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BORDEN, J., with whom VERTEFEUILLE, J., joins, dissenting. The majority concludes that sexual orientation is a quasi-suspect class under our state constitutional provisions guaranteeing equal protection of the laws; article first, § 1, and article first, § 20, of the constitution of Connecticut, as amended by articles five and twenty-one of the amendments;[1] and, based on that conclusion, the majority further concludes that our statute confining marriage to opposite sex couples violates the rights of same sex couples under those constitutional provisions because the statute does not survive the heightened scrutiny required by that constitutional classification.[2] In my view, the majority's decision to grant quasi-suspect class status to sexual orientation is contrary to a sound and prudent interpretation of constitutional standards regarding equal protection of the laws because it unduly minimizes the unique and extraordinary political power of gay persons[3] in this state, both generally speaking, and particularly in regard to the question of whether gay marriage should be recognized in this state.

I conclude that sexual orientation does not constitute either a suspect or a quasi-suspect class under our state constitution. I also reject the other claims raised under our state constitution, by the plaintiffs, eight same sex couples,[4] namely, that our definition of marriage as limited to the union of a man and a woman creates an impermissible gender classification in violation of the plaintiffs' right to equal protection and deprives the plaintiffs of their fundamental constitutional right to marry, and conclude, accordingly, that our civil union and marriage statutes survive the constitutionally minimum standard of rational basis review. I therefore dissent and would affirm the trial court's judgment.[5]

I

SEXUAL ORIENTATION IS NOT A QUASI-SUSPECT CLASS UNDER ARTICLE FIRST, §§ 1 AND 20, OF THE CONSTITUTION OF CONNECTICUT

A

Background

I begin by noting my agreement with much of what the majority says in its eloquently written opinion. First, I agree with the majority that, contrary to the conclusion of the trial court, the plaintiffs have stated a cognizable constitutional claim.[6] I agree that there is enough of a difference between the new institution of civil union and the ancient institution of marriage to permit a constitutional challenge on equal protection grounds. There is no doubt that the institution of marriage carries with it a unique and important history and tradition in our society and state. Although the civil union statute pro-

vides all of the benefits and obligations of marriage, because it is so new, we cannot know with any reasonable degree of certitude whether it is now or soon will be viewed by the citizens of our state as the social equivalent of marriage. In my view, this uncertainty is enough to trigger equal protection analysis.

The majority concludes that the civil union statute has relegated the plaintiffs to an inferior status and affords them second class citizenship, that civil unions are perceived to be inferior to marriage, and that, "[d]espite the truly laudable effort of the legislature in equalizing the legal rights afforded same sex and opposite sex couples, there is no doubt that civil unions enjoy a lesser status in our society than marriage." Unlike the majority, I do have such a doubt, and I do not think that the plaintiffs have established that proposition as beyond doubt.

First, the majority's determination that civil union status is a second class or inferior status is not, as the majority presents it, an established fact that serves as the starting point of the debate, but an issue of fact that has not yet been resolved in the present case. In fact, in the trial court on the cross motions for summary judgment in the present case, the plaintiffs presented a statement of undisputed facts in support of their motion. In that statement, one of the plaintiffs, Gloria Searson, alleged that "[b]eing 'placed into a separate category, such as civil union, brands [her] relationship [with her civil union spouse, Damaris Navarro] as second class and makes [her] feel substandard.' " In response, the defendants, certain state and local officials, stated that, solely for purposes of the cross motions, they did not dispute the allegations of that particular paragraph, "except that to the extent that the statement '[b]eing placed into a separate category, such as civil union, brands [the couple's] relationship as second class' is asserted as a statement of fact, as opposed to a statement of [Searson] and [Navarro's] opinion, that fact is denied." Thus, the procedural posture of this appeal has not yet allowed the fact finder to make the factual determination of whether the civil union statute relegates same sex couples to an inferior status. Thus, the majority has drawn this conclusion without questioning whether the underlying factual assumption is true, without having allowed the parties to present evidence to the trial court in support of their positions, and without having allowed the trial court to make the disputed factual finding.

This is particularly significant given the fact that the question of what is perceived or considered to be an inferior status in a given society may not be readily apparent when the subject is a brand new institution, such as civil union. One only needs to open the New York Times on a given Sunday and see civil unions announced on the same page and in the same style as

marriages. It is questionable, at least, that a couple that views their civil union as a sign of second class citizenship would choose to publicize it in the society column of the newspaper, particularly one with a circulation as large as the New York Times.[7] And, of course, the factual question of whether the statute relegates same sex couples to a perceived second class status would be readily subject to such proof by way, for example, of public opinion polls on the views of the people of this state.[8] Thus, the majority has ignored this essentially factual dispute and made its own factual assertion without evidence.

In this connection, I also note that this court is constitutionally prohibited from finding facts. *Weil* v. *Miller*, 185 Conn. 495, 502, 441 A.2d 142 (1981) ("[t]his court cannot find facts; that function is, according to our constitution, our statute, and our cases, exclusively assigned to the trial courts"); see also Conn. Const., amend. XX, § 1 ("The judicial power of the state shall be vested in a supreme court, an appellate court, a superior court, and such lower courts as the general assembly shall, from time to time, ordain and establish. The powers and jurisdiction of these courts shall be defined by law."). Thus, to the extent that the perceived status of civil unions in this state is factual in nature, the majority has, by making its findings regarding that status, exceeded this court's power. This further undermines the majority's assertion of second class status attached to civil unions at this point in our history.

Moreover, we have had civil unions in our state only since June 30, 2005, when the statutory scheme became effective. See Public Acts 2005, No. 05-10, § 1. Indeed, we are one of only two states in the nation that have legislatively enacted a civil union statutory scheme that was not mandated by its Supreme Court.[9] In addition, both the Vermont and the New Jersey Supreme Courts have held, under their state constitutions, that the legislature must enact, in effect, *civil union* (but not same sex marriage) statutes to remedy the unconstitutionality of their respective marriage statutes. See *Baker* v. *State*, 170 Vt. 194, 744 A.2d 864 (1999); *Lewis* v. *Harris*, 188 N.J. 415, 908 A.2d 196 (2006).[10] Both Vermont and New Jersey already have done so—Vermont several years before the enactment of our civil union statute, and New Jersey some time thereafter. Undoubtedly, at this point in time, there have been thousands of civil union ceremonies performed in Connecticut, Vermont and New Jersey, with the result that there are now thousands of families headed by same sex couples joined in civil union, both with and without children.

I acknowledge that, because of its name, civil union is a different status from marriage. In this connection, I also note my agreement with Justice Zarella's observation in part I of his dissenting opinion regarding the nature of that different status, namely, that the institu-

tion of civil union is a creature of statute, while marriage is a fundamental civil right protected by the constitution. At this point in our state's history, however, and without any appropriate fact-finding on the issue, I am unable to say that it is widely considered to be less than or inferior to marriage, or that it does not bring with it the same social recognition as marriage. It is simply too early to know this with any reasonable measure of certitude.[11]

I agree with the New Jersey Supreme Court that "same-sex couples [are] free to call their relationships by the name they choose . . . ." *Lewis* v. *Harris*, supra, 188 N.J. 461. Indeed, parties to a civil union are free to—and do, in my experience—refer to their partner as "my spouse," or any other appellation that is derived from the vocabulary of marriage. For that matter, I know of no barrier, legal or otherwise, to such parties referring to themselves as "married," if they choose to do so. After all, in the eyes of the law, they have all of the rights and obligations "as are granted to spouses in a marriage . . . ." General Statutes § 46b-38nn. Moreover, General Statutes § 46b-38oo specifically includes civil unions in any use in the General Statutes of the term " 'spouse' . . . or any other term that denotes the spousal relationship," and also specifically provides that, with certain exceptions, whenever "the term 'marriage' is used or defined, a civil union shall be included in such use or definition." In fact, as I have noted, the New York Times treats them the same as marriages for purposes of public announcement in the Sunday edition. In short, the state of social flux in this entire realm is simply too new and too untested for four members of this court to declare as an established social fact that civil unions are of lesser status than marriage in our state. In my view, that has not been established at this stage of our history. Judge Learned Hand has wisely reminded us as judges never to be too sure that we are always right.[12]

Thus, our experience with civil unions is simply too new and the views of the people of our state about it as a social institution are too much in flux to say with any certitude that the marriage statute must be struck down in order to vindicate the plaintiffs' constitutional rights. "[J]udicial authority . . . is certainly not the only repository of wisdom. 'When a democracy is in moral flux, courts may not have the best or the final answers. Judicial answers may be wrong. They may be counterproductive even if they are right. Courts do best by proceeding in a way that is catalytic rather than preclusive and that is closely attuned to the fact that courts are participants in the system of democratic deliberation.' " *Baker* v. *State*, supra, 170 Vt. 228, quoting C. Sunstein, "Foreword: Leaving Things Undecided," 110 Harv. L. Rev. 4, 101 (1996). The majority has disregarded this wise counsel.

