RECEIVED by MSC 3/24/2023 10:46:55 PM

APPENDIX TO

THE AMICUS BRIEF OF THE

FAMILY LAW SECTION OF THE STATE BAR OF MICHIGAN

Appendix

Tab A .....*Pueblo v Haas*, COA 12/28/21 Opinion
Tab B ..... *Obergefell v Hodges*, 576 US 644 (2015)
Tab C…….*LeFever v Matthews*, 336 Mich App 651, 663; 971 NW2d 673 (2021)
Tab D…… *Lipnevicius v Lipnevicius*, Mich Ct App No. 289073 (August 26, 2010)

* * * * *

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

RECEIVED by MSC 3/24/2023 10:46:55 PM

STATE OF MICHIGAN

COURT OF APPEALS

CARRIE PUEBLO,

Plaintiff-Appellant,

v

RACHEL HAAS,

Defendant-Appellee.

UNPUBLISHED
December 28, 2021

No. 357577
Kalamazoo Circuit Court
LC No. 2020-006382-DC

Before: GADOLA, P.J., and SWARTZLE and CAMERON, JJ.

PER CURIAM.

Plaintiff, Carrie Pueblo, appeals as of right the trial court's order granting defendant, Rachel Haas, summary disposition under MCR 2.116(C)(5) and (8) of plaintiff's complaint for child custody. We affirm.

I. FACTS

Plaintiff and defendant were in a romantic relationship from sometime in the early 2000s until 2012 or 2014. The parties were not married to each other, nor did they marry after the United States Supreme Court issued its decision in *Obergefell v Hodges*, 576 US 644; 135 S Ct 2584; 192 L Ed 2d 609 (2015).[1] During the relationship, defendant underwent in-vitro fertilization and in November 2008, gave birth to a child. The parties agree that plaintiff has no biological relationship to the child, and that after the child was born plaintiff did not adopt the child. In her complaint, plaintiff alleged that after the child was born both parties parented the child, even after the parties' relationship ended. According to plaintiff, in 2017 defendant demanded that plaintiff have no further contact with the child.

In 2020, plaintiff initiated this action under the Child Custody Act of 1970 (CCA), MCL 722.21 *et seq*., seeking joint legal and physical custody of the child, and arguing that the child's

[1] *Obergefell* struck down Michigan's constitutional and statutory prohibitions on same-sex marriage. *Sheardown v Guastella*, 324 Mich App 251, 256; 920 NW2d 172 (2018).

RECEIVED by MSC 3/24/2023 10:46:55 PM

best interests were supported by the parties sharing custody. In her answer to the complaint, defendant asserted that plaintiff lacked standing to seek custody of the child under the CCA because she had neither a biological nor adoptive relationship with the child. Defendant thereafter moved for summary disposition of plaintiff's complaint under MCR 2.116(C)(5) and (8), asserting that plaintiff lacked standing to seek custody of the child and also had failed to state a claim upon which relief could be granted.

After a hearing, the trial court granted defendant's motion and dismissed plaintiff's complaint without prejudice. Defendant moved for reconsideration, contending that she was entitled to have plaintiff's complaint dismissed with prejudice. Upon reconsideration, the trial court agreed and entered an order dismissing plaintiff's complaint with prejudice. Thereafter, plaintiff moved for reconsideration, contending that this Court's then newly-released opinion in *LeFever v Matthews*, ___ Mich App ___; ___ NW2d ___ (2021) (Docket No. 353106), dictated a finding that plaintiff had standing to bring the custody action. The trial court disagreed, finding *LeFever* to be factually distinct and concluding accordingly that it had not palpably erred by granting defendant summary disposition of plaintiff's claim. Plaintiff now appeals.

II. DISCUSSION

A. STANDARD OF REVIEW

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). A motion for summary disposition under MCR 2.116(C)(5) is properly granted when "[t]he party asserting the claim lacks the legal capacity to sue."[2] When reviewing a motion under MCR 2.116(C)(5), this Court considers the pleadings, depositions, admissions, affidavits, and other

[2] We note that standing and legal capacity to sue are distinct concepts. See *Flint Cold Storage v Dep't of Treasury*, 285 Mich App 483, 502; 776 NW2d 387 (2009), citing *Michigan Chiropractic Council v Comm'r of Office of Fin and Ins Servs*, 475 Mich 363, 374 n 25; 716 NW2d 561 (2006) (opinion by YOUNG, J.) (admonishing Michigan courts not to conflate the two concepts for purposes of motions under MCR 2.116(C)(5)), overruled on other grounds by *Lansing Schs Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 352, 371 & n 18; 792 NW2d 686 (2010). Standing generally is the plaintiff's right initially to invoke the power of the trial court to adjudicate a claimed injury. *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 290; 715 NW2d 846 (2006). Capacity to sue refers to the absence of a legal barrier, such as infancy or mental incompetency, which deprives a party of the right to bring an action. *Moorhouse v Ambassador Ins Co, Inc*, 147 Mich App 412, 419 n 1; 383 NW2d 219 (1985). This Court has observed that because standing and legal capacity to sue are distinct concepts, a challenge to standing is more appropriately considered under MCR 2.116(C)(8) or (10). See *Le Gassick v Univ of Mich Regents*, 330 Mich App 487, 494 n 2; 948 NW2d 452 (2019). Nonetheless, MCR 2.116(C)(5) often is identified as the appropriate subrule of MCR 2.116(C) under which a party may assert that a plaintiff lacks standing. See *Miller v Chapman Contracting*, 477 Mich 102, 104; 730 NW2d 462 (2007); see also *Pontiac Police & Fire Retiree v Pontiac No. 2*, 309 Mich App 611, 619; 873 NW2d 783 (2015). We may, of course, review an issue under an appropriate subrule regardless of the subrule under which the trial court granted summary disposition.

RECEIVED by MSC 3/24/2023 10:46:55 PM

documentary evidence submitted by the parties. *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 493; 815 NW2d 132 (2012). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *El-Khalil*, 504 Mich at 159. When reviewing a motion for summary disposition under MCR 2.116(C)(8), we accept all well-pleaded factual allegations as true and construe them in the light most favorable to the non-moving party. *Id*. at 160. A motion for summary disposition is properly granted under MCR 2.116(C)(8) when, considering the pleadings alone, the claims alleged are clearly unenforceable as a matter of law and no factual development could justify recovery. *Id*.

Whether a party has standing is a legal question that we review de novo. *Barclae v Zarb*, 300 Mich App 455, 467; 834 NW2d 100 (2013). Similarly, whether a party has sufficient basis to assert parental rights under the equitable-parent doctrine is a question of law that we review de novo. *Lake v Putnam*, 316 Mich App 247, 250; 894 NW2d 62 (2016). We also review de novo questions of statutory interpretation and constitutional questions. *LeFever*, ___ Mich App at ___; slip op at 3. We review a trial court's decision to grant or deny reconsideration for an abuse of discretion, which occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Sanders v McLaren-Macomb*, 323 Mich App 254, 264; 916 NW2d 305 (2018). We also observe that with regard to the resolution of a child custody dispute under the CCA, "all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28; *Lake*, 316 Mich App at 250.

B. STANDING

Plaintiff contends that the trial court erred by granting defendant summary disposition of plaintiff's custody claim on the basis that plaintiff lacks standing to seek custody because she is not a parent of the child. Plaintiff argues that she has standing to seek custody under the CCA because the parties were "equitably married" at the time the child was conceived and born, and she therefore is the child's "natural father." Plaintiff thus urges that we extend the existing equitable-parent doctrine to create a new legal concept of "equitable marriage." We decline to extend existing law in that manner.

Generally, the term "standing" refers to the plaintiff's right initially to invoke the power of the trial court to adjudicate a claimed injury. *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 290; 715 NW2d 846 (2006). A party generally has standing if the party has a real interest in the cause of action or the subject matter of the cause of action. *Lake*, 316 Mich App at 250. In the context of child custody, however, the concept of standing is less broad when considering disputes involving a party other than a parent. *Id*.

In Michigan, the CCA governs custody, parenting time, and child support issues for minor children; it is the exclusive means by which to pursue child custody rights. MCL 722.24(1); *LeFever*, ___ Mich App at ___; slip op at 3. The CCA is equitable in nature and is to be liberally construed. MCL 722.26(1). The CCA provides the following parental presumption:

> If a child custody dispute is between the parents, between agencies, or between third persons, the best interests of the child control. If the child custody dispute is between the parent or parents and an agency or a third person, the court shall

RECEIVED by MSC 3/24/2023 10:46:55 PM

> presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence. [MCL 722.25(1).]

The CCA defines "parent" as "the natural or adoptive parent of a child." MCL 722.22(i). The CCA does not define "natural parent," but this Court has defined that term as meaning that the person is a parent related to the child by "blood" rather than by adoption. See *Stankevich v Milliron (On Remand)*, 313 Mich App 233, 236; 882 NW2d 194 (2015). More recently, this Court has expanded the meaning of natural parent as used in the statute to include a parent related to the child "by birth," regardless of a genetic connection. See *LeFever*, ___ Mich App at ___; slip op at 4 (including in the definition of natural parent a woman who gives birth to a child as a surrogate).

In addition, a person may also be deemed a natural parent under the equitable-parent doctrine. Under the equitable-parent doctrine, a husband who is not the biological father of a child born or conceived during wedlock nevertheless may be considered that child's natural father if (1) the husband and the child mutually acknowledge their father-child relationship, or the child's mother cooperated in the development of that father-child relationship before the divorce proceedings commenced, (2) the husband expresses a desire to have parental rights to the child, and (3) the husband is willing to accept the responsibility of paying child support. *Van v Zahorik*, 460 Mich 320, 330; 597 NW2d 15 (1999). Our Supreme Court in *Van*, however, specifically declined to extend the equitable-parent doctrine outside the context of marriage. *Id*. at 331.

The CCA defines a "third person" as "an individual other than a parent." MCL 722.22(k). Under the CCA, a third person "does not have standing by virtue of the fact that he or she resides with the child and has a 'personal stake' in the outcome of the litigation." *Bowie v Arder*, 441 Mich 23, 42-43; 490 NW2d 568 (1992); see also *Lake*, 316 Mich App at 250-251. Further, a third person may not "create a custody dispute by simply filing a complaint in circuit court alleging that giving legal custody to the third party is in the child's best interests." *In re Anjoski*, 283 Mich App 41, 51; 770 NW2d 1 (2009) (quotation marks and citation omitted). The CCA limits the standing of a third person to bring a custody action to guardians or limited guardians under certain circumstances, MCL 722.26b, and to a third person when (1) the minor child's biological parents were never married to each other, (2) the parent who has custody of the child dies or is missing and the other parent does not have legal custody of the child, and (3) the third person seeking custody is related to the child "within the fifth degree by marriage, blood, or adoption." MCL 722.26c(1)(b); *Lake*, 316 Mich App at 251. Thus, if plaintiff in this case is not a parent, she is a third person who was obligated to satisfy the requirements of either MCL 722.26b or MCL 722.26c(1)(b) to demonstrate standing to initiate this custody action. See *Lake*, 316 Mich App at 251.

We conclude that plaintiff in this case is not a parent of the child. In *Lake*, the parties were in a romantic relationship for several years, during which the defendant underwent artificial insemination and gave birth to a child. After the parties' relationship ended, the defendant denied the plaintiff parenting time with the child and the plaintiff initiated a custody action. The defendant sought summary disposition on the basis that the plaintiff was an unrelated third person who lacked standing under the CCA to seek parenting time. The trial court denied the motion. This Court reversed the trial court's decision and determined that the plaintiff lacked standing. Relying in part on *Van*, this Court explained:

RECEIVED by MSC 3/24/2023 10:46:55 PM

> On appeal, plaintiff argues that "she has standing to bring this suit" because she "asserts a right to custody and parenting time . . . under Michigan's equitable-parent doctrine." Under the equitable-parent doctrine, a husband who is not the biological father of a child born or conceived during wedlock may, nevertheless, be considered that child's natural father if three requirements are satisfied: (1) the husband and the child must mutually acknowledge their father-child relationship, or the child's mother must have cooperated in the development of that father-child relationship before the divorce proceedings commenced, (2) the husband must express a desire to have parental rights to the child, and (3) the husband must be willing to accept the responsibility of paying child support. *Van v Zahorik*, 460 Mich 320, 330; 597 NW2d 15 (1999); *Atkinson v Atkinson*, 160 Mich App 601, 608-609; 408 NW2d 516 (1987). "Once it is determined that a party is an equitable parent, that party becomes endowed with both the rights and responsibilities of a parent." *York v Morofsky*, 225 Mich App 333, 337; 571 NW2d 524 (1997). Plaintiff claims that because she satisfies the three requirements in *Van* and *Atkinson*, she is the child's equitable parent. She is incorrect.
>
> While plaintiff claims that she satisfies all requirements under the equitable-parent doctrine, she ignores one crucial, and dispositive, requirement for the equitable-parent doctrine to apply—*the child must be born in wedlock*. *Van*, 460 Mich at 330 (stating that the equitable-parent doctrine applies only "to a child born or conceived during the marriage"). The child at issue in this case was not born or conceived during a marriage. In fact, it is undisputed that the parties were never married. Therefore, the equitable-parent doctrine does not apply. [*Lake*, 316 Mich App at 252.]

Thus, Michigan's equitable-parent doctrine applies only to married couples. *Id*. at 254. In this case, as in *Lake*, because the parties were never married, plaintiff's argument that she is an equitable parent fails. See *Lake*, 316 Mich App at 250-253.

Plaintiff argues, however, that she has standing under the "elastic definition" of natural parent adopted by this Court in *LeFever*. In *LeFever*, the parties were in a domestic relationship during which they decided to have children together using plaintiff's eggs, fertilized by a sperm donor, and implanted in defendant's womb, which resulted in the defendant giving birth to twins. The parties separated in 2014, but continued jointly to parent the children. In 2016, the defendant experienced serious health concerns, and the plaintiff became the twins' primary caretaker until a custody dispute arose in 2018. *Id*. at ___; slip op at 1-2. The plaintiff initiated a custody action asserting that she was the "natural parent" of the children because she was genetically related to the children while the defendant had been only a gestational surrogate. The trial court awarded plaintiff sole legal and physical custody of the children, finding that the defendant had not established a biological relationship to the children. On appeal, this Court determined that the defendant was a natural parent because, despite lacking a genetic connection to the twins, she was related to them by virtue of having given birth to them. *Id*. at ___; slip op at 4. In other words, the defendant in *LeFever* did not demonstrate that she was a natural parent under the equitable-parent doctrine; rather, the defendant was determined to be a natural parent of the twins by virtue of her own physical relationship to the children because she had given birth to them.

RECEIVED by MSC 3/24/2023 10:46:55 PM

Plaintiff here argues that the facts of this case mirror those of *LeFever*. In *LeFever*, however, unlike this case, although the twins were the product of the plaintiff's eggs and donor sperm, the defendant gave birth to the twins, which this Court equated with the physical connection of being a parent by virtue of genetic relationship. Here, plaintiff lacks the physical connection to the child that this Court in *LeFever* found determinative to being a natural parent. Nor is plaintiff an adoptive parent of the child. Because plaintiff is not related to the child genetically or by birth, she could only be determined to be a parent if under the equitable-parent doctrine she met the requirements for being a natural parent.

As discussed, a person is only a natural parent under the equitable-parent doctrine if he or she was married to the child's mother at the time of the child's conception or birth, and the other requirements of the doctrine are met. Relying upon the reasoning of the concurring opinion in *Lake*, however, plaintiff asserts that the parties were "equitably married" because, although at the time of their relationship same-sex marriages were not permitted under Michigan law, the fact that the parties participated in a commitment ceremony in 2007 demonstrates that the parties would have married had they been permitted to do so in Michigan. But in contrast to the view advocated by the concurring opinion in *Lake*, the majority opinion in that case declined to extend the equitable-parent doctrine by imposing the status of marriage upon a couple who had never married. This Court explained:

> [I]t is undisputed that the parties were never married. Therefore, the equitable-parent doctrine does not apply. Had the parties married in another jurisdiction, for example, our conclusion might be different. See, e.g., *Stankevich v Milliron (On Remand)*, 313 Mich App 233, 240-241; 882 NW2d 194 (2015). While we acknowledge that the issue presented in this case is complex, we simply do not believe it is within courts' discretion to, at the request of one party and in light of the United States Supreme Court decision in *Obergefell v Hodges*, 576 US ___; 135 S Ct 2584; 192 L Ed 2d 609 (2015), retroactively transform an unmarried couple's past relationship into marriage for the purpose of custody proceedings. Stated differently, it is, in our view, improper for a court to impose, several years later, a marriage on a same-sex unmarried couple simply because one party desires that we do so. [*Lake*, 316 Mich App at 252-253.]

Here, because plaintiff was not married to defendant, she cannot achieve the status of natural parent under the equitable-parent doctrine. Plaintiff thus is a third person under the CCA with respect to the child. Because plaintiff has not established the requisite factors for standing under MCL 722.26b or MCL 722.26c(1)(b), plaintiff is not entitled as a third person to initiate this custody action. See *Lake*, 316 Mich App at 251. The trial court therefore did not err by granting defendant summary disposition of plaintiff's complaint.

C. DUE PROCESS/EQUAL PROTECTION

Plaintiff also contends that the trial court's dismissal of her complaint violates her constitutional right to due process and equal protection. Plaintiff argues that the trial court failed to recognize her as the child's natural parent because of the procreation method used to conceive the child, thereby failing to protect her constitutional right to custody and parenting time. We disagree.

RECEIVED by MSC 3/24/2023 10:46:55 PM

"The Fourteenth Amendment of the United States Constitution provides that '[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' " *In re Sanders*, 495 Mich 394, 409; 852 NW2d 524 (2014), quoting US Const, Am XIV, § 1 (alteration in *Sanders*.). "The Due Process Clause requires, procedurally, 'notice and a meaningful opportunity to be heard before an impartial decision-maker,' . . . and substantively, 'the statute need only be rationally related to a legitimate government interest.' " *Lake*, 316 Mich App at 254-255 (citations omitted). "The Equal Protection Clause requires that all persons similarly situated be treated alike under the law." *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010). Michigan's equal-protection provision is treated as coextensive with the Equal Protection Clause of the federal Constitution. *Id*.

On appeal, plaintiff refers to the rights to procreate and to maintain relationships between children and parents, briefly mentioning gender, sexual orientation, and the use of artificial insemination. Plaintiff does not explicitly argue, however, that she was denied equal protection or due process on the basis of sex, gender, or sexual orientation, and does not establish that she was treated differently than a heterosexual person or homosexual male would be under the same circumstances. Rather, plaintiff asserts that the trial court's decision violates her right to procreate in the manner she chooses by failing to ensure her right to co-parent a child born to her partner during a non-marital relationship, who is not biologically related to plaintiff, and whom plaintiff has not adopted. Plaintiff's argument lacks merit, however. The trial court did not dismiss plaintiff's complaint because of the method the parties used to become pregnant; the trial court dismissed the complaint because plaintiff lacked standing to seek custody of the child, being neither a natural nor adoptive parent of the child under the CCA. The trial court reasoned that the parties were never married, plaintiff has no biological relationship with the child, and plaintiff did not adopt the child, and therefore was not a parent of the child under the CCA.

We note that the definition of parent under MCL 722.22(i) does not violate the equal protection considerations of *Obergefell*[3] because "that definition applies equally to same-sex and opposite sex married couples." *Sheardown v Guastella*, 324 Mich App 251, 256; 920 NW2d 172 (2018). Plaintiff cannot assert an equal protection violation because she was not subjected to dissimilar treatment under the statute as compared to a heterosexual unmarried individual. See *id*. at 258. We also reject plaintiff's contention that the trial court's decision violates the child's constitutional right to equal protection; a person does not have standing to assert the constitutional rights of another person. *Lake*, 316 Mich App at 256.

D. RECONSIDERATION

Plaintiff also contends that the trial court abused its discretion by granting defendant's motion for reconsideration, and dismissing plaintiff's complaint with prejudice. Defendant fails to cite relevant authority or to explain the basis of her argument, however, thereby abandoning the issue. See *Seifeddine v Jaber*, 327 Mich App 514, 519-520; 934 NW2d 64 (2019).

[3] *Obergefell* requires states to afford the same marriage-related benefits to same-sex married couples that are afforded to heterosexual married couples. *Sheardown*, 324 Mich App at 258-259.

Affirmed.

/s/ Michael F. Gadola
/s/ Brock A. Swartzle
/s/ Thomas C. Cameron

RECEIVED by MSC 3/24/2023 10:46:55 PM

Caution
As of: March 24, 2023 4:45 PM Z

RECEIVED by MSC 3/24/2023 10:46:55 PM

Obergefell v. Hodges

Supreme Court of the United States

April 28, 2015, Argued [*]; June 26, 2015, Decided

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

[*] 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.

RECEIVED by MSC 3/24/2023 10:46:55 PM

Reporter
576 U.S. 644 *; 135 S. Ct. 2584 **; 192 L. Ed. 2d 609 ***; 2015 U.S. LEXIS 4250 ****; 83 U.S.L.W. 4592; 99 Empl. Prac. Dec. (CCH) P45,341; 115 A.F.T.R.2d (RIA) 2015-2309; 25 Fla. L. Weekly Fed. S 472

JAMES ***OBERGEFELL***, et al., Petitioners (No. 14-556) v. RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, et al.VALERIA TANCO, et al., Petitioners (No. 14-562) v. BILL HASLAM, GOVERNOR OF TENNESSEE, et al.APRIL DeBOER, et al., Petitioners (No. 14-571) v. RICK SNYDER, GOVERNOR OF MICHIGAN, et al.GREGORY BOURKE, et al., Petitioners (No. 14-574) v. STEVE BESHEAR, GOVERNOR OF KENTUCKY

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Subsequent History: Costs and fees proceeding at, Motion granted by, in part, Motion denied by, in part, Sub nomine at *Tanco v. Haslam, 2016 U.S. Dist. LEXIS 39403 (M.D. Tenn., Mar. 25, 2016)*

Prior History: [**1]** ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Deboer v. Snyder, 772 F.3d 388, 2014 U.S. App. LEXIS 21191 (6th Cir.), 2014 FED App. 275P (6th Cir.) (6th Cir. Mich., 2014)

Disposition: *772 F. 3d 388*, reversed.

Core Terms

marriage, same-sex, couples, marry, cases, rights, fundamental rights, dignity, opposite-sex, benefits, principles, courts, man and woman, religious, lesbians, decisions, Loving, invalidated, restrictions, license, rooted, sexual, protections, procreate, lives, religious liberty, due process, deprived, intimacy, intimate

Case Summary

Overview

HOLDINGS: [1]-Under the Due Process and *Equal Protection Clauses of the Fourteenth Amendment*, same-sex couples have a fundamental right to marry. Laws of Michigan, Kentucky, Ohio, and Tennessee were held invalid to the extent they excluded same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples; [2]-Because same-sex couples can exercise the fundamental right to marry in all states, it follows 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.

Outcome

Judgment reversed. 5-4 decision; 4 dissents.

LexisNexis® Headnotes

Constitutional Law > Substantive Due Process > Scope

HN1[] **Constitutional Law, Substantive Due Process**

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.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

RECEIVED by MSC 3/24/2023 10:46:55 PM

Constitutional Law > Substantive Due Process > Scope

HN2[] **Privacy, Personal Decisions**

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*. In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.

Constitutional Law > Bill of Rights > Fundamental Rights > General Overview

HN3[] **Bill of Rights, Fundamental Rights**

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. Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. 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 tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects history and learns from it without allowing the past alone to rule the present.

Constitutional Law > Bill of Rights > General Overview

Constitutional Law > Substantive Due Process > Scope

HN4[] **Constitutional Law, Bill of Rights**

The nature of injustice is that one may not always see it in one's own time. 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 they 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.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Family Law > Marriage > Nature of Marriage

Constitutional Law > Substantive Due Process > Scope

HN5[] **Privacy, Personal Decisions**

The right to marry is protected by the Constitution. Marriage is one of the vital personal rights essential to the orderly pursuit of happiness by free men. The right to marry is fundamental under the Due Process Clause.

