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ZARELLA, J., dissenting. The majority concludes that the marriage laws,[1] which define marriage as the union of one man and one woman,[2] classify on the basis of sexual orientation, that this classification is subject to intermediate scrutiny under article first, §§ 1 and 20, of the Connecticut constitution, as amended by articles five and twenty-one of the amendments,[3] and that, under this heightened level of review, the state has failed to provide sufficient justification for limiting marriage to one man and one woman. The latter conclusion is based primarily on the majority's unsupported *assumptions* that the essence of marriage is a loving, committed relationship between two adults and that the sole reason that marriage has been limited to one man and one woman is society's moral disapproval of or irrational animus toward gay persons. Indeed, the majority fails, during the entire course of its page opinion, even to identify, much less to discuss, the actual *purpose* of the marriage laws, even though this is the first, critical step in any equal protection analysis. I conclude, to the contrary, that, because the long-standing, fundamental purpose of our marriage laws is to privilege and regulate procreative conduct, those laws do not classify on the basis of sexual orientation and that persons who wish to enter into a same sex marriage are not similarly situated to persons who wish to enter into a traditional marriage. The ancient definition of marriage as the union of one man and one woman has its basis in biology, not bigotry. If the state no longer has an interest in the regulation of procreation, then that is a decision for the legislature or the people of the state and not this court. Therefore, I conclude that the equal protection provisions of the state constitution are not triggered. I further conclude that there is no fundamental right to same sex marriage. Accordingly, I dissent.

I

At the outset, I note that I agree with the majority that the trial court improperly concluded that the plaintiffs[4] had failed to demonstrate a legally cognizable or actionable harm because they are entitled to enter into a legal relationship, i.e., a civil union, that confers the same legal rights as marriage. I reach this conclusion, however, for a different reason than the majority. The institution of civil union is purely a creature of statute, subject to change or repeal at the pleasure of the legislature. Marriage, on the other hand, is a fundamental civil right protected by the constitution.[5] Although the legislature has the authority to alter the legal incidents of marriage, it presumably could not abolish the institution altogether, and would be required to apply any statutory changes uniformly to all married couples.[6] Thus, contrary to the trial court's conclusion, the differ-

ence between the two institutions is not merely one of nomenclature but has specific legal consequences for the plaintiffs. Accordingly, I conclude that the plaintiffs have raised a cognizable legal claim.

II

I turn, therefore, to the plaintiffs' claim under the equal protection provisions of our state constitution. As the majority correctly states, "[t]he concept of equal protection [under both the state and federal constitutions] has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. . . . Conversely, the equal protection clause places no restrictions on the state's authority to treat dissimilar persons in a dissimilar manner. . . . Thus, [t]o implicate the equal protection [clause] . . . it is necessary that the state statute . . . in question, either on its face or in practice, treat persons standing *in the same relation to it differently*. . . . [Accordingly], the analytical predicate [of an equal protection claim] is a determination of who are the persons [purporting to be] similarly situated. . . . The similarly situated inquiry focuses on whether the [plaintiff is] similarly situated to another group *for purposes of the challenged government action*. . . . Thus, [t]his initial inquiry is not whether persons are similarly situated for all purposes, but whether they are similarly situated *for purposes of the law challenged*." (Citations omitted; emphasis added; internal quotation marks omitted.) Part III of the majority opinion; see also *Eielson* v. *Parker*, 179 Conn. 552, 566, 427 A.2d 814 (1980) ("[T]he constitution does not, of course, prevent the legislature from dealing differently with different classes of people. It means only that classifications must be based on natural and substantial differences, *germane to the subject and purpose of the legislation*, between those within the class included and those whom it leaves untouched." [Emphasis added; internal quotation marks omitted.]). Moreover, the equal protection clause "is implicated only when a state legislatur[e] select[s] or reaffirm[s] a particular course of action at least in part because of, not merely in spite of, its adverse effects upon *an identifiable group* . . . ." (Citations omitted; emphasis added; internal quotation marks omitted.) *Hunt* v. *Cromartie*, 526 U.S. 541, 558, 119 S. Ct. 1545, 143 L. Ed. 2d 731 (1999) (Stevens, J., concurring), quoting *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 279, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979). It is clear, therefore, that, in performing its equal protection analysis, the court must identify, at the outset, the group that is adversely affected by the challenged legislation and determine whether that group is similarly situated to another, differently treated group *with respect to the purpose of the challenged legislation*.

Without any analysis, the majority simply accepts

the plaintiffs' assertion that our state's marriage laws classify persons on the basis of sexual orientation even though nothing in those laws expressly does so. It then concludes, without considering the fundamental purpose of the marriage laws, that gay persons are similarly situated to heterosexual persons with respect to those laws because they "share the same interest in a committed and loving relationship as heterosexual persons who wish to marry . . . ." Part III of the majority opinion. I cannot agree.

Because it is central to a proper equal protection analysis, I begin with the fundamental subject and purpose of our laws limiting marriage to the union of one man and one woman. As many courts have recognized, the primary societal good advanced by this ancient institution is responsible procreation.[7] See *Citizens for Equal Protection* v. *Bruning*, 455 F.3d 859, 867 (8th Cir. 2006); *Standhardt* v. *Superior Court*, 206 Ariz. 276, 287, 77 P.3d 451 (App. 2003), review denied sub nom. *Standhardt* v. *MCSC*, Docket No. CV-03-0422-PR, 2004 Ariz. LEXIS 62 (Ariz. May 25, 2004); *Morrison* v. *Sadler*, 821 N.E.2d 15, 25 (Ind. App. 2005); *Conaway* v. *Deane*, 401 Md. 219, 299–300, 932 A.2d 571 (2007); *Baker* v. *Nelson*, 291 Minn. 310, 312, 191 N.W.2d 185 (1971), appeal dismissed, 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65 (1972); *Lewis* v. *Harris*, 378 N.J. Super. 168, 185, 875 A.2d 259 (App. Div. 2005), aff'd in part and modified in part, 188 N.J. 415, 908 A.2d 196 (2006); *Andersen* v. *King County*, 158 Wash. 2d 1, 37, 138 P.3d 963 (2006); see also *Goodridge* v. *Dept. of Public Health*, 440 Mass. 309, 381, 798 N.E.2d 941 (2003) (Cordy, J., dissenting); cf. *Hernandez* v. *Robles*, 7 N.Y.3d 338, 359, 855 N.E.2d 1, 821 N.Y.S.2d 770 (2006). "Paramount among its many important functions, the institution of marriage has systematically provided for the regulation of heterosexual behavior, brought order to the resulting procreation, and ensured a stable family structure in which children will be reared, educated, and socialized." (Internal quotation marks omitted.) *Morrison* v. *Sadler*, supra, 25. "The institution of marriage provides the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other. The partners in a marriage are expected to engage in exclusive sexual relations, with children the probable result and paternity presumed." (Internal quotation marks omitted.) Id., 26; see also J. Root, Introduction, 1 Root (Conn.) xxvii (1789–93) (observations on government and laws of Connecticut) ("[t]hat one man should be joined to one woman in a constant society of cohabiting together . . . is necessary for the propagation of the species, and for the preservation and education of their offspring").

It also is clear that the link between traditional marriage and procreation forms the basis of the institution's status as a fundamental civil right under the federal constitution. See *Zablocki* v. *Redhail*, 434 U.S. 374, 384,

98 S. Ct. 673, 54 L. Ed. 2d 618 (1978) ("the right to marry, establish a home and bring up children is a central part of the liberty protected by the [d]ue [p]rocess [c]lause" [internal quotation marks omitted]); id., 386 ("if [the] right to procreate means anything at all, it must imply some right to enter the only relationship in which the [s]tate . . . allows sexual relations legally to take place"); *Loving* v. *Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) ("[m]arriage is one of the basic civil rights of man, fundamental to our very existence and survival" [internal quotation marks omitted]); *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942) ("[m]arriage and procreation are fundamental to the very existence and survival of the race"); see also *Dean* v. *District of Columbia*, 653 A.2d 307, 332–33 (D.C. 1995) (Ferren, J., concurring in part and dissenting in part); *Andersen* v. *King County*, supra, 158 Wash. 2d 30. To remove the procreative link from marriage, "which long predates the constitutions of this country and [s]tate . . . would, to a certain extent, extract some of the deep . . . root[s] that support its elevation to a fundamental right." (Citation omitted; internal quotation marks omitted.) *Samuels* v. *Dept. of Health*, 29 App. Div. 3d 9, 15, 811 N.Y.S.2d 136 (2006).