Consider and compare, for example, the change in social attitudes toward unmarried opposite sex couples living together. It was not long ago that there was a widespread attitude of moral disapproval, and stronger than that on the part of many persons, toward such couples. Yet, it is fair to say that, even independent of or without any positive statutory reinforcement or judicial decisions, now such living arrangements are widely accepted as an ordinary and common part of our social landscape, without social stigma of any kind. It is certainly possible that, but for the majority's decision in this case, social attitudes toward civil unions would have proven not to have the negative connotations that the majority suggests, either independent of or because such unions have the positive reinforcement of legal approval.[13] The point is that at this time it is simply impossible to say what the current prevailing view is, and what it would have turned out to be in the future.

I also agree, however, with the majority that the same factors that trigger strict scrutiny under our equal protection clauses trigger intermediate scrutiny, and I agree generally with the majority's four factor test applicable to trigger those tiers of judicial scrutiny, including the notion that there is no formula for applying the four factor test. Furthermore, applying those four factors to the facts of this case, I agree that gay persons have suffered a deplorable history of invidious discrimination, that their sexual orientation is a distinguishing characteristic that defines them as a discrete group, and that one's sexual orientation has no relation to a person's ability to contribute to society.

My fundamental disagreement with the majority focuses, however, on the relevance and application of the fourth factor, namely, the political power of gay persons in this state. The majority discounts this factor as the least important of the factors in the equal protection calculus, and applies it in a way that, in my view, renders it all but irrelevant. To the contrary, I view this factor as equal to the other factors, and think that, under our state constitution, it should be given its due weight.

In this connection, I emphasize the limitations on the scope of my analysis. First, we decide this case under the equal protection clauses of our state constitution. When we do so, we ordinarily look to those equal protection principles articulated by the United States Supreme Court; but we do so as a matter of jurisprudential choice, not as a matter of state constitutional mandate. Second, as I explain in part II of this opinion, in my view those classes specified in article first, § 20; see footnote 1 of this dissenting opinion; and only those classes, are entitled to strict scrutiny under our constitution. Thus, the four factor test employed by the majority, and with which I agree generally, applies only to determine whether, as in the present case, an unspeci-

fied class is entitled to heightened scrutiny.[14]

Furthermore, in applying the political power factor to the facts of this case, I conclude that, because one of the fundamental purposes of heightened review scrutiny is, as I explain in part I B of this opinion, the need for judicial intervention into the process of legislative classification to protect discrete and insular minorities who cannot effectively use the political process to protect themselves, the political power of gay persons in this state at this time regarding the right of gay marriage is so strong that the political power factor outweighs the other factors. I turn now, therefore, to the political power factor in the suspect class status analysis.

B

The History and Significance of the Political Power Factor

Some history is necessary in order to understand the significance of the political power factor in equal protection jurisprudence. One of the principal purposes of the four factor test for heightened scrutiny, based on its history, is to provide for the extraordinary remedy of judicial intervention into legislative classification in those instances in which, because of the status of the group affected by the classification, the group has no likely effective means of redressing any discrimination effected by means of the classification through the normal political process.

The starting point for evaluating the constitutionality of a legislative classification under equal protection principles has long been the rational basis test, which applies to economic and social regulation. See *Metropolitan Casualty Ins. Co.* v. *Brownell*, 294 U.S. 580, 583, 55 S. Ct. 538, 79 L. Ed. 1070 (1935). This test is rooted in the notion that the principal function of the legislature is to draw lines—in effect, to make classifications, so that it is not necessary for all legislation to apply to everyone in the first instance—and that, when the legislature does so, "the [c]onstitution presumes that even improvident decisions will eventually be rectified by the democratic process." *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). As the United States Supreme Court has recognized: "Classification is the essence of all legislation, and only those classifications which are invidious, arbitrary, or irrational offend the [e]qual [p]rotection [c]lause of the [c]onstitution." *Clements* v. *Fashing*, 457 U.S. 957, 967, 102 S. Ct. 2836, 73 L. Ed. 2d 508 (1982). Thus, the rational basis test is based on judicial respect for the separation of powers.

In 1938, in *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152, 58 S. Ct. 778, 82 L. Ed. 1234 (1938), the United States Supreme Court upheld a legislative classification created by the federal Filled Milk Act as having a rational basis. In what has now been recog-

nized as its seminal footnote 4; id., 152–53 n.4; however, the court for the first time suggested the rationale for a more searching level of judicial inquiry for certain cases. One category of such cases was those in which "those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" were, by the nature of the legislation itself, restrictive of those processes, such as legislation restricting the right to vote, restraining the dissemination of information and interfering with political organizations. Id. The court then broadened its suggestion of the possibility of a more searching level of judicial inquiry to another category of cases. The court stated: "Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . [*or*] *whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry*." (Citations omitted; emphasis added.) Id., 153 n.4.

Footnote 4 has had such great impact on constitutional law that it is often referred to as the "most famous" and "most celebrated" footnote in the Supreme Court's history. See, e.g., D. Hutchinson, "Symposium, Discrimination and Inequality: Emerging Issues, 'Gay Rights' for 'Gay Whites'?: Race, Sexual Identity, and Equal Protection Discourse," 85 Cornell L. Rev. 1358, 1379 n.107 (2000) ("'most famous footnote'"); P. Linzer, "The *Carolene Products* Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely vs. Harlan Fiske Stone," 12 Const. Commentary 277 (1995) (same); A. Amar, "The Bill of Rights and the Fourteenth Amendment," 101 Yale L.J. 1193, 1195 (1992) (same); S. Delchin, comment, "*United States* v. *Virginia* and Our Evolving 'Constitution': Playing Peek-a-boo with the Standard of Scrutiny for Sex-Based Classifications," 47 Case W. Res. L. Rev. 1121, 1154 n.206 (1997) ("'most celebrated footnote'"); L. Wardle, "A Critical Analysis of Constitutional Claims for Same-Sex Marriage," 1996 BYU L. Rev. 1, 92 (same); L. Powell, "*Carolene Products* Revisited," 82 Colum. L. Rev. 1087 (1982) (first description as "most celebrated footnote").

Justice Powell, delivering the Harlan Fiske Stone Lecture at Columbia University in New York, observed that *Carolene Products Co.* was an "unremarkable" case. L. Powell, supra, 82 Colum. L. Rev. 1087. Justice Powell explained that footnote 4, which, ironically, was not only relegated to a footnote, but also was dicta, is the sole reason for the continuing fascination with the case. Indeed, Justice Powell noted that the footnote "now is recognized as a primary source of strict scrutiny judicial review," which "many scholars think . . . actually

commenced a new era in constitutional law." (Internal quotation marks omitted.) Id., 1088.

Justice Powell's explanation of the theory underlying footnote 4 is significant. "The fundamental character of our government is democratic. Our constitution assumes that majorities should rule and that the government should be able to govern. Therefore, for the most part, Congress and the state legislatures should be allowed to do as they choose. But there are certain groups that cannot participate effectively in the political process. And the political process therefore cannot be trusted to protect these groups in the way it protects most of us. Consistent with these premises, the theory continues, the Supreme Court has two special missions in our scheme of government: "First, to clear away impediments to participation, and ensure that all groups can engage equally in the political process; and Second, to review with heightened scrutiny legislation inimical to discrete and insular minorities *who are unable to protect themselves in the legislative process*." (Emphasis added.) Id., 1088–89.

Thus, a principal purpose underlying heightened scrutiny judicial intervention into the realm of legislative judgment—into its essential process of classification—is directly related to the political power factor. Heightened scrutiny analysis is designed as an extraordinary form of judicial intervention on behalf of those insular minority classes who presumably are unlikely to be able to rectify burdensome or exclusive legislation through the political process.

The United States Supreme Court's equal protection case law reflects the importance of footnote 4 of *Carolene Products Co.*, and the close tie between heightened scrutiny analysis and the relative political power of the group being considered for protected class status. See, e.g., *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 105, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973) (Marshall, J., dissenting) ("The reasons why such classifications [of race, nationality and alienage] call for close judicial scrutiny are manifold. Certain racial and ethnic groups have frequently been recognized as 'discrete and insular minorities' who are relatively powerless to protect their interests in the political process. See *Graham* v. *Richardson*, [403 U.S. 365, 372, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971)]; cf. *United States* v. *Carolene Products Co.*, [supra, 304 U.S. 152–53] n.4."); *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 313, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976) ("[b]ut even old age does not define a 'discrete and insular' group, *United States* v. *Carolene Products Co.*, [supra, 152–53 n.4], in need of 'extraordinary protection from the majoritarian political process' "); *Plyler* v. *Doe*, 457 U.S. 202, 217 n.14, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982) ("[C]ertain groups . . . have historically been 'relegated to such a position of political powerlessness

as to command extraordinary protection from the majoritarian political process.' . . . [S]ee *United States* v. *Carolene Products Co.*, [supra, 152–53 n.4]." [Citations omitted.]).