Constitutional Law > Substantive Due Process > Scope

Family Law > Marriage > Nature of Marriage

Family Law > Marriage > Types of Marriages > Same Sex Marriages

HN6[] **Constitutional Law, Substantive Due Process**

Same-sex couples may exercise the right to marry. The reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.

RECEIVED by MSC 3/24/2023 10:46:55 PM

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Family Law > Marriage > Validity > Interracial Marriages

Family Law > Marriage > Nature of Marriage

HN7[] **Privacy, Personal Decisions**

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 v. Virginia invalidated interracial marriage bans under the Due Process Clause. 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. Indeed, 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 U.S. society.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

HN8[] **Privacy, Personal Decisions**

As the U.S. Supreme Court held in Lawrence v. Texas, 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 when 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. 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.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Family Law > Marriage > Nature of Marriage

HN9[] **Privacy, Personal Decisions**

A 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. The U.S. Supreme Court has recognized these connections by describing the varied rights as a unified whole: The right to marry, establish a home and bring up children is a central part of the liberty protected by the Due Process Clause.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Family Law > Marriage > Validity > General Overview

Family Law > Marriage > Nature of Marriage

HN10[] **Privacy, Personal Decisions**

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 U.S. Supreme 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.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Constitutional Law > Substantive Due

RECEIVED by MSC 3/24/2023 10:46:55 PM

Process > Scope

HN11[] **Privacy, Personal Decisions**

Washington v. 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 the U.S. Supreme Court has used in discussing other fundamental rights, including marriage and intimacy.

Constitutional Law > Equal Protection > Gender & Sex

Family Law > Marriage > Types of Marriages > Same Sex Marriages

Constitutional Law > Substantive Due Process > Scope

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN12[] **Equal Protection, Gender & Sex**

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. This interrelation of the two principles furthers the U.S. Supreme Court's understanding of what freedom is and must become.

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN13[] **Equal Protection, Nature & Scope of Protection**

In interpreting the *Equal Protection Clause*, the U.S. Supreme Court has recognized that new insights and societal understandings can reveal unjustified inequality within the United States' most fundamental institutions that once passed unnoticed and unchallenged.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Family Law > Marriage > Nature of Marriage

HN14[] **Equal Protection, Nature & Scope of Protection**

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.

Constitutional Law > Equal Protection > Gender & Sex

Family Law > Marriage > Types of Marriages > Same Sex Marriages

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

HN15[] **Equal Protection, Gender & Sex**

The right to marry is a fundamental right inherent in the liberty of the person, and under the Due

RECEIVED by MSC 3/24/2023 10:46:55 PM

Process and *Equal Protection 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. No longer may this liberty be denied to them. *Baker v. Nelson, 409 U.S. 810 (1972)* must be and is overruled, and *Mich. Const. art. I, § 25*, *Ky. Const. § 233a*, *Ohio Rev. Code Ann. § 3101.01* (2008), and *Tenn. Const. art. XI, § 18* are held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

Constitutional Law > Bill of Rights > Fundamental Rights > General Overview

Constitutional Law > Separation of Powers

HN16[] **Bill of Rights, Fundamental Rights**

The Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. The Supreme Court has noted 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. Indeed, it is most often through democracy that liberty is preserved and protected in one's life. But the 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. Thus, when the rights of persons are violated, the Constitution requires redress by the courts, notwithstanding the more general value of democratic decisionmaking. This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.

Constitutional Law > Bill of Rights > Fundamental Rights > General Overview

Constitutional Law > Separation of Powers

HN17[] **Bill of Rights, Fundamental Rights**

The dynamic of the United States' 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 the United States' 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 is 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. This is why fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.

Family Law > Marriage > Types of Marriages > Same Sex Marriages

HN18[] **Types of Marriages, Same Sex Marriages**

Same-sex couples may exercise the fundamental right to marry in all States. It follows 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.

Lawyers' Edition Display

Decision

[*609]** Same-sex couples held able to exercise right to marry in all states; no lawful basis held to exist for state to refuse to recognize lawful same-sex marriage performed in another state on ground

RECEIVED by MSC 3/24/2023 10:46:55 PM

of same-sex character.

Summary

Overview: HOLDINGS: [1]-Under the Due Process and *Equal Protection Clauses of the Fourteenth Amendment*, same-sex couples have a fundamental right to marry. Laws of Michigan, Kentucky, Ohio, and Tennessee were held invalid to the extent they excluded same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples; [2]-Because same-sex couples can exercise the fundamental right to marry in all states, it follows 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.

Outcome: Judgment reversed. 5-4 decision; 4 dissents.

Headnotes

[*610]**

CONSTITUTIONAL LAW §525 > RIGHTS -- LIBERTY > Headnote:
LEdHN[1][⬇] [1]

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. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §525 > DUE PROCESS -- PERSONAL CHOICES > Headnote:
LEdHN[2][⬇] [2]

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*. In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §9 > CONSTITUTION -- JUDICIAL CONSTRUCTION > Headnote:
LEdHN[3][⬇] [3]

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. Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. 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 tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects history and learns from it without allowing the past alone to rule the present. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §9 CONSTITUTIONAL LAW §525 > CONSTITUTION -- JUDICIAL CONSTRUCTION > Headnote:
LEdHN[4][⬇] [4]

The nature of injustice is that one may not always see it in one's own time. The generations that wrote and ratified the *Bill of Rights* and the *Fourteenth Amendment* did not presume to know the extent of

RECEIVED by MSC 3/24/2023 10:46:55 PM

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 they 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. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §525.5MARRIAGE §1 > DUE PROCESS -- RIGHT TO MARRY > Headnote:
LEdHN[5][] [5]

The right to marry is protected by the Constitution. Marriage is one of the vital personal rights essential to the orderly pursuit of happiness by free men. The right to marry is fundamental under the *Due Process Clause*. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

[*611]**

CONSTITUTIONAL LAW §525.5MARRIAGE §1 > RIGHT TO MARRY -- SAME-SEX COUPLES > Headnote:
LEdHN[6][] [6]

Same-sex couples may exercise the right to marry. The reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §525.5MARRIAGE §1 > DUE PROCESS -- RIGHT TO MARRY > Headnote:
LEdHN[7][] [7]

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 v. Virginia invalidated interracial marriage bans under the *Due Process Clause*. 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. Indeed, 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 U.S. society. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §528.1 > LIBERTY AND FREEDOM -- SAME-SEX COUPLES > Headnote:
LEdHN[8][] [8]

As the U.S. Supreme Court held in Lawrence v. Texas, 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 when 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. 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. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

RECEIVED by MSC 3/24/2023 10:46:55 PM

CONSTITUTIONAL LAW §525.5MARRIAGE §1 > DUE PROCESS -- RIGHT TO MARRY > Headnote:
LEdHN[9][⬇] [9]

A 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. The U.S. Supreme Court has recognized these connections by describing the varied rights as a unified whole: The right to marry, establish a home and bring up children is a central part of the liberty protected by the *Due Process Clause*. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

[*612]**

CONSTITUTIONAL LAW §525.5MARRIAGE §1 > DUE PROCESS -- RIGHT TO MARRY > Headnote:
LEdHN[10][⬇] [10]

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 U.S. Supreme 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. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §17 CONSTITUTIONAL LAW §525.5MARRIAGE §1 > DUE PROCESS -- RIGHT TO MARRY > Headnote:
LEdHN[11][⬇] [11]

Washington v. 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 the U.S. Supreme Court has used in discussing other fundamental rights, including marriage and intimacy. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §313.3 CONSTITUTIONAL LAW §525.5MARRIAGE §1 > DUE PROCESS -- EQUAL PROTECTION -- RIGHT TO MARRY > Headnote:
LEdHN[12][⬇] [12]

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. This interrelation of the two principles furthers the U.S. Supreme Court's understanding of what freedom is and must become. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §348.5 > EQUAL PROTECTION -- UNJUSTIFIED INEQUALITY > Headnote:
LEdHN[13][⬇] [13]

RECEIVED by MSC 3/24/2023 10:46:55 PM

In interpreting the *Equal Protection Clause*, the U.S. Supreme Court has recognized that new insights and societal understandings can reveal unjustified inequality within the United States' most fundamental institutions that once passed unnoticed and unchallenged. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §348.5MARRIAGE §1 > EQUAL PROTECTION -- INSTITUTION OF MARRIAGE > Headnote:
LEdHN[14][⬇] [14]

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. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

[*613]**

CONSTITUTIONAL LAW §348.5 CONSTITUTIONAL LAW §525.5 > FOURTEENTH AMENDMENT -- SAME-SEX COUPLES -- RIGHT TO MARRY > Headnote:
LEdHN[15][⬇] [15]

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. Same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. *Baker v. Nelson, 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65 (1972)* must be and is overruled, and *Mich. Const. art. I, § 25*, *Ky. Const. § 233a*, *Ohio Rev. Code Ann. § 3101.01* (2008), and *Tenn. Const. art. XI, § 18* are held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §101 > FUNDAMENTAL RIGHTS -- GOVERNMENTAL POWER -- JUDICIAL REDRESS > Headnote:
LEdHN[16][⬇] [16]

The Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. The Supreme Court has noted 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. Indeed, it is most often through democracy that liberty is preserved and protected in one's life. But the 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. Thus, when the rights of persons are violated, the Constitution requires redress by the courts, notwithstanding the more general value of democratic decisionmaking. This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §101 > FUNDAMENTAL RIGHTS -- JUDICIAL REDRESS > Headnote:
LEdHN[17][⬇] [17]

The dynamic of the United States' 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 the United States' basic charter. An individual can invoke a right to constitutional

RECEIVED by MSC 3/24/2023 10:46:55 PM

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 is 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. This is why fundamental rights may not be submitted to a vote; they depend on the outcome of no elections. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

CONSTITUTIONAL LAW §525.5MARRIAGE §1 > RIGHT TO MARRY -- SAME-SEX COUPLES > Headnote:

LEdHN[18][] [18]

Same-sex couples may exercise the fundamental right to marry in all States. It follows 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. (Kennedy, J., joined by Sotomayor, Ginsburg, Breyer, and Kagan, JJ.)

Syllabus

[*644] [*614] [**2588]** 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 **[****2]** 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. ___ - ___, 192 L. Ed. 2d, at 619-635*.

(a) Before turning to the governing principles and precedents, it is appropriate to note the history of the subject now before the Court. *Pp. ___ - ___, 192 L. Ed. 2d, at 619-623*.

(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 **[***615]** from seeking to devalue marriage, seek it for themselves because of their respect--and need--for its privileges and responsibilities, as illustrated by the petitioners' own experiences. *Pp. ___ - ___, 192 L. Ed. 2d, at 619-621*.

(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 **[****3]** 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 **[*645]** 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 2013, this

RECEIVED by MSC 3/24/2023 10:46:55 PM

Court overruled its 1986 decision in *Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140*, which upheld a Georgia law that criminalized certain homosexual acts, concluding laws making same-sex intimacy a crime "demea[n] the lives of homosexual persons." **[**2589]** *Lawrence v. Texas, 539 U.S. 558, 575, 123 S. Ct. 2472, 156 L. Ed. 2d 508*. In 2012, the federal Defense of Marriage Act was also struck down. *United States v. Windsor, 570 U.S. 744, 133 S. Ct. 2675, 186 L. Ed. 2d 808*. Numerous same-sex marriage cases reaching the federal **[****4]** courts and state supreme courts have added to the dialogue. *Pp. ___ - ___, 192 L. Ed. 2d, at 621-623*.

(b) The *Fourteenth Amendment* requires a State to license a marriage between two people of the same sex. *Pp. ___ - ___, 192 L. Ed. 2d, at 623-634*.

(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, 92 S. Ct. 1029, 31 L. Ed. 2d 349*; *Griswold v. Connecticut, 381 U.S. 479, 484-486, 85 S. Ct. 1678, 14 L. Ed. 2d 510*. 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 stricture, 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, 87 S. Ct. 1817, 18 L. Ed. 2d 1010*, invalidated bans on interracial unions, and *Turner v. Safley, 482 U.S. 78, 95, 107 S. Ct. 2254, 96 L. Ed. 2d 64*, held that prisoners could not be denied the right to marry. To be sure, these cases presumed a relationship involving opposite-sex partners, as **[***616]** did *Baker v. Nelson, 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65*, 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. **[****5]** But other, more instructive precedents have expressed broader principles. See, *e.g.*, *Lawrence, supra, at 574, 123 S. Ct. 2472, 156 L. Ed. 2d 508*. 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 **[*646]** protected. See, *e.g.*,*Eisenstadt, supra, at 453-454, 92 S. Ct. 1029, 31 L. Ed. 2d 349*. This analysis compels the conclusion that same-sex couples may exercise the right to marry. *Pp. ___ - ___, 192 L. Ed. 2d, at 623-625*.

(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, 87 S. Ct. 1817, 18 L. Ed. 2d 1010*. Decisions about marriage are among the most intimate that an individual can make. See *Lawrence, supra, at 574, 123 S. Ct. 2472, 156 L. Ed. 2d 508*. 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 **[****6]** 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, 85 S. Ct. 1678, 14 L. Ed. 2d 510*, and was acknowledged in *Turner, supra, at 95, 107 S. Ct. 2254, 96 L. Ed. 2d 64*. Same-sex couples have the same right as opposite-sex couples to enjoy

RECEIVED by MSC 3/24/2023 10:46:55 PM

intimate association, a right extending beyond mere freedom from laws making same-sex intimacy a criminal offense. See *Lawrence, supra, at 567, 123 S. Ct. 2472, 156 L. Ed. 2d 508*.

[2590]** 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, 45 S. Ct. 571, 69 L. Ed. 1070*. 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 772, 133 S. Ct. 2675, 186 L. Ed. 2d 808*. 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 **[****7]** 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, 8 S. Ct. 723, 31 L. Ed. 654*. States have contributed to the fundamental character of marriage by **[***617]** 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 **[*647]** 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. ___ - ___, 192 L. Ed. 2d, at 625-629*.

(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 **[****8]** co-extensive, 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, 98 S. Ct. 673, 54 L. Ed. 2d 618*, 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, 101 S. Ct. 1195, 67 L. Ed. 2d 428*, and confirmed the relation between liberty and equality, see, *e.g.*, *M. L. B. v. S. L. J., 519 U.S. 102, 120-121, 117 S. Ct. 555, 136 L. Ed. 2d 473*.

The Court has acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. See *Lawrence, supra at 575, 123 S. Ct. 2472, 156 L. Ed. 2d 508*. 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 **[****9]** denial **[**2591]** works a grave and continuing harm, serving to

RECEIVED by MSC 3/24/2023 10:46:55 PM

disrespect and subordinate gays and lesbians. *Pp. ___ - ___, 192 L. Ed. 2d, at 629-631*.

(4) 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. 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. ___ - ___, 192 L. Ed. 2d, at 631*.

[*648] (5) There may be an initial inclination to await further legislation, litigation, **[***618]** 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 **[****10]** 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. The 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. ___ - ___, 192 L. Ed. 2d, at 631-634*.

(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. ___ - ___, 192 L. Ed. 2d, at 634-635*.

772 F. 3d 388, reversed.

Counsel: Mary L. Bonauto argued the cause for petitioner on Question 1.

Donald B. Verrilli, [**11] Jr.**, argued the cause for the United States, as amicus curiae, by special leave of court on Question 1.

John J. Bursch argued the cause for respondents on Question 1.

Douglas Hallward-Driemeier for the petitioners on Question 2.

Joseph F. Whalen for the respondents on Question 2.

Judges: 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, ___.

Opinion by: Kennedy

RECEIVED by MSC 3/24/2023 10:46:55 PM

Opinion

[*651] [2593]** Justice **Kennedy** delivered the opinion of the Court.

HN1[↑] *LEdHN[1]*[↑] [1] The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, **[*652]** 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.

[*653] I

These cases come from Michigan, Kentucky, Ohio, **[****12]** and Tennessee, States that define marriage as a union between one **[*654]** man and one woman. See, *e.g.*, *Mich. Const., Art. I, §25*; *Ky. Const. §233A*; *Ohio Rev. Code Ann. §3101.01* (Lexis 2008); **[***619]** *Tenn. Const., Art. XI, §18*. The petitioners are 14 same-sex couples and two men whose same-sex partners are **[*655]** 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.

[*656] The 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. 1118, 135 S. Ct. 1039; 190 L. Ed. 2d 908 (2015)*. The first, presented by the cases from Michigan and Kentucky, is whether the *Fourteenth Amendment* requires a State to license a marriage **[****13]** 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 **[**2594]** 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 **[*657]** 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, **[****14]** 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

RECEIVED by MSC 3/24/2023 10:46:55 PM

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.

[*620]** 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 **[****15]** 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. **[*658]** 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 **[****16]** 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 **[**2595]** 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 **[****17]** needs joined their family. Michigan, however, permits **[*659]** 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 **[***621]** Ijpe DeKoe and his partner Thomas Kostura, co-plaintiffs in the Tennessee case, fell in love. In

RECEIVED by MSC 3/24/2023 10:46:55 PM

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 **[****18]** 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 **[*660]** 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, **[****19]** 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. **[**2596]** 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 **[****20]** 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 **[***622]** 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 **[*661]** 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

RECEIVED by MSC 3/24/2023 10:46:55 PM

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 **[****21]** 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, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (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, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (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 ***[*662]*** *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, 123 S. Ct. 2472, 156 L. Ed. 2d 508*.

Against this background, **[****22]** 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 **[**2597]** 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 **[***623]** 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. 744, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013)*, this Court invalidated DOMA to the extent it barred the **[****23]** 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 764, 133 S. Ct. 2675, 186 L. Ed. 2d at 823*.

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 **[*663]** 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

RECEIVED by MSC 3/24/2023 10:46:55 PM

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 **[****24]** 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

HN2[↑] ***LEdHN[2]***[↑] [2] 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, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (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.*, **[**2598]** *Eisenstadt v. Baird, 405 U.S. 438, 453, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972)*; *Griswold v. Connecticut, 381 U.S. 479, 484-486, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965)*.

HN3[↑] ***LEdHN[3]***[↑] [3] 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 **[*664]** to any formula." *Poe v. Ullman, 367 U.S. 497, 542, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961)* (Harlan, J., dissenting). Rather, it requires courts to exercise **[***624]** reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. See **[****25]** *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 tradition guide and discipline this inquiry but do not set its outer boundaries. See *Lawrence, supra, at 572, 123 S. Ct. 2472, 156 L. Ed. 2d 508*. That method respects our history and learns from it without allowing the past alone to rule the present.

HN4[↑] ***LEdHN[4]***[↑] [4] 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 ***HN5***[↑] ***LEdHN[5]***[↑] [5] the right to marry is protected by the Constitution. In *Loving v. Virginia, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (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 **[****26]** that holding in *Zablocki v. Redhail, 434 U.S. 374, 384, 98 S. Ct. 673, 54 L. Ed. 2d 618 (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, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987)*, which held the right to marry was abridged by regulations limiting the privilege of prison inmates to marry. Over time and in other

RECEIVED by MSC 3/24/2023 10:46:55 PM

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, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996)*; *Cleveland Bd. of Ed. v. LaFleur, **[*665]** 414 U.S. 632, 639-640, 94 S. Ct. 791, 39 L. Ed. 2d 52 (1974)*; *Griswold, supra, at 486, 85 S. Ct. 1678, 14 L. Ed. 2d 510*; *Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942)*; *Meyer v. Nebraska, 262 U.S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 1042 (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, 93 S. Ct. 37, 34 L. Ed. 2d 65*, 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.*, **[**2599]** *Lawrence, 539 U.S., at 574, 123 S. Ct. 2472, 156 L. Ed. 2d 508*; *Turner, supra, at 95, 107 S. Ct. 2254, 96 L. Ed. 2d 64*; *Zablocki, supra **[****27]** , at 384, 98 S. Ct. 673, 54 L. Ed. 2d 618*; *Loving, **[***625]** supra, at 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010*; *Griswold, supra, at 486, 85 S. Ct. 1678, 14 L. Ed. 2d 510*. 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, 92 S. Ct. 1029, 31 L. Ed. 2d 349*; *Poe, supra, at 542-553, 81 S. Ct. 1752, 6 L. Ed. 2d 989* (Harlan, J., dissenting).

This analysis compels the conclusion that ***HN6***[↑] ***LEdHN[6]***[↑] [6] 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 ***HN7***[↑] ***LEdHN[7]***[↑] [7] 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, 87 S. Ct. 1817, 18 L. Ed. 2d 1010*; see also *Zablocki, supra, at 384, 98 S. Ct. 673, 54 L. Ed. 2d 618* (observing *Loving* held "the right to marry is of fundamental importance **[*666]** 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, 123 S. Ct. 2472, 156 L. Ed. 2d 508*. Indeed, the Court has **[****28]** 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, 98 S. Ct. 673, 54 L. Ed. 2d 618*.

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

RECEIVED by MSC 3/24/2023 10:46:55 PM

freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. See *Windsor, 570 U.S., at 770 -772, 133 S. Ct. 2675, 186 L. Ed. 2d at 828*. 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, 87 S. Ct. 1817, 18 L. Ed. 2d 1010* ("[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 **[****29]** 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, 85 S. Ct. 1678, 14 L. Ed. 2d 510*. Suggesting that marriage is a right "older than the *Bill of Rights*," *Griswold* described marriage this way:

> **[*667]** **[***626]** "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 **[**2600]** as any involved in our prior decisions. " *Id., at 486, 85 S. Ct. 1678, 14 L. Ed. 2d 510*.

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, 107 S. Ct. 2254, 96 L. Ed. 2d 64*. The right to marry thus dignifies couples who "wish to define themselves by their commitment to each other." *Windsor, supra, at 763, 133 S. Ct. 2675, 186 L. Ed. 2d at 823*. 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 **[****30]** and understanding and assurance that while both still live there will be someone to care for the other.

HN8[↑] ***LEdHN[8]***[↑] [8] 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, 123 S. Ct. 2472, 156 L. Ed. 2d 508*. 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.

HN9[↑] ***LEdHN[9]***[↑] [9] 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, 45 S. Ct. 571, 69 L. Ed. 1070 (1925)*; **[*668]** *Meyer, 262 U.S., at 399, 43 S. Ct. 625, 67 L. Ed. 1042*. 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, 98 S. Ct. 673, 54 L. Ed. 2d 618* (quoting *Meyer, supra, at 399, 43 S. Ct. 625, 67 L. Ed. 1042*). Under the laws of the several **[****31]** 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

RECEIVED by MSC 3/24/2023 10:46:55 PM

in their daily lives." *Windsor, supra, at 772, 133 S. Ct. 2675, 186 L. Ed. 2d at 828*. 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 **[***627]** 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 **[****32]** 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 **[**2601]** here thus harm and humiliate the children of same-sex couples. See *Windsor, supra, at 772, 133 S. Ct. 2675, 186 L. Ed. 2d at 828*.

[*669] That is not to say the right to marry is less meaningful for those who do not or cannot have children. ***HN10***[⬆] ***LEdHN[10]***[⬆] [10] 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 **[****33]** 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, 8 S. Ct. 723, 31 L. Ed. 654 (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, 8 S. Ct. 723, 31 L. Ed. 654*. 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 **[*670]** free to vary the benefits they confer **[****34]** 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

RECEIVED by MSC 3/24/2023 10:46:55 PM

authority; adoption rights; the rights and benefits of survivors; birth and death certificates; **[***628]** 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 765, 133 S. Ct. 2675, 186 L. Ed. 2d at 824*. 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 **[****35]** 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 **[**2602]** 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 **[*671]** 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, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997)*, which called for a "'careful description'" of fundamental rights. They assert **[****36]** 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. ***HN11***[↑] ***LEdHN[11]***[↑] [11] *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, 117 S. Ct. 2258, 138 L. Ed. 2d 772* (Souter, J., concurring in judgment); *id., at 789-792, 117 S. Ct. 2258, 138 L. Ed. 2d 772* (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 **[***629]** justification **[****37]** 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, 87 S. Ct. 1817, 18 L. Ed. 2d 1010*; *Lawrence, 539 U.S., at 566-567, 123 S. Ct. 2472, 156 L. Ed. 2d 508*.