Thus, the United States Supreme Court and many of our sister state courts have recognized that traditional marriage serves two separate but closely related functions, both deriving from the capacity of a couple comprised of one man and one woman to propagate children. First, in order to advance society's interest in the survival of the human race, the institution of marriage honors and privileges the only sexual relationship—that between one man and one woman—that can result in the birth of a child.[8] Second, in order to protect the offspring of that relationship and to ensure that society is not unduly burdened by irresponsible procreation, marriage imposes obligations on the couple to care for each other and for any resulting children. See *Standhardt* v. *Superior Court*, supra, 206 Ariz. 286 ("by legally sanctioning a heterosexual relationship through marriage, thereby imposing both obligations and benefits on the couple and inserting the [s]tate in the relationship, the [s]tate communicates to parents and prospective parents that their long-term, committed relationships are *uniquely* important as a public concern" [emphasis added]); *Lewis* v. *Harris*, supra, 378 N.J. Super. 197 (Parrillo, J., concurring) ("[p]rocreative heterosexual intercourse is and has been historically through all times and cultures an important feature of [the] privileged status [of marriage], and that characteristic is a fundamental originating reason why the [s]tate privileges marriage").

It is obvious to me, therefore, that limiting the institution of marriage to one man and one woman does not create a classification based on sexual orientation.

Rather, the limitation creates a classification based on a couple's ability to engage in sexual conduct of a type that may result in the birth of a child. See *Morrison* v. *Sadler*, supra, 821 N.E.2d 25 (legislative classification created by marriage laws is based on "a clearly identifiable, inherent characteristic that distinguishes the two classes: the ability or inability to procreate by 'natural' means"); *Hernandez* v. *Robles*, supra, 7 N.Y.3d 376 (Graffeo, J., concurring) ("[T]he statutory scheme [does not] create a classification based on sexual orientation. . . . [Rather], the marriage laws create a classification that distinguishes between opposite-sex and same-sex couples . . . ."); *Andersen* v. *King County*, supra, 158 Wash. 2d 65 (law limiting marriage to marriage between one man and one woman "does not distinguish between persons of heterosexual orientation and homosexual orientation"); see also *Goodridge* v. *Dept. of Public Health*, supra, 440 Mass. 380 (Cordy, J., dissenting) ("[t]he classification is not drawn between men and women or between heterosexuals and homosexuals, any of whom can obtain a license to marry a member of the opposite sex; rather, it is drawn between same-sex couples and opposite-sex couples").

It also is obvious that a couple that is incapable of engaging in the type of sexual conduct that can result in children is not similarly situated to a couple that is capable of engaging in such conduct with respect to legislation that is intended to privilege and regulate that conduct. Cf. *Michael M.* v. *Superior Court*, 450 U.S. 464, 469, 101 S. Ct. 1200, 67 L. Ed. 2d 437 (1981) (although classifications based on gender are subject to heightened scrutiny, United States Supreme Court "has consistently upheld statutes [when] the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances"); id., 471 (state had sufficiently strong justification to criminalize sex with underage females, but not with underage males, because "young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse").[9] I fully agree with the majority that same sex couples and opposite sex couples are similar in many respects. Specifically, I agree that gay *individuals* are as capable of contributing to society, as desirous and capable of entering into loving and committed relationships with each other and as capable of caring for children as heterosexual persons. For purposes of an equal protection analysis, however, groups that are treated differently by a statute are not similarly situated unless they "are in *all* relevant respects alike." (Emphasis added.) *Nordlinger* v. *Hahn*, 505 U.S. 1, 10, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992). The fact that same sex couples cannot engage in sexual conduct of a type that can result in the birth of a child is a critical difference in this context.[10]

In reaching a contrary conclusion, the majority appar-

ently relies on the notion that the *disparate impact* of the marriage laws on gay persons who wish to enter into marriage creates a classification on the basis of sexual orientation. It is well settled, however, that the constitutional guarantee of equal protection is implicated only when "a state legislatur[e] . . . selected or reaffirmed a particular course of action *at least in part because of*, *not merely in spite of*, its adverse effects [on] an identifiable group."[11] (Emphasis added; internal quotation marks omitted.) *Personnel Administrator* v. *Feeney*, supra, 442 U.S. 279; see also *Harris* v. *McRae*, 448 U.S. 297, 324 n.26, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980) (constitutional equal protection principles prohibit "only purposeful discrimination . . . and when a facially neutral . . . statute is challenged on equal protection grounds, it is incumbent [on] the challenger to prove that [the legislature] selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects [on] an identifiable group" [citation omitted; internal quotation marks omitted]); *Pasquariello* v. *Stop & Shop Cos.*, 281 Conn. 656, 673, 916 A.2d 803 (2007) ("[d]isparate impact . . . is only a starting point in analyzing an equal protection claim"). Even if the existence of a history of societal disapproval of homosexual conduct is assumed, the majority has not pointed, and cannot point, to any evidence that the driving force behind the development of traditional marriage between one man and one woman has been irrational, discriminatory animus toward gay persons.[12] Indeed, even the laws criminalizing homosexual conduct were not originally driven by such animus. See, e.g., *Lawrence* v. *Texas*, 539 U.S. 558, 568, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) ("early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally"); id., 570 ("American laws targeting same-sex couples did not develop until the last third of the [twentieth] century"). It is also worth noting that even societies in which homosexual conduct was the norm and was well accepted have not recognized same sex marriage.[13] See generally M. Nussbaum, "Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies," 80 Va. L. Rev. 1515 (1994). The absence of any evidence of intentional discrimination, in and of itself, is fatal to the plaintiffs' equal protection claim. See, e.g., *Harris* v. *McRae*, supra, 324 n.26.

Having concluded without any basis that the marriage laws classify on the basis of sexual orientation, the majority then concludes that same sex couples are similarly situated to opposite sex couples with respect to the marriage laws because gay persons "share the same interest in a committed and loving relationship as heterosexual persons who wish to marry." The majority, however, makes no attempt to explain why the state ever would have had an interest in promoting or regulat-

ing committed and loving relationships that have no potential to result in the birth of a child. It simply assumes that loving commitment between two adults is the essence of marriage, even though the essence of marriage is the very question at the heart of this case.[14]

The majority then compounds this question begging methodology by suggesting that "preserving the institution of marriage as a union between a man and a woman is the overriding reason why same sex couples have been barred from marrying in this state."[15] In other words, the majority purports to believe that the primary justification for limiting marriage to one man and one woman is that "marriage is heterosexual because it just is . . . ." (Internal quotation marks omitted.) *Conaway* v. *Deane*, supra, 401 Md. 427 (Bell, C. J., dissenting). Thus, the majority simply assumes at the outset of its analysis the answer to the central question in the case and then declines even to address the *only* argument—that marriage was intended to privilege and regulate sexual conduct that may result in the birth of a child—that any court ever has found to be persuasive in determining that that answer is incorrect. For the reasons that I have stated, I cannot agree.

III

Because I would conclude that the plaintiffs cannot prevail on their equal protection claim, I must address their substantive due process claim under article first, §§ 8 and 10, of the Connecticut constitution.[16] The plaintiffs contend that two consenting, unrelated adults have a fundamental right to marry regardless of their respective sexes. I disagree. I further conclude that there is a rational basis for limiting marriage to one man and one woman.

A

I first address the plaintiffs' claim that any two consenting, unrelated adults have a fundamental right to marry regardless of their respective sexes. "Our substantive due process case law under the state constitution . . . clearly establishes that certain fundamental rights are protected." *Ramos* v. *Vernon*, 254 Conn. 799, 835 n.31, 761 A.2d 705 (2000). Under the federal constitution, "the due process clause protects those fundamental rights and liberties which are, objectively, deeply rooted in this [n]ation's history and tradition . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed . . . . Our [n]ation's history, legal traditions, and practices thus provide the crucial guideposts for responsible decisionmaking . . . that direct and restrain our exposition of the [d]ue [p]rocess [c]lause." (Internal quotation marks omitted.) *Hammond* v. *Commissioner of Correction*, 259 Conn. 855, 888–89, 792 A.2d 774 (2002). The plaintiffs do not claim that a different test should apply under the state constitution. When

state action affects a fundamental right, it is subject to strict scrutiny. E.g., *Rayhall* v. *Akim Co.*, 263 Conn. 328, 342, 819 A.2d 803 (2003).

