482 NYS2d 270; People v Carvajal, 6 NY3d 305, 845 NE2d 1225, 812 NYS2d 395; Nussenzweig v diCorcia, 38 AD3d 339, 832 NYS2d 510; Lichtman v Grossbard, 73 NY2d 792, 533 NE2d 1048, 537 NYS2d 19; People v Hobson, 39 NY2d 479, 348 NE2d 894, 384 NYS2d 419; People v Robles, 27 NY2d 155, 263 NE2d 304, 314 NYS2d 793.) IV. The standing requirements under *Domestic Relations Law §70* do not violate the *Due Process Clause* or *Equal Protection Clause* of either the United States or New York Constitution. (*Troxel v Granville, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49; Santosky v Kramer, 455 US 745, 102 S Ct 1388, 71 L Ed 2d 599; Stanley v Illinois, 405 US 645, 92 S Ct 1208, 31 L Ed 2d 551; Meyer v Nebraska, 262 US 390, 43 S Ct 625, 67 L. Ed. 1042; Pierce v Society of Sisters, 268 US 510, 45 S Ct 571, 69 L. Ed. 1070; M. L. B. v S. L. J., 519 US 102; Prince v Massachusetts, 321 US 158; Matter of Jacob, 86 NY2d 651, 660 NE2d 397, 636 NYS2d 716; Lehr v Robertson, 463 US 248, 103 S Ct 2985, 77 L Ed 2d 614; Michael H. v Gerald D., 491 US 110, 109 S Ct 2333, 105 L Ed 2d 91.*) V. There is no competent evidence in the record that M.R. would be any more harmed by the discontinuance of a relationship with Debra H. than he would be by the discontinuance of his relationship with his uncle or his nanny. (*Matter of Alison D. v Virginia M., 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586; Troxel v Granville, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49.*) VI. Even if equitable estoppel does apply to custody and visitation proceedings, it should only apply prospectively, not retroactively. (*Matter of Ronald FF. v Cindy GG., 70 NY2d 141, 511 NE2d 75, 517 NYS2d 932; Matter of Alison D. v Virginia M., 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586; Majewski v Broadalbin-Perth Cent. School Dist., 91 NY2d 577, 696 NE2d 978, 673 NYS2d 966; Anonymous v Anonymous, 6 NY3d 740; Gurnee v Aetna Life &Cas. Co., 55 NY2d 184, 433 NE2d 128, 448 NYS2d 145; Chevron Oil Co. v Huson, 404 US 97, 92 S Ct 349, 30 L Ed 2d 296.*) VII. Appellant gratuitously attacks Janice R. and misrepresents the record and Supreme Court holding. (*Langan v St. Vincent's Hosp. of N.Y., 196 Misc 2d 440, 765 NYS2d 411; Matter of Ronald FF. v Cindy GG., 70 NY2d 141, 511 NE2d 75, 517 NYS2d 932; Matter of Alison D. v Virginia M., 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586; Anonymous v Anonymous, 6 NY3d 740.*)

Kramer Levin Naftalis & Frankel LLP, New York City (Eve Preminger and Jason Moff of counsel), for National Association of Social Workers and others, amici curiae. I. Attachment bonds between children and their gay and lesbian psychological parents should be protected and preserved in the children's best interests. (*Matter of Tropea v Tropea, 87 NY2d 727, 665 NE2d 145, 642 NYS2d 575; Matter of Bennett v Jeffreys, 40 NY2d 543, 356 NE2d 277, 387 NYS2d 821.*) II. Sibling bonds between children should be protected and preserved in the children's best interests, including bonds between older and younger siblings.

Suzanne B. Goldberg, New York City, for Richard Allan and others, amici curiae. I. Family law academics overwhelmingly endorse a functional approach to recognizing the legal family. (*Matter of Alison D. v Virginia M., 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586.*) II. Adoption of a functional approach to recognizing parent-child relationships in jurisdictions across the country, including New York, confirms the approach's viability and simplicity. (*Matter of Alison D. v Virginia M., 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586; People v Damiano, 87 NY2d 477, 663 NE2d 607, 640 NYS2d 451; People v Hobson, 39 NY2d 479, 348 NE2d 894, 384 NYS2d 419; People v Taylor, 9 NY3d 129, 878 NE2d 969, 848 NYS2d 554; People v Bing, 76 NY2d 331, 558 NE2d 1011, 559 NYS2d 474; Burnet v Coronado Oil & Gas Co., 285 US 393; Matter of Simonson v Cahn, 27 NY2d 1, 261 NE2d 246, 313 NYS2d 97; Bing v Thunig, 2 NY2d 656, 143 NE2d 3, 163 NYS2d 3; People v Bartolomeo, 53 NY2d 225, 423 NE2d 371, 440 NYS2d 894; Babcock v Jackson, 12 NY2d 473, 191 NE2d 279, 240 NYS2d 743*).

Debevoise & Plimpton LLP, New York City (*Maeve O'Connor* and *Patrice Sabach* of counsel), and *Skadden, Arps, Slate, Meagher & Flom LLP* (*Vaughn Williams, Sean Marlaire* and *Katrina James* of counsel), for Citizens' Committee for Children and others, amici curiae. I. Granting standing to de facto parents is in the best interests of M.R. and children similarly situated. II. The Court should use its equitable power to protect the best interests of children such as M.R. (*Matter of Rich v Kaminsky, 254 App Div 6, 3 NYS2d 689; Laura WW. v Peter WW., 51 AD3d 211, 856 NYS2d 258; Matter of Shondel J. v Mark D., 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199; Matter of Baby Boy C., 84 NY2d 91, 638 NE2d 963, 615 NYS2d 318; Matter of Bruce W.L. v Carol A.P., 46 AD3d 1471, 848 NYS2d 493; Matter of Sarah S. v James T., 299 AD2d 785, 751 NYS2d 61; Matter of Karin T. v Michael T., 127 Misc 2d 14, 484 NYS2d 780; Matter of Glenn T. v Donna U., 226 AD2d 803, 640 NYS2d 297; Matter of Ettore I. v Angela D., 127 AD2d 6, 513 NYS2d 733; Matter of Kristen D. v Stephen D., 280 AD2d 717, 719 NYS2d 771.*) III. This Court is capable of fashioning a test that appropriately protects and balances the rights of the biological or adoptive parent, the de facto parent, and the child. (*Matter of E.S. v P.D., 8 NY3d 150; Weiss v Weiss, 52 NY2d 170, 418 NE2d 377, 436 NYS2d 862.*) IV. The availability of second parent

adoption does not adequately protect children such as M.R. (*Jean Maby H. v Joseph H., 246 AD2d 282, 676 NYS2d 677.*) V. This Court should not wait for the New York Legislature to protect M.R. and children similarly situated. (*Anonymous v Anonymous, 20 AD3d 333, 797 NYS2d 754; Matter of Multari v Sorrell, 287 AD2d 764, 731 NYS2d 238; United States v Mauro, 436 US 340, 98 S Ct 1834, 56 L Ed 2d 329; Flanagan v Mount Eden Gen. Hosp., 24 NY2d 427, 248 NE2d 871, 301 NYS2d 23; Matter of New York Pub. Interest Research Group v New York State Dept. of Ins., 66 NY2d 444; Davis v United States, 569 F Supp 2d 91.*)

Michael Getnick, Albany, and *Paul, Weiss, Rifkind, Wharton & Garrison LLP*, New York City (*Roberta A. Kaplan, Michael N. Berger* and *Julie E. Fink* of counsel), for New York State Bar Association, amicus curiae. I. The Court is not constrained to follow past precedent that is manifestly unjust and unsound. (*Silver v Great Am. Ins. Co., 29 NY2d 356, 278 NE2d 619, 328 NYS2d 398; Woods v Lancet, 303 NY 349, 102 NE2d 691; Bing v Thunig, 2 NY2d 656, 143 NE2d 3, 163 NYS2d 3; People v Hobson, 39 NY2d 479, 348 NE2d 894, 384 NYS2d 419; People v Bing, 76 NY2d 331, 558 NE2d 1011, 559 NYS2d 474; People v Epton, 19 NY2d 496, 227 NE2d 829, 281 NYS2d 9; Gallagher v St. Raymond's R. C. Church, 21 NY2d 554, 236 NE2d 632, 289 NYS2d 401; Caceci v Di Canio Constr. Corp., 72 NY2d 52, 526 NE2d 266, 530 NYS2d 771; Buckley v City of New York, 56 NY2d 300, 437 NE2d 1088, 452 NYS2d 331; Gelbman v Gelbman, 23 NY2d 434, 245 NE2d 192, 297 NYS2d 529.*) II. *Matter of Alison D. v Virginia M. (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991])* is inconsistent with New York cases recognizing out-of-state same-sex marriage. (*Laura WW. v Peter WW., 51 AD3d 211, 856 NYS2d 258; Matter of Gordon, 131 Misc 2d 823; State of New York ex rel. H. v P., 90 AD2d 434, 457 NYS2d 488; Matter of Sebastian, 25 Misc 3d 567, 879 NYS2d 677; Matter of May, 305 NY 486; Matter of Jacob, 86 NY2d 651, 660 NE2d 397, 636 NYS2d 716.*) III. *Matter of Alison D. v Virginia M. (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991])* is outmoded and should be overturned. (*Matter of Jacob, 86 NY2d 651, 660 NE2d 397, 636 NYS2d 716; Matter of Tripp v Hinckley, 290 AD2d 767, 736 NYS2d 506; Matter of Leora F. v Sofia D., 167 Misc 2d 840, 635 NYS2d 418; Braschi v Stahl Assoc. Co., 74 NY2d 201, 543 NE2d 49, 544 NYS2d 784; Anonymous v Anonymous, 20 AD3d 333, 797 NYS2d 754; Matter of Multari v Sorrell, 287 AD2d 764, 731 NYS2d 238; Matter of C.M. v C.H., 6 Misc 3d 361, 789 NYS2d 393; Broadnax v Gonzalez, 2 NY3d 148, 809 NE2d 645, 777 NYS2d 416; Millington v Southeastern El. Co., 22 NY2d 498, 239 NE2d 897, 293 NYS2d 305; Matter of Sebastian, 25 Misc 3d 567, 879 NYS2d 677.*) IV. *Matter of Alison D. v Virginia M. (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991])* is inconsistent with this Court's more recent decision in *Matter of Shondel J. v Mark D. (7 NY3d 320, 853 NE2d 610, 820 NYS2d 199 [2006]).* (*Matter of Jose F.R. v Reina C.A., 46 AD3d 564, 846 NYS2d 630; Matter of Louise P. v Thomas R., 223 AD2d 592, 636 NYS2d 408; Anonymous v Anonymous, 20 AD3d 333, 797 NYS2d 754; Matter of Janis C. v Christine T., 294 AD2d 496; Matter of Cindy P. v Danny P., 206 AD2d 615, 614 NYS2d 479; Jean Maby H. v Joseph H., 246 AD2d 282, 676 NYS2d 677; Matter of Christopher S. v Ann Marie S., 173 Misc 2d 824, 662 NYS2d 200; Matter of Gilbert A. v Laura A., 261 AD2d 886, 689 NYS2d 810; Beth R. v Donna M., 19 Misc 3d 724, 853 NYS2d 501; Bing v Thunig, 2 NY2d 656, 143 NE2d 3, 163 NYS2d 3.*)