Although the United States Supreme Court has not always cited the *Carolene Products Co.* footnote in its formulation of the test for heightened scrutiny, it has applied the political power factor in determining whether legislation affecting a particular class is to be made subject to that scrutiny, and its reasoning and language clearly have echoed the purpose of that factor as explained by Justice Powell. In *Cleburne* v. *Cleburne Living Center, Inc.*, supra, 473 U.S. 440, the court, in determining that the mentally retarded were not a quasi-suspect class, used language and reasoning that established clearly that the political power factor is integral to the determination of whether a class is entitled to suspect or quasi-suspect class status, and, therefore, whether legislation affecting that class should be subjected to heightened or merely rational basis scrutiny. First, in contrasting the rational basis test with the strict scrutiny test, the court noted that statutes that classify on the basis of race, alienage or national origin "are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. For these reasons *and because such discrimination is unlikely to be soon rectified by legislative means*, these laws are subjected to strict scrutiny . . . ." (Emphasis added.) Id. In summarizing the rational basis test, the court referred to the fact that, where the group involved has characteristics relevant to state interests, "courts have been very reluctant, as they should be in our federal system *and with our respect for the separation of powers*, to closely scrutinize legislative choices . . . ." (Emphasis added.) Id., 441. The court then turned to its explanation of why it rejected quasi-suspect classification for the mentally retarded, stating: "[T]he distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrates not only that they have unique problems, *but also that lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary.*" (Emphasis added.) Id., 443. After cataloguing the federal and state legislation demonstrating those legislative responses, the court stated: "[T]he legislative response, which could hardly have occurred and survived without public support, *negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers.*" (Emphasis added.) Id., 445. One cannot reasonably read these passages without hearing and seeing the important relevance of the political power factor to the three tier analysis; it is integral to the determination of whether a particular class should

be elevated to protected status.

Contrary to the majority, therefore, I conclude that the political power of the group that seeks heightened scrutiny is a highly relevant consideration in the formulation and application of the four part test to determine whether the legislation at issue is to be subject to that degree of scrutiny. I would, therefore, as a matter of our own state constitutional law, retain the political power factor as an equal consideration in the equal protection calculus because it constitutes one of the fundamental purposes of the entire heightened scrutiny analysis. Finally, as I explain in part I C of this opinion, I agree with the majority's formulation of how to define that factor and, in applying it to this case, I conclude that, under that definition, the plaintiffs are not entitled to heightened scrutiny. I turn now to the application of that factor in the present case.

C

Application of the Political Power Factor to the Right to Gay Marriage in Connecticut

I agree with the majority in its formulation of the political power factor: "[A] group satisfies the political powerlessness factor if it demonstrates that, because of the pervasive and sustained nature of the discrimination that its members have suffered, there is a risk that that discrimination will not be rectified, sooner rather than later, merely by resort to the political process. See *Cleburne* v. *Cleburne Living Center, Inc.*, supra, 473 U.S. 440." The majority has "little difficulty in concluding that gay persons are entitled to heightened constitutional protection despite some recent political progress." Unlike the majority, however, I come to the opposite conclusion: it is very clear to me that the discrimination to which the plaintiffs have been subjected in the past is no longer a factor preventing them from availing themselves of the political process to secure their rights. The most compelling illustration of that development is that the differential treatment of which the plaintiffs complain and seek to remedy by this case—the denial of the right to marry—*would be rectified* by the political process very soon. It is the unfortunate consequence of the majority opinion that it has short-circuited the democratic process.

I first emphasize that this case must be viewed realistically. It is not a case about trying to remedy the history of discrimination against gay persons in this state in general. As I explain in part I C 1 of this opinion, our current legislation effectively has done that, insofar as any law—legislative or judicial—can do so. Just as the New Jersey Supreme Court recognized in its gay marriage case: "The legal battle in this case has been waged over one overarching issue—the right to marry." *Lewis* v. *Harris*, supra, 188 N.J. 433. Indeed, in light of the extensive gay rights legislation that we have in this

state, the principal form of discrimination of which the plaintiffs complain, and what they seek to remedy in this case, is what they call "marriage discrimination." The plaintiffs state in their brief: "The journey of Connecticut lawmakers in confronting and eliminating aspects of discrimination against lesbian and gay people has been remarkable, but the legislature also has failed with respect to ending marriage discrimination. . . . While the legislature has addressed different manifestations of discrimination against gay people, it has consistently set aside any issue of marriage discrimination." (Citations omitted; internal quotation marks omitted.)

I also emphasize that this factor should be applied in the context of Connecticut today. It is today's Connecticut constitution that we are interpreting and applying; it is today's Connecticut marriage and civil union statutes that are under consideration; the plaintiffs are residents of Connecticut; and it is the conditions of their lives in this state now and for the foreseeable future that should inform the question of whether they have been denied the equal protection of the laws under the Connecticut constitution by being denied the right to marry. With these emphases in mind, I conclude, for two fundamental reasons, that the political power factor compels the conclusion that the plaintiffs are not denied the equal protection of the laws by our civil union and marriage statutes.

1

The Legislative Trend in Connecticut

The first reason for my conclusion is that the trajectory of Connecticut legislation over the past decades clearly indicates the extraordinarily great and growing political power of the gay community generally and more specifically with respect to the right to marry. That extraordinary trajectory consistently has been in the direction of greater protection and recognition of the rights of gay persons, of their rightful claims to be free from intimidation and discrimination, and, finally and most important, of their claim to the right to marry.

Since 1971, when our Penal Code came into effect, noncommercial, consensual sexual relations, whether homosexual or heterosexual, in private between adults has not been the business of the criminal law. Commission to Revise the Criminal Statutes, Penal Code Comments, Conn. Gen. Stat. Ann. (West 2007) § 53a-65, comment, p. 277. Thus, the preexisting criminal prohibition against sodomy, for example, which targeted male homosexual conduct even when engaged in privately, was eliminated from our criminal laws. In addition, General Statutes §§ 53a-181j through 53a-181*l*, which have been in effect since 1972, make intimidation based on sexual orientation criminal.[15] Furthermore, since 1991, General Statutes §§ 46a-81a through 46a-81n have prohibited discrimination by both private and state

actors based on sexual orientation in a broad range of human endeavors in this state, have required state agencies to take positive steps, including training and education, to remedy any such discrimination and ensure that it does not occur in the future, and have placed these prohibitions and positive obligations within the enforcement authority of the state commission on human rights and opportunities. More specifically, these statutes govern: professional or occupational licensing; General Statutes § 46a-81b; employment; General Statutes § 46a-81c; public accommodations; General Statutes § 46a-81d; housing; General Statutes § 46a-81e; credit practices; General Statutes § 46a-81f; employment practices in state agencies; General Statutes § 46a-81h; services performed by state agencies; General Statutes § 46a-81i; employment referral and placement services by state agencies; General Statutes § 46a-81j; state licensing; General Statutes § 46a-81k; state educational, counseling and vocational guidance programs; General Statutes § 46a-81m; allocation of state benefits; General Statutes § 46a-81n; and mandatory annual reporting to the governor by all state agencies of their efforts to effectuate their obligations under these sections. General Statutes § 46b-81o. Moreover, since 1991, General Statutes § 4a-60a has required all state contracts to contain a clause that the contracting party will not discriminate or permit discrimination on the grounds of sexual orientation.[16]

Then, in 2005, our state became the first state in the nation to establish by legislation the institution of civil union between persons of the same sex. We are one of only two states in the nation to establish civil unions purely by the political process, without being required to do so by a decision of the state's highest court.[17] Chapter 815f of our General Statutes, comprising General Statutes §§ 46b-38aa through 46b-38pp, entitled "Civil Union," is our comprehensive civil union statutory scheme. Although retaining the traditional definition of marriage as the union of one man and one woman; General Statutes § 46b-38nn; the statute provides that persons of the same sex may enter into a civil union. General Statutes § 46b-38bb (2). The core of that statutory scheme is § 46b-38nn, entitled "Equality of benefits, protections and responsibilities," which provides as follows: "Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source of civil law, as are granted to spouses in a marriage, which is defined as the union of one man and one woman." Thus, there is no doubt that, for all purposes "under law"; General Statutes § 46b-38nn; parties to a civil union are the same as parties to a marriage. This means that, in the eyes of the law, the two legal relationships—marriage and civil union—are the same. There is no concrete, substantive

or procedural legal right, privilege, immunity or obligation—no benefit, protection or responsibility, in the language of the statute—that differs between the two. The statute goes further. Section 46b-38oo provides in relevant part: "Whenever in the general statutes the terms 'spouse', 'family', 'immediate family', 'dependent', 'next of kin' or any other term that denotes the spousal relationship are used or defined, a party to a civil union shall be included in such use or definition, and wherever in the general statutes . . . the term 'marriage' is used or defined, a civil union shall be included in such use or definition." Such a statute could not have been enacted without the very heavy political power of the gay community in 2005, just three years ago. Indeed, the civil union bill passed the House of Representatives by a vote of eighty-five to sixty-three, and passed the Senate by a vote of twenty-six to eight, with bipartisan support in both chambers. See 48 H.R. Proc., Pt. 7, 2005 Sess., p. 2181; 48 S. Proc., Pt. 5, 2005 Sess., p. 1345.