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 **[*672]**

RECEIVED by MSC 3/24/2023 10:46:55 PM

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.

HN12[⬆] ***LEdHN[12]***[⬆] [12] 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 **[****38]** the equal protection of the laws. The *Due Process Clause* and the *Equal Protection Clause* **[**2603]** 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, 117 S. Ct. 555, 136 L. Ed. 2d 473*; *id., at 128-129, 117 S. Ct. 555, 136 L. Ed. 2d 473* (Kennedy, J., concurring in judgment); *Bearden v. Georgia, 461 U.S. 660, 665, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (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 **[*673]** 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, 87 S. Ct. 1817, 18 L. Ed. 2d 1010*. With this link to equal protection the Court proceeded to hold **[****39]** 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 **[***630]** 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, 98 S. Ct. 673, 54 L. Ed. 2d 618*. It was the essential nature of the marriage right, discussed at length in *Zablocki*, see *id., at 383-387, 98 S. Ct. 673, 54 L. Ed. 2d 618*, that made apparent the law's incompatibility with requirements of equality. Each concept—liberty and equal protection—leads to a stronger understanding **[****40]** of the other.

Indeed, ***HN13***[⬆] ***LEdHN[13]***[⬆] [13] 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

RECEIVED by MSC 3/24/2023 10:46:55 PM

in the 1970's and 1980's. Notwithstanding the gradual erosion of the doctrine of coverture, see *supra*, at 6, invidious sex-based classifications in marriage remained **[*674]** 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 **[**2604]** 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, 101 S. Ct. 1195, 67 L. Ed. 2d 428 (1981)*; *Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 100 S. Ct. 1540, 64 L. Ed. 2d 107 (1980)*; *Califano v. Westcott, 443 U.S. 76, 99 S. Ct. 2655, 61 L. Ed. 2d 382 (1979)*; *Orr v. Orr, 440 U.S. 268, 99 S. Ct. 1102, 59 L. Ed. 2d 306 (1979)*; *Califano v. Goldfarb, 430 U.S. 199, 97 S. Ct. 1021, 51 L. Ed. 2d 270 (1977)* (plurality **[****41]** opinion); *Weinberger v. Wiesenfeld, 420 U.S. 636, 95 S. Ct. 1225, 43 L. Ed. 2d 514 (1975)*; *Frontiero v. Richardson, 411 U.S. 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973)*. Like *Loving* and *Zablocki*, these precedents show ***HN14***[⬆] ***LEdHN[14]***[⬆] [14] 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, 117 S. Ct. 555, 136 L. Ed. 2d 473*. 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, 92 S. Ct. 1029, 31 L. Ed. 2d **[***631]** 349*. And in *Skinner* v. *Oklahoma ex rel. Williamson*, the Court invalidated under both principles a law that allowed sterilization of habitual criminals. See *316 U.S., at 538-543, 62 S. Ct. 1110, 86 L. Ed. 1655*.

In *Lawrence*, the Court acknowledged the interlocking nature of these constitutional safeguards in the context of the **[*675]** legal treatment of gays and lesbians. See *539 U.S., at 575, 123 S. Ct. 2472, 156 L. Ed. 2d 508*. 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. **[****42]** 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, 123 S. Ct. 2472, 156 L. Ed. 2d 508*.

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, 98 S. Ct. 673, 54 L. Ed. 2d 618*; *Skinner, 316 U.S., at 541, 62 S. Ct. 1110, 86 L. Ed.*

RECEIVED by MSC 3/24/2023 10:46:55 PM

1655.

These considerations lead to the conclusion that HN15[↑] LEdHN[15][↑] [15] the right to marry is a fundamental right inherent in the liberty of the person, and under the **[****43]** 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 **[**2605]** 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 the petitioners in these cases are now held invalid to the extent they exclude **[*676]** 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 **[***632]** campaigns, as well as countless studies, papers, **[****44]** 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,HN16[↑] LEdHN[16][↑] [16] 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 **[*677]** principle in Schuette v. BAMN, 572 U.S. 291, 134 S. Ct. 1623, 188 L. Ed. 2d 613 (2014), noting the "right of citizens to debate so they can learn and decide **[****45]** and then, through the political process, act in concert to try to shape the course of their own times." Id., at 312, 134 S. Ct. 1623, 188 L. Ed. 2d at 628. 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 311, 134 S. Ct. 1623, 188 L. Ed. 2d at 628. 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 313, 134 S. Ct. 1623, 188 L. Ed. 2d at 628. This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.

HN17[↑] LEdHN[17][↑] [17] 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.

RECEIVED by MSC 3/24/2023 10:46:55 PM

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 **[**2606]** the Constitution "was to withdraw certain subjects from **[****46]** 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, 63 S. Ct. 1178, 87 L. Ed. 1628 (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 **[***633]** **[*678]** same-sex intimacy. See *478 U.S., at 186, 190-195, 106 S. Ct. 2841, 92 L. Ed. 2d 140*. 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, 106 S. Ct. 2841, 92 L. Ed. 2d 140* (Blackmun, J., joined by Brennan **[****47]**, Marshall, and Stevens, JJ., dissenting); *id., at 214, 106 S. Ct. 2841, 92 L. Ed. 2d 140* (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, 123 S. Ct. 2472, 156 L. Ed. 2d 508*. 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 **[****48]** 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 **[*679]** 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 **[**2607]** between natural procreation and marriage. That argument, however, rests on a counterintuitive view of opposite-sex couple's

RECEIVED by MSC 3/24/2023 10:46:55 PM

decisionmaking processes regarding marriage and parenthood. Decisions about whether to marry and raise children are based on many personal, **[****49]** 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 **[***634]** 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 **[*680]** that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations **[****50]** 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, 63 S. Ct. 207, 87 L. Ed. 279 (1942)* (internal quotation marks omitted). Leaving the current state of affairs in place would maintain and promote instability and uncertainty. For some couples, even an ordinary drive into a neighboring State to visit family **[****51]** 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 **[*681]** recognize those marriages performed elsewhere are undermined. See Tr. of Oral Arg. on Question 2, p. 44. The Court, in this decision, holds***HN18***[↑] ***LEdHN[18]***[↑] [18] same-sex couples may exercise the fundamental right to marry in all States. It **[**2608]** 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.

[*635]** * * *

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital

RECEIVED by MSC 3/24/2023 10:46:55 PM

union, two people become something greater than once they were. As some of the petitioners in these **[****52]** 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)

[*682] *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)

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)

[2609]** ***[***636]*** *Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (ND Cal. 2010)*

[*683] *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)

RECEIVED by MSC 3/24/2023 10:46:55 PM

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 U.S. Dist. LEXIS 162583, 2013 WL 6044329 (MD La., Nov. 14, 2013)

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

Lee v. Orr, 2013 U.S. Dist. LEXIS 173801, 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 U.S. Dist. LEXIS 21620, 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 U.S. Dist. LEXIS 100894, 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)

[*684] *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)

[*637]** *Fisher-Borne v. Smith, 14 F. Supp. 3d 695 (MDNC 2014)*

Majors v. Horne, 14 F. Supp. 3d 1313 (Ariz. 2014)

Connolly v. Jeanes, 73 F. Supp. 3d 1094, 2014 U.S. Dist. LEXIS 147950, 2014 WL 5320642 (Ariz., Oct.

RECEIVED by MSC 3/24/2023 10:46:55 PM

17, 2014)

Guzzo v. Mead, 2014 U.S. Dist. LEXIS 148481, 2014 WL 5317797 (Wyo., Oct. 17, 2014)

Conde-Vidal v. Garcia-Padilla, 54 F. Supp. 3d 157 (PR 2014)

Marie v. Moser, 65 F. Supp. 3d 1175, 2014 U.S. Dist. LEXIS 157093, 2014 WL 5598128 (Kan., Nov. 4, 2014)

[2610]** Lawson v. Kelly, 58 F. Supp. 3d 923 (WD Mo. 2014)

McGee v . Cole, 66 F. Supp. 3d 747, 2014 U.S. Dist. LEXIS 158680, 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, 64 F. Supp. 3d 1260, 2014 U.S. Dist. LEXIS 165898, 2014 WL 6685391 (ED Ark., Nov. 25, 2014)

Campaign for Southern Equality v. Bryant, 64 F. Supp. 3d 906, 2014 U.S. Dist. LEXIS 165913, 2014 WL 6680570 (SD Miss., Nov. 25, 2014)

Inniss v. Aderhold, 80 F. Supp. 3d 1335, 2015 U.S. Dist. LEXIS 9697, 2015 WL 300593 (ND Ga., Jan. 8, 2015)

Rosenbrahn v. Daugaard, 61 F. Supp. 3d 862, 61 F. Supp. 3d 862, 2015 U.S. Dist. LEXIS 4018 (S. D., 2015)

Caspar v. Snyder, 77 F. Supp. 3d 616, 2015 U.S. Dist. LEXIS 4644, 2015 WL 224741 (ED Mich., Jan. 15, 2015)

Searcey v. Strange, 81 F. Supp. 3d 1285, 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)

[*685] 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)

[*638]** 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, 821 N.Y.S.2d 770 (2006)

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

In re Marriage Cases, 43 Cal. 4th 757, 76 Cal. Rptr. 3d 683, 183 P. 3d 384 (2008)

RECEIVED by MSC 3/24/2023 10:46:55 PM

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

Strauss v. Horton, 46 Cal. 4th 364, 93 Cal. Rptr. 3d 591, 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, 200 So. 3d 495, 2015 Ala. LEXIS 33, 2015 WL 892752 (Ala., Mar. 3, 2015)

[2611]** 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

[*686] 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, 2013 N. M. LEXIS 414, 316 P. 3d 865 (2013)

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

Dissent by: Roberts; Scalia; Thomas; Alito

Dissent

Chief Justice **Roberts**, with whom Justice **Scalia** and Justice **Thomas** join, dissenting.

Petitioners make strong arguments rooted in social **[****53]** 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 **[***639]** 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)

RECEIVED by MSC 3/24/2023 10:46:55 PM

(capitalization).

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. **[****54]** In short, our Constitution does not enact any one theory of marriage. The people of a State are free to expand marriage **[*687]** 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 **[**2612]** 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 **[****55]** to remake society according to its own "new insight" into the "nature of injustice." *Ante, at ___, ___, 192 L. Ed. 2d, at 624, 631*. 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, 25 S. Ct. 539, 49 L. Ed. 937 (1905)* (Holmes, J., dissenting). Accordingly, "courts are not concerned with the wisdom or policy of legislation." *Id., at 69, 25 S. Ct. 539, 49 L. Ed. 937* (Harlan, J., dissenting). The majority today neglects that restrained conception of the judicial role. It seizes for itself a question the **[*688]** 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 ___, 192 L. Ed. 2d, at 629*. I have no choice but to dissent.

Understand well what this dissent is **[****56]** 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 **[***640]** 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

RECEIVED by MSC 3/24/2023 10:46:55 PM

"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 ___, 192 L. Ed. 2d, at 620*, 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. 565, 577, 134 S. Ct. 1811, 188 L. Ed. 2d 835, 846 (2014)*.

A

As the majority acknowledges, marriage "has existed for millennia and **[****57]** across civilizations." *Ante, at ___, 192 L. Ed. 2d, at 619*. For all those millennia, across all those civilizations, "marriage" referred to only one relationship: the union of a man and a woman. See *ibid*. Tr. of Oral Arg. on Question 1, p. 12 **[*689]** (petitioners conceding that they are not aware of any society that permitted same-sex marriage before 2001). **[**2613]** 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. 744, 763, 133 S. Ct. 2675, 186 L. Ed. 2d 823 (2013)*.

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 lesbians. 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. **[****58]** 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 **[***641]** 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 **[*690]** 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 **[****59]** care for children that the mere desire for children, and the sex that makes children possible, does not solve." J. 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 ___, 192 L. Ed. 2d, at 621*. 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

RECEIVED by MSC 3/24/2023 10:46:55 PM

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 **[****60]** nothing about marriage, and the Framers thereby entrusted the States with "[t]he whole subject of the domestic relations of husband and wife." **[**2614]** *Windsor, 570 U.S., at 767, 133 S. Ct. 2675, 186 L. Ed. 2d 824* (quoting *In re Burrus, 136 U.S. 586, 593-594, 10 S. Ct. 850, 34 L. Ed. 500 (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 **[*691]** 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 **[****61]** 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 **[***642]** 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, 5 S. Ct. 747, 29 L. Ed. 47 (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, 8 S. Ct. 723, 31 L. Ed. 654 (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, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967)*; see *Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942)*. More recent cases have directly connected the right to marry with the "right to procreate." *Zablocki v. Redhail, 434 U.S. 374, 386, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978)*.

As the majority notes, some aspects of marriage have changed over time. Arranged marriages have largely given **[*692]** 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, **[****62]** 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, 87 S. Ct. 1817, 18 L. Ed. 2d 1010*.

The majority observes that these developments "were not mere superficial changes" in marriage, but rather "worked deep transformations in its structure." *Ante, at ___ - ___, 192 L. Ed. 2d, at 621*.

RECEIVED by MSC 3/24/2023 10:46:55 PM

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 **[**2615]** that the "history of marriage is one of both continuity and change," but the core meaning of marriage has endured. *Ante, at ___, 192 L. Ed. 2d, at 621*.

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 **[****63]** their analogy to *Loving*, and this Court summarily dismissed an appeal. *Baker v. Nelson, 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65 (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 **[*693]** State Constitution to require recognition of same-sex marriage, many States—including the **[***643]** 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 **[****64]** 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 **[*694]** 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 **[****65]** 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

RECEIVED by MSC 3/24/2023 10:46:55 PM

same-sex couples to marry. *Ante, at ___, 192 L. Ed. 2d, at 625*. In reality, however, **[**2616]** 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, 25 S. Ct. 539, 49 L. Ed. 937*. 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" **[***644]** Clause in the Constitution. See *ante, at ___, ___, 192 L. Ed. 2d, at 619, 626*. They **[****66]** 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, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993)*. The theory is that some liberties are "so rooted in the traditions **[*695]** 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, 54 S. Ct. 330, 78 L. Ed. 674 (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, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997)* (internal quotation marks omitted); see Kennedy, Unenumerated Rights and the Dictates of Judicial Restraint 13 (1986) (Address at Stanford University) ("One can conclude that certain essential, or fundamental, rights should exist in any just society. It **[****67]** 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, 60 U.S. 393, 19 How. 393, 15 L. Ed. 691 (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, 19 How. 393, 15 L. Ed. 691*. In a dissent that has outlasted the majority opinion, Justice **[**2617]** Curtis explained that **[*696]** 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 **[****68]** meaning, "we have no longer a Constitution; we are under the

RECEIVED by MSC 3/24/2023 10:46:55 PM

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, 19 How. 393, 15 L. Ed. 691*.

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 **[***645]** interferences with the rights of the individual," and "undue interference with liberty of person and freedom of contract." *198 U.S., at 60, 61, 25 S. Ct. 539, 49 L. Ed. 937*. 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, 25 S. Ct. 539, 49 L. Ed. 937*.

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, 25 S. Ct. 539, 49 L. Ed. 937* (opinion of Harlan, J.). The majority's contrary conclusion **[****69]** required adopting as constitutional law "an economic theory which a large part of the country does not entertain." *Id., at 75, 25 S. Ct. 539, 49 L. Ed. 937* (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 **[*697]** whether statutes embodying them conflict with the Constitution." *Id., at 75-76, 25 S. Ct. 539, 49 L. Ed. 937*.

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, 43 S. Ct. 394, 67 L. Ed. 785 (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 **[****70]** 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, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963)*; see *Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423, 72 S. Ct. 405, 96 L. Ed. 469 (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 **[**2618]** with a particular school of thought." *Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488, 75 S. Ct. 461, 99 L. Ed. 563 (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 **[***646]** due process cases have stressed the need for "judicial self-restraint."

RECEIVED by MSC 3/24/2023 10:46:55 PM

Collins v. Harker Heights, 503 U.S. 115, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992). Our precedents have required that implied fundamental rights be "objectively, **[*698]** deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered **[****71]** liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg, 521 U.S., at 720-721, 117 S. Ct. 2258, 138 L. Ed. 2d 772* (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, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009)*; *Flores, 507 U.S., at 303113 S. Ct. 1439, 123 L. Ed. 2d 1*; *United States v. Salerno, 481 U.S. 739, 751, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)*; *Moore v. East Cleveland, 431 U.S. 494, 503, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977)* (plurality opinion); see also *id., at 544, 97 S. Ct. 1932, 52 L. Ed. 2d 531* (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, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (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, 117 S. Ct. 2258, 138 L. Ed. 2d 772*)).

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 ___, 192 L. Ed. 2d, at 628*. But given the few "guideposts for responsible decisionmaking in this unchartered area," **[****72]** *Collins, 503 U.S., at 125, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261*, "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, 97 S. Ct. 1932, 52 L. Ed. 2d 531* (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 identifying fundamental rights, *ante, at ___ - ___, 192 L. Ed. 2d, at 623-624*, does not provide a meaningful constraint on a judge, for "what he is really likely to be 'discovering,' **[*699]** 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, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965)* (Harlan, J., concurring in judgment).

B

The majority acknowledges none of **[***647]** this doctrinal background, and it is easy to see why: Its aggressive application of substantive due process breaks sharply with decades **[**2619]** 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 **[****73]** 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 ___, ___, ___, ___, 192 L. Ed. 2d, at 619, 620, 621, 635*. 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

RECEIVED by MSC 3/24/2023 10:46:55 PM

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, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987)*; *Zablocki, 434 U.S., at 383, 98 S. Ct. 673, 54 L. Ed. 2d 618*; see *Loving, 388 U.S., at 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010*. 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. **[*700]** 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 **[****74]** 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 ___ - ___, n. 5, 192 L. Ed. 2d, at 666* (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 ___, 192 L. Ed. 2d, at 624*.

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 808, 133 S. Ct. 2675, 186 L. Ed. 2d at 852* (Alito, J., dissenting) ("What Windsor and the United States **[****75]** 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.

[*648]** 2

The majority suggests that "there are other, more instructive precedents" informing the right to marry. *Ante, at ___, 192 L. Ed. 2d, at 624*. Although not entirely clear, this reference seems to correspond **[*701]** to a line of cases discussing an implied fundamental "right of privacy." *Griswold, 381 U.S., at 486, 85 S. Ct. 1678, 14 L. Ed. 2d 510*. In the first of those cases, the Court invalidated a criminal law that banned the use of contraceptives. *Id., at 485-486, 85 S. Ct. 1678, 14 L. Ed. 2d 510*. The Court stressed the invasive nature of the ban, **[**2620]** which threatened the intrusion of "the police to search the sacred precincts of marital bedrooms." *Id., at 485, 85 S. Ct. 1678, 14 L. Ed. 2d 510*. 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, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972)* (internal quotation marks omitted); see *Olmstead v. United States, 277 U.S. 438, 478, 48 S. Ct. 564, 72 L. Ed. 944 (1928)* (Brandeis, J., dissenting).

The Court also invoked the right to privacy in *Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003)*, which struck down a Texas statute criminalizing homosexual sodomy.

RECEIVED by MSC 3/24/2023 10:46:55 PM

Lawrence relied on the position that criminal sodomy laws, like bans on contraceptives, invaded **[****76]** 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, 123 S. Ct. 2472, 156 L. Ed. 2d 508*.

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 loneliness" by the laws challenged in these cases—no one. *Ante, at ___, 192 L. Ed. 2d, at 635*. 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, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961)*. As the majority recounts, that opinion states that "[d]ue process has not been reduced to any formula." *Id., at 542, 81 S. Ct. 1752, 6 L. Ed. 2d 989*. But far from conferring the broad interpretive discretion that the majority discerns, Justice Harlan's opinion makes clear that **[*702]** courts implying fundamental rights are not "free to roam where unguided speculation might take them." *Ibid.* They must instead have "regard **[****77]** 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, 81 S. Ct. 1752, 6 L. Ed. 2d 989*.

In sum, the privacy cases provide no support for the majority's position, because petitioners do not seek privacy. Quite the opposite, they seek **[***649]** 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, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989)*; *San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 35-37, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973)*; *post, at ___ - ___, 192 L. Ed. 2d, at 664-667* (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 **[****78]** from precedent, the majority goes out of its way to jettison the "careful" approach to implied fundamental rights **[**2621]** taken by this Court in *Glucksberg*. *Ante, at ___, 192 L. Ed. 2d, at 628* (quoting *521 U.S., at 721, 117 S. Ct. 2258, 138 L. Ed. 2d 772*). 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 **[*703]** 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, 25 S. Ct. 539, 49 L. Ed. 937*. The majority opens its opinion by announcing petitioners' right to "define and express their identity." *Ante, at ___ - ___, 192 L. Ed. 2d, at 618*. The majority later explains that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy." *Ante, at ___,*

RECEIVED by MSC 3/24/2023 10:46:55 PM

192 L. Ed. 2d, at 625. 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, 25 S. Ct. 539, 49 L. Ed. 937 (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 **[****79]** 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 ___, ___, 192 L. Ed. 2d, at 624, 624. 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 ___, 192 L. Ed. 2d, at 629. 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, 25 S. Ct. 539, 49 L. Ed. 937 ("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 **[***650]** the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights." Ante, at ___, 192 L. Ed. 2d, at 632. On that much, we agree. The Court was "asked"—and it agreed—to "adopt a cautious approach" to **[*704]** implying fundamental rights after the debacle of the *Lochner* era. Today, the majority casts caution aside and revives **[****80]** 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 **[**2622]** ___, 192 L. Ed. 2d, at 625, 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 **[****81]** couple has the constitutional right to marry because their children would otherwise "suffer the stigma of knowing their families are somehow lesser," ante, at ___, 192 L. Ed. 2d, at 627, 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 ___, 192 L. Ed. 2d, at 631, 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 **[*705]** 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).

RECEIVED by MSC 3/24/2023 10:46:55 PM

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. **[****82]** 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, ___, 192 L. Ed. 2d, [***651] at 634*. 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, 25 S. Ct. 539, 49 L. Ed. 937*.

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 **[****83]** the Court to be guided by law, not any particular school of social thought. As Judge Henry Friendly once put it, echoing Justice **[*706]** 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 **[**2623]** 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 **[****84]** "nature of injustice is that we may not always see it in our own times." *Ante, at ___, 192 L. Ed. 2d, at 624*. 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 ___, 192 L. Ed. 2d, at 630*. Absent from this portion of the opinion, however, **[*707]** 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

RECEIVED by MSC 3/24/2023 10:46:55 PM

classification the government is using is sufficiently related to the goals it is pursuing." G. Stone, L. Seidman, C. Sunstein, M. Tushnet, & **[***652]** P. Karlan, Constitutional Law 453 (7th ed. 2013). **[****85]** 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 ___, 192 L. Ed. 2d, at 629*.

The majority goes on to assert in conclusory fashion that the *Equal Protection Clause* provides an alternative basis for its holding. *Ante, at ___, 192 L. Ed. 2d, at 631*. 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, 129 S. Ct. 2504, 174 L. Ed. 2d 140 (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, 123 S. Ct. 2472, 156 L. Ed. 2d 508* (O'Connor, J., concurring in judgment).

It is important to note with precision which laws petitioners **[****86]** have challenged. Although they discuss some of the ancillary **[*708]** 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 **[**2624]** 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, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (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 **[****87]** 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 ___ - ___, 192 L. Ed. 2d, at 621-623*.

Nowhere is the majority's extravagant conception of judicial supremacy more evident than in its description—and dismissal—of the public debate **[***653]** 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 **[*709]** in these cases alone. *Ante, at ___, ___, ___, 192 L. Ed. 2d, at 623, 623, 632*. What would be the point of allowing the democratic

RECEIVED by MSC 3/24/2023 10:46:55 PM

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 ___, 192 L. Ed. 2d, at 629*. 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 **[****88]** 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 ___, 192 L. Ed. 2d, at 622*. 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 unresolved 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. 291, 313, 134 S. Ct. 1623, 188 L. Ed. 2d 613, 628 (2014)*.