Hogan & Hartson LLP, New York City (*Allen A. Drexel, Hoa T.T. Hoang, Katie M. Lachter, Dennis M. Quinio, Brian G. Strand* and *Samuel E. Wolfe* of counsel), *Cynthia L. Schrock Seeley, Ann B. Lesk, Allan E. Mayefsky, Dakota D. Ramseur, Roberto Ramirez* and *Jonathan B. Behrins*, Staten Island, for New York City Bar Association and others, amici curiae. I. *Matter of Alison D. v Virginia M. (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991])* has been superseded by *Matter of Shondel J. v Mark D. (7 NY3d 320, 853 NE2d 610, 820 NYS2d 199 [2006])* and should now be reconsidered in the interests of consistency and basic fairness. (*Matter of Jacob, 86 NY2d 651, 660 NE2d 397, 636 NYS2d 716; Matter of H.M. v E.T., 65 AD3d 119, 881 NYS2d 113; People v Liberta, 64 NY2d 152, 474 NE2d 567, 485 NYS2d 207; Mississippi Univ. for Women v Hogan, 458 US 718; Craig v Boren, 429 US 190, 97 S Ct 451, 50 L Ed 2d 397; United States v Virginia, 518 US 515, 116 S Ct 2264, 135 L Ed 2d 735; Brown v State of New York, 89 NY2d 172, 674 NE2d 1129, 652 NYS2d 223; Hernandez v Robles, 7 NY3d 338, 855 NE2d 1, 821 NYS2d 770; Town of Orangetown v Magee, 88 NY2d 41, 665 NE2d 1061, 643 NYS2d 21; Jean Maby H. v Joseph H., 246 AD2d 282, 676 NYS2d 677.*) II. Consistent with New York's child-centered public policy and the historical applications of equitable estoppel doctrine, standing should be conferred evenhandedly to de facto parents in custody and visitation proceedings. (*Matter of Shondel J. v Mark D., 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199; Matter of Alison D. v Virginia M., 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586; Matter of Janis C. v Christine T., 294 AD2d 496; Matter of C.M. v C.H., 6 Misc 3d 361, 789 NYS2d 393; Anonymous v Anonymous, 20 AD3d 333, 797 NYS2d 754; Guinan v Guinan, 102 AD2d 963, 477 NYS2d 830; Syracuse Orthopedic Specialists, P.C. v Hootnick, 42 AD3d 890, 839 NYS2d 897; Matter of Huntington TV Cable Corp. v State of N.Y. Commn. on Cable Tel., 94 AD2d 816, 61 NY2d 926; Empire Fin. Servs., Inc. v Bellantoni, 53 AD3d 1095, 861 NYS2d 898; Matter*

of Reynolds v Oster, 192 AD2d 794, 596 NYS2d 545.) III. *Matter of Alison D. v Virginia M. (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991])* is outmoded, and strict application of the decision ignores the needs and rights of many New York families. *(Martinez v County of Monroe, 50 AD3d 189, 850 NYS2d 740; Beth R. v Donna M., 19 Misc 3d 724, 853 NYS2d 501; Matter of C.M. v C.H., 6 Misc 3d 361, 789 NYS2d 393; Anonymous v Anonymous, 20 AD3d 333, 797 NYS2d 754; Matter of Multari v Sorrell, 287 AD2d 764, 731 NYS2d 238; Braschi v Stahl Assoc. Co., 74 NY2d 201, 543 NE2d 49, 544 NYS2d 784; Matter of Jacob, 86 NY2d 651, 660 NE2d 397, 636 NYS2d 716; Matter of Behrens v Rimland, 32 AD3d 929, 822 NYS2d 285; Matter of Janis C. v Christine T., 294 AD2d 496; Matter of Speed v Robins, 288 AD2d 479, 732 NYS2d 902.)*

New York Civil Liberties Union Foundation, New York City (*Matthew Faiella, Galen Sherwin* and *Arthur Eisenberg* of counsel), and *American Civil Liberties Union Foundation* (*Rose Saxe* of counsel), for New York Civil Liberties Union and others, amici curiae. I. The constitutional protection of parent-child relationships is not limited to biological or formally recognized legal parents. *(Prince v Massachusetts, 321 US 158, 64 S Ct 438, 88 L. Ed. 645; Moore v East Cleveland, 431 US 494, 97 S Ct 1932, 52 L Ed 2d 531; Smith v Organization of Foster Families For Equality &Reform, 431 US 816; Lehr v Robertson, 463 US 248, 103 S Ct 2985, 77 L Ed 2d 614; Quilloin v Walcott, 434 US 246, 98 S Ct 549, 54 L Ed 2d 511; Stanley v Illinois, 405 US 645, 92 S Ct 1208, 31 L Ed 2d 551; Cleveland Bd. of Ed. v LaFleur, 414 US 632, 94 S Ct 791, 39 L Ed 2d 52; Vlandis v Kline, 412 US 441, 93 S Ct 2230, 37 L Ed 2d 63; Matter of E.S. v P.D., 8 NY3d 150; Troxel v Granville, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49.)* II. Applying equitable principles to grant standing to de facto parents and protect the best interests of the child is consistent with the broad equitable powers of New York courts, decisions by other state high courts and the US Constitution. *(Matter of Steinway, 159 NY 250, 53 N.E. 1103, 6 N.Y. Ann. Cas. 357; Kaminsky v Kahn, 23 AD2d 231, 259 NYS2d 716; People ex rel. Riesner v New York Nursery &Child's Hosp., 230 NY 119; Matter of Burde, 7 AD2d 344; Finlay v Finlay, 240 NY 429, 148 N.E. 624; Matter of Sandfort v Sandfort, 278 App Div 331, 105 NYS2d 343; Matter of Shondel J. v Mark D., 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199; Jean Maby H. v Joseph H., 246 AD2d 282, 676 NYS2d 677; Matter of Diana E. v Angel M., 20 AD3d 370, 799 NYS2d 484; Matter of Alison D. v Virginia M., 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586.)*

Wilson Sonsini Goodrich & Rosati, New York City (*Marina Tsatalis, Elizabeth Tippett* and Joy Chia of counsel), for National Center for Lesbian Rights and others, amici curiae. I. Numerous states have recognized that a non-legal parent may seek custody or visitation where there is a parent-child relationship that was fostered by the legal parent. II. The presumption of parentage for children born through donor insemination must apply to unmarried couples as well as married couples. *(Laura WW. v Peter WW., 51 AD3d 211, 856 NYS2d 258; State of New York ex rel. H. v P., 90 AD2d 434, 457 NYS2d 488; K.B. v J.R., 26 Misc 3d 465; Matter of Sebastian, 25 Misc 3d 567, 879 NYS2d 677; Matter of Karin T. v Michael T., 127 Misc 2d 14, 484 NYS2d 780; Matter of Jacob, 86 NY2d 651, 660 NE2d 397, 636 NYS2d 716; Braschi v Stahl Assoc. Co., 74 NY2d 201, 543 NE2d 49, 544 NYS2d 784; Matter of Donna S., 23 Misc 3d 338, 871 NYS2d 883; Beth R. v Donna M., 19 Misc 3d 724, 853 NYS2d 501; Martinez v County of Monroe, 50 AD3d 189, 850 NYS2d 740.)*

Alliance Defense Fund, Scottsdale, Arizona (*Brian W. Raum* of counsel), and *Ruta & Soulios, LLP*, New York City (*Joseph A. Ruta* of counsel), for New Yorkers for Constitutional Freedoms, Ltd., amicus curiae. I. The U.S. Supreme Court developed the recognition of fundamental parental rights. *(Meyer v Nebraska, 262 US 390, 43 S Ct 625, 67 L. Ed. 1042; People v Hollman, 68 NY2d 202, 500 NE2d 297, 507 NYS2d 977; Bartels v Iowa, 262 US 404, 43 S Ct 628, 67 L. Ed. 1047, 1 Ohio Law Abs. 628; Matter of Efrain C., 63 Misc 2d 1019; Farrington v Tokushige, 273 US 284, 47 S Ct 406, 71 L. Ed. 646; Matter of Daniel A.D., 106 Misc 2d 370; Prince v Massachusetts, 321 US 158, 64 S Ct 438, 88 L. Ed. 645; People ex rel. Sibley v Sheppard, 54 NY2d 320, 429 NE2d 1049, 445 NYS2d 420; Wisconsin v Yoder, 406 US 205, 92 S Ct 1526, 32 L Ed 2d 15; Quilloin v Walcott, 434 US 246, 98 S Ct 549, 54 L Ed 2d 511.)* II. Judicially implementing de facto parenting or parenthood by estoppel would infringe upon the well-established fundamental rights of fit natural parents. *(Troxel v Granville, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49; Matter of Ronald FF. v Cindy GG., 70 NY2d 141, 511 NE2d 75, 517 NYS2d 932; Stanley v Illinois, 405 US 645, 92 S Ct 1208, 31 L Ed 2d 551; Hodgson v Minnesota, 497 US 417, 110 S Ct 2926, 111 L Ed 2d 344; Santosky v Kramer, 455 US 745, 102 S Ct 1388, 71 L Ed 2d 599; Lehr v Robertson, 463 US 248, 103 S Ct 2985, 77 L Ed 2d 614; Lassiter v Department of Social Servs. of Durham Cty., 452 US 18, 101 S Ct 2153, 68 L Ed 2d 640; Matter of Alison D. v Virginia M., 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586; Matter of Ronald FF. v Cindy GG., 70 NY2d 141, 511 NE2d 75, 517 NYS2d 932.)* III. Because this Court's case law concerning de facto parenting or parenthood by estoppel is consistent with controlling U.S. Supreme Court precedent, this Court should not overturn that case law. *(Matter of Ronald FF. v Cindy GG., 70 NY2d 141, 511 NE2d 75, 517 NYS2d 932; Stanley v Illinois, 405 US 645, 92 S Ct*

1208, 31 L Ed 2d 551; *Matter of Alison D. v Virginia M., 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586*; *Troxel v Granville, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49*; *Matter of Midland Ins. Co., 20 Misc 3d 488, 861 NYS2d 922*; *Matter of Higby v Mahoney, 48 NY2d 15, 396 NE2d 183, 421 NYS2d 33*.)