Finally, on January 31, 2007, less than two years after the enactment of the civil union statute, the joint committee on the judiciary raised on its own Raised House Bill No. 7395 (2007), entitled "An Act Concerning Marriage Equality." Raised House Bill No. 7395 defined marriage as "the legal union of two persons," and specifically provided that a person is eligible to marry if such person is "[o]f the same or opposite sex as the other party to the marriage . . . ." It specifically would have eliminated the previous statutory declarations "that the current public policy of the state of Connecticut is now limited to a marriage between a man and a woman"; General Statutes § 45a-727a (4); and that "marriage . . . is defined as the union of one man and one woman." General Statutes § 46b-38nn. Raised House Bill 7395 would do everything that the majority does by constitutional adjudication in this lawsuit.

Simultaneously with the introduction of this bill in the judiciary committee, the cochairs of the committee held a news briefing in the state capitol in support of the bill. The public access television network, CT-N Connecticut Network, video-recorded that news briefing. See Videotape: Capitol News Briefing with the Chairs of the Judiciary Committee on the Same Sex Marriage Bill (CT-N Connecticut Network January 31, 2007) (copy contained in the file of this case with the Supreme Court Clerk's Office). That news briefing is significant in showing the extraordinary political support for the proposed legislation. In addition to the cochairs of the committee, in attendance and supporting the bill were numerous other senators and representatives, as well as a deputy comptroller of the state. In addition, other legislators could not attend but asked that their support be publicly acknowledged, and it was.

Senator Andrew J. McDonald, the Senate cochair of the committee, noted that, since the enactment of the

civil union legislation, there had been no public outcry regarding, and nothing but public acceptance of, civil unions. Id. Some of the remarks at that news briefing by Representative Michael P. Lawlor, the House cochair of the committee, indicate his view that the chances of the gay marriage bill passing were very good. Id. He noted the significant shift in public opinion over the past eleven years, when apparently the issue of gay marriage had begun to be discussed.[18] Id. Representative Lawlor stated that he had "never seen an issue where public opinion shifted so quickly as this one," and he referred to public opinion polls indicating that the evolution of the public acceptance of gay marriage has been extraordinary over the past few years. Id. He put forth his view that civil union is marriage by another name, and that those couples joined in such a union "are married." Id. He stated that he believed that legislative enactment of gay marriage was "inevitable," and that even legislators and other public officials who opposed gay marriage were of the same opinion.[19] Id. He remarked that he no longer sees public officials speaking out against gay marriage. Id. In his view, the enactment of the civil union legislation had been the "big stuff." Id. Representative Lawlor said that "times have changed—this law will change with the times." Id. Referring specifically to Governor M. Jodi Rell's indication that she would veto the bill if it passed, he stated that governors change their minds as well as legislators, and that there is a political tide in the direction of gay marriage. Id.

The public legislative hearings on the bill further show the extraordinary political support for gay marriage through legislation. Speaking in support of the bill were State Comptroller Nancy Wyman; Conn. Joint Standing Committee Hearings, Judiciary Committee, Pt. 17, 2007 Sess., p. 5312; State Treasurer Denise L. Nappier; id., p. 5339; Secretary of the State Susan Bysiewicz; id., p. 5395; Senator Edith Prague; id., p. 4771; Teresa C. Younger, executive director of the Permanent Commission on the Status of Women; id., p. 5258; and the mayors of three of our largest cities, namely, Dannel P. Malloy, the mayor of Stamford; id., p. 5343; Eddie A. Perez, the mayor of Hartford; id., p. 5331; and John DeStefano, Jr., the mayor of New Haven. Id., p. 5390. In addition to these state and municipal public officials, the bill was supported by the Hartford Court of Common Council; id., p. 5331; and by two major labor unions in the state, namely, the Connecticut State United Auto Workers CAP Council; id., p. 5326; and the Connecticut AFL-CIO. Id., p. 5333. In addition, support was registered from the American Civil Liberties Union of Connecticut; id., p. 5314; the Connecticut Chapter of the National Association of Social Workers; id., p. 5351; the National Council of Jewish Women; id., p. 5309; the Connecticut Chapter of the American Academy of Pediatrics; id., p. 5310; and the Connecticut Women's Educa-

tion and Legal Fund. Id., p. 5328. Furthermore, nine religious leaders of both Christian and Jewish denominations registered their support of the bill. Not one state or local official—elected or appointed—and not one labor or professional organization opposed the bill.[20] The judiciary committee reported the bill out favorably by a bipartisan vote of twenty-seven to fifteen. See Raised House Bill No. 7395, Judiciary Committee Vote Tally Sheet, April 12, 2007.

Subsequently, the cochairs of the judiciary committee decided not to ask for a floor vote on the bill. Their reasons for doing so, however, are extremely significant, because they underscore the extraordinary growing political support for the bill. In a press release announcing their decision, Senator McDonald and Representative Lawlor stated that "several vote counts of legislators show the results to be encouragingly close," but that "many lawmakers have requested more time before voting for the bill." Press Release, Judiciary Chairman Will Not Seek Vote on Marriage Equality, but Are Encouraged by Increasing Public Support (May 11, 2007) (copy contained in the file of this case with the Supreme Court Clerk's Office). Senator McDonald stated that "[t]he number of legislators backing this proposal has more than doubled in just the past two years since the bill was last introduced . . . . Support toward gay marriage equality is growing. We achieved an incredible benchmark this year by passing the bill out of committee—a step that many believed we would not be able to accomplish." Id. Representative Lawlor stated: "I thought passing the bill out of committee was a possibility. However, following the public hearing, at least five more committee members changed their minds and decided to vote for the bill . . . ." Id. He stated that numerous colleagues on both sides of the aisle had approached him privately and said that while they were personally in favor of same sex marriage, they were hesitant at that time to announce publicly their support for the bill. In due time, they told him, they will be comfortable voting for it as public opinion continues to shift in that direction. Id. Representative Lawlor stated: "A significant number of legislators have told us that they are currently in favor of same sex marriage personally, but feel that the state will be ready for it in another year or two. With time, these are the people that will create a majority . . . . This doesn't surprise me because we've been seeing the same trends happening in the general public, too, with more people gradually coming out in support for same-sex marriage. *When* [*not if*] *it passes*, I hope it is a strong bipartisan vote as was the case with civil unions in 2005." (Emphasis added.) Id.

The press release reported that a poll conducted in April, 2007, for the Hartford Courant by the Center for Survey Research and Analysis at the University of Connecticut showed that 49 percent of Connecticut

residents favor same sex marriage, while 46 percent oppose it. Id. Senator McDonald stated that "[l]ike most people in Connecticut, I think that the governor has demonstrated an increased willingness to be open-minded and she understands that peoples' views are changing rapidly on the topic . . . ." Id. Noting the public testimony in favor of the bill by the state comptroller, treasurer and secretary of the state, as well as the three mayors, Senator McDonald stated: "An increasing number of elected officials will support marriage equality as time progresses. The trend is undoubtedly moving in that direction." Id.

Other legislators were quoted in the press release as being in favor of the bill, acknowledging the rapid shift in public opinion, and expressing their belief that the bill would soon pass. Senator Mary Ann Handley stated: "I've long believed that gay and lesbian couples should have the same rights to marriage that heterosexual couples have and should not be treated differently by the government. I'm very encouraged that we have come closer this year to achieving this . . . . *Full equality is definitely in reach*." (Emphasis added.) Id. Representative Beth Bye said that the great majority of feedback has been positive, stating: "The support shown has been immense . . . I've received numerous e-mails and phone calls of encouragement from my constituents, and even words of support from other legislators who actually oppose the legislation. *It's clear to me that opinions are moving in this direction*." (Emphasis added.) Id. Representative Toni Walker said that throughout her time in the legislature, she has seen a growing number of legislators switch their positions into the direction of equal marriage rights for same sex couples. Id. Representative Walker stated: "I've seen it for myself. Increasingly, as I sit down and talk with my colleagues, *I've found that they are changing their views toward the direction of marriage equality*." (Emphasis added.) Id.