As I have indicated, the right of one man and one woman to marry has been recognized as a fundamental right under the federal constitution. See *Zablocki* v. *Redhail*, supra, 434 U.S. 384; *Loving* v. *Virginia*, supra, 388 U.S. 12; *Skinner* v. *Oklahoma ex rel. Williamson*, supra, 316 U.S. 541. As I also have indicated, the link between marriage and procreation forms the basis of that fundamental right. For this reason, and for the reasons cogently set forth in Justice Borden's dissenting opinion, it is clear to me that the fundamental right to marry is limited to couples comprised of one man and one woman.[17] There simply is no deeply rooted history, tradition or practice of same sex marriage, or of marriage defined as a loving, committed relationship, in this nation or in this state.

Indeed, to the contrary, the relationship between men and women and the procreative potential of that relationship were the defining concerns of marriage long before the social compact that is our state constitution came into existence. The preamble to our state constitution provides in relevant part: "The People of Connecticut . . . do, *in order more effectually to define, secure, and perpetuate the liberties, rights and privileges which they have derived from their ancestors*; hereby, after a careful consideration and revision, ordain and establish the . . . constitution and form of civil government."[18] (Emphasis added.) Thus, the express and fundamental purpose of this social compact is to guarantee the right of the people to preserve their basic institutions, traditions and beliefs, assuming, of course, that they do not intrude on other constitutionally protected rights in doing so. As I have indicated, I am quite certain that preserving the institution of traditional marriage between one man and one woman does no such thing. Accordingly, although the deeply rooted and rationally based cultural preference for traditional marriage, and the institution's attendant liberties, rights and privileges, may be subject to change in light of new information and experiences, any such change is emphatically not for this court but is quintessentially a matter to be decided by the people through the democratic process.[19] "The virtue of a democratic system . . . is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the [c]onstitution." *United States* v. *Virginia*, 518 U.S. 515, 567, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996) (Scalia, J., dissenting).

B

Having concluded that there is no fundamental right

to same sex marriage, I next must determine whether there is a rational basis for the laws limiting marriage to one man and one woman. See, e.g., *Ramos* v. *Vernon*, supra, 254 Conn. 840–41 (rational basis review applies to substantive due process claims that do not implicate fundamental rights). "In determining whether the challenged classification is rationally related to a legitimate public interest . . . [t]he test . . . is whether this court can conceive of a rational basis for sustaining the legislation; we need not have evidence that the legislature actually acted [on] that basis. . . . Further, the [e]qual [p]rotection [c]lause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification. . . . Rational basis review is satisfied [as] long as there is a plausible policy reason for the classification . . . . [I]t is irrelevant whether the conceivable basis for the challenged distinction actually motivated the legislature. . . . To succeed, the party challenging the legislation must negative every conceivable basis which might support it . . . ." (Citation omitted; internal quotation marks omitted.) *Contractor's Supply of Waterbury, LLC* v. *Commissioner of Environmental Protection*, 283 Conn. 86, 93, 925 A.2d 1071 (2007).

In my view, the state's interests in promoting and regulating procreative conduct are legitimate. Indeed, they are compelling. I further believe that limiting marriage to one man and one woman is rationally related to the advancement of those interests. First, the state rationally could conclude that "[t]he power of biological ties means that heterosexual families are most likely to achieve stability and successfully perform the child-rearing function." A. Wax, "The Conservative's Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage," 42 San Diego L. Rev. 1059, 1077 (2005). Second, and relatedly, the state rationally could conclude that children do best when they are raised by a mother and a father, a belief that finds great support in life experience and common sense.[20] See K. Young & P. Nathanson, "Marriage á la mode: Answering the Advocates of Gay Marriage" (2003), available at http://www.marriageinstitute.ca/images/mmode.pdf.[21] This belief does not denigrate the parenting abilities of same sex couples but merely recognizes that a high level of individual parenting ability is no substitute for having *both* a mother and a father. Third, the benefits and social status associated with traditional marriage encourage men and women to enter into a state, namely, long-term, mutually supported cohabitation, that is conducive both to procreation and responsible child rearing on the part of the biological parents.[22] I acknowledge that these rationales, although supported by experience and common sense, are fact based and are open to debate. The burden is on the plaintiffs, however, to establish why none of these reasons provides a conceivable basis for

the deeply rooted societal preference for families with a mother and a father.

The plaintiffs rely on several sociological studies that have concluded that "children of same sex parents are as healthy, happy and well adjusted, and fare as well on all measures of development, as their peers." These studies, however, are far from conclusive.[23] Moreover, "[t]he story of the controversy surrounding out-of-wedlock childbearing . . . illustrates the point that knowledge often comes too late. There is a necessary lag between the instigation of a social change and the generation of persuasive evidence on its ultimate effects." A. Wax, supra, 42 San Diego L. Rev. 1087. Thus, it is entirely reasonable for the state to be cautious about implementing genderless marriage, the long-term effects of which cannot be known beforehand with any degree of certainty.

The plaintiffs also contend that procreation has "[*n*]*ever*" been the purpose of marriage. (Emphasis added.) In support of this startling claim, the plaintiffs note that opposite sex couples who choose not to procreate or who are incapable of procreating are not and never have been prohibited from marrying. Even if the institution of marriage is overinclusive, however, "[a] [s]tate does not violate the [e]qual [p]rotection [c]lause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the [c]onstitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. . . . The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, [though] it may be, and unscientific." (Citation omitted; internal quotation marks omitted.) *Dallas* v. *Stanglin*, 490 U.S. 19, 26–27, 109 S. Ct. 1591, 104 L. Ed. 2d 18 (1989); see also *Vance* v. *Bradley*, 440 U.S. 93, 108, 99 S. Ct. 939, 59 L. Ed. 2d 171 (1979) ("[e]ven if the classification involved . . . is to some extent . . . overinclusive, and hence the line drawn by [the legislature] imperfect, it is nevertheless the rule that . . . perfection is by no means required" [internal quotation marks omitted]).

I also would note that married couples who choose not to procreate can change their minds. In addition, until very recently, the nature and causes of infertility were not well understood and it was impossible to predict with certainty whether a marriage that appeared to be barren ultimately would prove to be so. Under such circumstances, the requirement that a married couple consist of one man and one woman *was* the requirement that the couple be able to procreate.[24] In any event, requiring proof of intent and ability to procreate prior to—and, presumably, during the course of—marriage would entangle the state in procedures that are grossly intrusive, ever-changing and counterproduc-

tive. "Marriage's social role does not rest on any ironclad, exceptionless demand that all couples actually achieve the optimum arrangement. Nor does the channeling function require the elimination of all relationships that fall short of the ideal [of procreative marriage]. After all, adhering to an airtight rule [that a couple must be willing and able to procreate in order to marry] would itself entail costs and intrusions. Such adherence would fail to accommodate the untidy, unpredictable nature of male-female relationships and the imperfect state of knowledge that prevents infallible prediction about biological functioning." A. Wax, supra, 42 San Diego L. Rev. 1078–79.

The plaintiffs further claim that a state policy based on a belief that marriage between one man and one woman promotes responsible procreation is precluded both by the civil union law, General Statutes § 46b-38aa et seq., and by General Statutes § 45a-727a (3), which provides that, for purposes of adoption, "[t]he best interests of a child are promoted when the child is part of a loving, supportive and stable family, whether that family is a nuclear, extended, split, blended, single parent, adoptive or foster family . . . ." Specifically, the plaintiffs contend that, because "the civil union law provides the same state based legal protections and obligations with respect to children for same sex couples as for married couples," and because § 45a-727a (3) evinces "a legislative policy that family configuration is not a relevant factor in determining the best interests of children . . . any proffered issue related to the welfare of children must be legally irrelevant as a reason that the state denies marriage to same sex couples." I am not persuaded. I see no reason why the state rationally could not continue to promote the *public's* vital interest in responsible procreation by limiting marriage to opposite sex couples while enacting a civil union law in recognition of the legitimate interests *of same sex couples*.[25] In other words, the state reasonably could believe that limiting marriage to a man and a woman accomplishes vital social goods, while the institution of civil union promotes the legitimate interests of those who enter into it. Recognition of the latter private interests does not necessarily entail abandonment of the former public interests.