Alan J. Pierce, Syracuse, for Single Mothers by Choice and others, amici curiae. I. *Matter of Alison D. v Virginia M. (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991])* should not be overruled; therefore, the Court correctly held that under *Domestic Relations Law §70*, an individual who is not the biological or adoptive parent of the child of another individual with whom he or she has a relationship lacks standing to seek visitation and/or custody of the child. (*Anonymous v Anonymous, 20 AD3d 333, 6 NY3d 740*; *Perry-Rogers v Fasano, 276 AD2d 67, 96 NY2d 712*; *Bank v White, 40 AD3d 790, 9 NY3d 1002*; *Matter of Behrens v Rimland, 32 AD3d 929, 8 NY3d 807*; *Matter of Multari v Sorrell, 287 AD2d 764, 731 NYS2d 238*; *Matter of Lynda A.H. v Diane T.O., 243 AD2d 24, 92 NY2d 811*; *Matter of Jacob, 86 NY2d 651, 660 NE2d 397, 636 NYS2d 716*; *Matter of Carolyn B., 6 AD3d 67, 774 NYS2d 227*; *Troxel v Granville, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49*; *Matter of Cindy P. v Danny P., 206 AD2d 615, 614 NYS2d 479*.) II. Equitable estoppel is not available to establish standing to seek custody or visitation under *Domestic Relations Law §70*. (*Matter of Alison D. v Virginia M., 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586*; *Matter of Multari v Sorrell, 287 AD2d 764, 731 NYS2d 238*; *Anonymous v Anonymous, 20 AD3d 333, 797 NYS2d 754*; *Matter of Shondel J. v Mark D., 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199*; *Jean Maby H. v Joseph H., 246 AD2d 282, 676 NYS2d 677*; *Matter of Jennifer Diane D. v Arnold D., 187 AD2d 425, 81 NY2d 705*; *Hernandez v Robles, 7 NY3d 338, 855 NE2d 1, 821 NYS2d 770*; *Godfrey v Spano, 13 NY3d 358, 892 NYS2d 272*.)

Law Offices of Robert W. Dapelo, P.C., Patchogue (*Robert W. Dapelo* of counsel), and *Marriage Law Foundation*, Lehi, Utah (*William C. Duncan* of counsel), for Family Watch International, amicus curiae. I. This Court should continue to defer to the Legislature on the fundamental question of standing to seek child custody. (*Matter of Alison D. v Virginia M., 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586*; *Debra H. v Janice R., 61 AD3d 460, 877 NYS2d 259*.) II. The Legislature's failure to grant standing to seek visitation and custody to unrelated adults protects the interests of children and parents. (*Matter of Alison D. v Virginia M., 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586*; *Hernandez v Robles, 7 NY3d 338, 855 NE2d 1, 821 NYS2d 770*; *Matter of Jacob, 86 NY2d 651, 660 NE2d 397, 636 NYS2d 716*; *Meyer v Nebraska, 262 US 390, 43 S Ct 625, 67 L. Ed. 1042*; *Pierce v Society of Sisters, 268 US 510, 45 S Ct 571, 69 L. Ed. 1070*; *Troxel v Granville, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49*.)

JUDGES: Opinion by Judge Read. Judges Graffeo, Pigott and Jones concur, Judge Graffeo in a separate concurring opinion in which Judge Jones also concurs. Judge Ciparick concurs in result in an opinion in which Chief Judge Lippman concurs. Judge Smith concurs in result in an opinion.

OPINION BY: READ

OPINION

[***265] [**186] [*586] Read, J.

Respondent Janice R. is the biological mother of M.R., a six-year-old boy conceived through artificial insemination and born in December 2003. Janice R. and petitioner Debra H. met in 2002 and entered into a civil union in the State of Vermont in November 2003, the month before M.R.'s birth. Janice R. repeatedly rebuffed Debra H.'s requests to become M.R.'s second parent by means of adoption.

After the relationship between Janice R. and Debra H. soured and they separated in the spring of 2006, Janice R. allowed Debra H. to have supervised visits with M.R. each week on Sunday, Wednesday and Friday for specified periods of time, as well as daily contact by telephone. In the spring of 2008, however, Janice R. began scaling back the visits. By early May 2008, she had cut off all communication between Debra H. and M.R.

In mid-May 2008, Debra H. brought this proceeding against Janice R. in Supreme Court by order to show cause. She sought [*587] joint legal and physical custody of M.R., restoration of access and decisionmaking authority with respect to his upbringing, and appointment of an attorney for the child. [1] After a hearing on May 21, 2008, the judge signed the order to show cause, which set a briefing schedule, and the parties, at his instance, entered into a "so-ordered" stipulation that reinstated the [**187] [***266] three-day-a-week visitation schedule previously followed. The stipulation required M.R.'s nanny or a mutually agreed-upon third party to accompany M.R. when he visited Debra H.

1 After Janice R. and Debra H. broke up, Janice R. conceived another child through artificial insemination. Debra H. does not claim to have developed any relationship with this child, who was born after she brought this action.

As Supreme Court later put it, "few facts ... [were] undisputed" at the hearings and in the parties' submissions, which "differ[ed] substantially with respect to the

nature and extent of [Debra H.'s] relationship with [Janice R.] and, more significantly, with M.R." (*2008 NY Misc LEXIS 6367, *1, *4-5 [Sup Ct, NY County 2008]*). At the hearing on July 10, 2008, Debra H. acknowledged our decision in *Matter of Alison D. v Virginia M. (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991])*, which held that only a child's biological or adoptive parent has standing to seek visitation against the wishes of a fit custodial parent, but contended that *Matter of Shondel J. v Mark D. (7 NY3d 320, 853 NE2d 610, 820 NYS2d 199 [2006])* endorsed a nonbiological or nonadoptive parent's right to invoke equitable estoppel to secure visitation or custody notwithstanding *Alison D.* In support of this interpretation of our precedents, Debra H. emphasized that *Shondel J.* cited *Jean Maby H. v Joseph H. (246 AD2d 282, 676 NYS2d 677 [2d Dept 1998])*, a divorce proceeding in which the husband successfully invoked equitable estoppel to seek custody and visitation with a child born to the wife prior to the marriage, whom he neither fathered nor adopted. Debra H. also urged Supreme Court to consider the effect of the parties' civil union, and alluded to the Vermont Supreme Court's decision in *Miller-Jenkins v Miller-Jenkins (180 Vt 441, 912 A2d 951 [2006], cert denied 550 US 918, 127 S Ct 2130, 167 L Ed 2d 863 [2007])*.

In opposition to Debra H.'s application, Janice R. stressed that she had always spurned Debra H.'s entreaties to permit a second-parent adoption. She argued that *Alison D.*, which interpreted *Domestic Relations Law § 70*, was not eroded or overruled by *Shondel J.*, a case involving a filiation determination; pointed out that the Legislature did not amend *section 70* after *Alison D.* was handed down, or elsewhere enact any [*588] provision broadening standing to seek visitation or custody; and observed that Janice R. conceived M.R. prior to entering into the civil union with Debra H. in Vermont. At the hearing's conclusion, Supreme Court reserved decision and continued visitation in a further "so-ordered" stipulation.

In a decision and order filed on October 9, 2008, Supreme Court ruled in Debra H.'s favor. The judge reasoned that "it [was] inconsistent to estop a nonbiological father from disclaiming paternity in order to avoid support obligations, but preclude a nonbiological parent from invoking [equitable estoppel] against the biological parent in order to maintain an established relationship with the child" since, in either event, "the court's primary concern should be furthering the best interests of the child" (*2008 NY Misc LEXIS 6367, *25*).

Supreme Court concluded that the facts alleged by Debra H., if true, "establish[ed] a prima facie basis for invoking the doctrine of equitable estoppel" (*id., at *25-26*). In this regard, the judge considered the parties' civil union to be "a significant, though not necessarily a determinative, factor in [Debra H.'s] estoppel argument" because, under Vermont law, "parties to a civil union are given the same benefits, protections and responsibilities ... as are granted to those in a marriage," which "includes the assumption that the birth of a child during a couple's legal union is 'extremely persuasive evidence [**188] [***267] of joint parentage'" (*id., at *26*, quoting *Miller-Jenkins, 180 Vt at 466, 912 A2d at 971*).

Because of the many contested facts, however, Supreme Court ordered another hearing to resolve whether Debra H. stood in loco parentis to M.R., as she asserted, and therefore possessed standing to seek visitation and custody. The judge noted that, in the event Debra H. succeeded in proving the facts that she alleged, a further hearing would then be required to assess whether it was in M.R.'s best interest to award Debra H. visitation and/or custodial rights. Supreme Court continued the existing "so-ordered" stipulation permitting supervised visitation, and also granted Debra H.'s request for appointment of an attorney to represent the child.

Janice R. appealed, and obtained a stay of the equitable-estoppel hearing ordered by Supreme Court, pending disposition of the appeal. On April 9, 2009, the Appellate Division unanimously reversed on the law, vacated Supreme Court's order, denied the petition, and dismissed the proceeding. The court [*589] acknowledged that while the "record indicate[d] that [Debra H.] served as a loving and caring parental figure during the first 2 1/2 years of [M.R.'s] life, she never legally adopted [him]" and, in accordance with *Alison D.*, "a party who is neither the biological nor the adoptive parent of a child lacks standing to seek custody or visitation rights under *Domestic Relations Law § 70*" (*61 AD3d 460, 461, 877 NYS2d 259 [1st Dept 2009]*). The Appellate Division commented that, to the extent that denial of any right to equitable estoppel in this case might be considered inconsistent with *Shondel J.* and *Jean Maby H.*, its own "reading of precedent [was] such that the doctrine of equitable estoppel may not be invoked where a party lacks standing to assert at least a right to visitation" (*id.*).