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, **[****89]** 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 **[*710]** reexamining their positions, and either reversing **[**2625]** 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 **[****90]** is exactly **[***654]** how our system of government is supposed to work." *Post, at ___ - ___, 192 L. Ed. 2d, at 656* (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 **[*711]** this day, it is

RECEIVED by MSC 3/24/2023 10:46:55 PM

worth acknowledging what they have lost, and lost forever: the opportunity to win the true acceptance that comes from persuading their fellow **[****91]** 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 ___, 192 L. Ed. 2d, at 634*. The *First Amendment* guarantees, however, the freedom to "*exercise*" religion. **[****92]** 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 **[**2626]** 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 **[*712]** 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 **[***655]** 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 ___, 192 L. Ed. 2d, at 629*. That disclaimer is hard to square with the very next sentence, in which the majority explains that "the necessary **[****93]** consequence" of laws codifying the traditional definition of marriage is to "demea[n] or stigmatiz[e]" same-sex couples. *Ibid*. 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 definition of marriage—have acted to "lock . . . out," "disparage," "disrespect and subordinate," and inflict "[d]ignitary wounds" upon their gay and lesbian neighbors. *Ante, at ___, ___, ___, ___, 192 L. Ed. 2d, at 628, 629, 631, 633*. These apparent assaults on the character of fairminded people will have an effect, in society and in court. See *post, at ___ - ___, 192 L. Ed. 2d, at 672-673* (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 ___, 192 L. Ed. 2d, at 629*.

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 **[****94]** more sensitive

RECEIVED by MSC 3/24/2023 10:46:55 PM

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 **[*713]** 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.

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 **[****95]** is not of immense personal importance to me. The law can recognize as marriage whatever sexual attachments and living arrangements **[**2627]** it wishes, and can accord them favorable civil consequences, from tax treatment to rights of inheritance. Those civil consequences—and the public approval **[***656]** 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 **[*714]** 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 **[****96]** 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 government 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

---

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

[2] Accord, *Schuette v. BAMN, 572 U.S. 291, 311, 134 S. Ct. 1623, 188 L. Ed. 2d 613, 628 (2014)* (plurality opinion).

[3] *U. S. Const., Art. I, §10*.

RECEIVED by MSC 3/24/2023 10:46:55 PM

Credit" to the "public Acts" of other States, [4] prohibiting the free exercise of religion, [5] abridging the freedom **[*715]** of speech, **[****97]** [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?

[*657]** Of course not. It would be surprising to find a prescription regarding marriage in the Federal Constitution since, as the author **[**2628]** 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]
>
> "[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 **[****98]** 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 **[*716]** 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 **[****99]** not presume to know the extent of freedom in all of its 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

---

[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. 744, 766, 133 S. Ct. 2675, 186 L. Ed. 2d 808 at 814 (2013)* (internal quotation marks and citation omitted).

[11] *Id., at 767, 133 S. Ct. 2675, 186 L. Ed. 2d 808 at 824*)

[12] See *Town of Greece v. Galloway, 572 U.S. 565, 576-577, 134 S. Ct. 1811, 188 L. Ed. 2d 835, 846 (2014)*).

[13] *Ante, at ___, 192 L. Ed. 2d, at 624*.

[14] *Ibid*.

RECEIVED by MSC 3/24/2023 10:46:55 PM

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 **[***658]** of us. "History and tradition guide and discipline [our] inquiry but do not set its outer boundaries." [16] Thus, **[*717]** 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]

[2629]** This is a naked judicial claim to legislative—indeed, *super*-legislative—power; a claim fundamentally at odds with **[****100]** 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 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 **[*718]** character of the body voting **[****101]** 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 **[****102]** are entirely comfortable concluding that 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* **[***659]** 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

[15] *Ibid*.

[16] *Ibid*.

[17] *Ante, at ___ - ___, 192 L. Ed. 2d, at 624-629*.

[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).

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

RECEIVED by MSC 3/24/2023 10:46:55 PM

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 **[**2630]** 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 **[*719]** 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 **[****103]** 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 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 **[****104]** can a better informed understanding of how constitutional imperatives [whatever that means] define [whatever that means] an urgent liberty **[*720]** [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" **[***660]** 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 *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 **[****105]** this Court's reputation for clear thinking and sober analysis.

* * *

---

[21] *Windsor, 570 U.S., at 808, 133 S. Ct. 2675, 186 L. Ed. 2d at 830* (Alito, J., dissenting).

[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 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 ___, 192 L. Ed. 2d, at 625*.

[24] *Ante, at ___, 192 L. Ed. 2d, at 629*.

[25] *Ante, at 672, 192 L. Ed. 2d, at 629*.

RECEIVED by MSC 3/24/2023 10:46:55 PM

[2631]** 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." [26] 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.

[*721] 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 **[****107]** "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, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (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 **[***661]** views" as to the "'fundamental rights'" protected by that document. *Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 953, 964, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)* (Rehnquist, C. J., concurring in judgment in part and dissenting in **[*722]** part) (quoting *Griswold v. Connecticut, 381 U.S. 479, 502, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (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 **[****108]** 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 **[**2632]** this Court, *ante, at ___, 192 L. Ed. 2d, at 632*, 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

[26] The Federalist No. 78, pp. **[****106]** 522, 523 (J. Cooke ed. 1961) (A. Hamilton).

RECEIVED by MSC 3/24/2023 10:46:55 PM

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 **[****109]** 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*.

[*723] 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, 24 L. Ed. 616 (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, **[***662]** 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: **[****110]** "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 process 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 **[*724]** 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, **[**2633]** or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." **[****111]** *Id.*, at 125, 130. [2]

[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 ___, 192 L. Ed. 2d, at 629*. Despite the "synergy" it finds "between th[ese] two protections," *ante, at ___, 192 L. Ed. 2d, at 630*, 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.

[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

RECEIVED by MSC 3/24/2023 10:46:55 PM

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 decisions interpreting these provisions between the founding and the ratification of the *Fourteenth Amendment* almost uniformly **[*725]** 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 **[****112]** 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 **[***663]** 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, 4 S. Ct. 111, 28 L. Ed. 232 (1884)*. Indeed, this Court has previously commented, "The conclusion is . . . irresistible, that when the same phrase was employed in **[**2634]** 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 Court's earliest *Fourteenth Amendment* decisions appear to interpret the Clause as **[****114]** using "liberty" to mean freedom from physical restraint. In *Munn v. Illinois, 94 U.S. 113, 24 L. Ed. 77 (1877)*, for example, the Court recognized the relationship between the two *Due Process Clauses* and Magna Carta, see *id., at 123-124, 24 L. Ed. 77*, and implicitly rejected the dissent's argument that "'liberty'" **[*726]** encompassed "something more . . . than mere freedom from physical restraint or the bounds of a prison," *id., at 142, 24 L. Ed. 77* (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

---

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." **[****113]** *Mass. Const., pt. I, Art. XII* (1780), in 3 *id.*, at 1891; see also N. H. Const., pt. I, Art. XV (1784), in 4 *id.*, at 2455.

RECEIVED by MSC 3/24/2023 10:46:55 PM

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 **[****115]** "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, **[***664]** 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]

[*727] 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* ***[**2635]*** *Nature*" was the "inherent natural Right" "of each Man" "to make a free Use **[****117]** 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. 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 **[*728]** 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 **[****118]** 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

[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 **[****116]** by human laws." 1 Blackstone 121-122. And in a "treatise routinely cited by the Founders," *Zivotofsky v. Kerry, ante, at ___, 135 S. Ct. 2076, 192 L. Ed. 2d 83* (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.

RECEIVED by MSC 3/24/2023 10:46:55 PM

existed outside of government.

B

Whether we define "liberty" as locomotion or freedom from governmental **[***665]** 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 **[****119]** 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, **[*729]** 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 **[**2636]** and benefits that exist solely *because of* the government. They want, for example, to receive the State's **[****120]** *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 **[****121]** 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 **[*730]** 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 **[***666]** 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, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967)*, for example, involved a couple who was criminally prosecuted for marrying in the District of Columbia

RECEIVED by MSC 3/24/2023 10:46:55 PM

and cohabiting in Virginia, *id., at 2-3, 87 S. Ct. 1817, 18 L. Ed. 2d 1010*. [5] They **[**2637]** were each sentenced to a year **[*731]** 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, 87 S. Ct. 1817, 18 L. Ed. 2d 1010*. [6] In a similar vein, *Zablocki v. Redhail, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618 (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 **[****122]** obligations, *id., at 387, 98 S. Ct. 673, 54 L. Ed. 2d 618*; see *id., at 377-378, 98 S. Ct. 673, 54 L. Ed. 2d 618*. And *Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (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, 107 S. Ct. 2254, 96 L. Ed. 2d 64*. In *none* of those cases were individuals denied solely governmental 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 ___, 192 L. Ed. 2d, at 618*. But "liberty" is not lost, nor can it be found in the way petitioners **[***667]** 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 ___, 192 L. Ed. 2d, at 629*,—better informed, we must assume, than that of the people who ratified **[*732]** 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, 77 S. Ct. 1222, 1 L. Ed. 2d 1148 (1957)* (plurality opinion), not "Thou shalt provides."

III

The majority's inversion **[****125]** 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,

---

[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 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 **[****123]** 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 **[****124]** 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.

RECEIVED by MSC 3/24/2023 10:46:55 PM

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 **[**2638]** of a State would agree. See Locke §98, at 49 (suggesting that **[****126]** 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 **[*733]** 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 **[***668]** religious practice. **[****127]** *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 **[*734]** 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 **[****128]** 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 ___, 192 L. Ed. 2d, at 634*. And even that gesture indicates a misunderstanding of religious liberty in our Nation's tradition. Religious liberty is about more

RECEIVED by MSC 3/24/2023 10:46:55 PM

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]

[2639]** Although **[****129]** 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.

[*735] 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 ___, ___, ___, ___, 192 L. Ed. 2d, at 619, **[***669]** 625, 633, 635*. [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" 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 **[****131]** demeans. Its mischaracterization of the arguments presented by the States and their *amici* can **[*736]** 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

---

[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 ___, 192 L. Ed. 2d, at 619*. 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" **[****130]** than another. And the suggestion that Americans who choose not to marry are inferior to those who decide to enter such relationships is specious.

RECEIVED by MSC 3/24/2023 10:46:55 PM

simple truth: One's liberty, not to **[**2640]** 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 **[****132]** and our society. I respectfully dissent.

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 **[***670]** should recognize same-sex marriage. [1] The question in 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.

[*737] 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 **[****133]** 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. 702, 720-721, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (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. 744, 808, 570 U.S. 744, 133 S. Ct. 2675, 186 L. Ed. 2d 808, 830 (2013)* (Alito, J., dissenting) .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. 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 **[*738]** cause for both caution and humility." *Id., at 809, 133 S. Ct. 2675, 186 L. Ed. 2d 808, 851* (footnote omitted).

For today's majority, it does not matter **[****134]** that the right to same-sex marriage lacks deep roots or even that it is contrary to long-established tradition. The Justices in **[**2641]** the majority claim the authority to confer constitutional protection upon that right simply because they believe that it is fundamental.

II

[1] I use the phrase "recognize marriage" as shorthand for issuing marriage licenses and conferring those special benefits and obligations provided under state law for married persons.

RECEIVED by MSC 3/24/2023 10:46:55 PM

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 **[***671]** 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 **[****135]** 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.

[*739] 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 **[****136]** 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 development undoubtedly is both a cause and a result of changes in our society's understanding of marriage.

While, for many, the attributes **[****137]** of marriage in 21st-century America have changed, those States that do not want to **[**2642]** 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 **[*740]** 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 **[***672]** 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

---

[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. Matthews, 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/nvsr64nvsr64_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 Nonmarital Childbearing in the United States, NCHS Data Brief, No. 18 (May 2009), online at http://www.cdc.gov/nchs/data/databrief/db18.pdf .

RECEIVED by MSC 3/24/2023 10:46:55 PM

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 **[****138]** 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 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 **[*741]** 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 **[****139]** through their elected officials." *570 U.S., at 809-810, 133 S. Ct. 2675, 186 L. Ed. 2d 808 at 852* (dissenting opinion) (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 ___ - ___, 192 L. Ed. 2d, at 624-625*. 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 ___ - ___, 192 L. Ed. 2d, at 633-634*. 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 **[***673]** of their homes, but if they repeat **[**2643]** 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 **[****140]** 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 **[*742]** 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

RECEIVED by MSC 3/24/2023 10:46:55 PM

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 **[****141]** 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.

References

U.S.C.S., *Constitution, Amendment 14*

3 Civil Rights Actions P 12B.02 (Matthew Bender)

L Ed Digest, Constitutional Law §§348.5, 525.5; Marriage § 1

L Ed Index, Homosexuality; Marriage

Rights of, and validity of provisions **[****142]** concerning or affecting, homosexuals, under Federal Constitution--Supreme Court cases. *134 L. Ed. 2d 1047*.

Federal constitutional right to marry--Supreme Court cases. *96 L. Ed. 2d 716*.

Supreme Court's views as to concept of "liberty" under *due process clauses of Fifth* and *Fourteenth Amendments*. *47 L. Ed. 2d 975*.

Supreme Court's views as to the federal legal aspects of the right of privacy. *43 L. Ed. 2d 871*.

End of Document

RECEIVED by MSC 3/24/2023 10:46:55 PM

Caution
As of: March 24, 2023 6:17 PM Z

LeFever v. Matthews

Court of Appeals of Michigan

April 1, 2021, Decided

No. 353106

Reporter
336 Mich. App. 651 *; 971 N.W.2d 672 **; 2021 Mich. App. LEXIS 2109 ***; 2021 WL 1232747

KYRESHA ***LEFEVER***, Plaintiff-Appellee, v LANESHA MATTHEWS, Defendant-Appellant.

Notice: THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE MICHIGAN COURT OF APPEALS REPORTS.

Prior History: [*1]** Wayne Circuit Court LC No. 19-103263-DP.

Core Terms

twins, genetic, trial court, custody, natural parent, birth, gestation, parentage, marriage, parental rights, unmarried, dictionary, parties, rights, woman, female, parenthood, relinquishment, blood relation, maternity, birth certificate, child custody, third party, conceived, married, donor, https, egg, acknowledgment, biological

Case Summary

Overview

HOLDINGS: [1]-Defendant mother's relationship to the twins as their birth mother had a closer biological connection than a step-parent or foster parent, and even that of a grandparent because she was related to the twins in a closer degree than a grandparent as she gave birth to the children; [2]-Because the *Child Custody Act (CCA)* was the exclusive means of pursuing child custody rights, there was reason to conclude that *MCL 722.25(1)*, which provided that the best interests of the child were served by awarding custody to the child's parent or parents unless there was clear and convincing evidence to the contrary, was inapplicable; [3]-The defendant mother remained a "natural parent" under the CCA; [4]-The trial court had to hold a new custody hearing where both parties were considered parents.

Outcome

Judgment vacated and remanded.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Family Law > Child Custody > Child Custody Procedures

Governments > Legislation > Interpretation

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN1[⬇] **Standards of Review, Abuse of Discretion**

Legal standing constitutes a question of law that we review de novo. As it relates specifically to the resolution of a child custody dispute, the Child

RECEIVED by MSC 3/24/2023 10:46:55 PM

Custody Act provides that all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue, *MCL 722.28*. A clear legal error occurs when the circuit court incorrectly chooses, interprets, or applies the law. The appellate court reviews matters of statutory interpretation and constitutional issues de novo.

Evidence > Burdens of Proof > Clear & Convincing Proof

Family Law > ... > Custody Awards > Standards > Best Interests of Child

Family Law > ... > Custody Awards > Inferences & Presumptions > Natural Parent Presumption

HN2[] **Burdens of Proof, Clear & Convincing Proof**

The Child Custody Act (CCA) governs custody, parenting time, and child support issues for minor children in Michigan and it is the exclusive means of pursuing child custody rights, *MCL 722.24(1)*; It is equitable in nature, and must be liberally construed and applied to establish promptly the rights of the child and the rights and duties of the parties involved., *MCL 722.26(1)*. The CCA contains the following parental presumption: If a child custody dispute is between the parents, between agencies, or between third persons, the best interests of the child control. If the child custody dispute is between the parent or parents and an agency or a third person, the court shall presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence, *MCL 722.25(1)*. "Parent" is defined as the natural or adoptive parent of a child, *MCL 722.22(i)*. However, determining whether the term "natural parent" is elastic enough to include defendant is a matter of statutory interpretation.

Governments > Legislation > Interpretation

HN3[] **Legislation, Interpretation**

The judiciary's objective when interpreting a statute is to discern and give effect to the intent of the Legislature. First, the court examines the most reliable evidence of the Legislature's intent, the language of the statute itself. When construing statutory language, the court must read the statute as a whole and in its grammatical context, giving each and every word its plain and ordinary meaning unless otherwise defined. Effect must be given to every word, phrase, and clause in a statute, and the court must avoid a construction that would render part of the statute surplusage or nugatory. If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted. Generally, when language is included in one section of a statute but omitted from another section, it is presumed that the drafters acted intentionally and purposely in their inclusion or exclusion. The courts may not read into the statute a requirement that the Legislature has seen fit to omit.

Governments > Legislation > Interpretation

HN4[] **Legislation, Interpretation**

When the Legislature fails to address a concern in the statute with a specific provision, the courts cannot insert a provision simply because it would have been wise of the Legislature to do so to effect the statute's purpose. Statutes that address the same subject matter or share a common purpose are in pari materia and must be read collectively as one law, even when there is no reference to one another.

RECEIVED by MSC 3/24/2023 10:46:55 PM

Family Law > Child Custody > Custody Awards > Nonparents

HN5 **Custody Awards, Nonparents**

The term "natural parent" is not defined by the statute. However, the appellate court has previously interpreted the term to mean a blood relation. A blood relation is different from relation by affinity or adoption, and the term natural parent as defined in the Child Custody Act (CCA) does not include those relationships. This is supported by the inclusion of the term "adoptive parent" as a separate category from "natural parent" within the same subsection, MCL 722.22(i). Thus a parent within the meaning of the CCA does not include relations such as step-parents (who are related to a child by marriage or affinity), foster parents (whose relationship to a child is determined and controlled by the agency foster/parent agreement), or grandparents (who may be related to a child by consanguinity, but are removed in their relation by one degree). Such parties are third persons. MCL 722.22(k).

Family Law > ... > Visitation Awards > Third Parties > Grandparent Visitation

Family Law > Child Custody > Custody Awards > Nonparents

HN6 **Third Parties, Grandparent Visitation**

Thus a parent within the meaning of the CCA does not include relations such as step-parents (who are related to a child by marriage or affinity), foster parents (whose relationship to a child is determined and controlled by the agency foster/parent agreement), or grandparents (who may be related to a child by consanguinity, but are removed in their relation by one degree). Such parties are third persons. MCL 722.22(k) (defining third person as an individual other than a parent); (considering a step-parent as a third party); (considering foster parents as third parties); (considering a grandparent as a third party).

Governments > Legislation > Interpretation

HN7 **Legislation, Interpretation**

Moreover, when interpreting an undefined statutory term, the term must be accorded its plain and ordinary meaning. Consulting a lay dictionary is proper when defining common words or phrases that lack a unique legal meaning, but when the statutory term is a legal term of art, the term must be construed in accordance with its peculiar and appropriate legal meaning.

Governments > Courts > Common Law

HN8 **Courts, Common Law**

However, the Child Custody Act (CCA) is a comprehensive statutory scheme concerning child-custody matters. In general, where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter. The appellate court's duty os therefore to address the comprehensive statutory language of the CCA.

Governments > Legislation > Interpretation

HN9 **Legislation, Interpretation**

The first step of statutory interpretation is to review the language of the statute at issue, not that of another statute.

RECEIVED by MSC 3/24/2023 10:46:55 PM

Family Law > ... > Proof of Paternity > Types of Evidence > Blood Tests

Family Law > ... > Proof of Paternity > Types of Evidence > Genetic Tests

Family Law > Paternity & Surrogacy > Establishing Paternity > Father's Acknowledgment

Family Law > ... > Proof of Paternity > Inferences & Presumptions > Factors

Family Law > Paternity & Surrogacy > Proof of Paternity > Burdens of Proof

HN10[] **Types of Evidence, Blood Tests**

MCL 722.1003, Michigan's Acknowledgment of Parentage Act has clearly identified that only a biological parent will have the duties of a child-parent relationship and legal status of a natural parent. However, the act establishes paternity (not maternity), MCL 722.1004. The act defines the term "father" but not the term "mother." Moreover, the act defines father as the man who signs an acknowledgment of parent of a child, MCL 722.1002(d). This definition does not hint at any legal requirement of a genetic connection between a parent and a child. In fact, nothing in the Acknowledgement of Parentage Act requires that the man completing the acknowledgement form actually be the child's biological father. MCL 722.1007(g)(i) expressly provides that the acknowledgement form must include notice that signing the form waives blood or genetic tests to determine if the man is the biological father of the child. The only indication in the act as to how maternity is determined is found in MCL 722.1002(b) which defines the term "child" as a child conceived and born to a woman.

Evidence > ... > Scientific Evidence > Bodily Evidence > DNA

Family Law > Paternity & Surrogacy > Establishing Paternity > Father's Acknowledgment

Family Law > ... > Proof of Paternity > Types of Evidence > Genetic Tests

HN11[] **Bodily Evidence, DNA**

The definition of "child" does not include any requirement that the child be conceived by the same woman who births the child, nor does it indicate any preference for a genetic parent to take priority over a birth parent. Although MCL 722.1437 permits for the revocation of acknowledgment of parentage, nothing in the act indicates that DNA results, standing alone, are sufficient to require revocation of an acknowledgment of parentage.

Family Law > ... > Proof of Paternity > Types of Evidence > Genetic Tests

HN12[] **Types of Evidence, Genetic Tests**

The Safe Delivery of Newborns Act states that a party petitioning for custody of a newborn may be ordered to submit to genetic testing unless the birth was witnessed by the emergency service provider and sufficient evidence exists to support maternity, MCL 712.11(2).

Family Law > ... > Proof of Paternity > Types of Evidence > Blood Tests

Family Law > ... > Proof of Paternity > Types of Evidence > Genetic Tests

Family Law > Paternity & Surrogacy > Establishing Paternity > Uniform Parentage Act

Family Law > Paternity & Surrogacy > Proof of Paternity > Burdens of Proof

RECEIVED by MSC 3/24/2023 10:46:55 PM

Family Law > Paternity & Surrogacy > Establishing Paternity > Father's Acknowledgment

HN13 **Types of Evidence, Blood Tests**

The Adoption Code does not define or otherwise address genetic parents or birth parents. The Genetic Parentage Act, MCL 722.1461 et seq., permits a man to establish paternity by way of blood, tissue, or genetic testing, MCL 722.1467. The act focuses on a genetic parent-child connection, but considering it in the context of the entire statutory scheme, it does not support a conclusion that the Legislature intended for genetics to be the only way to establish parentage. Rather, the Legislature has provided numerous statutory paths to establishing paternity. There is no indication in the plain language of any of these statutes that the Legislature intended to limit the path to establishing maternity to the single route of demonstrating a genetic connection.

Governments > Courts > Authority to Adjudicate

HN14 **Courts, Authority to Adjudicate**

However, the Michigan Supreme Court has stated that it is not within the authority of the judiciary to redetermine the Legislature's choice or to independently assess what would be most fair or just or best public policy.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN15 **Reviewability of Lower Court Decisions, Preservation for Review**

Waiver is a voluntary and intentional abandonment of a known right. A party cannot stipulate to a matter and then argue on appeal that the resultant action was error. A party who waives a right is precluded from seeking appellate review based on a denial of that right because waiver eliminates any error. To allow a party to assign error on appeal to something that he or she deemed proper in the lower court would be to permit that party to harbor error as an appellate parachute. Although an issue is waived, the appellate court may overlook the preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented. Moreover, when the trial court incorrectly chooses, interprets, or applies the law, it commits legal error that the appellate court is bound to correct.