With respect to the adoption laws, the legislative history of § 45a-727a (3) indicates that the statute was intended to address the situation in which "a person already sharing parental responsibility for a child [is prevented] from adopting a child even when absolutely everyone involved agrees that such an adoption would be in the best interest of the child." Conn. Joint Standing Committee Hearings, Judiciary, Pt. 9, 2000 Sess., p. 2773, testimony of Reverend Mark Santucci; see also id., p. 2864, testimony of Representative Patrick Flaherty ("[t]he bill makes it possible for a child who has one parent to be adopted by a second person who shares

parental responsibilities for that child").[26] The state reasonably could recognize that "[t]he best interests of a child are promoted when the child is part of a loving, supportive and stable family"; General Statutes § 45a-727a (3); regardless of the sex of the child's statutory and adoptive parents, while rationally concluding that the *ideal* family consists of both a mother and a father. In other words, if the choice is between one parent and two parents, there is no reason for the state ever to prefer one parent. If the choice is between two same sex parents and two opposite sex parents, however, there are reasons for the state to promote the latter. Indeed, General Statutes § 45a-727a (4) expressly provides that "the current public policy of the state of Connecticut is now limited to a marriage between a man and a woman." The inclusion of this provision, which defines the state's policy regarding the best interests of a child, in the adoption statutes clearly indicates that the legislature believes that limiting marriage to one man and one woman is in the best interests of children as a class.[27] This conclusion is further supported by General Statutes § 45a-727b, which expressly provides that "[n]othing in . . . section . . . 45a-727a . . . shall be construed to establish or constitute an endorsement of any public policy with respect to marriage, civil union or any other form of relation between unmarried persons . . . ." In addition, General Statutes § 45a-726a provides in relevant part that "[n]othing in th[at] section shall be deemed to require the Commissioner of Children and Families or a child-placing agency to place a child for adoption or in foster care with a prospective adoptive or foster parent or parents who are homosexual or bisexual."

The plaintiffs also contend that the state could not rationally conclude that extending marriage to same sex couples would *prevent* procreation and child rearing by opposite sex couples. I agree with the plaintiffs that it is doubtful whether any state policy could entirely prevent men and women from procreating. As I have indicated, however, the state could rationally conclude that honoring and privileging marriage between one man and one woman as the ideal setting for procreation is conducive both to procreation and to responsible child rearing, and that redefining marriage to be a loving, committed relationship between two adults could have a significant effect on the number of opposite sex couples who choose to procreate and raise children together. See footnote 15 of this opinion.

Finally, I address the plaintiffs' claim that, even if there once was a link between procreation and marriage, such a link was based on sexual stereotypes and other outdated notions about the nature of family life, and such notions are no longer viable in light of the "steady legal, sociological and economic developments since the late nineteenth century . . . ." They contend that "[m]arriage is now an institution of legal equality

between . . . two parties whose respective rights and responsibilities are equal, mutual and reciprocal. The state's astonishing insistence on resurrecting legal restrictions that pigeonhole individuals . . . on [the basis of] broad generalizations about sex roles flies in the face of rudimentary sex discrimination law." It is undisputed that the role of women in public and economic life has increased dramatically in the last century and that women have achieved an unprecedented degree of equality with men in our nation. That does not mean, however, that the procreative roles of men and women have changed or that there is no distinction between the parenting roles of men and women.[28]

In any event, even if the plaintiffs were correct that procreation is no longer at the center of the institution of marriage, that would not help them. As I have indicated, the reason that marriage between one man and one woman historically has had a privileged social status and has been considered a constitutionally protected fundamental right has been society's special concern with procreative conduct. If the link between marriage and procreation were destroyed, then the elevated social and constitutional status of marriage in our society also would be destroyed, and marriage would be nothing but a set of statutory rights and obligations, which is exactly what civil union is. In that case, the trial court would have been correct to conclude that the difference between the two institutions was merely a matter of nomenclature.

Accordingly, I reject the plaintiffs' claim, and the majority's conclusion, that redefining marriage to include same sex couples takes nothing away from the institution. See part VI E of the majority opinion (redefining marriage "would *expand* the right to marry without any adverse effect on those already free to exercise the right" [emphasis in original]). The redefinition of marriage takes away society's special concern with the institution as one involving the great societal risks and benefits of procreative conduct. The majority's reliance on *Loving* v. *Virginia*, supra, 388 U.S. 1, in support of its conclusion to the contrary is entirely misplaced. See part VI E of the majority opinion (recognizing right to same sex marriage "[will] not disturb the fundamental value of marriage in our society and . . . will not diminish the validity or dignity of opposite-sex marriage . . . any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of [his or] her own race" [internal quotation marks omitted]), quoting *Goodridge* v. *Dept. of Public Health*, supra, 440 Mass. 337. The laws criminalizing miscegenation intruded on the fundamental right to procreate, and the constitutional prohibition against this intrusion recognizes and *enhances* the special status of procreative conduct. Redefining marriage to include same sex couples has no such purpose or effect.

IV

Although there is no need for me to reach many of the other issues that the majority addresses, I am compelled to state that I am extremely troubled by several aspects of its analysis. First, as Justice Vertefeuille notes in her dissenting opinion, those who challenge the constitutionality of legislation "must sustain the heavy burden of proving its unconstitutionality *beyond a reasonable doubt*." (Emphasis added; internal quotation marks omitted.) *State* v. *McKenzie-Adams*, 281 Conn. 486, 500, 915 A.2d 822, cert. denied, U.S. , 128 S. Ct. 248, 169 L. Ed. 2d 148 (2007). Instead of requiring the plaintiffs to meet this heavy burden, the majority bases its opinion on entirely unfounded assumptions about the subject and purpose of our marriage laws, the classification created by them and their discriminatory intent. Not only have the plaintiffs failed to establish these matters beyond a reasonable doubt, they have failed to present *any* evidence to support the majority's conclusions.

Second, the majority states that "[t]his court also has determined that, for purposes of the state constitution, [the] two-tier analysis of the law of equal protection . . . that distinguishes only between legislation requiring strict scrutiny, which typically fails to pass constitutional muster, and legislation requiring a rational basis, which typically does pass, is not sufficiently precise to resolve all cases. Legislation that involves rights that may be significant, though not fundamental, or classifications that are sensitive, though not suspect, may demand some form of intermediate review." (Internal quotation marks omitted.) Part III of the majority opinion, quoting *Eielson* v. *Parker*, supra, 179 Conn. 564. Contrary to this statement, we never have made any such determination. Our statements in *Eielson*, in *Daly* v. *DelPonte*, 225 Conn. 499, 513, 624 A.2d 876 (1993), and in *Keogh* v. *Bridgeport*, 187 Conn. 53, 67, 444 A.2d 225 (1982), that the state constitution might recognize intermediate scrutiny were dicta and were unsupported by any analysis of the text of the equal protection provisions of the Connecticut constitution. In *Carofano* v. *Bridgeport*, 196 Conn. 623, 495 A.2d 1011 (1985), we assumed without deciding that laws affecting "the liberty of a person to live where he chooses while maintaining employment with a municipality" were subject to intermediate scrutiny. Id., 642. In light of the significant differences between the equal protection provisions of the state and federal constitutions, I have serious doubts as to whether intermediate scrutiny ever is appropriate under the state constitution.

Third, I am troubled by the majority's analysis under *State* v. *Geisler*, 222 Conn. 672, 685, 610 A.2d 1225 (1992). Historically, this court has used the *Geisler* analysis to determine the scope of a right under the state constitution. I am not aware of, and the majority has

not cited, any cases in which we have used *Geisler* to determine whether the Connecticut constitution recognizes a suspect class that has not been recognized under the federal constitution. Indeed, *Geisler* was not mentioned in any of the cases to which the majority cites in support of its conclusion that intermediate scrutiny has been applied under the state constitution.

Moreover, none of the six *Geisler* factors supports a conclusion that sexual orientation is a quasi-suspect class in this state. With respect to the first *Geisler* factor, the text of the state constitutional provisions, I am not persuaded by the majority's analysis for the reasons that I already have stated. The cases that the majority relies on for the proposition that the state constitution contemplates quasi-suspect classifications do not support such a conclusion, and the majority has not squarely addressed the textual differences between the state and federal constitutions.