Both Debra H. and the attorney for the child asked the Appellate Division for a stay of enforcement so as to allow visitation to continue until further appellate proceedings were completed, and for leave to appeal to us. Pending resolution of those motions, a Justice of the Appellate Division granted Debra H.'s emergency application for an interim stay and allowed Sunday visitation. After the Appellate Division denied the motions on June 25, 2009 (2009 NY Slip Op 76701[U]), Debra H. and the attorney for the child separately asked us for leave to appeal and sought another stay.

[1] On July 13, 2009, a Judge of this Court signed a "so-ordered" stipulation continuing one-day-a-week visitation. And on September 1, 2009, we granted Debra H. and the attorney for the child permission to appeal *(13 NY3d 702, 914 NE2d 1011, 886 NYS2d 93 [2009])*. We also approved their request for a further stay to the extent of reinstating and permitting enforcement of so much of Supreme Court's order as allowed Debra H. to have Sunday visitation with M.R. *(13 NY3d 753, 914 NE2d 1006, 886 NYS2d 89 [2009])*. We now reaffirm our holding in *Alison D.*, but reverse the Appellate Division's order in this case for reasons of comity in light of Debra H.'s status as M.R.'s parent under Vermont law.

I.

Domestic Relations Law § 70 (a) provides that

"[w]here a minor child is residing within this state, *either parent* may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award [*590] the natural guardianship, [**189] [***268] charge and custody of such child to either parent for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order. In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will promote its welfare and happiness, and make award accordingly" (emphasis added).

In *Alison D.*, we decided that *section 70* does not confer standing on a biological stranger to seek visitation with a child in the custody of a fit parent. Debra H. urges us to exercise what she characterizes as long-standing common-law and equitable powers to recognize the parentage of a nonbiological, nonadoptive individual on a theory of equitable estoppel and in the child's best interest. As a consequence, she asks us to revisit and either distinguish or overrule *Alison D.*, a case that closely resembles this one factually.

Alison D., the former romantic partner of Virginia M., petitioned for visitation with Virginia M.'s child under *Domestic Relations Law § 70*. According to Alison D., she and Virginia M. established a relationship, began living together, and decided to have a child whom Virginia M. would conceive through artificial insemination. They agreed to share all parenting responsibilities, and continued to do so for the first two years of the child's life. When the child was about 2 1/2 years old, however, the parties ended their relationship and Alison D. moved out of the family home. The parties adhered to a visitation schedule for a time, but Virginia M. at first restricted and eventually stopped Alison D.'s contact with the child.

When the case reached us, we rejected Alison D.'s argument that she "acted as a '*de facto' parent* or that she should be viewed as a *parent 'by estoppel*'" *(Alison D., 77 NY2d at 656* [emphasis added]). As we explained,

"[t]raditionally, in this State it is the child's mother and father who, assuming fitness, have the right to the care and custody of their child, even in situations where the nonparent has exercised some control over the child with the parents' consent ... To allow the courts to award visitation--a limited form of custody--to a third [*591] person would necessarily impair the parents' right to custody and control" *(id. at 656-657)*.

Because Alison D. "concede[d] that [Virginia M. was] a fit parent," she had "no right to petition the court to displace the choice made by the fit parent in deciding what is in the child's best interests" *(id. at 657)*.

Citing *Domestic Relations Law §§ 71* and *72* (permitting siblings and grandparents respectively to petition for visitation), we emphasized that "[w]here the Legislature deemed it appropriate, it gave other categories of persons standing to seek visitation and it gave the courts the power to determine whether an award of visitation would be in the child's best interests" *(id.)*. Thus, we refused to "read the term parent in *section 70* to include categories of nonparents who have developed a relationship with a child or who have had prior relationships with a child's parents and who wish to continue visitation with the child" *(id.)*.

In support of our decision in *Alison D.*, we cited *Matter of Bennett v Jeffreys (40 NY2d 543, 356 NE2d 277, 387 NYS2d 821 [1976])* and *Matter of Ronald FF. v Cindy GG. (70 NY2d 141, 511 NE2d 75, 517 NYS2d 932 [1987])*, cases which set forth bedrock principles of family law. In [**190] [***269] *Bennett*, we held that the State "may not deprive a parent of the custody of a child absent surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances" *(40 NY2d at 544)*. Where extraordinary circumstances are present, the court determines custody based on the child's best interest. Concomitantly, in *Ronald FF.*, we held that "[v]isitation rights may not be granted on the authority of the ... *Bennett* ... extraordinary circumstances rule, to a biological stranger where the child, born out of wedlock, is properly in the custody of his mother" *(70 NY2d at 142)*; and further noted that the mother possessed a fundamental right "to choose those with whom her child associates," which the State may not "interfere with ... unless it shows some compelling State purpose which furthers the child's best interests" *(id. at 144-145)*.

In *Matter of Jacob (86 NY2d 651, 660 NE2d 397, 636 NYS2d 716 [1995])*, decided four years after *Alison D.*, we construed *section 110 of the Domestic Relations Law*, New York's adoption statute, to permit "the unmarried partner of a child's biological mother, *whether heterosexual or homosexual*, who is raising the child together with the biological parent, [to] become the child's second parent by means of adoption" (*id. at 656* [emphasis added]). We stressed that permitting such second-parent adoptions "allows ... children [*592] to achieve a measure of permanency with both parent figures and avoids the sort of disruptive visitation battle we faced in [*Alison D.*]" (*Id. at 659*). [2]

> 2 While Judge Ciparick criticizes *Alison D.* for taking an "unwarranted hard line stance, fixing biology above all else as the key to determining parentage" (see Ciparick, J., concurring op at 607), our subsequent decision in *Jacob* softened any such "hard line" by permitting second-parent adoption.

Although Debra H. argues otherwise, we did not implicitly depart from *Alison D.* in *Shondel J.*, where there were affirmed findings of fact that Mark D. had held himself out as the child's biological father, and had treated her as his daughter for the first 4 1/2 years of her life. When Shondel J. sought orders of filiation and support, Mark D. requested DNA testing. The Family Court hearing examiner ordered genetic marker tests, which revealed that Mark D. was not, in fact, the child's biological father. As we pointed out, *Shondel J.* was an unusual case because "the process was inverted": "The procedure contemplated by [*sections 418 (a)* and *532 (a) of the Family Court Act*] is that Family Court should consider paternity by estoppel *before* it decides whether to test for biological paternity" (*7 NY3d at 330* [emphasis added]; *see Family Court Act §§ 418 [a]* [governing paternity where there is a marriage] and *532 [a]* [governing paternity where there is no marriage], which both specify that "[n]o [genetic marker or DNA] tests shall be ordered ... upon a written finding by the court that it is not in the best interests of the child on the basis of res judicata, equitable estoppel, or the presumption of legitimacy of a child born to a married woman").

We held in *Shondel J.* that "a man who has mistakenly represented himself as a child's father may be estopped from denying paternity, and made to pay child support, when the child justifiably relied on the man's representation of paternity, to the child's detriment" (*7 NY3d at 324*). We premised our decision on "our precedents, the [**191] [***270] affirmed findings of fact and the legislative recognition of paternity by estoppel" (*id. at 326*). On the latter point, we highlighted that although paternity by estoppel for purposes of child support "originated in case law," it was "now secured by statute in New York"; namely, *sections 418 (a)* and *532 (a) of the Family Court Act* (*id. at 327*).

We did not mention *Alison D.* in *Shondel J.* Nor did we intend to signal disaffection with *Alison D.* by citing *Jean Maby H.*, one of a handful of lower court decisions applying equitable estoppel to custody and visitation proceedings despite *Alison D.*, where [*593] we considered and explicitly rejected this approach (*see Alison D., 77 NY2d at 656*). Specifically, after noting that "New York courts have long applied the doctrine of estoppel in *paternity and support proceedings* [because of] the best interests of the child" (*Shondel J., 7 NY3d at 326*), we cited *Jean Maby H.* The pinpoint citation was made to a page where the Appellate Division similarly observed that courts have recognized equitable estoppel "as a defense in various proceedings involving *challenges to paternity*, including cases where there is evidence that the person seeking to avoid estoppel is not a biological parent" (*see Jean Maby H., 246 AD2d at 285* [citations omitted and emphasis added]), and that "[t]he paramount concern in applying equitable estoppel in *these cases* has been, and continues to be, the best interests of the child" (*id.* [emphasis added]).

Our holding in *Shondel J.* was limited to the context in which that case arose--the procedure for determining the paternity of an "alleged father." Moreover, we see no inconsistency in applying equitable estoppel to determine filiation for purposes of support, but not to create standing when visitation and custody are sought. As already noted, the Legislature has drawn the distinction for us: *sections 418 (a)* and *532 (a) of the Family Court Act* direct the courts to take equitable estoppel into account before ordering paternity testing, while *section 70 of the Domestic Relations Law* does not even mention equitable estoppel. The procedure dictated by *sections 418 (a)* and *532 (a)* is intended to prevent someone who has held himself out as a child's biological father from later evading the financial obligations of paternity by means of a scientific litmus test, thereby endangering the child's economic security or even rendering the child a ward of the State. This may on occasion result in deeming a biological relationship to exist where the putative father is, in fact, a biological stranger to the child, as turned out to be the case in *Shondel J.* (*see Shondel J., 7 NY3d at 332* [cautioning that "a man who harbors doubts about his biological paternity has a choice to make. He may either put the doubts aside and initiate a parental relationship with the child, or insist on a scientific test of paternity *before* initiating a parental relationship"]). Debra H. would have us upend this rationale by allowing someone who is a *known* biological stranger to a child assert a parental relationship over the objections of the child's biological parent. *Shondel J* is consistent with *Alison D.*'s

core holding that parentage under New York law derives from biology or adoption.

In sum, *Alison D.*, in conjunction with second-parent adoption, creates a bright-line rule that promotes certainty in the wake of domestic breakups otherwise fraught with the risk of [*594] "disruptive ... battle[s]" (*Jacob, 86 NY2d at 659*) over parentage as a prelude to further potential combat [**192] [***271] over custody and visitation. While Debra H. and various amici in this case complain that *Alison D.* is formulaic, or too rigid, or out of step with the times, we remain convinced that the predictability of parental identity fostered by *Alison D.* benefits children and the adults in their lives. All four departments of the Appellate Division have consistently followed *Alison D.* (*see e.g. Anonymous v Anonymous, 20 AD3d 333, 797 NYS2d 754 [1st Dept 2005], appeal dismissed 6 NY3d 740 [2005]; Bank v White, 40 AD3d 790, 837 NYS2d 181 [2d Dept 2007], lv dismissed 9 NY3d 1002 [2007]; Guibin v Moss-Guibin, 45 AD3d 1230, 846 NYS2d 743 [3d Dept 2007], lv denied 10 NY3d 705 [2008]; Matter of Lynda A.H. v Diane T.O., 243 AD2d 24, 673 NYS2d 989 [4th Dept 1998], lv denied 92 NY2d 811, 703 NE2d 269, 680 NYS2d 457 [1998]*).