Family Law > Paternity & Surrogacy > Surrogacy > Assisted Reproduction Parentage

HN16 **Surrogacy, Assisted Reproduction Parentage**

The Surrogate Parenting Act, MCL 722.851 et seq., governs surrogacy agreements. MCL 722.855 renders invalid surrogate parentage contracts. MCL 722.853(i) defines "surrogate parentage contract" as follows: a contract, agreement, or arrangement in which a female agrees to conceive a child through natural or artificial insemination, or in which a female agrees to surrogate gestation, and to voluntarily relinquish her parental or custodial rights to the child. t is presumed that a contract, agreement, or arrangement in which a female agrees to conceive a child through natural or artificial insemination by a person other than her husband, or in which a female agrees to surrogate gestation, includes a provision, whether or not express, that the female will relinquish her parental or custodial rights to the child. In turn, surrogate gestation means the implantation in a female of an embryo not genetically related to that female and

RECEIVED by MSC 3/24/2023 10:46:55 PM

subsequent gestation of a child by that female, *MCL 722.853(g)*.

Family Law > ... > Custody
Awards > Standards > Best Interests of Child

HN17[] **Standards, Best Interests of Child**

In turn, "surrogate gestation" means the implantation in a female of an embryo not genetically related to that female and subsequent gestation of a child by that female, *MCL 722.853(g)*. In addition, *MCL 722.861* provides: If a child is born to a surrogate mother or surrogate carrier pursuant to a surrogate parentage contract, and there is a dispute between the parties concerning custody of the child, the party having physical custody of the child may retain physical custody of the child until the circuit court orders otherwise. The circuit court shall award legal custody of the child based on a determination of the best interests of the child. As used in this section, "best interests of the child" means that term as defined in the Child Custody Act, *MCL 722.23*.

Family Law > Paternity & Surrogacy > Surrogacy > Assisted Reproduction Parentage

Healthcare Law > ... > Reproductive Services > Reproductive Technology > Artificial Insemination

Family Law > Parental Duties & Rights > Termination of Rights > Voluntary Termination

HN18[] **Surrogacy, Assisted Reproduction Parentage**

The voluntary relinquishment of parental rights is a necessary element to finding that a surrogate parentage contract exists: The statutory language clearly defines a surrogate parentage contract as consisting of two elements: (1) conception, through either natural or artificial insemination, of, or surrogate gestation by a female and (2) her voluntary relinquishment of her parental rights to the child. Only a contract, agreement, or arrangement combining these two elements constitutes a "surrogate parentage contract" that is void and unenforceable under the act.

Family Law > Paternity & Surrogacy > Surrogacy > Assisted Reproduction Parentage

Healthcare Law > ... > Reproductive Services > Reproductive Technology > Artificial Insemination

Family Law > Parental Duties & Rights > Termination of Rights > Voluntary Termination

HN19[] **Surrogacy, Assisted Reproduction Parentage**

(1) A surrogate parentage contract is void and unenforceable; (3) For a surrogate parentage contract to exist there must be present the elements of (1) conception, through either natural or artificial insemination, of, or surrogate gestation by a female and (2) the voluntary relinquishment of her parental rights to the child; and (4) A contract, agreement, or arrangement that does not contain both elements set forth in (3) above is neither void and unenforceable nor unlawful and prohibited, even when entered into for compensation.

Evidence > Burdens of Proof > Preponderance of Evidence

HN20[] **Burdens of Proof, Preponderance of Evidence**

MCL 722.853(i) does not state that the presumption of relinquishment of parental rights is conclusive,

RECEIVED by MSC 3/24/2023 10:46:55 PM

but it also does not indicate what level of proof is required to rebut the presumption of relinquishment. Thus, the appellate court must use the usual standard required to overcome a rebuttable presumption: competent and credible evidence. In addition, where the statute does not specify the standard of proof, the usual civil preponderance of the evidence quantum of proof applies.

Evidence > Inferences & Presumptions > Inferences

Governments > Legislation > Interpretation

HN21 **Inferences & Presumptions, Inferences**

A statutory conclusive presumption may not be rebutted by other evidence. In the absence of any language indicating that a statutory presumption is conclusive, the appellate court will decline to make such an inference.

Evidence > Burdens of Proof > Allocation

HN22 **Burdens of Proof, Allocation**

MRE 301, entitled Presumptions in Civil Actions and Proceedings, explains the effect of rebuttable presumptions: In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Evidence > Burdens of Proof > Clear & Convincing Proof

Family Law > ... > Termination of Rights > Involuntary Termination > Best Interest of Child

Family Law > ... > Custody Awards > Standards > Best Interests of Child

Family Law > ... > Termination of Rights > Involuntary Termination > Burdens of Proof

HN23 **Burdens of Proof, Clear & Convincing Proof**

Because the Child Custody Act is the exclusive means of pursuing child custody rights, there is no reason to conclude that MCL 722.25(1), which provides that the best interests of the child are served by awarding custody to the child's parent or parents unless there is clear and convincing evidence to the contrary, is inapplicable.

Family Law > ... > Custody Awards > Standards > Best Interests of Child

HN24 **Standards, Best Interests of Child**

MCL 722.861 states: If a child is born to a surrogate mother or surrogate carrier pursuant to a surrogate parentage contract, and there is a dispute between the parties concerning custody of the child, the party having physical custody of the child may retain physical custody of the child until the circuit court orders otherwise. The circuit court shall award legal custody of the child based on a determination of the best interests of the child. As used in this section, "best interests of the child" means that term as defined in MCL 722.23.

Counsel: For LANESHA MATTHEWS, Defendant-Appellant: REGINA D JEMISON.

For PROFESSORS OF FAMILY LAW, Amicus Curiae: JANE A BASSETT.

For AMERICAN CIVIL LIBERTIES UNION,

RECEIVED by MSC 3/24/2023 10:46:55 PM

Amicus Curiae: J D KAPLAN.

Judges: Before: GLEICHER, P.J., and K. F. KELLY and RIORDAN, JJ.

Opinion by: RIORDAN

Opinion

[676] [*656]** RIORDAN, J.

In this child custody case, defendant, Lanesha Matthews, appeals as of right the trial court's order of parentage, custody, and parenting time. The trial court awarded sole legal custody and sole physical custody of plaintiff's and defendant's two minor children to plaintiff, Kyresha ***LeFever***, granted parenting time to defendant, and ordered defendant's name be removed from the children's birth certificates. The custody order was premised on an earlier determination that defendant was merely a third party and not a parent of the children because, although she gestated and birthed the children, she did not have a genetic connection to them, unlike plaintiff, whose ova were used in the procreation of the children.

However, we conclude that the trial court improperly interpreted the term "parent" as defined by *MCL 722.22(i)* in the *Child Custody Act ("CCA"), MCL 722.21 et seq.*, as requiring a genetic connection and misapplied **[*657]** the **[***2]** *Surrogate Parenting Act ("SPA"), MCL 722.851 et seq.* Accordingly, we vacate the trial court's order and remand this case for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

This case arises out of the dissolution of the parties' relationship and the subsequent custody dispute over their two minor children, twin girls. Plaintiff and defendant, both women, began a romantic relationship in 2011. At some point during the relationship, they decided to have children together using plaintiff's eggs, fertilized by a sperm donor and implanted in defendant's womb. The in vitro fertilization resulted in defendant's pregnancy with the twins. Although the parties intended for defendant to give birth in Ohio, where both women could be listed on the birth certificates, defendant gave birth two months early in Michigan. At that time, the Michigan Department of Health and Human Services Division for Vital Records permitted one father and one mother to be listed on a birth certificate. As a result of this practice, defendant was listed as the twins' mother, and although plaintiff was not listed on the birth certificates, the twins were given plaintiff's last name.

The parties cohabitated and parented the twins **[***3]** together until they separated in 2014—before statutes excluding same-sex couples from marriage were declared unconstitutional in *Obergefell v Hodges, 576 U.S. 644; 135 S. Ct. 2584; 192 L. Ed. 2d 609 (2015)*. The parties continued coparenting the twins and shared custody until defendant experienced serious health concerns in 2016. At that time, plaintiff became the twins' primary caretaker until 2018, when a custody dispute arose.

In November 2018, plaintiff filed a complaint for custody of the twins as well as a motion to establish **[*658]** interim custody and parenting time. The matter was heard by a referee, who determined parentage should first be established. The case was dismissed and resubmitted by plaintiff as a complaint to establish parentage.

The trial court held a hearing to establish plaintiff's standing as a parent. Plaintiff argued that she was the twins' "natural mother" by virtue of her genetic connection to the children and that defendant, the "gestational surrogate," was merely "the woman who carried the eggs of [plaintiff] and the sperm of an anonymous donor[.]" Plaintiff also raised due-process and equal-protection arguments. Defendant countered that the SPA applied in such a way that it invalidated any surrogacy contract between the

RECEIVED by MSC 3/24/2023 10:46:55 PM

parties. Defendant **[***4]** reasoned that because there is no valid surrogacy contract, she is the twins' "natural parent" by default because she gave birth to them. Defendant further argued that Michigan **[**677]** law provides no avenue for conferring maternity on a party except by way of birth and delivery of a child and that, therefore, plaintiff lacked standing to seek custody. Defendant asserted that the parties decided not to have plaintiff recognized as a legal parent of the children at the time of their birth and that plaintiff must now live with the consequences of that decision.

The trial court found that plaintiff is the twins' "natural and legal mother" and ordered that the birth certificates be amended to add plaintiff. The trial court also awarded joint legal custody on an interim basis and set forth a parenting-time schedule. However, during the preliminary hearing, the trial court raised the issue of defendant's standing as a "natural parent" and ordered additional briefing on the matter. Defendant **[*659]** moved for reconsideration of the trial court's orders; the trial court denied the motion.

Regarding defendant's standing, plaintiff then argued that defendant was not the twins' natural parent because she shared no genetic **[***5]** connection with them. In response, defendant maintained her position that her biological connection to the twins, by way of gestation, made her the twins' natural parent too. Defendant argued that neither the statute, nor the dictionary definition, limit "natural parent" to mean only a genetic parent and that such a narrow interpretation of the term is antithetical to the purpose of the CCA and would violate her constitutional rights to substantive due process and equal protection. Defendant also argued that she has "standing by agreement" by way of the parties' comaternity arrangement and that plaintiff's action to revoke defendant's parentage of the twins was barred by the limitations period in MCL 722.1437(1) of the *Revocation of Paternity Act ("ROPA"), MCL 722.1437(1)*.

The trial court concluded that the SPA applied to the facts of this case because the act broadly defines a surrogate-parentage contract as encompassing any arrangement in which a female agrees to conceive a child through artificial insemination or in which a female agrees to surrogate gestation. The trial court further reasoned that the SPA identifies the "mother" as a party with a genetic connection to the child, whereas a "surrogate carrier" **[***6]** gestates and births a child to whom she has no genetic relationship. The trial court recognized that the SPA does not indicate which party should have custody to the resultant offspring but, rather, directs courts to apply the CCA.

The trial court noted that this case presents a matter of first impression in Michigan, but it considered **[*660]** the various outcomes in other jurisdictions under similar factual circumstances. The trial court was persuaded by the public policy rationale in *Belsito v Clark, 67 Ohio Misc 2d 54; 644 NE2d 760 (1994)*. The trial court also considered MCL 722.1003 of the *Acknowledgment of Parentage Act, MCL 722.1003*, the *Safe Delivery of Newborns Act, MCL 712.1 et seq.*, the *Adoption Code, MCL 710.21*, and finally, the CCA, which defines a parent as "natural" or "adoptive," *MCL 722.22(i)*. The trial court concluded that "the [L]egislature of this state has established that it is the public policy of this state to identify a parent as a person with a biological connection to the child." In this case, the trial court concluded that plaintiff, by way of her genetic connection to the twins, was the only party to establish a biological connection. As a result, this finding created a presumption that the best interests of the twins were served by awarding plaintiff custody, while the SPA granted defendant **[***7]** standing as a third party.

Defendant sought leave to appeal in this Court, but the application was dismissed for lack of jurisdiction because the opinion **[**678]** issued by the trial court was not a decision on a dispositive motion. ***LeFever** v Matthews, unpublished order of*

RECEIVED by MSC 3/24/2023 10:46:55 PM

the Court of Appeals, entered October 23, 2019 (Docket No. 351133), 2019 Mich. App. LEXIS 6622 Accordingly, the matter progressed to trial where defendant was required to show by clear and convincing evidence that it was in the twins' best interests for her to have custody.

After a six-day trial, the court concluded that defendant failed to carry her burden to establish parentage. Plaintiff was awarded full legal and physical custody, and the trial court ordered that defendant's name be removed from the twins' birth certificates. However, the trial court granted parenting time to defendant **[*661]** because of her standing as a third party under *MCL 722.27(1)(b)*. Defendant now appeals and challenges the trial court's finding that she is not a natural parent. She argues that the trial court misinterpreted the CCA when it found that she is not a "natural parent," that it misapplied the SPA to the facts of this case, and that the trial court's order implicates her federal constitutional **[***8]** rights to substantive due process and equal protection under the law.

II. STANDARDS OF REVIEW

HN1[↑] Legal standing constitutes a question of law that we review de novo. *Heltzel v Heltzel, 248 Mich App 1, 28; 638 NW2d 123 (2001)*. Because it relates specifically to "the resolution of a child custody dispute," the CCA provides that "all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." *MCL 722.28*. "A clear legal error occurs when the circuit court incorrectly chooses, interprets, or applies the law . *Kubicki v Sharpe, 306 Mich App 525, 538; 858 NW2d 57 (2014)*; *Fletcher v Fletcher, 447 Mich 871, 881; 526 NW2d 889 (1994)*. We review de novo matters of statutory interpretation and constitutional issues. *Estes v Titus, 481 Mich 573, 578-579; 751 NW2d 493 (2008)*; *In re MKK, 286 Mich App 546, 556; 781 NW2d 132 (2009)*.

III. THE CHILD CUSTODY ACT

Defendant first argues that the trial court committed error requiring reversal when it concluded that she was not a "natural parent" under the CCA because she lacked a genetic connection to the twins. We agree.

[*662] ***HN2***[↑] The CCA governs custody, parenting time, and child support issues for minor children in Michigan, and it is the exclusive means of pursuing child custody rights. *MCL 722.24(1)*; *Aichele v Hodge, 259 Mich App 146, 153; 673 NW2d 452 (2003)*. It is "equitable in nature" and must be "liberally construed and applied to establish promptly **[***9]** the rights of the child and the rights and duties of the parties involved." *MCL 722.26(1)*. The CCA contains the following parental presumption:

> If a child custody dispute is between the parents, between agencies, or between third persons, the best interests of the child control. If the child custody dispute is between the parent or parents and an agency or a third person, the court shall presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence. [*MCL 722.25(1)*.]

"Parent" is defined as "the natural or adoptive parent of a child." *MCL 722.22(i)*. However, determining whether the term "natural parent" is elastic enough to include defendant is a matter of statutory **[**679]** interpretation. ***HN3***[↑] To that end, we consider the following principles:

> "The judiciary's objective when interpreting a statute is to discern and give effect to the intent of the Legislature. First, the court examines the most reliable evidence of the Legislature's intent, the language of the statute itself. When construing statutory language, the court must read the statute as a whole and in its grammatical context, giving each and every

RECEIVED by MSC 3/24/2023 10:46:55 PM

word its plain and ordinary **[***10]** meaning unless otherwise defined. Effect must be given to every word, phrase, and clause in a statute, and the court must avoid a construction that would render part of the statute surplusage or nugatory. If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted. Generally, when language is included in one section of a statute but omitted from another section, it is presumed **[*663]** that the drafters acted intentionally and purposely in their inclusion or exclusion. The courts may not read into the statute a requirement that the Legislature has seen fit to omit. ***HN4***[⬆] When the Legislature fails to address a concern in the statute with a specific provision, the courts cannot insert a provision simply because it would have been wise of the Legislature to do so to effect the statute's purpose. Statutes that address the same subject matter or share a common purpose are *in pari materia* and must be read collectively as one law, even when there is no reference to one another." [*In re Jajuga Estate, 312 Mich App 706, 712; 881 NW2d 487 (2015)*, quoting *Book—Gilbert v Greenleaf, 302 Mich App 538, 541-542; 840 NW2d 743 (2013)* (brackets omitted).]

HN5[⬆] The term "natural parent" is not defined by the statute. However, we have previously interpreted the term **[***11]** to mean a blood relation. *Stankevich v Milliron (On Remand), 313 Mich App 233, 236; 882 NW2d 194 (2015)* (*Stankevich III*) (citing the *Random House Webster's College Dictionary* (2005) definition of "natural"). A blood relation is different from relation by affinity or adoption, and the term "natural parent," as used in the CCA, does not include those relationships. This is supported by the inclusion of the term "adoptive parent" as a separate category from "natural parent" within the same subdivision, *MCL 722.22(i)*. ***HN6***[⬆] Thus a "parent" within the meaning of the CCA does not include relations such as stepparents (who are related to a child by marriage or affinity), foster parents (whose relationship to a child is determined and controlled by the agency foster/parent agreement), or grandparents (who may be related to a child by consanguinity, but are removed in their relation by one degree). Such parties are "third persons" under the CCA. See *MCL 722.22(k)* (defining "third person" as "an individual other than a parent"); **[*664]** *In re Anjoski, 283 Mich App 41, 52; 770 NW2d 1 (2009)* (considering a stepparent as a third party); *Tallman v Milton, 192 Mich App 606; 482 NW2d 187 (1992)* (considering foster parents as third parties); *Bowie v Arder, 441 Mich 23, 48-49; 490 NW2d 568 (1992)* (considering a grandparent as a third party). Here, defendant's relationship to the twins as their birth mother has a closer biological connection than a stepparent or foster parent; **[***12]** the connection is arguably even closer than that of a grandparent because she gave birth to the children.

HN7[⬆] Moreover, when interpreting an undefined statutory term, the term "must be accorded its plain and ordinary meaning." *Brackett v Focus Hope, Inc, 482 Mich 269, 276; 753 NW2d 207 (2008)*. Consulting a lay dictionary is proper when defining common words or phrases that **[**680]** lack a unique legal meaning, but when the statutory term is a legal term of art, the term must be construed in accordance with its peculiar and appropriate legal meaning. *Id. Black's Law Dictionary* (11th ed) does not define "natural parent," but it defines "blood relative" as "[s]omeone who shares an ancestor with another." *Id. at 1542*. In addition, the entry for "genetic parent" refers to the definition of "biological parent," which is "[t]he woman who provides the egg . . . to form the zygote that grows into an embryo." *Id.* at 1340, 1341. "Birth parent" is defined as "[e]ither the biological father or the mother who gives birth to the child." *Id.* at 1340. Thus, plaintiff meets the definition of "biological parent" and "genetic parent," and defendant satisfies the definition of a "birth parent." However, those terms are not included in the definition of

RECEIVED by MSC 3/24/2023 10:46:55 PM

"blood relative" or otherwise **[***13]** mention the term "natural parent."

Accordingly, we must consider the lay dictionary definition as we did in **[*665]** *Stankevich III, 313 Mich App at 236*.[1] We have found no dictionary definition of "natural parent," but, building off our analysis in *Stankevich III*, we consider the various dictionary definitions of "blood relation" and conclude that the term is used to differentiate between those related by birth and those related by adoption. See *The American Heritage Dictionary of the English Language* (5th ed) (defining "blood relation" as "a person who is related to another by birth rather than by marriage"); Merriam-Webster.com Dictionary, *blood relative* **[*666]** <https://www.merriam-webster.com/dictionary/blood%20relative> [https://perma.cc/G3SL-N377] (defining "blood relative" as "someone who has the same parents or ancestors as another person"); MacmillanDictionary.com, *blood relation* <https://www.macmillandictionary.com/us/dictionary/american/blood-relation> [https://perma.cc/N8P5-HJDJ] (defining "blood relation" as "someone that you are related to by birth, rather **[**681]** than by marriage"); Dictionary.Cambridge.org, *blood relation* <https://www.dictionary.cambridge.org/us/dictionary/english/blood-relation> [https://perma.cc/54VZ-GVG3] (defining "blood relation" as "someone who is related to you by birth rather than through marriage"). Thus, the textual clues indicate that the term "natural parent" is elastic enough to include defendant, who, although she has no genetic connection to the twins, is related to them by the process of birthing them rather than through marriage.[2]

In concluding otherwise, the trial court erroneously considered the genetic requirements in other family-law statutes, namely, MCL 722.1003 of the *Acknowledgment of Parentage Act, MCL 722.1003*, the *Safe Delivery of Newborns Act, MCL 712.1 et seq.*, and the *Adoption Code, MCL 710.21*. ***HN9***[↑] "However, the first step of statutory interpretation is to review the language of the

---

[1] In that case, the parties were a same-sex couple that was married in Canada in 2007. *Stankevich III, 313 Mich App at 233*. Using artificial insemination, the defendant became pregnant and gave birth before the parties separated in 2009 and a subsequent custody complaint was filed. *Id.* It was undisputed that the defendant was the biological parent of the child. *Id.* Rather, the issue before us concerned the application of the equitable-parent doctrine which recognizes that "'a person who is not the biological father of a child may be considered a parent against his will, and consequently burdened with the responsibility of the support for the child,' such a person, in being treated as a parent, may also seek the rights of custody or parenting time." *Id. at 238*, quoting *Atkinson v Atkinson, 160 Mich App 601, 608-609; 408 NW2d 516 (1987)*.

Initially, we concluded that the equitable-parent doctrine was inapplicable to the case because in *Van v Zahorik, 460 Mich 320, 330-331; 597 NW2d 15 (1999)*, the Michigan Supreme Court had declined to extend application of the doctrine outside the context of marriage and because the doctrine was inapplicable to the facts of the case given that Michigan did not recognize same-sex marriage at the time of the appeal. *Stankevich v Milliron, unpublished opinion per curiam of the Court of Appeals, issued October 17, 2013 (Docket No. 310710), 2013 Mich. App. LEXIS 1684, p 1*, (*Stankevich I*), vacated and remanded ***498 Mich 877; 868 NW2d 907 (2015)*** (*Stankevich II* ***[***14]***). While the appeal in *Stankevich I* was pending in our Supreme Court, the United States Supreme Court issued its decision in *Obergefell, 576 US 644; 135 S. Ct. 2584; 192 L. Ed. 2d 609*, which struck down as unconstitutional Michigan's statute that prohibited same-sex marriage. Accordingly, the Michigan Supreme Court vacated *Stankevich I* and remanded the case to the Court of Appeals for reconsideration in light of *Obergefell*. On remand, we maintained our interpretation of the term "natural parent" but concluded that the plaintiff was not barred from asserting the equitable-parent doctrine, and we remanded the matter to the trial court for an evidentiary hearing regarding the validity of the marriage and the other disputed factual issues. *Stankevich III, 313 Mich App at 240-242*.

[2] The concurrence criticizes us for relying on dictionaries, rather than the common law, to ascertain the meaning of "natural parent." ***HN8***[↑] However, the CCA is "a comprehensive statutory scheme" concerning child custody matters. See *Van, 460 Mich at 327*. "In general, where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter." *Hoerstman Gen Contracting, Inc v Hahn, 474 Mich 66, 74; 711 NW2d 340 (2006)*. Our duty is, therefore, to address the comprehensive statutory language of the CCA.

RECEIVED by MSC 3/24/2023 10:46:55 PM

statute at issue, not that of another statute." **[*667]** *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Michigan, 492 Mich 503, 521; 821 NW2d 117 (2012)*. Although a statute must be read in conjunction with other relevant statutes and interpreted in a manner that ensures that it works in harmony with the entire statutory scheme, *Potter v McLeary, 484 Mich 397, 411; 774 NW2d 1 (2009)*, none of these other statutes was implicated by the facts of this case.