Because the majority's analysis under *Geisler*'s second factor, decisions of this court and the Appellate Court, and the third factor, decisions of the federal courts, are closely intertwined, I address them together. The majority acknowledges that the Appellate Court and virtually all federal courts have concluded that sexual orientation is not a suspect classification but rejects the reasoning of these courts because they "relied on the holding of *Bowers* v. *Hardwick*, [478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), overruled by *Lawrence* v. *Texas*, supra, 539 U.S. 558], in which the United States Supreme Court upheld the constitutionality of a Georgia statute that criminalized homosexual sodomy." These courts have concluded that, because it is constitutionally permissible to criminalize homosexual conduct, a group that is defined by that conduct cannot be a quasi-suspect class. See, e.g., *Ben-Shalom* v. *Marsh*, 881 F.2d 454, 464–65 (7th Cir. 1989), cert. denied sub nom. *Ben-Shalom* v. *Stone*, 494 U.S. 1004, 110 S. Ct. 1296, 108 L. Ed. 2d 473 (1990); cf. *State* v. *John M.*, 94 Conn. App. 667, 678–84, 894 A.2d 376 (2006), rev'd on other grounds sub nom. *State* v. *John F.M.*, 285 Conn. 528, 940 A.2d 755 (2008). The majority notes that *Bowers* was overruled by *Lawrence* v. *Texas*, supra, 558, and concludes that, "after *Lawrence*, the social and moral disapprobation that gay persons historically have faced supports their claim that they are entitled to heightened protection under the state constitution." Part VI C of the majority opinion.

The majority may be correct on this point, which it already has made in the first part of its analysis applying the federal test for determining suspect classifications, *but it is not the point that is under consideration.* Under these two prongs of *Geisler*, the question is whether the courts of this state or federal courts ever have concluded that sexual orientation is a quasi-suspect classification. If the answer to that question is no,

but the reasoning of cases in which that classification has been rejected is not persuasive, then it may be that these cases do not weigh *against* this court's determination that sexual orientation is a quasi-suspect classification. It cannot be said, however, that the cases *support* such a determination. Thus, at best, the second and third *Geisler* factors are neutral.

Similarly, with respect to the fourth prong of *Geisler*, the decisions of our sister states, if the majority is not persuaded by the reasoning of the majority of state courts that have concluded that sexual orientation is not a suspect class, then the factor is neutral, at best. The fact that only a small minority of states agree with the majority's independent analysis under the federal test cannot be considered as favoring the plaintiffs' claim.

The majority declines to address the fifth prong of *Geisler*, the history of our state's equal protection provisions, because, according to the majority, "[n]either the plaintiffs nor the defendants contend that the history of this state's equal protection provisions . . . bears materially on the determination of whether [sexual orientation is] a quasi-suspect class[ification]." Footnote 73 of the majority opinion. To the contrary, however, the defendants expressly contend that "nothing in Connecticut's 'unique historical record' supports the conclusion that [the equal protection] provisions of the state constitution . . . were intended to protect sexual orientation as a suspect classification" and that "it is not possible to conclude that the framers intended [these provisions] to protect sexual orientation as a suspect classification . . . ."[29] The plaintiffs do not rebut this contention and point to nothing in the history of our constitution that would support a conclusion that the framers or the people of the state believed that gay persons would receive special protection under the equal protection provisions. Accordingly, I would conclude that this factor weighs in favor of the defendants.

With respect to the sixth *Geisler* factor, economic and sociological considerations, the majority focuses on the effect that denying marriage to same sex couples purportedly has on same sex couples and their children. The question under review, however, is whether the state constitution requires this court to treat sexual orientation as a suspect classification, not the constitutionality of excluding same sex couples from marriage. In my view, this *Geisler* factor requires this court to examine existing cultural and economic conditions in the state in order to determine whether Connecticut citizenry have expectations that are not adequately protected by the federal constitution. Cf. *State* v. *Bernier*, 246 Conn. 63, 72, 717 A.2d 652 (1998) ("[t]he analysis focuses on whether Connecticut citizenry [are] prepared, because of [their] code of values and [their] notions of custom and civility to [recognize heightened

protection under the state constitution]" [internal quotation marks omitted]). The majority has pointed to no specific "values [or] . . . notions of custom and civility"; id.; in this state that would lead to the conclusion that Connecticut citizenry have expectations about laws classifying on the basis of sexual orientation that differ from those shared by the rest of the country, thereby requiring this court to subject the laws to heightened scrutiny. Instead, the majority apparently concludes that it must determine whether barring same sex marriage would have a disparate impact on gay persons because, if so, then sexual orientation must be a suspect classification; otherwise, the state would not be required to provide strong justification for that disparate impact.[30] The majority ultimately concludes that, because barring same sex couples from marriage could lead some gay persons to feel like second-class citizens, this prong "militates strongly in favor of the [plaintiffs' claim]."[31] Part VI E of the majority opinion. The majority has cited no authority, however, for the novel proposition that the potential negative impact of legislation on a particular group is a factor in determining whether the group constitutes a suspect class.[32] Moreover, its reasoning is entirely circular, and, like the reasoning throughout the majority opinion, omits any reference to the actual interest of the citizenry in preserving the institution of traditional marriage despite any disparate impact that it may have on gay persons. Finally, as I have indicated, in the absence of intentional discrimination, a law's disparate impact on a particular group does not implicate equal protection principles. Accordingly, I am distinctly unpersuaded by the majority's *Geisler* analysis. Indeed, it is apparent to me that these factors weigh in the defendants' favor.

V

Contrary to the majority's purported belief that society's sole justification for preserving traditional marriage between one man and one woman is the tautological claim that "marriage is heterosexual because it just is"; (internal quotation marks omitted) *Conaway* v. *Deane*, supra, 401 Md. 427 (Bell, C. J., dissenting); there are powerful reasons for preserving the institution. In concluding otherwise, the majority deliberately has closed its eyes to those reasons, has failed to engage in a proper analysis under the equal protection provisions of our state constitution and has distorted our state constitutional jurisprudence as set forth in *Geisler*. Indeed, in my view, the sole basis for the majority's conclusion that traditional marriage is no longer constitutional is the majority's a priori, unsubstantiated belief that "it just isn't." "Thus, the majority has [abused] this court's power to interpret the constitution in order to mandate a vast and unprecedented social experiment"; *Sheff* v. *O'Neill*, 238 Conn. 1, 61, 678 A.2d 1267 (1996) (*Borden, J.*, dissenting); the results of which will be beyond the power of both this court

and the people of this state to correct.

Accordingly, I reject the majority's conclusion that limiting marriage to one man and one woman is unconstitutional. If the state's interests in promoting and regulating procreation are no longer sufficient to warrant the continuation of traditional marriage, then the decision to terminate that ancient institution is appropriate for the democratically elected legislature. To end an institution that the plaintiffs contend is time honored and special by judicial fiat is a usurpation of the legislative prerogative and a violation of the fundamental right of the people, on which the very existence of our constitution is premised, "to define, secure and perpetuate the liberties, rights and privileges which they have derived from their ancestors . . . ." Conn. Const., preamble.

[1] In their complaint, the plaintiffs seek a judgment declaring that, "[t]o the extent that any statute, regulation, or common-law rule . . . is applied to deny otherwise qualified individuals from marrying because they wish to marry someone of the same sex or are gay or lesbian couples, such statutes, regulations, and common-law rules violate the equal protection provisions . . . of the Connecticut [c]onstitution." There is no dispute in this case that, under this state's common law and statutes governing marriage, same sex couples are barred from marriage. For convenience, we refer to these laws collectively as "marriage laws."

[2] See General Statutes § 46b-38nn.

[3] See footnotes 5 and 6 of the majority opinion for the relevant text of these constitutional provisions.

[4] The plaintiffs are identified in footnote 2 of the majority opinion.

[5] E.g., *Zablocki* v. *Redhail*, 434 U.S. 374, 384, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978); *Loving* v. *Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967); see also *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942).

[6] See *In re Marriage Cases*, 43 Cal. 4th 757, 818–20, 183 P.3d 384, 76 Cal. Rptr. 3d 683 (2008). I also believe that the fundamental right to marriage is protected by the preamble to the state constitution, which provides in relevant part: "The People of Connecticut . . . do, *in order more effectually to define, secure, and perpetuate the liberties, rights and privileges which they have derived from their ancestors*; hereby, after a careful consideration and revision, ordain and establish the . . . constitution and form of civil government." (Emphasis added.) It is arguable that this provision would prevent the legislature from redefining marriage to include same sex couples. See footnote 19 of this opinion. A fortiori, it would prevent the legislature from abolishing the institution altogether.