Despite this evidence to the contrary, Debra H. also protests that *Alison D.* has spawned doubt and confusion in the law in the 19 years since it was handed down. To cure this ostensible ill, though, Debra H. asks us to replace the bright-line rule in *Alison D.* with a complicated and nonobjective test for determining so-called functional or de facto parentage [3] at an equitable-estoppel hearing to be conducted by the trial court after [*595] discovery and fact-intensive inquiry in the individual case. These equitable-estoppel hearings--which would be followed by a second, best-interest hearing in the event functional or de facto parentage is demonstrated to the trial court's satisfaction--are likely often to be contentious, costly, and lengthy. Here, for instance, the two sides collectively submitted affidavits to Supreme Court [**193] [***272] from at least 60 individuals, any or all of whom might be expected to testify at the equitable-estoppel hearing.

3 At oral argument, Debra H. advocated for the standard established by the Wisconsin Supreme Court in *Matter of H.S.H.-K. (193 Wis 2d 649, 533 NW2d 419 [1995])*. After first concluding that Wisconsin's visitation statute was not the exclusive means of obtaining court-ordered visitation and therefore did not preclude an exercise of its equitable powers, the Wisconsin Supreme Court, "mindful of preserving a biological or adoptive parent's constitutionally protected interests and the best interest of a child," decided that a trial court may "determine whether visitation is in a child's best interest if the petitioner *first proves* that he or she has *a parent-like relationship* with the child and that *a significant triggering event* justifies state intervention in the child's relationship with a biological or adoptive parent" (*193 Wis 2d at 658, 533 NW2d at 421* [emphases added]). The court further determined that "[t]o meet these two requirements, the petitioner must prove the component elements of each one" (*id. at 658, 533 NW2d at 421*).

Specifically,

"[t]o demonstrate the existence of the petitioner's parent-like relationship with the child, the petitioner must prove four elements: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitionerhas been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature" (*id. at 658-659, 533 NW2d at 421*).

The contribution to a child's support (the third element) need not be monetary. Finally,

"[t]o establish a significant triggering event justifying state intervention in the child's relationship with a biological or adoptive parent, the petitioner must prove that this parent has interfered substantially with the petitioner's parent-like relationship with the child, and that petitioner sought court ordered visitation within a reasonable time after the parent's interference" (*id. at 658, 533 NW2d at 421*).

More to the point, the flexible type of rule championed by Debra H. threatens to trap single biological and adoptive parents and their children in a limbo of doubt. These parents could not possibly know for sure when another adult's level of involvement in family life might reach the tipping point and jeopardize their right to bring up their children without the unwanted participation of a third party. [4] Significantly, "the interest of parents in the care, custody, and control of their children[] is perhaps the oldest of the fundamental liberty interests recognized by" the United States Supreme Court (*Troxel v Granville, 530 U.S. 57, 65, 120 S Ct 2054, 147 L Ed 2d 49 [2000]*). Courts must be sensible of "the traditional presumption that a fit parent will act in

the best interest of his or her child" and protect the parent's "fundamental constitutional right to make decisions concerning the rearing of" that child (*id at 69-70*). In our view, this fundamental right entitles biological and adoptive parents to refuse to allow a second-parent adoption, as Janice R. did, even if they have [*596] permitted or encouraged another adult to become a virtual parent of the child, as Debra H. insists was the case here.

> 4 Judge Ciparick counters that the biological or adoptive parent may simply withhold "consent[] to the formation of [a] parental relationship between the [third party] and the child" (*see* Ciparick, J., concurring op at 609). This is no answer since the parent cannot predict the inherently unpredictable--i.e., how a judge might someday rule on the question of whether or when there had been sufficient "consent" such that, as a consequence, a "parental relationship" had been "formed." And erecting a Chinese wall to isolate the child from those adults who play a significant role in the parent's life is probably not practical, and is certainly not desirable for either the child or the parent.

Next, we agree with Janice R. that any change in the meaning of "parent" under our law should come by way of legislative enactment rather than judicial revamping of precedent. Many states have adopted statutes expanding standing so that individuals who are not legal parents or blood relatives of a child may seek visitation and/or custody. Indiana, for example, authorizes a court to award custody to a "de facto custodian," defined as

"a person who has been the primary caregiver for, and financial support of, a child who has resided with the person for at least:

"(1) six (6) months if the child is less than three (3) years of age; or

"(2) one (1) year if the child is at least three (3) years of age" (*see Ind Code Ann §§ 31-17-2-8.5 31-9-2-35.5*).

Several other states, including Colorado, Texas and Minnesota, likewise incorporate a temporal element in their third-party standing statutes, which contributes to predictability (*see e.g. Colo Rev Stat Ann § 14-10-123 [1] [c]* [person "other than a parent" may file a petition seeking allocation of parental responsibilities for the child if the person "has had the physical care of a child for a period of six months or more, if such action is commenced within six months of the termination of such physical care"]; *Tex Fam Code Ann § 102.003 [a] [9]* ["An original suit may be filed at any time by ... a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition"]; *Minn Stat Ann § 257C.08 [4]* ["If an unmarried minor has resided in a household with a person, other than a foster parent, for two years or more [**194] [***273] and no longer resides with the person, the person may petition the district court for an order granting the person reasonable visitation rights to the child during the child's minority"]; *see also DC Code Ann § 16-831.01 [1]*; *Or Rev Stat Ann § 109.119 [1]*; *Wyo Stat Ann § 20-7-102 [a]*).

Before granting custody to a nonparent over the parent's objection, a court in California must "make a finding that granting custody to a parent would be detrimental to the child and that granting custody to the nonparent is required to serve the [*597] best interest of the child" (*Cal Fam Code § 3041 [a]*). "Detriment to the child" is defined to include "the harm of removal from a stable placement ... with a person who has assumed, on a day-to-day basis, the role of [the child's] parent, fulfilling both the child's physical needs and ... psychological needs for care and affection, and who has assumed that role for a substantial period of time" (*id. § 3041 [c]*). Notably, "[a] finding of detriment does not require any finding of unfitness of the parents" (*id.*). When making custody determinations in Virginia, the court must "give primary consideration to the best interests of the child . . [and] assure minor children of frequent and continuing contact with both parents, when appropriate" (*Va Code Ann § 20-124.2 [B]*). In addition, while "[t]he court shall give due regard to the primacy of the parent-child relationship," it "may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award custody or visitation to any other person with a legitimate interest" (*id.*).

As this brief discussion of how some other states have tackled the standing issue shows, different policies and approaches have been implemented legislatively throughout the nation. Debra H. would have us preempt our Legislature by sidestepping *section 70 of the Domestic Relations Law* as presently drafted and interpreted in *Alison D.* to create an additional category of parent--a functional or de facto parent--through the exercise of our common-law and equitable powers. But the Legislature is the branch of government tasked with assessing whether *section 70* still fulfills the needs of New Yorkers. The Legislature may conduct hearings and solicit comments from interested parties, evaluate the voluminous social science research in this area cited by Debra H. and the amici, weigh the consequences of various proposals, and make the tradeoffs needed to fashion the rules that best serve the population of our state.

In conclusion, *Alison D.*, coupled with the right of second-parent adoption secured by *Jacob*, furnishes the biological and adoptive parents of children--and, importantly, those children themselves--with a simple and un-

derstandable rule by which to guide their relationships and order their lives. For the reasons set out in this opinion, we decline Debra H.'s invitation to distinguish or overrule *Alison D.* Whether to expand the standing to seek visitation and/or custody beyond what *sections 70, 71* and *72 of the Domestic Relations Law* currently encompass remains a subject for the Legislature's consideration.

[*598] II.

Our reaffirmation of *Alison D.* does not dispose of this case, however. Debra H. and Janice R. entered into a civil union in Vermont before M.R.'s birth. This circumstance presents two issues for us to decide: whether Debra H. is M.R.'s parent under Vermont law and, in the event that she is, whether as a matter of comity she is his parent under New York law as well, thereby conferring standing for her to seek visitation and custody in a best-interest hearing.

[**195] [***274] Vermont's civil union statute provides that parties to a civil union shall have "all the same benefits, protections and responsibilities under law ... as are granted to spouses in a marriage" (*Vt Stat Ann tit 15, § 1204 [a]*); and that they shall enjoy the same rights "with respect to a child of whom either becomes the natural parent during the term of the civil union," as "those of a married couple" (*Vt Stat Ann tit 15, § 1204 [f]*). In *Miller-Jenkins*, the Vermont Supreme Court relied upon these provisions to hold that a child born by artificial insemination to one partner of a civil union should be deemed the other partner's child under Vermont law for purposes of determining custodial rights following the civil union's dissolution (*Miller-Jenkins, 180 Vt at 464-465, 912 A2d at 969-970*). The court concluded that in the context of marriage, a child born by artificial insemination was deemed the child of the husband even absent a biological connection. In light of *section 1204* and by parity of reasoning, the court decided that the same result pertained to the partner in the civil union with no biological connection to the child.

Janice R. counters that in *Miller-Jenkins* the child was conceived by artificial insemination after the parties entered into their civil union, while M.R. was conceived before her civil union with Debra H. We see no reason why the Vermont Supreme Court would reach a different result about parentage based on this distinction. The court repeatedly emphasized how important it was that the child was *born* during the civil union (*id. at 465, 912 A2d at 970* ["Many factors are present here that support a conclusion that (the partner with no biological connection to the child) is a parent, including, first and foremost, that (she and the child's biological mother) were in a valid legal union at the time of the child's birth"]; *id. at 466, 912 A2d at 971* ["Because so many factors are present in this case that allow us to hold that the nonbiologically-related partner is the child's parent, we need not address which factors [*599] may be dispositive on the issue ... We do note that, in accordance with common law, the couple's legal union at the time of the child's birth is extremely persuasive evidence of joint parentage"]). Indeed, entering into the civil union at a time when both partners know that one of them is pregnant by artificial insemination might well be viewed as presenting an even stronger case than *Miller-Jenkins* to support the nonbiological partner's parentage. There is certainly no potential for misunderstanding, ignorance or deceit under such circumstance.