It is to blink at political reality to ignore or to dismiss, as the majority does, this extraordinary and unprecedented public record. No other court that considers the political power factor as relevant has been presented with this unique demonstration of political power. Moreover, I note that it is influential elected politicians—not appointed judges—who think that gay marriage through legislation is inevitable in Connecticut; who have discussed the issue with their elected colleagues and their constituents; who have read the public opinion polls, and have concluded that gay marriage will be enacted legislatively in Connecticut sooner rather than later; and who determined, in April, 2007, more than one year ago, that within one or two years from then a strong, bipartisan majority likely would pass a gay marriage bill, and that such a majority, as well as the growing public support for gay marriage in the state, might well persuade the governor to sign the

bill. The majority dismisses this extraordinary public record of political support for gay marriage through legislation, and substitutes its uninformed view of the political landscape for that of those who shape it and work in it day after day.[21]

As a result, the majority joins only two other states, namely, California and Massachusetts, in mandating same sex marriage as a matter of state constitutional law. See *In re Marriage Cases*, 43 Cal. 4th 757, 785, 183 P.3d 384, 76 Cal. Rptr. 3d 683 (2008); *Goodridge* v. *Dept. of Public Health*, 440 Mass. 309, 344, 798 N.E.2d 941 (2003).[22] The other five state courts of final appeal that have considered the issue have concluded to the contrary. See *Conaway* v. *Deane*, 401 Md. 219, 312, 932 A.2d 571 (2007); *Lewis* v. *Harris*, supra, 188 N.J. 441; *Hernandez* v. *Robles*, 7 N.Y.3d 338, 362–63, 855 N.E.2d 1, 821 N.Y.S.2d 770 (2006); *Baker* v. *State*, supra, 170 Vt. 224–25; *Andersen* v. *King County*, 158 Wash. 2d 1, 53, 138 P.3d 963 (2006). California is the only one of these states that has what could be called a civil union statute, but in the California constitutional jurisprudence there is no political power factor analysis. See *In re Marriage Cases*, supra, 843 ("[O]ur cases have not identified a group's *current* political powerlessness as a necessary *prerequisite* for treatment as a suspect class. . . . Instead, our decisions make clear that the most important factors in deciding whether a characteristic should be considered a constitutionally suspect basis for classification are whether the class of persons who exhibit a certain characteristic historically has been subjected to invidious and prejudicial treatment, and whether society now recognizes that the characteristic in question generally bears no relationship to the individual's ability to perform or contribute to society." [Emphasis in original.]). Although the Massachusetts Supreme Judicial Court stated, in a subsequent proceeding, that a civil union statute would not be sufficient; *Opinions of the Justices to the Senate*, 440 Mass. 1201, 1207–1208, 802 N.E.2d 565 (2004); it did so by way of an advisory opinion in the absence of an operating civil union statutory scheme. Thus, the majority in the present case stands alone in mandating gay marriage as a matter of state constitutional law in the presence of both a fully functioning civil union statute and a highly relevant[23] and revealing public record of extraordinary political support for gay marriage through legislation.

I disagree with the cramped notion of political power applied by the majority. The majority, relying on the plurality opinion in *Frontiero* v. *Richardson*, 411 U.S. 677, 686 n.17, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973), asserts that, because there has never been, in Connecticut, an openly gay person elected to statewide office or appointed to our higher courts, gay persons " 'remain a political underclass' " in our state. I agree that election or appointment to high office is one aspect of a group's

political power, and that the plurality opinion in *Frontiero* supports that view. I also believe, however, that the legislative record regarding a particular group is another measure of the group's political power, and that *Cleburne* supports that view.[24]

Consequently, the political power of a group is not measured solely by whether one who is a member of the group has been elected or appointed to high office. It is also measured by whether the group has been and is able to secure the passage of important and beneficial legislation on its behalf. One does not measure the political power in this state of organized labor, for example, solely by examining the number of labor union officers or members elected or appointed to high public office; or the political power of the business community solely by examining the number of chief executive officers of major corporations, or the number of officers of the Connecticut Business and Industry Association, so elected or appointed; or the political power of the plaintiffs' trial bar solely by examining the number of plaintiffs' lawyers, or officers of the Connecticut Trial Lawyers Association, so elected or appointed. On the contrary, one measures the political power of those powerful groups also—indeed, often primarily—by examining the success they have achieved in enacting legislation that affects their interests.

Thus, the legislative history in our state for the past thirty-seven years, beginning with the passage of the Penal Code in 1971, and the public record discussed previously, are proof of the political power of gay persons in this state. Simply put, one cannot read the record of legislation over the past thirty-seven years, including the passage of the civil union legislation in 2005, watch the video of the press briefing following the introduction of the gay marriage bill in early 2007, read the outpouring of political support for that bill and the vote of the judiciary committee in favorably reporting out the bill, and read the press release of the cochairs of the judiciary committee, including the comments of other influential legislators, regarding the bill, and reasonably conclude that gay persons are a political underclass in today's Connecticut. Rather, the only reasonable conclusion from this extraordinary public record is that gay persons as a class now have in Connecticut the political power to enact gay marriage legislation—sooner rather than later.

Consequently, I also disagree with the majority's characterization of our state's admirable record of legislation described previously as "*supporting* the conclusion that the subject group is in need of heightened constitutional protection." (Emphasis in original.) In the context of equal protection jurisprudence, this characterization renders a group's political power, as demonstrated by its ability to secure beneficial and protective legislation, essentially irrelevant.

Under the majority's view, if the state *has* enacted a large body of legislation beneficial to or protective of a particular group—as this state has done with respect to gay persons—that means that the group lacks political power because the legislation is evidence of the group's need for protection. But if the state has *not* enacted such legislation, that also undoubtedly would mean that the group lacks political power because of that lack of legislation. Indeed, that lack of such legislation is precisely what Chief Judge Kaye cited, in her dissent in *Hernandez* v. *Robles*, supra, 7 N.Y.3d 388, as evidence of a lack of political power of gay persons in New York: "The simple fact is that New York has not enacted anything approaching comprehensive statewide domestic partnership protections for same sex couples, much less marriage or even civil unions."

In this way, the political power of the group, as demonstrated by the state's record of legislation, is rendered irrelevant to the equal protection analysis, because either way—if there is or is not a body of beneficial legislation—it supports the view that the group lacks political power. This simply cannot be.

It is true that our long history, beginning in 1971, and running through 2005, of enacting legislation protective of the rights of gay persons demonstrates their need for protection. Of course the legislation was aimed at rectifying historic and ongoing wrongs. That is always what civil rights legislation aims to do. But it is a strangely narrow view of such legislation to say that it *supports* heightened scrutiny because it demonstrates the group's need for protection. This view ignores the fact that the body of legislation obviously has another, equally important aspect: it also clearly demonstrates the political power of the group to bring about beneficial and protective legislation for the precise purpose of rectifying those wrongs. In my view, it is untenable to dismiss, as the majority does, this other important aspect of such legislation. Moreover, were there *no* record of such legislation in this state, the majority would undoubtedly—and justifiably—cite that as evidence of a *lack* of political power.

It is also true, as the majority notes, that, despite the growing political power of both women and African-Americans, neither gender nor race has since been questioned as a class entitled to strict scrutiny. That does not compel the conclusion, however, that political power must be relegated to secondary status in our own state constitutional protection jurisprudence. As I indicate in part II of this opinion, our state constitution already specifically protects both gender and race, among other classes, as entitled to strict scrutiny. Thus, there is no need to consider even the possibility of a reclassification of those two classes under our constitution, and I would not attempt to answer the academic question asked by the majority, namely: why, if the

political factor is important, do both gender and race still retain their heightened scrutiny status? No one has ever suggested—nor do I—that, once established, a class entitled to heightened scrutiny protection may subsequently lose that status if its political power grows substantially.[25] No court has ever been presented with such a question, and this court certainly never will be. But the answer to that academic question should not be that, when considering whether as a matter of first impression under our own state constitution a new, unspecified group is entitled to heightened scrutiny, we must, as the majority does, nevertheless ignore the root of the entire heightened scrutiny analysis, namely, the need of a burdened class for judicial intervention because of its likely inability to invoke the political process on its own, and blind ourselves to the powerful record of political support for gay marriage in the present case that clearly indicates that the legislature is about to do by legislation what the majority does by adjudication.