[7] The plaintiffs state baldly that procreation "[*n*]*ever*" has been the purpose of marriage. (Emphasis added.) In support of this statement, they point to the civil union law enacted in 2005, which grants the same rights and privileges as marriage, and to the fact that proof of the ability to procreate never has been a requirement of marriage. I address these arguments in part III of this dissenting opinion. It is sufficient at this point in my analysis to state that it is impossible to contemplate the development of the institution of traditional marriage between one man and one woman without recognizing that responsible procreation and the rearing of children were central to that development. If the purpose of marriage was not to promote and regulate procreative conduct, what was its purpose?

[8] The plaintiffs argue that the states are precluded from recognizing a privileged status for heterosexual conduct by virtue of the United States Supreme Court's decision in *Lawrence* v. *Texas*, 539 U.S. 558, 578, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), in which the court concluded that a state constitutionally cannot criminalize homosexual conduct between two consenting adults. The plaintiffs' reading of *Lawrence* is overly broad. The fact that states constitutionally cannot criminalize private sexual conduct between two consenting adults does not mean that they are precluded from promoting the public interest in responsible procreation.

[9] In addition, see *Rostker* v. *Goldberg*, 453 U.S. 57, 79, 101 S. Ct. 2646, 69 L. Ed. 2d 478 (1981) (requirement that men, but not women, register for draft did not create invidious gender classification "but rather realistically

reflects the fact that the sexes are not similarly situated" [internal quotation marks omitted]); *Ramos* v. *Vernon*, 353 F.3d 171, 179 (2d Cir. 2003) ("in the context of the class-based equal protection framework, the [United States Supreme] Court has explicitly repudiated complete blindness with regard to gender-based laws, reasoning that, although such laws elicit some suspicion, the physical differences between the sexes are relevant and enduring"); *McNamara* v. *Lantz*, United States District Court, Docket No. 3:06-CV-93 (D. Conn. September 16, 2008) (male inmate is not similarly situated to female inmates for purposes of prison's medical protocol of providing methadone to female inmates but not male inmates because he cannot become pregnant); *J&B Social Club #1, Inc.* v. *Mobile*, 966 F. Sup. 1131, 1139 (S.D. Ala. 1996) (men and women are not similarly situated with respect to prohibition on topless dancing); *Betts* v. *McCaughtry*, 827 F. Sup. 1400, 1405–1406 (W.D. Wis. 1993) (because equal protection clause does not prevent different treatment of men and women when their situations are different in fact, prison rules that accorded certain privileges to female inmates but not to male inmates were not unconstitutional), aff'd, 19 F.3d 21 (7th Cir. 1994); *Jane L.* v. *Bangerter*, 794 F. Sup. 1537, 1549 (D. Utah 1992) (sexes are not biologically similarly situated with respect to abortion statutes); *State* v. *Wright*, 349 S.C. 310, 313, 563 S.E.2d 311 (2002) ("[a] law will be upheld [when] the gender classification realistically reflects the fact that the sexes are not similarly situated in certain circumstances").

[10] Contrary to the majority's assertion that, "[a]lthough it may be argued that the state's interest in regulating procreative conduct constitutes a rational basis for limiting marriage to opposite sex couples . . . that rationale does not answer the entirely different question of whether same sex and opposite sex couples are similarly situated"; footnote 19 of the majority opinion; the purpose of the marriage statutes is dispositive of the question of whether same sex couples are similarly situated to opposite sex couples. See part III of the majority opinion ("[t]he similarly situated inquiry focuses on whether the [plaintiff is] similarly situated to another group *for purposes of the challenged government action*" [emphasis added; internal quotation marks omitted]). Courts do not make a generalized determination that classes are similarly situated with respect to *all* state action, regardless of its purpose. Compare *Michael M.* v. *Superior Court*, supra, 450 U.S. 469 (men and women are not similarly situated with respect to legislation intended to reduce risk of teenage pregnancy) with *United States* v. *Virginia*, 518 U.S. 515, 545, 546–54, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996) (women and men are similarly situated with respect to state's provision of " 'citizen-soldier' " training when some women are qualified for such training). As I discuss more fully in the text of this opinion, the majority's belief that the ability of a couple to conceive children is an insignificant distinction in the marriage context simply begs the central question in this case by *assuming* that the essence of marriage is a loving and committed relationship. That assumption is unfounded.

I recognize that no court expressly has held that same sex couples are not similarly situated to opposite sex couples in this context. As I have indicated in the text of this opinion, however, the majority of courts that have considered the issue have concluded that promoting and regulating procreation is the central concern of marriage. See, e.g., *Citizens for Equal Protection* v. *Bruning*, supra, 455 F.3d 867; *Standhardt* v. *Superior Court*, supra, 206 Ariz. 287; *Morrison* v. *Sadler*, supra, 821 N.E.2d 25; *Conaway* v. *Deane*, supra, 401 Md. 299–300; *Baker* v. *Nelson*, supra, 291 Minn. 312; *Lewis* v. *Harris*, supra, 378 N.J. Super. 185; *Andersen* v. *King County*, supra, 158 Wash. 2d 37. The sole basis for the majority's disagreement with my conclusion that same sex couples and opposite sex couples are not similarly situated in this context is its belief that that procreation does not "[define] the institution of marriage"; footnote 19 of the majority opinion; although it concedes that "procreative conduct plays an important role in many marriages . . . ." Id. Thus, the majority implicitly concedes that, if promoting and regulating procreation *were* the purpose of marriage, then same sex couples and opposite sex couples would *not* be similarly situated. It is clear, therefore, that my conclusion is squarely supported by these cases.

[11] The majority states that "this state's bar against same sex marriage *effectively* precludes gay persons from marrying"; (emphasis in original) footnote 24 of the majority opinion; and that "[i]f . . . the intended *effect* of a law is to treat politically unpopular or historically disfavored minorities differently than persons in the majority or favored class . . . the very existence of the classification gives credence to the perception that separate treatment is warranted for the same illegitimate reasons that gave rise to

the past discrimination in the first place." (Citations omitted; emphasis added.) Part I of the majority opinion. The fact that gay persons have been subject to discriminatory conduct in some contexts does not prove, or even imply, however, that same sex couples have been barred from marriage *because* they are gay. Indeed, gay *individuals* never have been barred from marriage. Moreover, the existence of a classification based on the ability of a couple to engage in the type of sexual conduct that can result in the birth of a child cannot give credence to the notion that another, invidious classification, i.e., one based on sexual orientation, is justified.

I agree with the majority, of course, that our civil union law, like our preexisting marriage laws, "purposefully and intentionally distinguishes between same sex and opposite sex couples." Footnote 24 of the majority opinion. Unlike the majority, however, I have explained the reasons why the laws draw this distinction. Those reasons have nothing to do with intentional discrimination against the class of gay individuals.

The reasoning of the court in *In re Marriage Cases*, 43 Cal. 4th 757, 839–40, 183 P.3d 384, 76 Cal. Rptr. 3d 683 (2008), in support of its conclusion to the contrary is entirely conclusory. Like the majority in the present case, the California court confuses an incidental effect of the marriage laws with their purpose. There simply is no evidence that the institution of marriage ever was *intended* to affect gay persons in any manner whatsoever. Indeed, the majority summarizes the California case by stating that "this state's bar against same sex marriage *effectively* precludes gay persons from marrying." (Emphasis in original.) Footnote 24 of the majority opinion.

The majority appears to suggest that this court's statement in *State* v. *Long*, 268 Conn. 508, 847 A.2d 862, cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004), that, "[t]o implicate the equal protection [clause] . . . it is necessary that the state statute [or statutory scheme] in question, *either on its face or in practice*, treat persons standing in the same relation to it differently"; (emphasis added; internal quotation marks omitted) id., 534; means that a person challenging the statute is not required to prove discriminatory intent. See part IV of the majority opinion. To the contrary, the emphasized language merely distinguishes facial equal protection challenges from as applied challenges. It does not dispense with the intent requirement.

[12] To the extent that the majority suggests that anyone who opposes same sex marriage must harbor animus toward gay persons—an impression conveyed by the prevailing tone of the majority opinion—I strongly disagree. For all of the reasons set forth in this opinion, persons of good will can disagree about this matter of great public importance. To suggest otherwise is unwarranted.