In addition, a review of these statutes does not support the trial court's conclusion that Michigan law generally requires a genetic connection in order to establish maternity. Specifically, the trial court concluded that ***HN10***[] "*MCL 722.1003*, Michigan's Acknowledgment of Parentage Act has clearly identified that only a biological parent will have the 'duties of a child-parent relationship and legal status of [a] natural parent' . . . ." However, the act establishes paternity (not maternity). *MCL 722.1004*. The act defines the term "father" but not the term "mother." *MCL 722.1002*. Moreover, the act defines **[***15]** "father" as "the man who signs an acknowledgment of parentage of a child." *MCL 722.1002(d)*. This definition does not hint at any legal requirement of a genetic connection between a parent and a child. In fact, "[n]othing in the Acknowledgement of Parentage Act requires that the man completing the acknowledgement form actually be the child's biological father." *In re Daniels Estate, 301 Mich App 450, 456; 837 NW2d 1 (2013)*. *MCL 722.1007(g)(i)* expressly provides that the acknowledgment form must include notice that signing the form waives blood or genetic tests to determine if the man is the biological father of the child. The only indication in the act as to how maternity is determined is found in *MCL 722.1002(b)* which defines the term "child" as "a child conceived and born to a woman . . . ." ***HN11***[] This definition does not include a requirement that the child be conceived by the same **[*668]** woman who births the child, and it does not indicate any preference for a genetic parent to take priority over a birth parent. Although *MCL 722.1437* permits the revocation of **[**682]** an acknowledgment of parentage, "[n]othing in the act indicates that DNA results, standing alone, are sufficient to require revocation of an acknowledgment of parentage." *Helton v Beaman, 304 Mich App 97, 108; 850 NW2d 515 (2014)*.).

HN12[] The Safe Delivery of Newborns Law states that a party petitioning for custody of a newborn **[***16]** may be ordered to submit to genetic testing "[u]nless the birth was witnessed by the emergency service provider and sufficient evidence exists to support maternity[.]" *MCL 712.11(2)*. Thus, it appears that the act only contemplates scenarios in which a birth mother is also the genetic mother, and it is uninformative as to the statutory construction of the CCA in this case.

The trial court's reliance on the Adoption Code is also misplaced. ***HN13***[] The act does not define or otherwise address genetic parents or birth parents. In addition, the trial court did not consider the *Genetic Parentage Act, MCL 722.1461 et seq.*, which permits a man to establish paternity by way of blood, tissue, or genetic testing. *MCL 722.1467*. The act focuses on a genetic parent-child connection, but considering it in the context of the entire statutory scheme, it does not support a conclusion that the Legislature intended for genetics to be the only way to establish parentage. Rather, the Legislature has provided numerous statutory paths to establishing paternity. *In re MKK, 286 Mich App at 557*. There is no indication in the plain language of any of these statutes that the Legislature intended to limit the path to establishing maternity to the single route of demonstrating a genetic connection.

[*669] **[***17]** In addition, the trial court relied on the public-policy rationale provided in *Belsito v Clark, 67 Ohio Misc 2d 54; 644 N.E.2d 760*. We do not find this case by the Ohio Court of Common Pleas to be persuasive. In that case, the plaintiffs, Anthony and Shelly Belsito, a heterosexual married

RECEIVED by MSC 3/24/2023 10:46:55 PM

couple, used in vitro fertilization to combine their own genetic material and produce an embryo that was implanted into a surrogate, Carol Clark (Shelly's younger sister). *Id. at 56*. Before the child was born, the local hospital informed Shelly that, in accordance with Ohio law, Carol would be listed on the birth certificate as the child's mother, and because Carol was not married to the child's father, Anthony, the child would be considered illegitimate. *Id. at 58*. Thereafter, Shelly, along with Anthony, sought a declaratory order recognizing that they were the child's legal and natural parents. *Id.* The court concluded that, although both Shelly and Carol would be considered legal mothers under the language of the applicable Ohio statutes, society would be served best by a determination that only one woman was the child's mother. *Id. at 58, 65-66*

On public-policy grounds, the Ohio court rejected the "intent test" adopted by California courts whereby parentage was awarded to the intended parent. *Id. at 61-62*. Instead, the court, without reliance on any legal authority, concluded that in such cases, genetics wins out over gestation because the "genetic parent can guide the child from experience through the strengths and weaknesses of a common ancestry of genetic traits." *Id. at 64*. ***HN14***[↑] However, our Supreme Court has stated that "[i]t is not within the authority of the judiciary 'to redetermine the Legislature's choice or to independently assess what would be most fair or just or best public policy.'" *Lash v City of Traverse City, 479 Mich 180, 197; 735 NW2d 628 (2007)*, quoting *Hanson v Mecosta Co Rd Comm'rs, 465 Mich 492, 504; 638 NW2d 396 (2002)*.

[*670] [683]** Therefore, we vacate the trial court's final order and remand this case for the trial court to consider custody and parenting time with both parties as "natural parents" under the CCA.

IV. THE SURROGATE PARENTING ACT

Defendant also argues that the trial court erred when it concluded that the SPA applies to the facts of this case. We agree but conclude that the trial court's misapplication of the law does not require reversal.[3]

HN16[↑] The SPA governs surrogacy **[***18]** agreements. *MCL 722.855* renders invalid surrogate-parentage contracts. **[*671]** *MCL 722.853(i)* defines "surrogate parentage contract" as follows:

> [A] contract, agreement, or arrangement in which a female agrees to conceive a child through natural or artificial insemination, or in which a female agrees to surrogate gestation, and to *voluntarily relinquish her parental or custodial rights to the child.* It is presumed that a contract, agreement, or arrangement in which a female agrees to conceive a child through natural or artificial insemination by a person other than her husband, or in which a female

[3] At the outset, we note that defendant has waived this issue by initially arguing in the trial court, during the May 7, 2019 hearing regarding plaintiff's standing, that the SPA *applies*. Now on appeal, defendant reverses course and argues that the trial court erred when it concluded that the SPA applies. "***HN15***[↑] A waiver is a voluntary and intentional abandonment of a known right." *Braverman v Granger, 303 Mich App 587, 608; 844 NW2d 485 (2014)*. "A party cannot stipulate [to] a matter and then argue on appeal that the resultant action was error." *Holmes v Holmes, 281 Mich App 575, 588; 760 NW2d 300 (2008)* (quotation marks and citation omitted). "A party who waives a right is precluded from seeking appellate review based on a denial of that right because waiver eliminates any error." *The Cadle Co v City of Kentwood, 285 Mich App 240, 255; 776 NW2d 145 (2009)*. To allow a party to assign error on appeal to something that he or she deemed proper in the lower court would be to permit that party to harbor error as an appellate parachute. *In re Hudson, 294 Mich App 261, 264; 817 NW2d 115 (2011)*. Although an issue has been waived, we "may overlook the preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Johnson Family Ltd Pship v White Pine Wireless, LLC, 281 Mich App 364, 377; 761 NW2d 353 (2008)* (quotation marks and citation omitted). Moreover, when the trial court "incorrectly chooses, interprets, or applies the law, it commits legal error that the appellate court is bound to correct." *Fletcher, 447 Mich at 881*. Accordingly, we address defendant's argument on appeal.

RECEIVED by MSC 3/24/2023 10:46:55 PM

> agrees to surrogate gestation, includes a provision, whether or not express, that the female will relinquish her parental or custodial rights to the child. [Emphasis added.]

HN17[↑] In turn, "surrogate gestation" means "the implantation in a female of an embryo not genetically related to that female and subsequent gestation of a child by that female." MCL 722.853(g). In addition, MCL 722.861 provides:

> If a child is born to a surrogate mother or surrogate carrier pursuant to a surrogate parentage contract, and there is a dispute between the parties concerning custody of the child, the party having physical custody of the child may retain physical custody of **[***19]** the child until the circuit court orders otherwise. The circuit court shall award legal custody of the child based on a determination of the best interests of the child. As used in this section, "best interests of the child" means that term as defined in [the CCA, MCL 722.23].

There is no doubt that the parties had an arrangement, though not at arm's **[**684]** length, for plaintiff to provide the eggs and for defendant to carry and birth the twins. HN18[↑] However, we have previously explained that the voluntary relinquishment of parental rights is a necessary element to finding that a surrogate-parentage contract exists:

> The statutory language clearly defines "a surrogate parentage contract" as consisting of two elements: (1) conception, through either natural or artificial insemination, **[*672]** of, or surrogate gestation by a female and (2) her voluntary relinquishment of her parental rights to the child. Only a contract, agreement, or arrangement combining these two elements constitutes a "surrogate parentage contract" that is void and unenforceable under the act.
> * * *

HN19[↑] To summarize, we hold:

> (1) A surrogate parentage contract is void and unenforceable under § 5;
> * * *
>
> (3) For a surrogate parentage contract to exist there must **[***20]** be present the elements of (1) conception, through either natural or artificial insemination, of, or surrogate gestation by a female and (2) the voluntary relinquishment of her parental rights to the child; and
>
> (4) A contract, agreement, or arrangement that does not contain both elements set forth in (3) above is neither void and unenforceable under § 5 nor unlawful and prohibited by § 9, even when entered into for compensation. [Doe v Attorney Gen, 194 Mich App 432, 441-443; 487 NW2d 484 (1992)).]

HN20[↑] MCL 722.853(i) does not state that the presumption of relinquishment of parental rights is conclusive,[4] but it also does not indicate what level of proof is required to rebut the presumption of relinquishment. Therefore, we must use the "the usual standard required to overcome a rebuttable presumption: competent and credible evidence." Reed v Breton, 475 Mich 531, 539; 718 NW2d 770 (2006). In addition, when a statute does **[*673]** not specify the standard of proof, the usual civil "preponderance of the evidence" quantum of proof applies. Mayor of Cadillac v Blackburn, 306 Mich App 512, 521-522; 857 NW2d 529 (2014); Residential Ratepayer Consortium v Pub Serv Comm, 198 Mich App 144, 149; 497 NW2d 558 (1993).[5]

---

[4] HN21[↑] A statutory conclusive presumption may not be rebutted by other evidence. Pearo v Mackinac Island, 307 Mich 290; 11 NW2d 893 (1943). In the absence of any language indicating that a statutory presumption is conclusive, we decline to make such an inference. Maier v General Telephone Company of Michigan, 247 Mich App 655; 637 NW2d 263 (2001).

[5] HN22[↑] MRE 301, entitled "Presumptions in Civil Actions and Proceedings," explains the effect of rebuttable presumptions:

RECEIVED by MSC 3/24/2023 10:46:55 PM

The trial court did not make any finding on whether the evidence in this case successfully rebutted the statutory presumption of relinquishment of parental rights in MCL 722.853(i). However, the parties testified that they intended to coparent the twins, and the clinic forms filled out by the parties at the time of the in vitro fertility treatments state that the parties intended a comaternity arrangement. In any event, the trial court does not need to consider this issue on remand because, even assuming **[**685]** the SPA applies, MCL 722.861 of the SPA directs the trial court to consider the best-interest factors in the CCA when determining legal custody.[6] Notably, the SPA does not indicate that the surrogate mother is a third party under the CCA, nor does it cross-reference any **[*674]** other provision of the CCA. Nor does MCL 722.23 (the CCA's best-interest factors) cross-reference MCL 722.25(1) (the parental-presumption provision of the CCA). ***HN23***[↑] But because the CCA is the exclusive means of pursuing child custody rights,[7] there is no reason to conclude that MCL 722.25(1), which provides that the best interests of the child are **[***22]** served by awarding custody to the child's parent or parents unless there is clear and convincing evidence to the contrary, is inapplicable. In other words, even if the SPA applies, defendant remains a "natural parent" under the CCA, as already discussed, and the trial court's erroneous conclusion that the SPA applies does not alter the outcome of the case.

V. CONSTITUTIONAL CLAIMS

Defendant also argues that the trial court's order violates her constitutional rights under the Equal Protection Clause and Due Process Clause of the United States Constitution.[8] However, because we conclude that the trial court erred in its interpretation of the CCA and misapplied the SPA in this case, we need not address defendant's remaining constitutional arguments. See Dep't of Health & Human Services v Genesee Circuit Judge, 318 Mich App 395, 407; 899 NW2d 57 (2016) (noting that the widely accepted and venerable rule of constitutional avoidance counsels that we first consider whether statutory or general law concepts are instead dispositive).

[*675] VI. CONCLUSION

The trial court erred when it concluded that defendant is not a "natural parent" under the CCA because she lacks a genetic link to the twins whom she carried through gestation and birthed.[9]

> In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof **[***21]** in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

[6] ***HN24***[↑] As already MCL 722.861 states:

> If a child is born to a surrogate mother or surrogate carrier pursuant to a surrogate parentage contract, and there is a dispute between the parties concerning custody of the child, the party having physical custody of the child may retain physical custody of the child until the circuit court orders otherwise. The circuit court shall award legal custody of the child based on a determination of the best interests of the child. As used in this section, "best interests of the child" means that term as defined in [MCL 722.23].

[7] Aichele, 259 Mich App at 153.

[8] See US Const, Am XIV.

[9] We conclude that the term "natural parent" is elastic enough to include both parents in this case, where the parties divided the female reproductive roles of conceiving a child so that each has assumed a function traditionally used to evidence a legal maternal relationship. However, we note that the advent of assisted reproductive technology has complicated an area of law that traditionally was fairly straightforward. The statutes at play in this case—specifically the CCA and the SPA (the latter being passed in 1988, 1988 PA 199)—were written and enacted in an era when modern forms of assisted reproductive technology that are commonly used today were considered science fiction, and the cutting-edge technology being developed now was unimaginable then. Certainly, the common law could not have anticipated the fairly common circumstances of the parties in this case, let alone the circumstances of families where one child has three genetic parents, or where a child is produced from the DNA of one egg fertilizing a

RECEIVED by MSC 3/24/2023 10:46:55 PM

Accordingly, we vacate **[**686]** the custody order and remand this case to the trial court for a new custody hearing in which both parties are considered parents.

/s/ Michael **[***23]** J. Riordan

/s/ Kirsten Frank Kelly

Concur by: Elizabeth L. Gleicher

Concur

GLEICHER, P.J. (*concurring*).

Kyresha ***LeFever*** and Lanesha Matthews agreed to create and parent a child together. Using assisted reproductive technology, their efforts resulted in the birth of twins. The majority holds that both women are legal mothers of the twins. I fully concur.

As the majority cogently explains, the trial court erred by interpreting the *Surrogate Parenting Act (SPA), MCL 722.851 et seq.*, as an impediment to the parental standing of Matthews, who bore the children. No surrogacy contract existed and neither woman agreed to relinquish her parental rights, removing this case from the SPA's ambit. The trial court further erred, the majority points out, by plucking excerpts from other unrelated, inapplicable statutory provisions in an effort to condition a mother's right to parent on a genetic relationship. I write separately to propose an additional analysis and to address the constitutional questions the majority abjures.

second egg, or where a child has two genetic fathers and no genetic mother. Our current statutory schemes are poor vehicles for modern-made families to seek relief, and we question whether they are robust enough in their current form to provide equitable outcomes to such families. These new technologies have thrown a wrench into the legal understanding of parentage and have given rise to novel issues in contract law, insurance coverage, immigration law, and estate planning. Accordingly, we anticipate that the Legislature will need to modernize the law to keep pace with technological advancements and to appropriately balance various public-policy concerns.

I. THE COMMON LAW AND THE CHILD CUSTODY ACT

The novel legal issue presented in this custody dispute is whether Matthews, who bore twins while in a committed, nonmarital relationship with ***LeFever***, is entitled to be recognized as the children's mother. **[***24]** Given that ***LeFever*** supplied the ova that were fertilized by donor sperm and implanted in Matthews's uterus, the trial court determined that only ***LeFever*** qualified as the twins' "natural parent." Matthews, the trial court ruled, was a "third party" entitled to none of the rights of parenthood. In rejecting the trial court's reasoning and ruling, the majority centers its analysis on the Child Custody Act (CCA), *MCL 722.21 et seq.*, specifically the act's definition of "parent" as "the natural or adoptive parent of a child." *MCL 722.22(i)*. My colleagues devote considerable effort to unraveling the meaning of "natural parent," consulting four different dictionaries before ultimately concluding that the term "is elastic enough to include" a child's birth mother.[1]

[1] The majority also unnecessarily relies on dicta in *Stankevich v Milliron*, unpublished per curiam opinion of the Court of Appeals, issued October 17, 2013 (Docket No. 310710), p 2 (*Stankevich I*), defining a "natural parent" as "related by blood." (Cleaned up.) *Stankevich I* arose from a custody suit brought by a woman whose wife gave birth to the couple's child. The panel granted summary disposition to the defendant, holding that the plaintiff lacked standing because she was not a "natural parent." *Id.* Relying on a dictionary, *Stankevich I* held that as used in the phrase "natural parent," "natural" meant "'related by blood rather than by adoption: one's natural parents.'" *Id.* (quotation marks, citation, and **[***25]** emphasis omitted). Our Supreme Court vacated *Stankevich I* based on *Obergefell v Hodges, 576 US 644; 135 S Ct 2584; 192 L Ed 2d 609 (2015)*, and remanded for further proceedings. *Stankevich v Milliron, 498 Mich 877 (2015)* (*Stankevich II*). On remand and in recounting the history of the case, this Court "noted" its holding in *Stankevich I* that the plaintiff was not a "natural parent" because she was not "related to the child by blood" but held that because of the parties' marriage, the plaintiff was "not barred from asserting" the "equitable-parent doctrine" described in *Atkinson v Atkinson, 160 Mich App 601; 408 NW2d 516 (1987)*. *Stankevich v Milliron (On Remand), 313 Mich App 233, 236, 240; 882 NW2d 194 (2015)* (*Stankevich III*). The "related by blood" definition advanced in *Stankevich I* was inconsequential to the holding of *Stankevich III* and

RECEIVED by MSC 3/24/2023 10:46:55 PM

[687]** This dictionary-driven search for a suitable definition is unnecessary. A woman who gives birth to a child is that child's natural mother under the common law, and there is no reason to look elsewhere for the meaning.

For centuries, "natural mother" has meant a woman who gestates and bears a child; the common law knew no other possibility. "Historically, gestation proved genetic parentage beyond doubt, so it was unnecessary to distinguish between gestational and genetic mothers." Roosevelt, *The Newest Property: Reproductive Technologies and the Concept of Parenthood*, 39 Santa Clara L Rev 79, 97 (1998). This case involves children born to lesbian women who were legally prohibited **[***26]** from marrying at the time of the children's conception. Under the common law, an unmarried woman who gave birth was always considered the mother and had no need to legally establish her custodial rights. "At the moment of birth, the nonmarital child—unlike the marital child—had one legal parent: the mother. Gestation and birth evidenced the biological fact of maternity and furnished a relationship to the child that justified legal recognition." NeJaime, *The Nature of Parenthood*, *126 Yale LJ 2260, 2267 (2017)*.[2]

When the CCA was enacted in 1970, the Legislature undoubtedly assumed that a woman who bore a child would automatically qualify as the child's natural mother; it made no provision for an alternate choice, and nothing in the act even remotely contemplates a dispute regarding maternity. Three decades later, when enacting the Estates and Protected Individuals Code (EPIC), *MCL 700.1101 et seq.*, the Legislature described various methods through which a man may attain the status of a "natural parent," but it again presumed that a woman bearing a child was the child's "natural" mother. See *MCL 700.2114*. Because the plain and ordinary meaning of the term "natural parent" **[***27]** includes a woman who bears a child, I would hold that Matthews is a "natural parent."[3] Accordingly, I concur with the majority that a genetic connection to one's child is unnecessary to establish maternity.

II. THE CONSTITUTION

The majority elects against addressing the constitutional arguments made by **[**688]** Matthews and amici.[4] In my view, the constitutional issues presented are weighty and merit consideration, particularly because they may become relevant on remand and in similar cases.

Excluding a *married* birth mother who achieved parenthood through assisted reproductive technology from consideration as a "natural parent" poses serious equal-protection problems. Michigan law provides that a husband is the legal parent of a child born to his wife through assisted reproduction technology if he consented to the procedure. *MCL 333.2824(6)*. Analogously, **[***28]** a married woman in a same-sex relationship should have precisely the same right.

---

has no precedential force. The term that requires interpretation in this case is "natural parent," the phrase the Legislature selected, rather than a term identified by an appellate court in a now-vacated opinion.

[2] See also Roberts, *The Genetic Tie*, *62 U Chi L Rev 209, 253 (1995)* ("At common law, a woman was the legal mother of the child to whom she gave birth."); D'Alton-Harrison, Abstract, *Mater Semper Incertus Est: Who's Your Mummy*?, 22 Medical Law Rev 357, 357 (2014) ("In English law, the legal term for father has been given a broad definition but the definition of mother remains rooted in biology with the Roman law principle *mater semper certa est* (the mother is always certain) remaining the norm.").

[3] The CCA also uses the term "biological parent" in several places; see, e.g., *MCL 722.26c(1)(b)(i)*, *MCL 722.27a(4)*, and *MCL 722.25(2)*. "Biological parent" is not defined in the act. In a brief order, our Supreme Court equated the term "biological parent" with "natural parent," but limited its statement to "the circumstances of this case[.]" *Porter v Hill, 495 Mich 987, 987 (2014)*. Why did the Legislature choose the word "biological" and not "genetic"? The CCA was enacted in 1970, while the sections containing the world "biological" were added later. Having given birth to the twins, Matthews is, indisputably, their "biological parent."

[4] We had the benefit of two helpful amicus curiae briefs—one filed on behalf of a number of professors of family law and the other by the American Civil Liberties Union of Michigan.

RECEIVED by MSC 3/24/2023 10:46:55 PM

Matthews and ***LeFever*** could not have legally married in Michigan when the twins were born, and when they separated, same-sex marriage remained illegal. At that time, the common law did not authorize or even recognize the concept of two legal fathers. See *Michael H v Gerald D, 491 US 110, 118; 109 S Ct 2333; 105 L Ed 2d 91 (1989)* (opinion by Scalia, J.) ("California law, like nature itself, makes no provision for dual fatherhood."). Before *Obergefell v Hodges, 576 US 644; 135 S Ct 2584; 192 L Ed 2d 609 (2015)*, dual motherhood was also considered legally impossible. See *Johnson v Calvert, 5 Cal 4th 84, 92; 851 P2d 776 (1993)* ("Yet for any child California law recognizes only one natural mother, despite advances in reproductive technology rendering a different outcome biologically possible.").

The majority relies on the CCA to conclude that here, both women have parental standing, but it takes as a given that an unmarried egg donor such as ***LeFever*** is automatically a second "natural parent" under the CCA. The CCA does not identify genetics as a criterion establishing parenthood. Historically, when it came to paternity, genetics were not relevant to the fatherhood of a child born of a marriage; the marital presumption instead controlled.[5] The sperm donor who fertilized the eggs implanted in Matthews's uterus **[***29]** certainly is not a candidate for official fatherhood of the twins. Why should ***LeFever***, whose role was analogous to the sperm donor, have automatic standing under the CCA?

I suggest that this gap in the majority's opinion remains unaddressed because the majority inherently accepts an unarticulated proposition: by donating genetic material, ***LeFever*** demonstrated her *intent* to parent, and that, combined with the commitment of her ova, sufficed to endow her with "natural parent" status.

In *DMT v TMH, 129 So3d 320, 327 (Fla, 2013)*, the Florida Supreme Court confronted precisely this issue. There, the mother who gestated and bore the child asserted that her partner, the egg donor, had no fundamental right to parent the child. The Florida Supreme Court held that Florida's assisted reproduction statute was unconstitutional on due-process and equal-protection grounds, in part because it denied same-sex couples "the statutory protection against the automatic relinquishment of parental rights that it affords to heterosexual unmarried couples seeking **[**689]** to utilize the identical assistance of reproductive technology." *Id. at 328*. The Michigan and Florida statutory schemes are dissimilar. But the larger constitutional holding of Florida's Supreme Court **[***30]** resonates: "The due process guarantees in the Florida and United States Constitutions and the privacy provision of the Florida Constitution do not permit the State to deprive this biological mother of parental rights where she was an intended parent and actually established a parental relationship with the child." *Id. at 347*.

This approach dovetails with the purpose of the CCA: "This act is equitable in nature and shall be liberally construed and applied to establish promptly the rights of the child and the rights and duties of the parents involved." *MCL 722.26(1)*. A "natural parent" paradigm focusing exclusively on genetics would exclude Matthews as a parent, despite that she birthed the children and intended to parent them. Similarly, a "natural parent" paradigm focusing exclusively on gestation and birth would exclude ***LeFever*** from establishing her status as a parent, despite that she intended to parent the twins and her egg donation demonstrated her commitment to parenthood. Indisputably, ***LeFever*** is also a "natural parent" despite that there was nothing "natural" about the process through which the twins were conceived. In the majority's parlance, the CCA's use of the term "natural parent" is "elastic **[***31]** enough" to include ***LeFever*** as

[5] "Under what became known as 'Lord Mansfield's Rule,' a husband was presumed to be the father of his wife's child and a declaration of the father or mother could not be admitted to bastardize the issue born after marriage." *Aichele v Hodge, 259 Mich App 146, 157-158; 673 NW2d 452 (2003)* (quotation marks and citations omitted).