Janice R. does not challenge the civil union's validity. She protests, though, that it was "of utterly no consequence" to her, and that while she "gave into" Debra H.'s "demand[s]," she did not enter into the civil union "blindly." Rather, Janice R.--who is a practicing attorney--professes to have conducted research and to have "found that [entering into a Vermont civil union] was of no legal significance in the State of New York, which is still the case today." Moreover, she claims to have "conferred with an attorney to make certain that a 'civil union' was of no legal consequence," and to have been "assured that it was not." Finally, she avers that "[k]nowing that the civil union was of no legal consequence in New York and did not confer ... any additional rights and responsibilities, combined with [her] desire to put an end to [Debra H.'s] nagging, [she] acquiesced to the civil union."

[2] In fact, the potential legal ramifications in New York of entering into a civil union in Vermont were uncertain in 2003, [5] and [**196] [***275] remain unsettled except to the extent we resolve the specific issue--i.e., parentage--presented by this case. Whatever her motivation or expectation, Janice R. chose to travel to Vermont to enter into a civil union with Debra H. In light of the *Miller-Jenkins* decision, we conclude that Debra H. is M.R.'s parent under Vermont law as a result of that choice. The question then becomes whether New York courts should accord comity to [*600] Vermont and recognize Debra H. as M.R.'s parent under New York law as well.

5 The first Supreme Court decision to consider the consequences in New York of a Vermont civil union was issued in April 2003--several months before Debra H. and Janice R. entered into their civil union--and was widely publicized. Although reversed by the Appellate Division in 2005, the trial court concluded that the surviving partner of a civil union validly contracted in Vermont was entitled to recognition as a "spouse" under New York's wrongful death statute and therefore had

standing to recover for the wrongful death of his partner in the civil union (*see Langan v St. Vincent's Hosp. of N.Y., 196 Misc 2d 440, 765 NYS2d 411 [Sup Ct, Nassau County 2003]*), *revd 25 AD3d 90, 802 NYS2d 476 [2d Dept 2005], appeal dismissed based on lack of finality 6 NY3d 890, 850 NE2d 672, 817 NYS2d 625 [2006])*.

The doctrine of comity

"does not of its own force compel a particular course of action. Rather, it is an expression of one State's entirely voluntary decision to defer to the policy of another. Such a decision may be perceived as promoting uniformity of decision, as encouraging harmony among participants in a system of co-operative federalism, or as merely an expression of hope for reciprocal advantage in some future case in which the interests of the forum are more critical" (*Ehrlich-Bober & Co. v University of Houston, 49 NY2d 574, 580, 404 NE2d 726, 427 NYS2d 604 [1980]* [citation omitted]).

New York's "determination of whether effect is to be given foreign legislation is made by comparing it to our own public policy; and our policy prevails in case of conflict" (*id*). The court locates the public policy of the state in "the law as expressed in statute and judicial decision" and also considers "the prevailing attitudes of the community" (*id*). Even in the case of a conflict, however, New York's public policy may yield "in the face of a strong assertion of interest by the other jurisdiction" (*id*).

[3] New York will accord comity to recognize parentage created by an adoption in a foreign nation (*see Matter of Doe, 14 NY3d 100, 107-108, 923 NE2d 1129, 896 NYS2d 741 [2010]* [comity may be extended to a Cambodian adoption certificate so that an individual who is a child's father under Cambodian law is also his father under New York law]). We see no reason to withhold equivalent recognition where someone is a parent under a sister state's law. Janice R., as was her right as M.R.'s biological parent, did not agree to let Debra H. adopt M.R. But the availability of second-parent adoption to New Yorkers of the same sex negates any suggestion that recognition of parentage based on a Vermont civil union would conflict with our State's public policy. Nor would comity undermine the certainty that *Alison D.* promises biological and adoptive parents and their children: whether there has been a civil union in Vermont is as determinable as whether there has been a second-parent adoption. And both civil union and adoption require the biological or adoptive parent's legal consent, as opposed to the indeterminate implied consent featured in the various tests proposed to establish de facto or [*601] functional parentage. * [**197] [***276] In sum, our decision does not lead to protracted litigation over standing and is consistent with New York's public policy by affording predictability to parents and children alike.

> 6 Vermont, like New York, does not provide by statute or case law for functional or de facto parentage (*see Titchenal v Dexter, 166 Vt 373, 385, 693 A2d 682, 689 [1997]* [Vermont Supreme Court concluded that lesbian companion of adoptive mother has no right to parent-child contact as equitable or de facto parent, noting that "(g)iven the complex social and practical ramifications of expanding the classes of persons entitled to assert parental rights by seeking custody or visitation, the Legislature is better equipped to deal with the problem" of third parties claiming a parent-like relationship and seeking court-compelled contact with a child]).

Although she sought more expansive rulings, Debra H. also made the narrower case on this appeal that "comity should be accorded to the civil union at least to recognize [her] as a parent to M.R.," and that "[a]cknowledging the significance to M.R. of his parents' Vermont civil union *does not require resolving* whether New York grants comity to the civil union for other purposes" (emphasis added) (*see e.g. Godfrey v Spano, 13 NY3d 358, 892 NYS2d 272 [2009]* [deciding taxpayer challenges on grounds not implicating New York's common-law marriage recognition rule]). We agree for the reasons given, and thus in this case decide only that New York will recognize parentage created by a civil union in Vermont. Our determination that Debra H. is M.R.'s parent allows her to seek visitation and custody at a best-interest hearing. There, she will have to establish facts demonstrating a relationship with M.R. that warrants an award in her favor.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the case remitted to Supreme Court for a best-interest hearing in accordance with this opinion.

CONCUR BY: GRAFFEO; CIPARICK; SMITH

CONCUR

GRAFFEO, J.: (concurring)

I concur with Judge Read's analysis as well as the result she reaches but write separately to explain why I believe our decision in *Matter of Alison D. v Virginia M. (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991])* must be reaffirmed. There, we held that the term "parent" in *Domestic Relations Law § 70* encompasses a biological or adoptive parent, i.e., only a person with a legally-recognized parental relationship to the child. We noted that a child's parent has a constitutionally protected

right to determine with whom the child may associate. Under New York law, a legal parent's right to make such determinations "may not be displaced absent grievous cause or necessity" (*Alison D.*, 77 [*602] *NY2d at 656; see Matter of Ronald FF v Cindy GG, 70 NY2d 141, 144, 511 NE2d 75, 517 NYS2d 932 [1987]; Bennett v Jeffreys, 40 NY2d 543, 549, 356 NE2d 277, 387 NYS2d 821 [1976]*). A similar right has been recognized under the federal constitution (*see Troxel v Granville, 530 U.S. 57, 120 S Ct 2054, 147 L Ed 2d 49 [2000]*). The Legislature authorizes parents to bring proceedings to ensure the proper care and custody of their children and has permitted a limited class of other persons -- siblings and grandparents -- standing to seek visitation in specified circumstances (*see Domestic Relations Law § 72; Matter of E.S. v P.D., 8 NY3d 150, 863 NE2d 100, 831 NYS2d 96 [2007]*). Rather than employing an "equitable estoppel" or "in loco parentis" basis for establishing parental status, *Alison D.* created a bright-line rule that made it possible for biological and adoptive parents to clearly understand in what circumstances a third party could obtain status as a parent and have standing to seek visitation or custody with a child. For 19 years the rule articulated in [***277] [**198] *Alison D.* has provided certainty and predictability to New York parents and their children.

The *Alison D.* decision was criticized by some because it was unclear at that time whether a same-sex partner that was not biologically related to a child could become a legal parent through second parent adoption. Any concern in that regard was resolved four years later in *Matter of Jacob (86 NY2d 651, 660 NE2d 397, 636 NYS2d 716 [1995])* where we held that the adoption statutes permit second-parent adoption by the unmarried partner of a child's biological parent. Thus, the law in New York is clear: a person who lacks a biological relationship to a child and desires to become a legal parent must undertake a second-parent adoption. Parents -- whether in heterosexual or same-sex relationships, whether married or unmarried -- have been able to order their lives accordingly. This rule has avoided confusion, particularly in the event a relationship is dissolved years later, as to whether the party lacking biological or legal ties to the child (i.e., who failed to pursue an adoption) would have standing to petition for custody or visitation.

As Judge Read points out, our decision in *Matter of Shondel J. v Mark D. (7 NY3d 320, 853 NE2d 610, 820 NYS2d 199 [2006])* applying equitable principles in the context of a paternity dispute was fully consistent with *Alison D.* Beyond the fact that the Legislature has incorporated an equitable standard in the Family Court Act provisions governing paternity determinations (*see Family Ct Act §§ 418[a], 532[a]*), Shondel J. -- the biological mother in that case -- did not object to a finding that Mark D. was the father of the child. To the contrary, Shondel J. initiated a proceeding expressly seeking to have Mark D. adjudicated the father for purposes of [*603] obtaining financial support. Thus, the constitutional right of a fit parent to determine with whom her child associates was not implicated in *Shondel J.*, nor were equitable principles relied on in that case to declare a person lacking biological or adoptive ties to a child to be a parent over the objection of the child's fit biological mother. Consistent with the relevant statute, and with the consent of the biological mother, equitable estoppel was merely used as a vehicle to preclude Mark D. from withdrawing his prior sworn and unsworn statements that he was the child's father and from relying on genetic marker or DNA tests to disprove paternity.

Shondel J. did not undermine *Alison D.* and the objective standard for determining parental status emanating from that case continues to serve the interests of both parents and children. *Alison D.*'s clear standard encourages a party who seeks to form a parental relationship with a child but lacks biological ties to pursue a legal adoption as soon as possible, without leaving a question as important as parental status undetermined perhaps for years, subject to the credibility battles that characterize equitable estoppel hearings held long after the relationships between the parties have soured. By encouraging early adoptions, the *Alison D.* rule serves the best interests of New York's children as it is optimal to expeditiously establish legal parenthood, especially to protect a child against unforeseen events such as the death of a biological parent. And since the express written consent of the biological parent is a condition precedent to a second-parent adoption, the rule also guarantees that standing to seek visitation or custody will never hinge on an after-the-fact dispute as to whether the other party's relationship with the child was sufficiently close or had been fostered by the biological parent. Under *Alison D.*, when a romantic relationship ends, whether the parties were same-sex or heterosexual [**199] [***278] partners, a hearing to determine who is the child's legal parent is generally unnecessary as the parentage issue can readily be determined as a matter of law based on objective genetic proof or documentary evidence. Thus, protracted litigation on the standing of a party hoping to obtain custodial rights or visitation is avoided, which further promotes the settlement of these issues rather than the contentious litigation that is all too frequently harmful to children.