The majority denies suggesting that opposition to same sex marriage can only be driven by animus toward gay persons. The primary basis for its decision, however, is its conclusion that that the intent of the marriage laws is "to treat [a] politically unpopular [and] historically disfavored [minority] differently" for "illegitimate reasons . . . ." Part I of the majority opinion. The majority also suggests that all state and federal legislation that classifies on the basis of an individual's sexual conduct or orientation is driven by discriminatory animus toward gay persons and is designed to "undermine the legitimacy of homosexual relationships, to perpetuate feelings of personal inferiority and inadequacy among gay persons, and to diminish the effect of the laws barring discrimination against gay persons." Part V D 2 of the majority opinion. Finally, the majority suggests that naked legislative preference for opposite sex couples, moral disapproval of same sex couples and private biases against homosexuality are the primary justifications for limiting marriage to one man and one woman. If, contrary to the import of these statements, the majority believes that persons of good will sincerely can believe that there are legitimate reasons for limiting marriage to one man and one woman, it should identify those reasons and take them into account in its analysis.

[13] There are a few exceptional examples of same sex marriage in ancient times. See K. Young & P. Nathanson, "Marriage á la mode: Answering the Advocates of Gay Marriage" (2003) ("[a]s for Nero and Elgabalus, Roman emperors, they married men but in a context—Rome's degenerate aristocracy in which murder was rampant and even a horse could be made a senator—that few people today, gay or straight, would find edifying"), available at http://www.marriageinstitute.ca/images/mmmode.pdf.

[14] The majority also ignores the fact that, if consensual, loving commitment among adults is the essence of marriage, then the state has no basis for prohibiting polygamous marriage. The duality of traditional marriage derives from the duality of the sexes. If marriage is genderless, then there is no

reason—other than the pure "tradition" argument that the majority already has rejected—why any combination of loving, committed, adult men and women should not be allowed to get married.

The plaintiffs contend that this argument is baseless because, unlike the redefinition of marriage to include same sex couples, allowing more than two persons to marry "would require a complete restructuring of the laws of civil marriage. The state would not be able to determine under existing laws which spouse would make decisions in the event of incapacity, who would inherit in the event of intestacy, and how custody, visitation, child support, and tax matters would be handled." If marriage is a fundamental right, however, and the essence of marriage is a loving, committed relationship among adults, then an adult has a fundamental right to enter into a loving, committed relationship with other adults. The objections that the plaintiffs raise to polygamous marriage could readily be addressed by agreement among the parties to a polygamous marriage, by litigation or by minor changes to our statutes, similar to those required to accommodate same sex marriage. Surely, the need for such minor changes would not constitute a sufficiently compelling reason to defeat a fundamental right.

[15] The majority states that "[t]his conclusion is amply supported by the legislative history of the civil union law" and cites the remarks of Representative Robert M. Ward during debate on that legislation. Footnote 80 of the majority opinion, citing 48 H.R. Proc., Pt. 7, 2005 Sess., p. 2002. Contrary to the majority's suggestion, however, Representative Ward did not indicate that there were no good *reasons* for preserving traditional marriage. Rather, he indicated that the civil union law extended rights to same sex couples in a way that was consistent with his constituents' views "of what marriage is"; 48 H.R. Proc., supra, p. 2002, remarks of Representative Ward; i.e., an institution designed to privilege and regulate the type of sexual conduct that can result in the birth of a child. In any event, the institution of traditional marriage long predates the civil union law. Even if the majority's interpretation of Representative Ward's remarks were correct, I do not believe that the statements of a single state legislator in 2005 should provide the sole basis for determining the fundamental purpose of a basic civil institution that has existed in innumerable societies over millennia.

The majority also states that "the defendants expressly have disavowed any claim that the legislative decision to create a separate legal framework for committed same sex couples was motivated by the belief that the preservation of marriage as a heterosexual institution is in the best interests of children, or that prohibiting same sex couples from marrying promotes responsible heterosexual procreation . . . ." Part VII of the majority opinion. Accordingly, the majority concludes that it need not address the *only* argument that other courts have found to be persuasive in determining that limiting marriage to one man and one woman is not unconstitutional. As the majority is aware, however, several amici, including the Family Institute of Connecticut (institute), have raised this argument, and there is nothing to prevent this court from considering it. See *Lewis* v. *Harris*, supra, 378 N.J. Super. 185 n.2 (when attorney general disclaimed reliance on promotion of procreation and creating optimal environment for raising children as justifications for limiting marriage to opposite sex couples, court was entitled to consider those arguments when raised by amici, and found them to be dispositive); see also id. ("amicus is not at liberty to inject new issues in a proceeding . . . [but] is not confined solely to arguing the parties' theories in support of a particular issue" [internal quotation marks omitted]). As the majority also is aware, at oral argument before this court on the institute's appeal from the trial court's denial of its motion to intervene in this case; see generally *Kerrigan* v. *Commissioner of Public Health*, 279 Conn. 447, 904 A.2d 137 (2006); the institute argued vigorously that intervention was necessary because the attorney general had indicated that he would not defend the institution of traditional marriage on the ground that it advanced the state's compelling interest in promoting responsible procreation and child rearing. See id., 451–52. The institute also noted that, if it was not allowed to raise this argument as a party, this court could deem the argument waived in any appeal from the trial court's decision on the merits. In response to this argument, members of this court indicated that, if the attorney general failed to argue that there was a rational basis for traditional marriage, he would not be adequately representing the state's interests, and expressed some skepticism that that would be the case. This court also questioned the institute about the substance of the arguments that it had made in the amicus brief that it had submitted to the trial court and expressed reservations as to whether the institute's intervention as a party was required when

the institute was participating in the case as an amicus curiae. This court subsequently affirmed the trial court's denial of the institute's motion to intervene because "the trial court reasonably could have determined that the institute's interest in defending the constitutionality of the [civil union law] would be adequately represented by the attorney general, whose defense of state statutes is 'presumed' to be adequate"; id., 462; and because "the record demonstrate[d] that the institute ha[d] filed an extensive amicus brief that contain[ed] ample references to . . . scientific studies [concerning children raised without both a mother and a father]." Id., 464. In light of this history, I believe that it is unseemly, to say the least, for the majority to decline even to address the arguments raised by the amici.

[16] See footnotes 3 and 4 of the majority opinion for the relevant text of these provisions.

[17] The majority purports not to reach the plaintiffs' claim that they have a fundamental right to marry. It is difficult, however, to see how that could be the case. The majority concludes that the plaintiffs are entitled to enter into *precisely the same* institution of marriage as that entered into by opposite sex couples. Marriage either is a fundamental civil right or it is not; it cannot have both characteristics at the same time. Because marriage indisputably is a fundamental civil right for opposite sex couples, the majority must believe that it is a fundamental civil right for same sex couples. Any such right can only be based on a loving, committed relationship between consenting adults. It is uncontroverted, however, that, up to now, marriage has been a fundamental right under the constitution because of its link to procreation. See *Zablocki* v. *Redhail*, supra, 434 U.S. 386; *Skinner* v. *Oklahoma ex rel. Williamson*, supra, 316 U.S. 541. Thus, the majority must believe that there are *two* fundamental rights to marriage. If that is the case, however, then the participants in the two different fundamental rights are not similarly situated.

[18] See *State* v. *Ross*, 230 Conn. 183, 289, 646 A.2d 1318 (1994) (*Berdon, J.*, dissenting in part) ("[t]he preamble of the constitution makes clear that *it reserves to the people* 'the liberties, rights and privileges which they have derived from their ancestors' " [emphasis added; internal quotation marks omitted]), cert. denied, 513 U.S. 1165, 115 S. Ct. 1133, 130 L. Ed. 2d 1095 (1995); see also Conn. Const., art. I, preface (declaration of rights is made so "[t]hat the great and essential principles of . . . *free government* may be recognized and established" [emphasis added]); id., art. I, § 2 ("[a]ll political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit").