RECEIVED by MSC 3/24/2023 10:46:55 PM

well as Matthews.

LeFever and Matthews also have a *constitutional* right to the custody of their children. Our Supreme Court has described the CCA as "a comprehensive statutory scheme" representing "the exclusive means for pursuing" rights to a child's custody, support, and parenting time. *Van v Zahorik, 460 Mich 320, 327-328; 597 NW2d 15 (1999)*. As the majority points out, the CCA does not specifically address the unique question presented in this case. The United States Constitution fills this gap. Longstanding constitutional principles compel the conclusion that both ***LeFever*** and Matthews are legal parents of the twins and are entitled to a full complement of parental rights.

"The essence of the *Equal Protection* Clauses is that the government not treat persons differently on account of certain, largely innate, characteristics that do not justify disparate treatment." *Crego v Coleman, 463 Mich 248, 258; 615 NW2d 218 (2000)*. The *Genetic Parentage Act (GPA), MCL 722.1461 et seq.*, permits a man to establish paternity by way of genetic testing and to then acquire parental rights. The *Revocation of Paternity Act (ROPA), MCL 722.1431 et seq.*, grants an unmarried man who claims to be the father of a child standing to challenge paternity determinations under certain circumstances. No '"exceedingly persuasive justification"' exists for treating men and women differently. *Mississippi Univ for Women v Hogan, 458 US 718, 724; 102 S Ct 3331; 73 L Ed 2d 1090 (1982)* ("Our decisions also establish **[***32]** that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification.") (citation omitted).

The GPA, *MCL 722.1469(2)* provides, in relevant part:

> Genetic testing that determines the man is the biological father of a child under this act may be the basis for court-ordered child support, custody, or parenting time without further adjudication under the paternity act. The child who is the subject of the genetic testing has the same relationship to the mother and the man determined to be the biological father under this act as a child **[**690]** born or conceived during a marriage and has identical status, rights, and duties of a child born in lawful wedlock effective from birth.

A genetically proven mother is entitled to the same "status, rights, and duties," *id.*, as a genetically proven father, despite that she is unmarried to the birth mother. Under the EPIC, when a child is born out of wedlock or is not the "issue" of a marriage, a man is considered a child's "natural father" for purposes of intestate succession if he and the child "have established a mutually acknowledged relationship **[***33]** of parent and child that begins before the child becomes age 18 and continues until terminated by the death of either." *MCL 700.2114(1)(b)(iii)*. Interpreting this statute as allowing only men to utilize and benefit from alternative methods of establishing "natural parenthood" would violate basic equal-protection principles.

Further, ***LeFever*** and Matthews had a constitutional right to create the twins in the manner they chose, and it follows that both women have constitutionally protected due-process rights to parent the twins despite their nonmarital status. That Matthews lacks a genetic relationship with the twins is constitutionally irrelevant to her liberty interest in their custody. And even had she not personally gestated and birthed the children (or had an ovum from a donor other than ***LeFever*** been implanted in Matthews's womb), I suggest that both women would nonetheless be entitled to be considered parents of the twins.

"[T]he interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v Granville, 530 US 57, 65; 120 S Ct*

RECEIVED by MSC 3/24/2023 10:46:55 PM

2054; 147 L Ed 2d 49 (2000) (opinion by O'Connor, J.). *Troxel* drew on a number of cases expressing the same sentiment, including *Wisconsin v Yoder, 406 US 205, 232; 92 S Ct 1526; 32 L Ed 2d 15 (1972)* ("The history and culture **[***34]** of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); and *Quilloin v Walcott, 434 US 246, 255; 98 S Ct 549; 54 L Ed 2d 511 (1978)* ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."). *Troxel, 530 US at 66*.

Had Matthews and ***LeFever*** been able to marry at the time the twins were born, it is likely both would have been named as parents on the birth certificates. This Court has developed an equitable-parent doctrine designed to permit *married*, nonbiological parents to secure parental rights. In *Atkinson v Atkinson, 160 Mich App 601, 608-609; 408 NW2d 516 (1987)*, we held that

> a husband who is not the biological father of a child born or conceived during the marriage may be considered the natural father of that child where (1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility **[***35]** of paying child support.

Our Supreme Court has refused to apply the equitable-parent doctrine to an unwed nonbiological parent, however, holding that "the extension of substantive rights regarding child custody implicates significant public policy issues and is within the province **[**691]** of the Legislature, not the judiciary." *Van, 460 Mich at 331*.

Here, we confront a biological tie that makes the case for equitable parenthood stronger. And in the years that have elapsed since *Van*, our Legislature has signaled that neither marriage nor biology are central to parenthood. In addition to allowing unmarried men to establish paternity under the GPA, the Legislature allows an unmarried man to pursue parental rights under the ROPA. The ROPA defines an "alleged father" as "a man who by his actions could have fathered [a] child." *MCL 722.1433(c)*. An "alleged father" may pursue an action to deprive a "presumed father," defined as "a man who is presumed to be the child's father by virtue of his marriage to the child's mother at the time of the child's conception or birth," *MCL 722.1433(e)*, of parental rights. By enacting this statute, the Legislature empowered unmarried men to seek parental rights, signaling that marriage is not a prerequisite to legal **[***36]** parent status and custody of a child.[6]

Indeed, as Justice MARILYN KELLY pointed out in her dissent in *Van*, the CCA says nothing at all about biology or marriage and never defines the term "parent." *Van, 460 Mich at 343, 346* (KELLY, J., dissenting). Given that "[o]ne-in-four parents living with a child in the United States today are unmarried," and that more than 24 million children in this county now live with an unmarried parent, conditioning custodial rights on marriage serves no legitimate interests, particularly those of the involved children. Livingston, *The Changing Profile of Unmarried Parents*, Pew Research Center, April 25, 2018, available at <https://www.pewresearch.org/social-trends/2018/04/25/the-changing-profile-of-

---

[6] See also *MCL 722.1003(1)* ("If a child is born out of wedlock, a man is considered to be the natural father of that child if the man joins with the mother of the child and acknowledges that child as his child by completing a form that is an acknowledgment of parentage.").

RECEIVED by MSC 3/24/2023 10:46:55 PM

unmarried-parents/> (accessed March 15, 2021) [https://perma.cc/8YCK-BLG5]. As Justice KELLY presciently observed, "when child custody or visitation is at issue, the Legislature has decreed that the overriding concern is not the ultimate preservation by the state of the institution of marriage. It is, instead, the attainment of the best interests of the children." *Van, 460 Mich at 346* (KELLY, J., dissenting).

Applying the equitable and due-process principles described in a century of Supreme Court jurisprudence **[***37]** regarding parenthood and families, I conclude that unmarried parents in same-sex relationships who do not avail themselves of the sophisticated reproductive technology used by these parties should nevertheless be considered "natural parents" under Michigan law. Matthews and ***LeFever*** were able to afford a technology that provided both of them with a biological connection to their child. Two men in a committed but unmarried same-sex relationship would not be able to avail themselves of that option, and for some lesbian couples, shared biology may also be impossible.

"[B]iological relationships are not the exclusive determination of the existence of a family. . . . No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship." *Smith v Org of Foster Families for Equality & Reform, 431 US 816, 843-844; 97 S Ct 2094; 53 L Ed 2d 14 (1977)*. See also *Stanley v Illinois, 405 US 645, 652; 92 S Ct 1208; 31 L Ed 2d 551 (1972)* (declaring that an unmarried father's "interest in retaining **[**692]** custody of his children is cognizable and substantial"). Matthews and ***LeFever*** share a liberty interest in the twins created by both biology and an established parental relationship. I suggest that *Van*'s logic has been undermined by the GPA and the ROPA, which opens the door **[***38]** to parental rights for unmarried fathers. Due-process and equal-protection principles similarly open the door to parental rights for unmarried, same-sex parents to enjoy the rights and obligations of parenthood.

/s/ Elizabeth L. Gleicher

End of Document

RECEIVED by MSC 3/24/2023 10:46:55 PM

Neutral
As of: March 23, 2023 11:58 AM Z

Lipnevicius v. Lipnevicius

Court of Appeals of Michigan

August 26, 2010, Decided

No. 289073

Reporter
2010 Mich. App. LEXIS 1615 *; 2010 WL 3389748

KARI LYNN ***LIPNEVICIUS***, Plaintiff-Appellee, v GEOFFREY MICHAEL ***LIPNEVICIUS***, Defendant-Appellant, and JASON BRISTOL, Intervening Party-Appellee.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: [*1] Genesee Circuit Court. LC No. 06-270914-DM.

Lipnevicius v. Lipnevicius, 485 Mich. 872, 771 N.W.2d 802, 2009 Mich. LEXIS 2060 (2009)

Core Terms

equitable, marriage, biological father, trial court, intervene, paternity, divorce, custody, natural father, invoke, parentage, divorce proceeding, parental rights, divorce action, child custody, minor child, trial court's determination, biological parent, child born, legal father, extinguished, presumed, delayed, clear and convincing evidence, summary disposition, third person, termination, rights, presumption of legitimacy, motion to intervene

Judges: Before: JANSEN, P.J., and MURRAY and GLEICHER, JJ. JANSEN, P.J. (concurring in part and dissenting in part).

Opinion

PER CURIAM.

This case is before us as on leave granted. *Lipnevicius v Lipnevicius, 485 Mich 872; 771 NW2d 802 (2009)*. After review of the pertinent facts and relevant law, we unanimously agree with parts I, II and III (A)-(E)(2) of Judge JANSEN'S opinion. We disagree with part III(A)(3) of Judge JANSEN'S opinion for the reasons stated *infra*, and instead hold that the trial court's order should be vacated, and this matter remanded for an evidentiary hearing on whether defendant is entitled to be recognized as the minor child's equitable parent. And, although we recognize it as dicta, we note our disagreement with the continued recognition of the equitable parent doctrine. Accordingly, the trial court's opinion and order are vacated, and this case is remanded for an evidentiary hearing on whether defendant is entitled to the status of an equitable parent.

Defendant's main argument on appeal is that the trial court erred in refusing to consider whether defendant met the *Atkinson v Atkinson, 160 Mich App 601; 408 NW2d 516 (1987)*, standards **[*2]** because it had previously ruled that the child was not an issue of the marriage, and so it could not now "confer the status of equitable parent on the Defendant [for] it would . . . undermine this court's prior order and determination that [the child] was not an issue of the marriage which is impermissible pursuant to *Coble v Green, 271 Mich App 382; 722*

RECEIVED by MSC 3/24/2023 10:46:55 PM

NW2d 898 (2006)." This legal ruling, that a court finding that a child was not born of the marriage precludes application of the equitable parent doctrine, was in error. Indeed, *Atkinson* adopted the equitable parent doctrine so that "a husband who is not the biological father of a child born or conceived during the marriage may be considered the natural father", so long as the criteria are proven. Atkinson, 160 Mich App at 608. See also Van v Zahorik, 460 Mich 320, 330; 597 NW2d 15 (1999). The trial court's finding that the child was not an issue of the marriage is in fact a prerequisite to invocation of the equitable parent doctrine, for if the child was an issue of the marriage, there would be no parentage dispute. The timing of these decisions is not the critical factor, as revealed in York v Morofsky, 225 Mich App 333; 571 NW2d 524 (1997). **[*3]** In that case, the trial court entered a divorce judgment excluding the minor child as an issue of the marriage, and "later determined that defendant was not [the minor child's] biological or equitable parent." Id. at 334-336. Our Court affirmed the trial court's determination that the husband was not the biological father, but reversed the decision denying him the permanent status of equitable parent. *Id*.

The trial court's reliance on *Coble* was misplaced. In that case this Court held that the mother lacked standing to bring a subsequent paternity suit against the biological father because the trial court had previously found the husband to be an equitable parent, which we had affirmed in a prior appeal. [1] Coble, 271 Mich App at 388-389. Once a father is deemed an equitable parent, he has the same rights--as does the child--as if the child were an issue of the marriage. *Id*., citing Soumis v Soumis, 218 Mich App 27, 34; 553 NW2d 616 (1996). Hence, that finding of equitable parent foreclosed *someone else being declared a father by a court*. [2] Here, however, a finding that defendant was not the biological father did not preclude a declaration *in the same case* that defendant was the equitable **[*4]** parent. York, 225 Mich App at 334-335.

Although some may quibble over the notion that a biological father can be permanently excluded as a parent when a trial court finds a husband to be an equitable parent, the notion is consistent with the equitable parent doctrine and Michigan's (and our Nation's) long-standing policy in favor of preserving the parent-child relationship. This holds true because the purpose of the equitable parent doctrine is to permanently protect an established father-child relationship that was fostered from birth to the point of divorce, and which the father wants to continue. This preserves the stability, consistency, and bond that was created while the presumption of legitimacy governed their lives, and is considered a benefit to the child. So, the fact that the biological father is now in the picture does not foreclose *as a matter of law* the application of the equitable parent doctrine. See Soumis, 218 Mich App at 36 (MARKMAN, **[*5]** J., concurring). [3]

While recognizing this may not be the strongest case to invoke the doctrine, the fact intensive determination of whether to apply the equitable parent doctrine should first be made by the trial court after conducting an evidentiary hearing. For this reason, we must vacate and remand.

With respect to whether the equitable parent

---

[1] York, 225 Mich App at 340.

[2] A child cannot, by nature or by law, have two fathers. See Michael H v Gerald D, 491 US 110, 118; 109 S Ct 2333; 105 L Ed 2d 91 (1989) (SCALIA, J.); Sinicropi v Mazurek, 273 Mich App 149, 185; 729 NW2d 256 (2006).

[3] In a case where the equitable parent doctrine is invoked by the court because of the strong father-child bond, denying a right of parentage to the biological parent who was not involved in the child's life or upbringing does not run afoul of the United States or Michigan Constitutions. The protected liberty interest arises from the family life and bond between the father and child, not simply from a biological link. Sinicropi, 273 Mich App at 169, citing Hauser v Reilly, 212 Mich App 184, 188-189; 536 NW2d 865 (1995). Whether this holds true when the plaintiff has both a biological link and a father-son bond may be another issue, but cannot now be decided in this case until after findings are made on remand.

RECEIVED by MSC 3/24/2023 10:46:55 PM

doctrine should continue to be recognized in Michigan, the Supreme Court's order of remand does not ask us to determine the soundness **[*6]** of *Atkinson*, i.e., whether Michigan courts should continue to *recognize* the equitable parent doctrine. Nonetheless, we note that the continuing existence of the equitable parent doctrine necessitated a lengthy, multifaceted analysis of an otherwise simple and straightforward case. In our view, the equitable parent doctrine irreconcilably conflicts with statutes intended to occupy the entire field of child custody regulation. The governing laws, enacted by our Legislature, compel a far more direct end to this litigation.

The circuit court's ruling that Nathan was born out of wedlock disestablished defendant's paternity of the child, rendering defendant a "third person" under the Child Custody Act (CCA), *MCL 722.22(j)*. Pursuant to *MCL 722.26c(1)*, defendant lacked standing to bring an action for custody. These directly applicable statutes chart the way to a simple affirmance of the circuit court's denial of defendant's motion for summary disposition. Instead, the equitable parent doctrine resuscitates a claim otherwise unrecognized in the statutory framework governing child custody matters. Because this doctrine clashes with the well-established principle that "the public policy issues **[*7]** related to child custody disputes are to be resolved by the Legislature, not the judiciary," *Van, 460 Mich at 327*, it has no place in Michigan's jurisprudence.

In 1980, our Legislature amended the paternity act, *MCL 722.711 et seq.*, to "expand[ ] the definition of a child born out of wedlock to include 'a child which the court has determined to be a child born during a marriage but not the issue of that marriage." *Girard v Wagenmaker, 437 Mich 231, 240; 470 NW2d 372 (1991)*, quoting former *MCL 722.711(a)*. [4] With this amendment, the Legislature allowed divorcing parents to contest the biological parentage of their children, as occurred in this case. After a circuit court has extinguished the paternity presumption, a putative father may file a parentage action under *MCL 722.714*. *Girard, 437 Mich at 242-243*. [5]

Here, a "stipulated judgment" reflects that Bristol "acknowledges **[*8]** paternity of the minor child . . . ." This acknowledgment placed Nathan in "the same relationship" to Bristol "as a child born or conceived during a marriage," and invested Nathan with "the identical status, rights, and duties of a child born in lawful wedlock effective from birth." *MCL 722.1004*. When the circuit court recognized Bristol as Nathan's natural father, Bristol became a "parent" under the Child Custody Act, *MCL 722.22(h)*, and defendant assumed the status of a "third person," whom the Legislature has defined as "an individual other than a parent." *MCL 722.22(j)*.

"Our constitution requires that a plaintiff possess standing before a court can exercise jurisdiction over that plaintiff's claim." *Miller v Allstate Ins Co, 481 Mich 601, 606; 751 NW2d 463 (2008)*. A third person may initiate a custody action only pursuant to authority conferred by the Legislature. Two pertinent statutes confer standing in child custody actions, *MCL 722.26b* and *MCL 722.26c*. In *MCL 722.26c*, our Legislature, authorized, in relevant part as follows, the commencement of third-party custody actions:

> (1) A third person may bring an action for custody of a child if the court finds either of the following:
>
> (a) **[*9]** Both of the following:
>
> (*i*) The child was placed for adoption with the third person under the adoption laws of this or another state, and the placement order is still in

[4] Currently, the relevant portion of *MCL 722.711(a)* defines a "child born out of wedlock" as "a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage."

[5] The court rules describe an alternate mechanism for establishing biological fatherhood in *MCR 3.921(D)*.

RECEIVED by MSC 3/24/2023 10:46:55 PM

effect at the time the action is filed.

(*ii*) After the placement, the child has resided with the third person for a minimum of 6 months.
(b) All of the following:

(*i*) The child's biological parents have never married to one another.

(*ii*) The child's parent who has custody of the child dies or is missing and the other parent has not been granted legal custody under court order.

(*iii*) The third person is related to the child within the fifth degree by marriage, blood, or adoption.

Defendant did not possess standing under the clear and unambiguous terms of *MCL 722.26c(1)*. The alternate standing statute applicable in child custody actions, *MCL 722.26b*, applies only to guardians and limited guardians. Thus, the Legislature has not supplied defendant with any legal avenue for obtaining custodial rights to Nathan. As our Supreme Court recently emphasized, "no **[*10]** constitutional or statutory basis exists for third parties to have standing to seek child custody solely because they have an established custodial relationship with the child." *Hunter v Hunter, 484 Mich 247, 263; 771 NW2d 694 (2009)*.

Moreover, neither the Child Custody Act nor the Paternity Act contemplates the notion of an "equitable" parent. The Legislature simply has not bestowed parental prerogatives on persons whose status falls outside *MCL 722.22(h)*. Absent the equitable parent doctrine introduced in *Atkinson*, defendant would have no legally cognizable interest in custody of Nathan. [6] "Very few jurisdictions have embraced the equitable-parent doctrine adopted in Atkinson . . . ." *Titchenal v Dexter, 166 Vt 373, 384-385; 693 A2d 682 (1997)*. The Connecticut Supreme Court explained as follows one rationale for other jurisdictions' rejection of the equitable parent doctrine:

> [E]ven if we were to conclude that our statutes left room for a redefinition of parentage, we are not persuaded that it would be wise to employ the equitable parent doctrine in that fashion. It is true that the doctrine has considerable emotional appeal, because it permits a court, in a particularly compelling **[*11]** case, to conclude that, despite the lack of biological or adoptive ties to the child, the deserving adult nonetheless may be determined to be the child's parent. This appeal may be enhanced in a given case because the best interests of the child, if determined irrespective of the otherwise invalid claim of parentage, may point in that direction. That doctrine, however, would lack the procedural and substantive safeguards provided to the natural parents and the child by the adoption statutes. In addition, the equitable parent doctrine, which necessarily requires an ad hoc, case-by-case determination of parentage after the facts of the case have been determined, would eliminate the significant degree of certainty regarding who is and who is not a child's parent that our jurisprudence supplies. [*Doe v Doe, 244 Conn 403, 444 n 46; 710 A2d 1297 (1998)*, overruled in part on other grounds, *In re Joshua S, 260 Conn 182, 796 A2d 1141 (2002)*.]

While the Supreme Court has apparently reserved this question for another day, the continuing viability of the equitable parent doctrine merits

---

[6] Although this Court has referenced and relied on the equitable parent doctrine in several cases since *Atkinson*, none of those cases addresses whether the 1993 enactment of *MCL 722.26c*, governing third person actions for custody, conflicts with the common-law **[*12]** equitable parent doctrine. 1993 PA 259. This Court must "presume that the Legislature is aware of the common law that legislation will affect; therefore, if the express language of legislation conflicts with the common law, the unambiguous language of the statute must control." *Lewis v LeGrow, 258 Mich App 175, 183-184; 670 NW2d 675 (2003)*.

RECEIVED by MSC 3/24/2023 10:46:55 PM

prompt and careful evaluation. In *Hunter, 484 Mich at 251, 261, 271-275*, our Supreme Court overruled *Mason v Simmons, 267 Mich App 188; 704 NW2d 104 (2005)*, a case similarly premised in part on equitable considerations, instead of a governing statute. This Court had held in *Mason* "that unfit parents have the burden 'to show, by a preponderance of the evidence, that a change in the established custodial environment with the guardian was in the child's best interests.'" *Hunter, 484 Mich at 272*, quoting *Mason, 267 Mich App at 207*. The Supreme Court criticized that "*Mason* and its predecessors created this new standard out of thin air." *Id*. The equitable parent doctrine suffers from the same intrinsic infirmities **[*13]** as *Mason's* groundless injection of unfitness considerations into the parental presumption contained in *MCL 722.25(1)*. As did the fit parent requirement adopted in *Mason*, the equitable parent doctrine plainly contravenes the statutory scheme governing child custody. For this reason, it should be overruled.

Vacated and remanded. We do not retain jurisdiction.

No costs, neither party having prevailed in full. *MCR 7.219(A)*.

/s/ Christopher M. Murray

/s/ Elizabeth L. Gleicher

Concur by: JANSEN (In Part)

Dissent by: JANSEN (In Part)

Dissent

JANSEN, P.J. (*concurring in part and dissenting in part*).

My colleagues and I agree (1) that the trial court legally erred by allowing the biological father, intervening party Jason Bristol (Bristol), to intervene in the divorce proceedings, (2) that defendant was the child's legal father prior to the trial court's determination that he was not a biological parent, (3) that the trial court's determination that defendant was not a biological parent did not amount to a "termination" of his parental rights, but rather constituted an extinguishment of his parental rights, and (4) that defendant was entitled to invoke the so-called "equitable parent doctrine" after the trial court's determination **[*14]** that Bristol was the child's biological father. We also agree that that although the trial court's ruling extinguished defendant's parental rights, there exist no constitutional infirmities that would require reversal in this case. However, unlike my colleagues, I conclude that despite defendant's entitlement to invoke the equitable parent doctrine in this case, he would not have been able to satisfy the standards of an equitable parent. Accordingly, instead of remanding for an evidentiary hearing on this issue, I would affirm in full.

I

Plaintiff Kari Lynn ***Lipnevicius*** (plaintiff) married defendant in October 2000, in Grand Blanc, Michigan. Plaintiff gave birth to two sons during the marriage: Nicholas ***Lipnevicius***, born 3/25/03, and Nathan ***Lipnevicius***, born 10/14/04. The younger son, Nathan, was conceived while plaintiff was having an extramarital affair with Bristol. Plaintiff stopped the affair with Bristol when she and defendant moved to Ohio in March 2004. Plaintiff subsequently moved back to Michigan with her two children in March 2006, and filed her complaint for divorce in October 2006. Defendant continued to live in the marital home in Ohio.