Judge Smith proposes a standard that addresses the parental status of certain same-sex partners that employ artificial insemination to conceive a child. He proposes that "where a child is [*604] conceived through ADI [artificial donor insemination] by one member of a same sex couple living together, with the knowledge and con-

sent of the other, the child is as a matter of law -- at least in the absence of extraordinary circumstances -- the child of both" (*see* Smith conc op, at 5). Like the equitable estoppel test, this formulation invites litigation over whether the parties were "living together" (presumably, they must be living together in a romantic relationship, not merely as roommates) at the time of insemination, whether the insemination was "with the knowledge and consent" of the other partner, and whether "extraordinary circumstances" exist, whatever those might be. Under this set of factors, the same types of factual controversies that typify the equitable estoppel analysis would ensue. [7]

> 7 Although *Matter of H.M. v E.T. (14 NY3d 521 [2010]* (decided today]) does not involve an application for custody or visitation, the allegations in that case demonstrate some of the issues that arise in this context. There, twelve years after a same-sex relationship ended, the biological mother of a child born during the relationship through artificial insemination sought child support from her former same-sex partner and the same-sex partner denied that she was a parent of the child. The former partner alleged that, although she and the biological mother were living in the same household during the relevant period, this was not the product of a romantic relationship -- she and her husband had hired the biological mother as a live-in nanny to their children and the mother had remained in the home in that capacity after the marriage ended. The former partner asserted that she had assisted the biological mother with the process of insemination because they were close friends; although they had been involved in a brief romantic relationship at that time, she denied that she had ever agreed to become a parent to the child. Obviously, under Judge Smith's approach, these disputes as to the parties' living and relationship status more than a decade ago, as well as whether they consented to parent the child together, would be the subject of a hearing.

I do not suggest that a specialized approach should not be developed for same-sex couples who conceive children through artificial insemination or other assisted reproduction technologies (ART), particularly as medical techniques continue to evolve. But the criteria for establishing parental rights should be objective to ensure certainty for the parties and consistency in application. For these reasons, I believe it is more appropriate for the Legislature to develop the standards and procedures under which parenthood will be determined for same-sex couples in the artificial insemination and ART context, just as it has done for married couples under *Domestic Relations Law § 73* (providing that any child born to a married woman through artificial insemination is the child of her husband if he gave prior written consent to the procedure).

[*605] Indeed, some states have enacted statutes that specifically address the parental rights of same-sex partners who rely on artificial insemination or ART to conceive a child. For example, the New Mexico Legislature adopted a provision [**200] [***279] stating that "[a] person who provides eggs, sperm or embryos for or consents to assisted reproduction . . . with the intent to be the parent of a child is a parent of the resulting child" (*NM Stat Ann § 40-11A-703*). The statute contemplates that the "intended parent or parents shall consent to the assisted reproduction in a record signed by them before the placement of the eggs, sperm or embryos" (*NM Stat Ann § 40-11A-704*). The New York Legislature could craft a provision addressing the parental status of same-sex partners in the artificial insemination or ART context either by incorporating an objective standard that promotes predictability for parents and children, or by pursuing a different approach. But, to date it has not done so, nor has it legislatively overruled *Alison D.* I therefore conclude that there is no basis for this Court to depart from the analysis applied in that case and emphasize that, at present, the surest way for same-sex couples to protect the interests of children born during their relationships is to promptly undertake second parent adoptions that constitute conclusive proof of parental status.

Although parental status for visitation and custody depends on a biological or adoptive relationship under New York law, Judge Read aptly demonstrates why it is appropriate in this case to consider Vermont Law. Here, unable to marry or enter into a civil union in New York, the parties chose to enter into a civil union in Vermont when Janice R. was eight months pregnant. At that time, as is the case today, the Vermont civil union statute clearly stated that "[t]he rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage" (*Vt Stat Ann tit 15, § 1204[f]*). Under Vermont's statute, a child born by artificial insemination to one partner of a civil union becomes the child of the other partner, meaning that this non-biological parent has automatic standing to seek custody or visitation if there is a breakdown in the adult relationship (*see Miller-Jenkins v Miller-Jenkins, 180 Vt 441, 912 A.2d 951 [2006], cert denied 550 U.S. 918, 127 S Ct 2130, 167 L Ed 2d 863 [2007]*). The parties in this case are presumed to have understood the legal ramifications of their decision to enter into a civil union and one of [*606] those

legal ramifications was that each partner would be a parent of any child born during the union [4]. A legal, parental relationship was therefore created between Debra H. and the child.

> 8 Another child was born to Janice R. after the parties relationship ended but during the course of the civil union (which apparently has not been dissolved). Having failed to promptly attempt to establish a relationship with the second child and petition for custody or visitation, I believe that Debra H. has likely forfeited any right she may have had to assert parental rights.

Of course, the doctrine of comity would be inapplicable if the parentage provision in Vermont's civil union statute was inconsistent with New York public policy. But, in this regard, our sister-state's law -- like New York's -- predicates parentage on objective evidence of a formal legal relationship -- the civil union. Since Debra H.'s status as a parent under Vermont Law does not turn on the application of amorphous equitable standards but depends on the fact that she and Janice R. entered into a civil union before the child was born, it does not run afoul of the policy underlying *Alison D.* as it does not undermine New York's interest in ensuring certainty for parents and children.

[**201] [***280] CIPARICK, J. (concurring in result):

Although I agree with the majority that principles of comity require the recognition of Debra H.'s parentage of M.R. because of the Vermont civil union between the parties, I write separately to set forth my view that *Matter of Alison D. v Virginia M. (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991]* should be overruled as outmoded and unworkable.

In *Alison D.*, the dissent predicted that the impact of the decision would be felt "far beyond th[e] particular controversy" of that case, by a "wide spectrum of relationships," including "heterosexual stepparents, 'common-law' and nonheterosexual partners . . .. and even participants in scientific reproduction procedures" (*77 NY2d at 657-658* [Kaye, J., dissenting]). That prediction has been borne out. In countless cases across the state, the lower courts, constrained by the harsh rule of *Alison D.*, have been forced to either permanently sever strongly formed bonds between children and adults with whom they have parental relationships (*see e.g. Matter of Janis C. v Christine T., 294 AD2d 496, 496-497, 742 NYS2d 381 [2d Dept 2002], lv denied 99 NY2d 504, 784 NE2d 76, 754 NYS2d 203 [2002]; Gulbin v Moss-Gulbin, 45 AD3d 1230, 1231, 846 NYS2d 743 [3d Dept 2007]*) or engage in deft legal maneuvering to explain away the apparent applicability of *Alison D.* (*see e.g. Jean Maby H. v Joseph H., 246 AD2d 282, 283, 288-289, 676 NYS2d 677 [2d Dept 1998]; Beth R. v Donna M., 19 Misc 3d 724, 734, 853 NYS2d 501 [Sup Ct, New York County 2008]*). [*607] Moreover, the decision in *Alison D.* has been both questioned by judges (*see e.g. Anonymous v Anonymous, 20 AD3d 333, 333-334, 797 NYS2d 754 [1st Dept 2005]* [Ellerin and Sweeny, JJ., concurring]) and roundly criticized by legal scholars (*see e.g.* Schepard, *Revisiting Alison D.: Child Visitation Rights for Domestic Partners*, NYLJ, June 27, 2002, at 3 [col 1]; Ettelbrick, *Who is a Parent?*, 10 NYL Sch J Hum Rts 513, 516-517, 522-532 [1993]).

To be sure, we are not in the practice of casting aside good legal precedent based merely on harsh results and scholarly criticism. *Alison D.*, however, has never been good legal precedent. Rather, the majority in that case took an unwarranted hard line stance, fixing biology above all else as the key to determining parentage and thereby foreclosing any examination of a child's best interests (*see 77 NY2d at 657-658* [Kaye, J., dissenting]). As the dissent explained, the majority in *Alison D.* rendered an opinion that fell "hardest on the children of [non-traditional] relationships, limiting their opportunity to maintain bonds that may be crucial to their development. The majority[] retreat[ed] from the [C]ourts' proper role . . . [by] tightening . . . rules that should . . ., above all, retain the capacity to take the children's interests into account" (*id. at 658*).

Since *Alison D.*, our decisions and the decisions of many of the lower courts have properly focused on the best interests of the children when determining questions of parentage, including the application of equitable estoppel to determine paternity and support obligations (*see e.g. Matter of Shondel J. v Mark D., 7 NY3d 320, 324, 853 NE2d 610, 820 NYS2d 199 [2006]*). The majority here insists that it was appropriate to apply the doctrine of equitable estoppel in *Shondel J.* and consider the child's best interests, but to apply the doctrine here would be inappropriate. The majority sees no "inconsistency in applying equitable estoppel to determine filiation [**202] [***281] for purposes of support, but not to establish standing when visitation and custody are sought" (majority op., at 12-13) because *section 70 of the Domestic Relations Law* makes no mention of equitable estoppel. The majority infers that economic considerations are present in paternity and child support proceedings but not custody and visitation proceedings (*see id.*). I disagree. Support obligations flow from parental rights; the duty to support and the rights of parentage go hand-in-hand and it is nonsensical to treat the two things as severable. Moreover, while it is true that [*608] *section 70 of the Domestic Relations Law* makes no mention of equitable estoppel, it is also true that the statute does not specifically define the term "parent." Nota-

bly, as Judge Kaye observed in the *Alison D.* dissent, one thing the Legislature *did* include in the statute was its intention that the courts "shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness" (*Domestic Relations Law § 70 [a]; see also Alison D., 77 NY2d at 659*).