2

Marriage Is a Fundamental Social Institution

The second reason why I conclude that the political power factor is particularly significant in the context of the present case is that marriage is a fundamental social institution. That being so, if it is to be changed, as the majority acknowledges that its decision does, it is appropriate that it be done by the democratic process, rather than by judicial fiat.[26]

Marriage is more than a relationship sanctioned by our laws. It is a fundamental and ancient social institution that has existed in our state from before its founding and throughout the world for millennia. It cannot be disputed that its meaning has always been limited to the union of a man and a woman. And it cannot be disputed that, by mandating same sex marriages, the majority has wrought a significant change in that fundamental social institution. To change the law of marriage by expanding it to include same sex couples is to change the institution that the law reflects.

Furthermore, that change is contrary to the public policy of the state as specifically declared by the legislature. The same section of the civil union statutory scheme that grants equal rights of marriage to civil unions specifically defines "marriage . . . as the union of one man and one woman." General Statutes § 46b-38nn; see also General Statutes § 45a-727a ("The General Assembly finds that . . . [4] It is further found that the current public policy of the state of Connecticut is now limited to a marriage between a man and a woman.").

It is an extreme act of judicial power to declare a statute unconstitutional. It should be done with great caution and only when the case for invalidity is estab-

lished beyond a reasonable doubt. *Kinney* v. *State*, 285 Conn. 700, 710, 941 A.2d 907 (2008). That principle applies with even more force when the judicial act of invalidation constitutes the alteration of a fundamental social institution, such as marriage.

Fundamental social institutions are the product of a web of history, tradition, custom, culture, widely shared expectations and law. But they are not static. They change. In my view, there are three ways in which such social institutions change, and sometimes the three ways will, to one extent or the other, overlap or combine with each other.

The first, and probably the most common, is by a process of gradual change over time, as a society's (or a state's) customs, culture and shared expectations change with changed conditions, without the prompting of law, legislative or judicial. An example of this is the change over the past decades in the fundamental social institution of the family. It cannot be disputed that our conception of the family has broadened from what it previously was. That broadened reach is reflected in § 45a-727a (3), which, in addressing the best interests of a child who is the subject of an adoption, refers to "a loving, supportive and stable family, whether that family is *a nuclear*, *extended*, *split*, *blended*, *single parent*, *adoptive or foster family* . . . ." (Emphasis added.) This list of different types of families is not a legislative prescription; it is, instead, a legislative recognition of what has already happened in society. This court has also recognized the changing nature of the institution of the family. See *Michaud* v. *Wawruck*, 209 Conn. 407, 415, 551 A.2d 738 (1988) ("[t]raditional models of the nuclear family have come, in recent years, to be replaced by various configurations of parents, stepparents, adoptive parents and grandparents").

The second way in which a fundamental social institution may change is by legislation. Thus, the legislature may say, as a matter of public policy, that for a *particular* purpose or purposes, but not necessarily *all* purposes, a particular social institution will be recognized in a context in which it may not have been recognized previously. Our civil union statute is a good example of this kind of legislative change of a social institution. The legislature has said that all of the legal rights and obligations of the fundamental social institution of marriage will be extended beyond opposite sex couples to same sex couples, in a new and differently named social institution of civil union. In fact, by virtue of § 46b-38oo, the legislature specifically has provided that, except for certain purposes,[27] "[w]herever in the general statutes . . . the term 'marriage' is used or defined, a civil union shall be included in such use or definition." Thus, it may fairly be said that, except for the particular specified purposes of the name of the institution and the corresponding statement of the "current" public policy of

the state, the legislature has changed the fundamental institution of marriage to include civil unions.

The virtue of these first two ways of changing a fundamental social institution is that each has the general support—either explicit or implicit—of the people. In the first way—by a natural process of social change—the people have voted for the change by their patterns of behavior over time. In the second way—by legislation—the people have voted through their duly elected representatives.

The third way is by judicial decision. In my view, this is the least desirable method of change of a fundamental social institution because it is effected, not through the people's behavioral patterns or the votes of their elected representatives, but through the reasoning and analysis of judges, who are accountable to the people only through their oaths and consciences. In this way, a fundamental social institution, which is the product of a state's history, tradition, custom, widely shared expectations and law, is changed by the decision of judges, who need not necessarily give deference to that history, tradition, custom and widely shared expectations. This is an extreme action for a court to take. Therefore, the court ought to be very cautious before doing so, and be very sure that it is constitutionally necessary. The majority opinion fails this test.

This is not to say, however, that a court should not, in engaging in the process of constitutional adjudication, change a fundamental social institution. When it is necessary to vindicate constitutional rights, it is the court's obligation to do so, irrespective of the fact that the decision will change a fundamental social institution. See, e.g., *Brown* v. *Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954) (striking down system of legally segregated schools as violative of equal protection of laws, irrespective of fact that such systems could be considered as fundamental social institutions in southern states). The present case, however, is not that kind of case.

Instead, this is a case in which the majority has given an answer that is not constitutionally compelled. The public record clearly indicates that the legislature is poised to consider and, in all likelihood, to enact gay marriage legislation. The majority in this case has, unfortunately, unnecessarily short-circuited this socially exemplary—and, in my view, superior—method of changing the nature of the fundamental institution of marriage in this state.

"We cannot escape the reality that the shared societal meaning of marriage—passed down through the common law into our statutory law—has always been the union of a man and a woman. To alter that meaning would render a profound change in the public consciousness of a social institution of ancient origin. When

such change is not compelled by a constitutional imperative, it must come about through civil dialogue and reasoned discourse, and the considered judgment of the people in whom we place ultimate trust in our republican form of government. Whether an issue with such far-reaching social implications as how to define marriage falls within the judicial or the democratic realm, to many, is debatable. [The majority of this court] think[s] that this [c]ourt should settle the matter, insulating it from public discussion and the political process. Nevertheless, a court must discern not only the limits of its own authority, but also when to exercise forbearance, recognizing that the legitimacy of its decisions rests on reason, not power. We [should] not short-circuit the democratic process from running its course." *Lewis* v. *Harris*, supra, 188 N.J. 460–61.

II

SEXUAL ORIENTATION IS NOT A SUSPECT CLASS UNDER ARTICLE FIRST, §§ 1 AND 20, OF THE CONSTITUTION OF CONNECTICUT

For all of the reasons that I have explained in part I of this dissenting opinion, I also conclude that sexual orientation is not a suspect class under article first, § 1, and article first, § 20, of the constitution of Connecticut, as amended by articles five and twenty-one of the amendments. Put another way, if it is not a quasi-suspect class, a fortiori it is not a suspect class.

There is, however, another, more fundamental reason why sexual orientation is not a suspect class under our state constitution, and that reason is rooted in the language and history of the constitution itself. Article first, § 20, of the constitution of Connecticut already explicitly affords the equal protection of the law to eight specific characteristics—namely, "religion, race, color, ancestry, national origin, sex or physical or mental disability." We consistently have held that any of these enumerated classes invokes strict scrutiny analysis. See *Daly* v. *DelPonte*, 225 Conn. 499, 512–15, 624 A.2d 876 (1993). Furthermore, this list of specifically protected classes has grown over time, by virtue of the democratic process of constitutional amendment. As originally adopted in the 1965 constitution, the list was limited to religion, race, color, ancestry and national origin. See Conn. Const. (1965), art. I, § 20. In 1974, the constitution was amended to include sex; see Conn. Const., amend. V (November 27, 1974); and in 1984, to include physical and mental disability. See Conn. Const., amend. XXI (November 28, 1984). I conclude, from this language and history, that these democratically selected groups are those that command the most demanding form of judicial intervention, namely, strict scrutiny. The constitutional framework embodies a balancing of the necessity of respect for the democratic process—including the most significant part of that process, namely, amending our constitution—and the need

for judicial intervention to protect those who cannot effectively use the political process to protect themselves. The list of specifically protected classes is the people's answer to the question of which groups are entitled to the most demanding level of judicial oversight. I would, therefore, reserve other groups' claims to protection for intermediate scrutiny, rather than the most demanding form of judicial intervention, namely, strict scrutiny.

Our caution in *Moore* v. *Ganim*, 233 Conn. 557, 597, 660 A.2d 742 (1995), that the list of protected classes in article first, § 20, of the constitution of Connecticut is "not dispositive," is not inconsistent with this conclusion. First, *Moore* dealt with a claim of a fundamental obligation to provide subsistence to the indigent; it was not an equal protection case. Second, we already have recognized intermediate level scrutiny for unenumerated groups, and I would continue that line of jurisprudence. See *Carofano* v. *Bridgeport*, 196 Conn. 623, 641, 495 A.2d 1011 (1985). Thus, the fact that a group is not enumerated in article first, § 20, would not mean that it had no claim to intermediate scrutiny. In this regard, I agree with the majority.