In June 2007, plaintiff filed a motion **[*15]** seeking, among other things, (1) a determination of the parentage of Nathan, (2) a determination that Nathan was "not a product of the marriage," and (3) a determination that "defendant is not the equitable parent." Plaintiff asserted that DNA testing had been completed and that defendant was not Nathan's biological father.

RECEIVED by MSC 3/24/2023 10:46:55 PM

Plaintiff also asserted that defendant had been largely absent from Nathan's life and had therefore not developed a meaningful father-son relationship with Nathan. Plaintiff anticipated that if defendant were found not to be Nathan's biological father, he might nonetheless attempt to raise the equitable parent doctrine. She argued that he should not be permitted to do so. Plaintiff's motion did not disclose the identity of Nathan's true biological father.

Jason Bristol [1] then moved to intervene in the divorce proceedings pursuant to *MCR 2.209* and filed a separate motion seeking "the court's determination that [Bristol] is the natural father of minor child Nathan ***Lipnevicius***." Bristol sought to intervene solely "with regard to the issue of the establishment of parentage [of] minor child, Nathan ***Lipnevicius***." Bristol represented that he was Nathan's true biological **[*16]** father. Bristol made clear that he "was not seeking to file a separate lawsuit," but was "merely seeking to intervene in the single issue of the determination of the natural father of minor child Nathan ***Lipnevicius***."

Bristol submitted a DNA test report concluding that there was a 99.998 percent probability that he was Nathan's biological father. The report provided that "[b]ased on testing results obtained from analyses of the DNA loci listed, the probability of paternity is 99.998%." Bristol acknowledged that, under Michigan law, it was presumed that Nathan was the child of both plaintiff and defendant because he was born during their marriage. However, Bristol argued that the DNA testing evidence was sufficient to rebut this presumption.

Defendant filed a response to Bristol's motions. Defendant cited *Killingbeck v Killingbeck, 269 Mich App 132; 711 NW2d 759 (2005)*, **[*17]** for the proposition that third parties are generally not permitted to intervene in divorce proceedings in Michigan. Defendant asserted that because Nathan was born during the marriage, it was presumed that he was the child of both plaintiff and defendant. Defendant observed that because he was already presumed to be Nathan's legal father, he had no reason to resort to the equitable parent doctrine in this case.

In August 2007, the trial court heard oral argument on Bristol's motion to intervene. Bristol's attorney argued that the facts of the present case were unlike those of *Killingbeck*, most specifically because "[t]he door was opened by [plaintiff]" when she filed her own earlier motion seeking a judicial determination of Nathan's parentage. Bristol suggested that his motion to intervene was simply complementary to plaintiff's own motion. Defendant's attorney cited *Killingbeck* and related cases for the proposition that a third party's motion to intervene in divorce proceedings should rarely be granted, and maintained that Bristol should not be permitted to intervene or to challenge defendant's position as Nathan's legal father. After hearing the arguments, the trial court entered **[*18]** an order granting Bristol's motion to intervene.

An evidentiary hearing was then held during which the DNA testing results were admitted into evidence. Counsel for defendant did not contest the DNA testing results, and conceded that Bristol was Nathan's biological father. On September 10, 2007, the trial court issued an order providing that "minor child Nathan ***Lipnevicius*** is not the issue of the marriage between Plaintiff Kari Lynn ***Lipnevicius*** and Defendant Geoffrey Michael ***Lipnevicius***," and that "Jason Bristol is the natural father of minor child Nathan ***Lipnevicius***."

A judgment of divorce was ultimately entered in December 2007, dissolving the parties' marriage. Bristol then filed a separate paternity action, which was assigned to the same trial court judge. Bristol's separate paternity action was resolved by a consent judgment, and Bristol then moved to be dismissed

[1] Plaintiff testified that she had known Bristol since about 1994, and had dated him in the 1990s for approximately 2 years. Plaintiff stated that she had always kept in touch with Bristol, and that she had met up with him again in 2003. Plaintiff testified that her extramarital affair with Bristol began sometime in the fall of 2003.

RECEIVED by MSC 3/24/2023 10:46:55 PM

from the divorce action. The circuit court granted Bristol's motion and dismissed him from the divorce proceedings. Bristol thereafter married plaintiff.

In January 2008, defendant filed a delayed application for leave to appeal the trial court's August 2007 order, arguing that Bristol had lacked standing to intervene in **[*19]** the divorce action. Plaintiff moved to dismiss the delayed application as moot, arguing that Bristol had already been dismissed from the divorce proceedings and that defendant had failed to properly preserve the issue of his status as Nathan's father. In June 2008, this Court dismissed defendant's delayed application as moot. [2] This Court's order provided in relevant part:

> The motion to dismiss defendant's delayed application for leave to appeal . . . is GRANTED for the reason that the issue raised in the application is moot. The natural father had standing to bring the subsequent paternity action based on the trial court's September 10, 2007 order finding that the child in question was not the issue of the marriage between plaintiff and defendant. Defendant does not challenge the substance of this order, which effectively gave the natural father standing to bring his subsequent action under the Paternity Act. *MCL 722.714*, *722.711(a)*; *Barnes v Jeudevine, 475 Mich 696, 703; 718 NW2d 311 (2006)*; *In re KH, 469 Mich 621, 634-635; 677 NW2d 800 (2004)*. Whether the trial court erred by allowing the natural father to intervene in the divorce action is irrelevant to the outcome. The delayed **[*20]** application for leave to appeal is DISMISSED.

This Court's dismissal of defendant's delayed application was not appealed to the Supreme Court.

Meanwhile, in October 2007, defendant had filed a motion for summary disposition in the trial court. In the motion for summary disposition, defendant argued that he was Nathan's equitable parent, even though Bristol was Nathan's true biological father. Defendant asserted that he "clearly satisfied the criteria" for being adjudicated an equitable parent under *Atkinson v Atkinson, 160 Mich App 601; 408 NW2d 516 (1987)*. Defendant further contended that, as Nathan's equitable father, he was "endowed with both the rights and responsibilities of a natural/legal parent."

Plaintiff and Bristol--Bristol had not yet been dismissed form the divorce case at this time--opposed defendant's motion for summary disposition, arguing that defendant was not an equitable parent and that he had stipulated to the admission of the DNA testing results. They also pointed out that the circuit court had already ruled on September 10, 2007, that Nathan was "not **[*21]** the issue of the marriage" and that "Bristol is the natural father of minor child Nathan ***Lipnevicius***."

In December 2007, the trial court denied defendant's motion for summary disposition. The trial court found its previous order of September 10, 2007, to be dispositive on the issue of Nathan's legal parentage. The court noted that a child born during a marriage is presumed to be the issue of that marriage, but that this presumption of legitimacy can be rebutted by clear and convincing evidence of paternity. The court also noted that it was authorized to determine that Nathan was not the issue of the marriage, and stated that "[o]nce this determination is made, a party claiming to be the equitable parent cannot then make claims challenging whether the child was, in fact, born out of wedlock." The trial court concluded:

> [T]here has been a conclusive legal proceeding wherein this court found by clear and convincing evidence that Nathan was not the product of the marriage--hence he was born out of wedlock. If this court were to now confer the status of equitable parent on the defendant it

---

[2] ***Lipnevicius*** *v* ***Lipnevicius***, unpublished order of the Court of Appeals, entered June 20, 2008 (Docket No. 282990).

RECEIVED by MSC 3/24/2023 10:46:55 PM

> would undermine this court's prior order and determination that Nathan was not an issue of the marriage, **[*22]** which is impermissible pursuant to *Coble v Green, 271 Mich App 382; 722 NW2d 898 (2006)*.
>
> After the plaintiff challenged the presumption of legitimacy, this court determined by clear and convincing evidence that third party Bristol was the natural father of Nathan--and that Nathan was not a product of the marriage; the arguments now made by the defendant seeking status as an equitable parent are moot pursuant to the holding in *Coble*. Accordingly, the order entered by this court on September 12, 2007, remains in effect. And the defendant's motion for summary disposition must be denied because the documentary evidence presented in support thereof cannot yield a different result.

In November 2008, defendant filed a delayed application for leave to appeal the trial court's December 2007 order. This Court initially denied defendant's delayed application for leave to appeal. [3] But in ***Lipnevicius v Lipnevicius***, *485 Mich 872 (2009)*, our Supreme Court remanded the matter for consideration as on leave granted, setting forth seven specific questions for this Court's consideration:

> [I]n lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted. **[*23]** The court should consider: (a) whether the trial court legally erred in allowing the biological father to intervene in the divorce proceedings; (b) whether the defendant father was the child's legal father prior to the trial court's determination that the defendant father was not a biological parent; (c) whether the trial court's determination that the defendant father was not the child's biological parent amounted to termination of his parental rights; (d) if the trial court's determination did amount to a termination of the defendant father's parental rights, whether any constitutional implications exist; cf. *Santosky v Kramer, 455 US 745 (1982)*; **[*24]** (e) whether the defendant father was entitled to invoke the equitable parent doctrine after the court determined that another man was the biological father; (f) whether the defendant father's entitlement to invoke the equitable parent doctrine is in any way affected by the fact that the biological father is apparently willing to undertake all parental responsibilities with regard to the child; and (g) whether, if the defendant father is entitled to invoke the equitable parent doctrine, he has satisfied the standards of an equitable parent.

II

This Court reviews for an abuse of discretion the trial court's decision on a motion to intervene. *Auto-Owners Ins Co v Keizer-Morris, Inc, 284 Mich App 610, 612; 773 NW2d 267 (2009)*. An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co, 476 Mich 372, 388; 719 NW2d 809 (2006)*. Whether defendant was Nathan's legal father prior to the trial court's determination that defendant was not a biological parent, whether the trial court's determination **[*25]** in this regard amounted to a termination of defendant's parental rights, and whether any constitutional implications exist in this case are all questions of law. This Court reviews de novo questions of law, *Cowles v Bank West, 476 Mich 1, 13; 719 NW2d 94 (2006)*, including questions of constitutional law, *Sidun v Wayne Co Treasurer, 481 Mich 503, 508; 751 NW2d 453 (2008)*. Lastly, whether a party may assert parental rights under the equitable parent doctrine is a question that this Court reviews de novo on appeal. *Killingbeck, 269 Mich App at 141*.

III

[3] ***Lipnevicius*** *v* ***Lipnevicius***, unpublished order of the Court of Appeals, entered January 21, 2009 (Docket No. 289073).

RECEIVED by MSC 3/24/2023 10:46:55 PM

A

I first conclude that although the trial court legally erred by allowing Bristol to intervene in the divorce proceedings, this error was plainly harmless in light of plaintiff's nearly identical motion seeking a determination that Bristol was Nathan's biological father. MCR 2.209 describes various instances in which a party may intervene by right, and other instances in which a party may intervene at the trial court's discretion. But as this Court has previously observed, "[d]omestic relations actions are strictly statutory. The only parties to a divorce action are the two people seeking dissolution of their marriage. Third-party intervention **[*26]** in divorce actions is permitted in extremely limited circumstances . . . ." Killingbeck, 269 Mich App at 140 n 1; see also Yedinak v Yedinak, 383 Mich 409, 413; 175 NW2d 706 (1970) (noting that a divorce court's jurisdiction is limited "to determin[ing] the rights and obligations between the husband and wife, to the exclusion of third parties"). Indeed, the general rule is that "third parties can be joined in [a] divorce action only if they have conspired with one spouse to defraud the other spouse of a property interest." Estes v Titus, 481 Mich 573, 583; 751 NW2d 493 (2008). I recognize that Bristol's motion to intervene was quite limited in scope, seeking only "to intervene in the single issue of the determination of the natural father of minor child Nathan ***Lipnevicius***." Nonetheless, as our precedent makes clear, the "sole recourse" for a nonparty to the divorce proceedings who seeks to establish paternity is by way of a paternity action, and not through the divorce action itself. Killingbeck, 269 Mich App at 140 n 1. Accordingly, I believe that the trial court legally erred by allowing Bristol to intervene in the parties' divorce action for the purpose of establishing the paternity **[*27]** of Nathan.

This is not to say, however, that the trial court was wholly without authority to determine the matter of paternity within the confines of the divorce action. Plaintiff, herself, had filed a nearly identical motion seeking a determination that Bristol was Nathan's true biological father. And as the text of the trial court's order makes clear, plaintiff's motion concerning the issue of paternity was decided concurrently with Bristol's motion. Even though Bristol should not have been permitted to intervene and to raise the matter of paternity by way of his own motion, plaintiff, as a party to the divorce, *did* have standing to raise the issue of Nathan's parentage. See York v Morofsky, 225 Mich App 333, 335; 571 NW2d 524 (1997). In a divorce proceeding, a wife may offer evidence that her husband is not the biological father of a child, even though the child was born during the marriage and the husband has treated the child as his own. Atkinson v Atkinson, 160 Mich App 601, 605-606; 408 NW2d 516 (1987). As this Court has held, "it is now well-established that in divorce actions the court may determine whether the husband is the father of the wife's child." Id. at 606. Accordingly, **[*28]** despite the trial court's error in permitting Bristol to intervene and raise the issue of Nathan's parentage, I conclude that the issue of Nathan's parentage was still properly before the court in the form of plaintiff's own motion. The trial court properly entertained plaintiff's separate motion and decided, on the basis of the undisputed DNA test results, that defendant was not Nathan's biological father. Therefore, the trial court's error in allowing Bristol to intervene and raise the issue of paternity was plainly harmless, and did not affect the outcome of the proceedings. It is well settled that this Court will not reverse on the basis of harmless error. Guerrero v Smith, 280 Mich App 647, 656; 761 NW2d 723 (2008).

B

I also conclude that defendant was, indeed, Nathan's legal father prior to the trial court's determination that defendant was not a biological parent. Under Michigan law, there is a rebuttable presumption that a child born or conceived during a marriage is the issue of that marriage. In re KH, 469 Mich 621, 624-625; 677 NW2d 800 (2004); see

RECEIVED by MSC 3/24/2023 10:46:55 PM

also *MCR 3.903(A)(7)(a)*, and *Aichele v Hodge, 259 Mich App 146, 158-159; 673 NW2d 452 (2003)*. This presumption "'is deeply rooted **[*29]** in our statutes and case law,'" and "can be overcome only by a showing of clear and convincing evidence." *Barnes v Jeudevine, 475 Mich 696, 703; 718 NW2d 311 (2006)*, quoting *In re KH, 469 Mich at 634*. It is undisputed that plaintiff gave birth to Nathan while plaintiff was still married to defendant. Thus, prior to the trial court's determination that defendant was not Nathan's biological father, defendant was legally presumed to be the child's father. See *In re KH, 469 Mich at 624-625*. Defendant did not lose his status as Nathan's legal father until the trial court subsequently decided plaintiff's motion, determining by clear and convincing evidence [4] that Bristol was the child's true biological father.

C

I next conclude that the trial court's determination that defendant was not Nathan's biological father *did not* amount to a "termination" of his parental rights as that term is used in the **[*30]** Juvenile Code, *MCL 712A.1 et seq*. Instead, I conclude that defendant's presumed parental rights in the child were *extinguished* once the trial court entered the judgment of divorce, determining that defendant was not the father of the child and that the child was not the issue of the marriage. Although it is arguable that the difference between "termination" and "extinguishment" is merely a matter of semantics, the former term carries significant legal implications that are inapplicable to the present situation.

There is no doubt that none of the grounds for terminating parental rights set forth in the Juvenile Code is present--or even alleged to be present--in this case. See *MCL 712A.19b(3)*. This is not an "abuse and neglect" case filed under the Juvenile Code by the Department of Human Services, and none of the procedures set out in the Juvenile Code was utilized here. Rather, this was a divorce case in which the issue of paternity was timely raised by plaintiff, and in which the court properly resolved to "settle with finality a controversy regarding the child's legitimacy." *Barnes, 475 Mich at 704*. In addressing the issues presented, the trial court found that the strong and historic **[*31]** presumption of legitimacy established when a child is born during the marriage had been overcome by clear and convincing evidence. *Id. at 703*. Any parental rights bestowed upon defendant as a result of this presumption were duly extinguished by the court's findings in the judgment of divorce that defendant was not the biological father of the child and that the child was not the issue of the marriage. I conclude that once the judgment of divorce was entered to this effect, defendant *at that point in time* no longer had any legally enforceable rights in the minor child. [5] Any such legally enforceable rights that he was previously presumed to have were extinguished.

D

Nor do I perceive any constitutional infirmities that would require reversal of the trial court's actions. It is true that natural parents enjoy a fundamental liberty interest in the care, custody, and management of their children. *Santosky v Kramer, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982)*; **[*32]** see also *In re Rood, 483 Mich 73, 76; 763 NW2d 587 (2009)*. It is equally true that Michigan law, "like nature itself, makes no provision for dual fatherhood." See *Michael H v Gerald D, 491 US 110, 118; 109 S Ct 2333; 105 L Ed 2d 91 (1989)* (opinion of SCALIA, J.). It cannot seriously be disputed that, until the presumption of

[4] I note that the undisputed DNA test results in this case, indicating a 99.998 percent probability that Bristol was Nathan's biological father, certainly constituted "clear and convincing evidence" sufficient to rebut the presumption that defendant was the child's father. See *Barnes, 475 Mich at 703*.

[5] Of course, this statement that defendant "no longer had any legally enforceable rights in the minor child" assumes that defendant was neither an equitable parent nor an individual with third-party custody rights in a child custody dispute.

RECEIVED by MSC 3/24/2023 10:46:55 PM

paternity was rebutted, the fundamental liberty interest in the care, custody, and management of Nathan belonged to defendant--who was *presumed* to be Nathan's natural father because he was married to plaintiff at the time of conception and birth. See *In re KH, 469 Mich at 624-625*; *MCR 3.903(A)(7)(a)*. However, once plaintiff introduced clear and convincing evidence in the divorce court to rebut the presumption of legitimacy, as she was entitled to do under Michigan law, *Atkinson, 160 Mich App at 605-606*, and once the trial court entered its order providing that Nathan "is not the issue of the marriage," Nathan had no "father" as defined in *MCR 3.903(A)(7)*, *In re KH, 469 Mich at 637 (2004)* (stating that "the trial court did not make a finding that the presumption of legitimacy was rebutted by the parents," but that "[i]f such a finding had been made, the children **[*33]** would have no "father"). At this point, defendant's rights as a father ceased to exist and Jason Bristol presumably could have been identified as a putative father under *MCR 3.903(A)(24)* and *MCR 3.921(D)*. *In re KH, 469 Mich at 637*. Because defendant was no longer a "parent" after the presumption of legitimacy was rebutted, he necessarily possessed no further fundamental liberty interest in Nathan's care and custody at that time. *Santosky, 455 US at 753*. Accordingly, I find no constitutional error in this case.

E

I next consider whether defendant was entitled to assert the equitable parent doctrine after the trial court determined that he was not the child's biological father. Like my colleagues, I conclude that he was. However, unlike my colleagues, I am convinced that defendant is unable to satisfy the requirements of an equitable parent in this case.

1 The facts of the present case are similar to those of *Atkinson*. In *Atkinson, 160 Mich App at 605-606*, the defendant-wife gave birth to a child during her marriage to the plaintiff-husband. Thereafter, during subsequent divorce proceedings, the defendant-wife wished to introduce evidence that the child was not the plaintiff-husband's biological **[*34]** issue. This Court ruled that the defendant-wife was entitled to introduce such evidence. *Id.* However, this Court also ruled that the plaintiff-husband was entitled to invoke the "equitable parent" doctrine, stating:

> [A] husband who is not the biological father of a child born or conceived during the marriage may be considered the natural father of that child where (1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support. [*Id. at 608-609*.]

The *Atkinson* Court went on to hold that the plaintiff-husband qualified as an "equitable parent" under the circumstances of that case, and remanded the matter to allow the trial court to reevaluate the plaintiff-husband's requests for custody and visitation. *Id. at 609*.

Pursuant to the reasoning of *Atkinson*, [6] I conclude that defendant was permitted to invoke the equitable parent doctrine following the trial court's determination **[*35]** that he was not the child's

---

[6] This Court's decision in *Atkinson* constitutes binding precedent. ***MCR 7.215(C)(2)***. Of course, because *Atkinson* was decided prior to November 1, 1990, my colleagues and I would be perfectly free to disagree with its holding and reach a contrary result in the case at bar. ***MCR 7.215(J)(1)***. However, the equitable parent doctrine has been referenced, if not expressly reaffirmed, in several post-1990 cases. See, e.g., *Van v Zahorik, 460 Mich 320, 330-334; 597 NW2d 15 (1999)*; *Coble v Green, 271 Mich App 382, 388; 722 NW2d 898 (2006)*; *York, 225 Mich App at 335-339*. I therefore decline to deviate from the holding and rationale of *Atkinson* in this case. Although I agree with my colleagues that the equitable parent doctrine is seemingly inconsistent with Michigan's comprehensive statutory scheme governing child custody matters, I would leave for the Supreme Court or the Legislature the question whether the equitable parent doctrine should be redefined or abolished.

RECEIVED by MSC 3/24/2023 10:46:55 PM

biological father. The trial court erred by denying defendant's motion for summary disposition and by declining to allow him to invoke the equitable parent doctrine.

2

I perceive no reason why defendant's entitlement **[*36]** to invoke the equitable parent doctrine should have been affected by the fact that Bristol was willing to undertake all parental responsibilities with regard to the child. It does not appear that a biological father's willingness or ability to provide for the child has ever been considered as an important factor in this Court's equitable-parent jurisprudence. I conclude that defendant's entitlement to invoke the equitable parent doctrine in this case was not dependent on, or affected by, Bristol's willingness to care for the child.

3

However, even though the trial court erred by declining to allow defendant to invoke the equitable parent doctrine in this case, I conclude that defendant would not have been able to satisfy the requirements of an equitable parent with respect to Nathan. For this reason, I would affirm the trial court's decision in full.

As this Court stated in *Atkinson, 160 Mich App at 608-609*:

> [A] husband who is not the biological father of a child born or conceived during the marriage may be considered the natural father of that child where (1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in **[*37]** the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support. We hold that the husband may be considered the "equitable parent" under these circumstances and remand this case in order to allow the circuit court to reevaluate custody and visitation, treating plaintiff as a natural parent . . .

It is clear that a man must satisfy all three of these requirements in order to be considered an equitable parent under the reasoning of *Atkinson*.

In the instant case, while defendant may desire to be a parent, and is apparently willing to support Nathan, the record indicates that he cannot meet the first criterion enumerated in *Atkinson*. Nathan was born in October 2004. Plaintiff filed her complaint for divorce in October 2006, and had moved the children out of the marital home in Ohio some time before that. During the brief time that Nathan lived with defendant, defendant worked a minimum of 80 hours a week, traveled frequently on business, and apparently spent very little time with Nathan or his **[*38]** older brother. In light of these circumstances and Nathan's young age at the time he left defendant's home, I simply cannot conclude that Nathan developed a real father-child relationship with defendant or that he would acknowledge such a relationship with defendant at this time. Nor does it appear that plaintiff cooperated in the development of such a relationship over a period of time before filing for divorce.

It is undisputed that defendant was largely absent during Nathan's early life, and defendant has had only minimal contact with Nathan since that time. I find no evidence in the record to suggest that Nathan has looked to defendant for parental comfort or that Nathan considers defendant to be his father. Accordingly, I conclude that even though defendant should have been permitted to invoke the equitable parent doctrine in this case, he would not have been able to satisfy the requirements of an equitable parent. See *id. at 608-609*.

IV

RECEIVED by MSC 3/24/2023 10:46:55 PM

In sum, my colleagues and I agree that the trial court legally erred by allowing Bristol to intervene in the divorce proceedings, that defendant was the child's legal father prior to the trial court's determination that he was not a biological parent, **[*39]** that the trial court's determination that defendant was not a biological parent constituted an extinguishment of his parental rights, and that defendant was entitled to invoke the equitable parent doctrine in the case at bar. We also agree that that there exist no constitutional infirmities that would require reversal in this case. However, unlike my colleagues, I would affirm in full because I conclude that defendant cannot satisfy the standards of an equitable parent and I do not believe that any further factual development of this issue is necessary.

/s/ Kathleen Jansen

End of Document