Other state courts have developed better, more flexible, multi-factored approaches to determine whether a parental relationship exists, thus conferring upon a petitioner standing to seek custody or visitation. Rather than relying strictly on biology or an adoptive relationship, as *Alison D.* does, other tests focus on a functional examination of the relationship between the parties and the child. For example, the approach developed by the Wisconsin Supreme Court is, in my opinion, properly protective of both the best interests of the children and the rights of biological and adoptive parents. Under the Wisconsin test, "[t]o demonstrate the existence of the petitioner's parent-like relationship with the child, the petitioner must prove four elements: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature" (*Matter of Custody of H.S.H.-K., 193 Wis 2d 649, 658-659, 533 NW2d 419, 421 [1995]*). In short, I believe that, in order to demonstrate the existence of a parental relationship sufficient to confer standing under *Domestic Relations Law § 70*, a petitioner unrelated to a child by biology or adoption must prove that (1) the biological or adoptive parent consented to and encouraged the formation of a parental relationship; and (2) that the petitioner intended to and actually did assume the typical obligations and roles associated with parenting (*see* Forman, *Same-Sex Partners: Strangers, Third Parties, or Parents? The Changing Legal Landscape and* [*609] *the Struggle for Parental Equality, 40 Fam LQ 23, 49 [2006]*; Ettelbrick, *Who is a Parent?*, 10 NYL Sch J Hum Rts at 516-517; Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage, 53 Hastings LJ 597, 640 [2002]*; *see also Matter of Custody of H.S.H.-K., 193 Wis 2d at 658*; *VC v MJB, 163 NJ 200, 225, 748 A2d 539, 553 [2000]* [discussing formation of parental relationship as relevant to determination of parentage]), as is alleged here.

[***282] [**203] Although the majority believes that a functional approach would "trap" single biological and adoptive parents "in a limbo of doubt" (majority op., at 16), I strongly disagree. In a test such as Wisconsin's, for example, one element that must be proven is that the biological or adoptive parent consented to the formation of parental relationship between the petitioner and the child. If a biological or adoptive parent does not consent, he or she may elect to continue raising the child on his or her own, without interference, as is a parent's constitutional right (*see Troxel v Granville, 530 U.S. 57, 65, 120 S Ct 2054, 147 L Ed 2d 49 [2000]*).

The majority claims that adopting a functional approach would "sidestep[]" *section 70 of the Domestic Relations Law* and "preempt our Legislature" by "creat[ing] an additional category of parent" (majority op., at 19). However, as noted above, *section 70 of the Domestic Relations Law* contains no definition of the term "parent." In my view, it was the majority in *Alison D.* that "sidestepped" *section 70* by refusing to give appropriate weight to the clear Legislative intent, expressed in the statute, to protect the "best interests" and "welfare and happiness" of children.

Thus, taking into consideration the social changes that have occurred since *Alison D.* (*see Godfrey v Spano, 13 NY3d 358, 380-381, 892 NYS2d 272 [2009]* [Ciparick, J., concurring]; *see also Matter of Jacob, 86 NY2d 651, 660 NE2d 397, 636 NYS2d 716 [1995]*) and recognizing that Supreme Court has inherent equity powers and authority pursuant to *Domestic Relations Law § 70* to determine who is a parent and what will serve a child's best interests, [1] I would reverse on both grounds and hold that Debra H. has standing to proceed with a hearing on the merits of her petition.

1 I agree with Judge Smith's concurrence insofar as he suggests that the presumption of legitimacy could be used to ascertain whether the same-sex partner of a biological parent is also a parent to a child born during the course of the parties' relationship, but would extend the presumption to include biological children of same-sex male couples as well. I believe that such a presumption, however, would constitute only one facet of a functional approach such as the one I suggest.

[*610] SMITH, J. (concurring in *Debra H. v Janice R.* and *Matter of H.M. v E.T.*):

These two cases present (though neither majority decision ultimately turns on) the question of whether a person other than a biological or adoptive mother or father may be a "parent" under New York law. In *Debra H. v Janice R.*, a visitation case, a majority of the Court

reaffirms the holding in *Matter of Alison D. v Virginia M. (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991])* that New York parenthood requires a biological or adoptive relationship, though the majority also holds -- correctly in my view -- that we should recognize Debra H.'s parental status under the law of Vermont. In *H.M. v E.T.*, a child support case, the majority holds -- again correctly in my view -- that Family Court has jurisdiction of the case, and does not reach the *Alison D.* question, while the dissent suggests that *Alison D.* requires dismissal.

Though I concur with the result in both cases, and join the *H.M. v E.T.* majority opinion in full, I would depart from *Alison D.*, both for visitation and child support purposes. I grant that there is much to be said for reaffirming *Alison D.*, but I conclude [**204] [***283] that there is even more to be said against it.

I begin by expressing wholehearted agreement with much of what the *Debra H.* majority opinion, and Judge Graffeo's concurring opinion, say. It is indeed highly desirable to have "a bright-line rule that promotes certainty in the wake of domestic breakups," and to avoid litigation "over parentage as a prelude to further potential combat over custody and visitation" (*Debra H.* majority op at 13-14). There are few areas of the law where certainty is more important than in the rules governing who a child's parents are. For that reason, I join the *Debra H.* majority in rejecting the approach taken by the *Alison D.* dissent, which favored a multi-factor test for parenthood "that protects all relevant interests" *(77 NY2d at 662)*, and by the Wisconsin Supreme Court's decision in *Matter of H.S.H.-K. (193 Wis 2d 649, 658-659, 533 NW2d 419, 421 [1995])*, which permitted a party to establish a "parent-like relationship" by proving four amorphous elements, including such things as "significant responsibility for the child's care, education and development" and "a bonded, dependent relationship" with the child. The *Debra H.* majority is quite right to see in these vague formulas a recipe for endless litigation, which would mean endless misery for children and adults alike.

[*611] These reasons lead the *Debra H.* majority and the *H.M. v E.T.* dissent to follow *Alison D.* in concluding that women in the position of Debra H. (putting aside her civil union with Janice R.) and E.T. are not parents of their former lovers' children. But despite the high value I set on certainty and predictability, I find this result unacceptable. I would therefore adopt a different "bright-line rule" -- one that includes these women and others similarly situated in the definition of "parent".

The position of Debra H. and E.T. is an increasingly common one. Each lived with her same sex romantic partner. In each case, while the couple was living together, the partner was artificially inseminated with sperm from an unknown donor (artificial donor insemination, or ADI) and gave birth. Both women in each case expected, and led the other to expect, that both of them would be the child's parents. Yet the *Debra H.* majority holds that Debra H. would never have become a parent absent the civil union, while the *H.M. v E.T.* dissent implies that E.T. never became a parent at all. This approach not only disappoints the expectations of the adults involved; much worse, it leaves each child with only one parent, rendering the child, in effect, illegitimate.

To put a large and growing number of our state's children in that status seems wrong to me. Each of these couples made a commitment to bring a child into a two-parent family, and it is unfair to the children to let the commitment go unenforced. Nor can it be said that adoption by the non-biological parent -- an option available under *Matter of Jacob (86 NY2d 651, 660 NE2d 397, 636 NYS2d 716 [1995])* -- is an adequate recourse, for adoption is possible only by the voluntary act of the adopting parent, with the consent of the biological one. To apply the rule of *Alison D.* to children situated as are the children in these cases is to permit either member of the couple to make the child illegitimate by her whim -- as the facts of these two cases illustrate.

I have said that the interest in certainty is extremely strong in this area; but society's interest in assuring, to the extent possible, that each child begins life with two parents is not less so. That policy underlies the common law presumption of legitimacy, "one of the strongest and most persuasive known to the law" (*Matter of* [***284] [**205] *Findlay, 253 NY 1, 7, 170 N.E. 471 [1930]* [Cardozo, Ch. J.]; *see also Michael H. v Gerald D., 491 U.S. 110, 125, 109 S Ct 2333, 105 L Ed 2d 91 [1989]* [the strength of the presumption derives from "an aversion to declaring children illegitimate . . . thereby depriving them of rights of inheritance and succession . . . and likely making them wards [*612] of the state"]). The policy has been adopted as a matter of statute in particular circumstances (*Domestic Relations Law §§ 24, 73*) and, in one persuasively reasoned Appellate Division case, has been adapted as a matter of common law to protect children born by ADI (*Laura WW. v Peter WW., 51 AD3d 211, 856 NYS2d 258 [3d Dept 2008]*). I would apply the common law presumption to the facts of these cases, and would hold that where a child is conceived through ADI by one member of a same sex couple living together, with the knowledge and consent of the other, the child is as a matter of law -- at least in the absence of extraordinary circumstances -- the child of both.

The rule I propose is clearly defined in at least one respect: It would apply only to same sex couples -- indeed, only to lesbian couples, because I would leave for another day the question of what rules govern male couples, for whom ADI is not possible. This limitation may give some pause, for it seems intuitively that all

people, male and female, gay and straight, should be treated the same way. Yet it is an inescapable fact that gay and straight couples face different situations, both as a matter of law and as a matter of biology. By the choice of our Legislature, a choice we have held constitutionally permissible (*Hernandez v Robles, 7 NY3d 338, 855 NE2d 1, 821 NYS2d 770 [2006]*), same sex couples in New York have neither marriage nor domestic civil unions available to them. And, pending even more astounding technological developments than we have yet witnessed, it is not possible for both members of a same sex couple to become biological parents of the same child. These differences seem to me to warrant different treatment. Indeed, different treatment already exists, for both a statute (*Domestic Relations Law § 73*) and the common law (*Laura WW., 51 AD3d at 217*) give a measure of protection to the children of married opposite-sex couples who are conceived by ADI. The rule I propose would give the children of lesbian couples similar, though not identical, protection.

In one respect, the rule I have suggested would come closer to treating gay and straight couples alike than the more flexible rules advocated or adopted in many writings, including the *Alison D.* dissent, the Wisconsin decision in *Matter of H.S.H.-K.*, and Judge Ciparick's dissent today in *Debra H.*. Under these approaches, the same sex partners of biological parents would have an opportunity to become quasi-parents -- "de facto parents", parents-by-estoppel, or persons "in a parent-like relationship". As to women in the situation of Debra H. and E.T., I would drop all the hyphens and quotation marks, and call them simply parents.

[*613] For these reasons, I would hold that Debra H. is M.R.'s parent, and that E.T. is the parent of H.M.'s biological son. Therefore, in *Debra H. v Janice R.*, I would not find it necessary to reach the effect of the Vermont civil union (although, since the majority does reach it, I join in its resolution of that question); and I would hold that Family Court has jurisdiction in *H.M. v E.T.* not only on the narrow ground adopted by the majority, but also on the ground that E.T. is the child's parent and therefore "chargeable with the support of such child" within the meaning of *Family Court Act § 413 (1) (a)*.

* * * *

[**206] [***285] Order reversed, with costs, and case remitted to Supreme Court, New York County, for further proceedings in accordance with the opinion herein. Opinion by Judge Read. Judges Graffeo, Pigott and Jones concur, Judge Graffeo in a separate concurring opinion in which Judge Jones also concurs. Judge Ciparick concurs in result in an opinion in which Chief Judge Lippman concurs. Judge Smith concurs in result in an opinion.

Decided May 4, 2010