Having concluded that the plaintiffs' claim to the right to marry under the equal protection provisions of the state constitution is not subject to either strict or intermediate scrutiny, I next turn to the plaintiffs' remaining claims, which the majority did not reach. Those claims are that: (1) the civil union statute creates an impermissible gender based classification in violation of their right to equal protection under article first, § 20, of the constitution of Connecticut, as amended by articles five and twenty-one of the amendments; and (2) the state's definition of marriage as limited to opposite sex couples violates the plaintiffs' fundamental right to marry in violation of their right to due process of law under article first, §§ 8 and 10, and their right to equal protection under article first, § 1, of the constitution of Connecticut. I reject both claims.

III

THE STATUTORY DEFINITION OF MARRIAGE DOES NOT DISCRIMINATE ON THE BASIS OF GENDER

The plaintiffs claim that the civil union statute, which defines marriage as the union of a man and woman, creates an impermissible, gender based classification in violation of their right to equal protection under article first, § 20, of the constitution of Connecticut, as amended by articles five and twenty-one of the amendments.[28] Specifically, the plaintiffs claim that the statute discriminates on the basis of gender because it prohibits a man from marrying a man, but allows a woman to do so, and it prohibits a woman from marrying a woman, but allows a man to do so. The state contends, however, that the civil union statute does not create gender based

classifications, and instead bars men and women equally from marrying a person of the same sex. I agree with the defendants.

Article first, § 20, of the constitution of Connecticut, as amended by articles five and twenty-one of the amendments, provides: "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights *because of* religion, race, color, ancestry, national origin, *sex* or physical or mental disability." (Emphasis added.) Section 46b-38nn provides: "Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source of civil law, as are granted to spouses in a marriage, *which is defined as the union of one man and one woman*." (Emphasis added.) This statute does not differentiate between the genders because both men and women are equally barred from marrying a person of the same sex. Thus, so long as the civil union statute treats both genders equally in prohibiting both from entering a same sex marriage, it does not run afoul of the constitutional provision barring discrimination on the basis of sex.

Linguistically, the plaintiffs' claim fails. They are not prohibited from marrying "because of [their] . . . sex . . . ." They are prohibited from marrying because of their sexual orientation.

This conclusion is supported by the purpose of the constitutional provision at issue. The pertinent language of the constitutional provision must be understood in light of its purpose. See *Cologne* v. *Westfarms Associates*, 192 Conn. 48, 62, 469 A.2d 1201 (1984). The history of this provision makes clear that it was designed, like its federal counterpart, namely, the equal rights amendment that failed ratification by the states, to equalize treatment of the two genders—male and female. Although worded to include both genders, it was prompted by the need to equalize the treatment of women with that of men before the law. It was not designed to equalize treatment between same sex couples and opposite sex couples, with respect to the right to marry or other rights. There is no evidence that the framers of the resolution that became the constitutional amendment had any such treatment of rights in mind.

The state provision was adopted by referendum in 1974, while the proposed equal rights amendment to the federal constitution was circulating among the states for possible ratification. See Conn. Const., amend. V. The legislative history of amendment V makes it clear that the intent of the legislature was to remedy the past unequal treatment of women, as compared to men, in many situations. See, e.g., 15 H.R. Proc., Pt. 2, 1972 Sess., pp. 872–73 (Representative David H. Neiditz,

describing the types of discriminatory laws to be invalidated by the proposed amendment, stated: "[Laws] to safeguard the health and morals of women, our laws limiting the number of hours which women may work, [restricting] women to certain kinds of employment and requir[ing] employers of women to give them special benefits, such as seats in factories. Instead of protecting women, these laws have served only to hinder this economic advancement, to [channeling] most women into the lowest paying and the least rewarding of jobs."); id., p. 877 (Representative Francis J. Collins, remarking that purpose of amendment was to eliminate "discrimination purely on the basis of sex and for no other reason"); 15 S. Proc., Pt. 4, 1972 Sess., p. 1526 (Senator Joseph I. Lieberman, remarking that the amendment was intended to address existing gender inequalities under the law, and the results of that unequal treatment, stated: "[M]en and women of equal age having worked an equal period of years, showed tremendous discrepancy between the amount of income actually being enjoyed by men and that being enjoyed by women. Namely, men are making much more money for the same kind of work over [a] similar period of time."); Conn. Joint Standing Committee Hearings, Government Administration and Policy, 1972 Sess., p. 34 (Barbara Lifton, Connecticut State Women's Political Caucus, testifying at the committee hearing in support of the amendment, stated: "I will not spend time listing the many laws now on the books which, under the guise of 'protecting' women, really serve to deny them the opportunities for career advancement or financial security now enjoyed only by men."). It is clear from these excerpts of the legislative history that the intent of the legislature in passing the state equal rights amendment was to make it unconstitutional for the state to favor one gender over another.

The plaintiffs rely on *McLaughlin* v. *Florida*, 379 U.S. 184, 85 S. Ct. 283, 13 L. Ed. 2d 222 (1964), and *Loving* v. *Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967), for the proposition that the mere equal application of a law containing gender classifications does not render the statute valid for equal protection purposes. This reliance is misplaced.

McLaughlin and *Loving* involved similar statutes. The statute at issue in *McLaughlin* criminalized the cohabitation of a white man and an African-American woman, or an African-American man and a white woman. *McLaughlin* v. *Florida*, supra, 379 U.S. 184–85. The law was part of a statutory scheme that prohibited "living in adultery" in general and required proof of intercourse as one of its elements. Id., 185. A separate provision, the one at issue in *McLaughlin*, barred the mere cohabitation of a white person and a person of African-American descent; intercourse was not an element of the offense. Id., 186–87. The statutory scheme declared unconstitutional in *Loving* prohibited the

intermarriage of a white person and a "colored person." *Loving* v. *Virginia*, supra, 388 U.S. 4. In both cases, the court invalidated the statutes at issue, despite the fact that each punished the participants equally, on the basis of its conclusion that each had the purpose of furthering and endorsing the doctrine of white supremacy; id., 7; and constituted an invidious official discrimination based on race. *McLaughlin* v. *Florida*, supra, 196.

The present case is distinguishable from *Loving* and *McLaughlin*. There has been no showing that the state's civil union statute was passed with the purpose of discriminating based on gender. The absence of such evidence, or even a credible argument in support of the claim of gender discrimination, is highlighted by the contrast with both *Loving* and *McLaughlin*. In both of those cases, despite the fact that the law was applied equally to both races, it was clear which racial group was being favored and which disfavored.

IV

THE STATUTORY DEFINITION OF MARRIAGE DOES NOT DEPRIVE THE PLAINTIFFS OF THE FUNDAMENTAL CONSTITUTIONAL RIGHT TO MARRY

Finally, I address the plaintiffs' claim that the civil union statute's exclusion of same sex couples from marriage violates their right to due process under article first, §§ 8 and 10,[29] of the constitution of Connecticut, and their right to equal protection under article first, § 1, of the constitution of Connecticut, because it infringes on the fundamental right to marry. I reject this claim. I conclude that the fundamental right to marry under our state constitution is the right to marry someone of the opposite sex and does not include the right to marry someone of the same sex.

Ordinarily, in determining whether our state constitution affords a particular fundamental right, we would employ the familiar test articulated in *State* v. *Geisler*, 222 Conn. 672, 685, 610 A.2d 1225 (1992). That test focuses on an analysis of six factors, namely: "(1) the text of the constitutional provisions at issue; (2) holdings and dicta of this court, and the Appellate Court; (3) federal precedent; (4) sister state decisions; (5) the historical approach; and (6) contemporary economic and sociological, or public policy, considerations." *Moore* v. *Ganim*, supra, 233 Conn. 581.[30]

In the present case, however, I conclude that a full *Geisler* analysis is not necessary, because in my view the dispositive issue is the scope of the right at issue. There is no doubt that, as I explain in the following discussion, there is a fundamental right to marry under our state constitution. The question is how to define that right for constitutional purposes. The plaintiffs claim that the fundamental right is the right to marry

a person of one's choice and, therefore, it should be construed to include a person of the same sex. The state maintains, to the contrary, that the fundamental right is the right to marry as traditionally understood, namely, the right to marry a person of the opposite sex of one's choice and, therefore, it does not include the right to marry someone of the same sex.