[19] It is arguable that the preamble to the state constitution protects the institution of marriage in the form that it existed at the time that the constitution was adopted, i.e., an institution designed to privilege and regulate procreation, and that the legislature would be barred from redefining it in such a way that it would no longer serve that basic and compelling public interest. Cf. *Evans* v. *General Motors Corp.*, 277 Conn. 496, 509, 893 A.2d 371 (2006) (article first, § 19, of state constitution consistently has been construed to mean that if there was right to trial by jury at time of adoption of provision, then that right remains intact); *Gentile* v. *Altermatt*, 169 Conn. 267, 286–87, 363 A.2d 1 (1975) (article first, § 10, of state constitution deprives legislature of authority to abolish legal right existing at common law prior to 1818 unless legislature simultaneously establishes reasonable alternative to enforcement of that right), appeal dismissed, 423 U.S. 1041, 96 S. Ct. 763, 46 L. Ed. 2d 631 (1976); see also J. Root, supra, 1 Root (Conn.) xxvii (under Connecticut law at time that state constitution was adopted, marriage constituted joining of one man and one woman for purpose of propagating, and preserving and educating offspring). It is beyond dispute, however, that this court is barred from doing so.

[20] There is strong evidence that the state increasingly has recognized the harm caused by the breakdown of the traditional family and a child's need for both a mother and a father. In 1999, the state enacted the " 'Fatherhood Initiative' " to "promote the positive involvement and interaction of fathers with their children . . . ." Public Acts 1999, No. 99-193, § 1. The objectives of the initiative are to: "(1) [p]romote public education concerning the financial and emotional responsibilities of fatherhood; (2) assist men in preparation for the legal, financial and emotional responsibilities of fatherhood; (3) promote the establishment of paternity at childbirth; (4) encourage fathers, regardless of marital status, to foster their emotional connection to and financial support of their children; (5) establish support mechanisms for fathers in their relationship with their children, regardless of their marital and financial status; and (6) integrate state and local services available for

families.” Id. In June, 2008, James Amann, the speaker of the Connecticut House of Representatives, announced that he had formed a twelve member task force to study the growing problem of children growing up without fathers. See C. Stuart, “Lawmakers to Study Fatherlessness” (June 26, 2008), available at http://www.ctnewsjunkie.com/state_capitol/lawmakers_to_study_fatherlessn.php. As the result of recent research, “[t]he vital influence of a loving father on a child and family is increasingly undeniable.” R. Rohner, Editorial, “What Fathers Mean for Kids,” Hartford Courant, August 4, 2008, p. A13.

[21] “One thing that [children] surely require is at least one parent of each sex. . . . [This] is because the sexes are not quite interchangeable. Though much more similar than dissimilar, both sexes are distinctive. Boys cannot learn how to become healthy men from even the most loving mother (or pair of mothers) alone. And girls cannot learn how to become healthy women from even the most loving father (or pair of fathers) alone.” K. Young & P. Nathanson, supra.

[22] “Because heterosexuality is directly related to both reproduction and survival [of the species], and because it involves much more than copulation, every human society has had to promote it actively (although some have also allowed homosexuality in specific circumstances). And marriage is the major way of doing so. It has always required a massive cultural effort involving myths or theologies, rituals, rewards, privileges, and so on. Heterosexuality is always fostered as a cultural norm, in other words, not merely allowed as one ‘lifestyle choice’ among many. Some norms vary greatly from one society to another, to be sure, but others—along with the very existence of norms—are universal. So deeply embedded in consciousness are these that few people are actually aware of them. The result, in any case, is a ‘privileged’ status for heterosexuality. Postmodernists are not wrong in identifying it as such, but they are wrong in assuming that any society can do without it. . . .

“Its universal features include the fact that marriage . . . encourages procreation under specific conditions . . . recognizes the interdependence of men and women . . . and . . . provides mutual support not only between men and women but also between them and children. Its nearly universal features [include] . . . an emphasis on durable relationships between biological parents . . . . These features assume the distinctive contributions of both sexes, transmit knowledge from one generation to another, and create not only ‘vertical’ links between the generations but also ‘horizontal’ ones between allied families or communities.” (Internal quotation marks omitted.) K. Young & P. Nathanson, supra.

[23] For example, in one of the studies on which the plaintiffs rely, the authors stated that “[t]he small and nonrepresentative samples studied and the relatively young age of most of the children suggest some reserve” and that “[r]esearch exploring the diversity of parental relationships among gay and lesbian parents is just beginning.” E. Perrin & Committee on Psychosocial Aspects of Child and Family Health, “Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents,” 109 Pediatrics 341, 343 (2002).

[24] In this regard, I would point out that couples never have been required to prove that they are in a loving relationship before being allowed to marry. Moreover, commitment is increasingly considered optional. That has not stopped the plaintiffs from claiming, and the majority from concluding, that loving commitment is the essence of marriage.

I recognize that, at least in more modern times, society has considered love between a man and a woman to be a sufficient justification for marriage. This does not mean, however, that the *state* has any particular interest in promoting romantic love, in and of itself. Rather, if the state has any interest in promoting love, it is only because love is instrumental to the sexual conduct and long-term commitment that are required to propagate and raise children.

[25] The United States Supreme Court has recognized that the “distinctive elements [of marriage] . . . rob it of most of its characteristics as a contract, and leave it simply as a *status* or institution. As such, it is not so much the result of private agreement, as of public ordination. In every enlightened government, it is preeminently the basis of civil institutions, and thus an object of the deepest public concern. In this light, marriage is more than a contract. It is not a mere matter of pecuniary consideration. It is a great public institution, giving character to our whole civil polity.” (Emphasis in original; internal quotation marks omitted.) *Maynard* v. *Hill*, 125 U.S. 190, 213, 8 S. Ct. 723, 31 L. Ed. 654 (1888). Thus, the institution of marriage

is primarily concerned with preserving the existing civil polity, not with bestowing individual rights.

[26] We long have recognized that testimony from legislative committee hearings may be relevant to a statutory analysis because it tends to shed light on the problems that the legislature was attempting to resolve in enacting the legislation. E.g., *Burke* v. *Fleet National Bank*, 252 Conn. 1, 17, 742 A.2d 293 (1999).

[27] The majority conspicuously omits any discussion of this statutory provision in its opinion, although it relies on § 45a-727a (3) in support of its conclusion that "it is the public policy of this state that sexual orientation bears no relation to an individual's ability to raise children . . . ." Part V B of the majority opinion. Of course, no one in this case is challenging the parenting ability of gay individuals. I find it troubling that the majority is willing to consider the plaintiffs' arguments in support of their claim that same sex marriage will have no deleterious effect on the welfare of children while expressly declining to address the arguments to the contrary. See footnote 12 of this opinion.

[28] I agree with Justice Borden's response to the plaintiffs' argument that any link between marriage and procreation was severed by the decisions of the United States Supreme Court in *Griswold* v. *Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), *Turner* v. *Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), and *Lawrence* v. *Texas*, supra, 539 U.S. 558. See part IV of Justice Borden's dissenting opinion.

[29] To the extent that the majority contends that these statements were inadequately supported by citations to the historical record, the burden is not on the defendants to prove a negative. Nevertheless, I note that the amicus brief filed by the Knights of Columbus notes that, at the time that article first, § 20, of the state constitution was amended in 1974 to prohibit discrimination on the basis of sex, some citizens were concerned that the amendment could be interpreted as requiring the recognition of same sex marriage. The Hartford Courant published an editorial stating that any such claim was "nonsense," and the Danbury News-Times characterized the claims as "scare tactics." Gloria Schaffer, then the secretary of the state, and Kay Bergin, the executive director of the permanent commission on the status of women, gave a joint public statement that such claims were "unfounded" and were "misleading and inflammatory, calculated to frighten and to distort the true meaning of the proposed amendment." There is no evidence that the drafters or the supporters of the amendment ever disputed these characterizations or believed that the critics of the amendment were correct. In light of this history, it is difficult for me to believe that the drafters of the equal protection provisions of our constitution, or those who voted for them, believed that sexual orientation should be treated as a quasi-suspect classification.

[30] The majority states that, "[a]t a minimum . . . recognizing gay persons as a quasi-suspect class would substantially increase the likelihood of a determination that same sex couples are entitled to marry in view of the fact that the state would be required to provide strong justification for denying them that right. Accordingly, we consider the public policy ramifications of invalidating the statutory scheme barring same sex marriage." Part VI E of the majority opinion.

[31] The defendants have stipulated that several of the plaintiffs *feel* that the marriage laws treat them as second-class citizens, and I have no reason to doubt that that is the case or to suggest that such feelings are unreasonable. The defendants have expressly denied, however, that "[b]eing 'placed into a separate category, such as civil unions, brands [the plaintiffs'] relationship[s] as second class . . . .' "

[32] Of course, if the legislation negatively impacts a fundamental right, then it is subject to heightened scrutiny under substantive due process principles. I have concluded that there is no fundamental right to same sex marriage.