If the plaintiffs are correct that the fundamental right to marry is defined, for constitutional purposes, broadly enough to include the right to marry a person of one's choice, then they would have a viable claim that it includes the right to marry a person of the same sex. If the state is correct, however, that the fundamental right to marry is not defined that broadly and that it is defined, instead, as the right to marry a person of the opposite sex, then the plaintiffs' claim necessarily fails. I conclude that the fundamental right to marry, under our state constitution, is properly defined as the right to marry a person of the opposite sex and, therefore, does not include the right to marry a person of the same sex.[31]

It is well established that the right to marry is guaranteed by our state constitution. *Gould* v. *Gould*, 78 Conn. 242, 244, 61 A. 604 (1905). It is also "part of the fundamental 'right of privacy' implicit in the [f]ourteenth [a]mendment's [d]ue [p]rocess [c]lause." *Zablocki* v. *Redhail*, 434 U.S. 374, 384, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978); *Zapata* v. *Burns*, 207 Conn. 496, 506, 542 A.2d 700 (1988).

The United States Supreme Court has given wise guidance to the judicial process of defining fundamental rights for constitutional purposes. "[W]e ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. . . . By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore exercise the utmost care whenever we are asked to break new ground in this field . . . lest the liberty protected by the [d]ue [p]rocess [c]lause be subtly transformed into the policy preferences of the [m]embers of this [c]ourt . . . .

"Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the [d]ue [p]rocess [c]lause specially 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 . . . . Second, we have required in substantive-due-process cases a careful description of the asserted fundamental liberty interest. . . . 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." (Citations omitted; internal quotation marks omitted.) *Washington* v. *Glucksberg*, 521 U.S. 702, 720–21, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997). Our own state precedent is consistent with these principles. "In construing the contours of our state constitution, we must exercise our authority with great restraint in pursuit of reaching reasoned and principled results. . . . We must be convinced, therefore, on the basis of a complete review of the evidence, that the recognition of a constitutional right or duty is warranted." (Citation omitted; internal quotation marks omitted.) *Moore* v. *Ganim*, supra, 233 Conn. 581.

Thus, in defining the scope of the fundamental right to marry under our state constitution, we are cautioned to exercise our authority with great restraint; to be reluctant to recognize new claims to fundamental rights because of the lack of reliable guideposts for responsible decision making; to look to those fundamental rights and liberties that are deeply rooted in our nation's history and tradition; to be careful in describing the right at issue; and to exercise the utmost care when asked to break new ground. The overarching reason for this judicial caution is that, by declaring a right as fundamental, we to a large extent place it outside the area of public debate and legislative action. These cautionary principles lead me to conclude that the fundamental right to marry under our state constitution cannot be so broadly defined in its scope to include the right to same sex marriage.

First, as I explained previously in this opinion, marriage is a fundamental institution in our state, as well as our nation, and recognizing it to include same sex marriage would be to change its nature. That is a change that should be left to the realm of public debate and legislative action, particularly because, as I also explain in part I of this opinion, the legislature is poised to consider doing so.

Second, to define the fundamental right to marry so broadly as to include the right to marry a person of the same sex would be inconsistent with the notion that we should be careful in describing the right at issue, with the notion that we should exercise our authority with great restraint, and with the notion that we should exercise the utmost care when asked to break new ground. To define it as the plaintiffs suggest would, on the contrary, display a lack of the utmost care in breaking new ground and in defining the right at issue, and would be to substitute a personal policy choice for sound constitutional analysis.

Third, same sex marriage cannot reasonably be regarded as deeply rooted in our state's history and traditions. "We cannot escape the reality that the shared

societal meaning of marriage—passed down through the common law into our statutory law—has always been the union of a man and a woman." *Lewis* v. *Harris*, supra, 188 N.J. 460. It cannot be disputed that, until recent years when the issue of same sex marriage has been presented to both our legislature and our courts, the notion of marriage was uniformly understood as the union of a man and a woman. Thus, to declare that the fundamental right to marry under our state constitution is defined so broadly as to include same sex marriage would be counter to that history and tradition.

The plaintiffs rely on *Loving* v. *Virginia*, supra, 388 U.S. 2, in which the court concluded that Virginia's antimiscegenation laws violated the right to equal protection, for the proposition that the fundamental right to marry is broadly defined. That reliance is misplaced. Although the court in *Loving* referred to the right to marry in general terms, it is clear that it contemplated the traditional notion of marriage as between a man and woman. The court stated: "Marriage is one of the basic civil rights of man, fundamental *to our very existence and survival*." (Emphasis added; internal quotation marks omitted.) Id., 12. Thus, its reference to marriage as fundamental to our survival must be taken as a reference to marriage as linked to procreation.

The court made a similar connection in one of the primary decisions on which it relied in *Loving*. In *Skinner* v. *Oklahoma*, 316 U.S. 535, 536, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942), the court concluded that a state law that had provided for the sterilization of persons convicted of two or more felonies "involving moral turpitude" unconstitutionally infringed upon the fundamental right to procreation. The court emphasized that the issue implicated a "basic liberty"; id., 541; and in the course of its discussion of the importance of the right of procreation, the court stated: "*Marriage and procreation* are fundamental to the very existence and survival of the race." (Emphasis added.) Id.

The plaintiffs also claim that the court's decision in *Griswold* v. *Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), conclusively severed any link between marriage and procreation. That claim relies on an incorrect reading of *Griswold*. Although *Griswold* relied on the nature of the marital relationship in arriving at its conclusion that the state statute at issue, proscribing the use of contraceptives, was unconstitutional, the court's primary concern in that decision was the right to marital privacy, not the right to marry. Id., 485–86. This link between marriage and procreation was not severed simply because the court recognized that the state cannot *compel* a married couple to have children. Instead, the court recognized that married couples have a fundamental right to privacy in deciding whether to procreate. Recognizing that married couples have such a choice, however, does not alter the fact

that the fundamental nature of the right to marry, for constitutional purposes, always has been linked to its procreative aspect.

Similarly, the plaintiffs' reliance on *Turner* v. *Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), also for the proposition that the link between marriage and procreation has been severed, is unpersuasive. In *Turner*, the Supreme Court invalidated a prison regulation that required inmates to seek the permission of the superintendent of the prison in order to get married, and authorized the granting of that permission only when there were "compelling reasons" for doing so. Id., 82. The court struck down the regulation because it did not pass rational basis scrutiny, the applicable level of review of a prison regulation that impinges on prisoners' constitutional rights. Id., 89–91. The plaintiffs claim that the court's decision, in light of the fact that, as the plaintiffs claim, prisoners had no expectation of the possibility of procreating, demonstrates that the link between marriage and procreation had been severed. On the contrary, the reasoning of *Turner* provides further support for the conclusion that one of the primary reasons for the status of marriage as a fundamental right is its implicit link to procreation. Specifically, in striking down the regulation, the court noted particularly that "most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated." Id., 96.

The plaintiffs also rely on *Lawrence* v. *Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), in support of their claim that the right to marry includes the right to marry a person of the same sex. In overruling *Bowers* v. *Hardwick*, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), and declaring unconstitutional in violation of federal due process a state statute criminalizing private homosexual conduct between consenting adults; *Lawrence* v. *Texas*, supra, 578; *Lawrence* represented a significant development in the court's thinking about sexual orientation. That development, however, is not as radical as the plaintiffs make it out to be. The court, in fact, was careful to craft its decision very narrowly, noting that the case did "not involve *whether the government must give formal recognition to any relationship that homosexual persons seek to enter*." (Emphasis added.) Id. In so limiting the scope of its decision, the court in *Lawrence* implicitly recognized that it is one thing to conclude that criminalizing private, consensual homosexual conduct between adults violates due process; it is entirely another matter to conclude that the constitution requires the redefinition of the institution of marriage to include same sex couples. Id., 567.

The plaintiffs also rely on *Lawrence* in urging this court to eschew the caution of *Glucksberg* to provide a

"careful description of the asserted fundamental liberty interest"; (internal quotation marks omitted) *Washington* v. *Glucksberg*, supra, 521 U.S. 721; and define the right at issue in the present case more broadly, as the right to marry a person of one's choice, rather than as the right to marry a person of the same sex. In *Lawrence*, the court concluded that it had framed the fundamental right at issue too narrowly in *Bowers*, as the "right [of] homosexuals to engage in sodomy . . . ." (Internal quotation marks omitted.) *Lawrence* v. *Texas*, supra, 539 U.S. 566. The court in *Lawrence* defined the right more broadly, stating that the right involved more than sexual conduct. Although the statutes at issue purported merely to prohibit certain sexual conduct, the court observed, "[t]heir penalties and purposes . . . have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes . . . seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals." Id., 567. In perhaps the most succinct statement of the right at issue, the court stated that the case involved the right of "adult persons in deciding how to conduct their private lives in matters pertaining to sex." Id., 572.

The plaintiffs argue that the Supreme Court's repudiation in *Lawrence* of the narrow definition of the right at issue in *Bowers* requires the conclusion that the right at issue in the present case also must be defined broadly. That argument ignores the significant context of *Lawrence* as opposed to the present case.

In tracing the developments in its case law following *Bowers* and explaining why those subsequent developments required the overruling of *Bowers*, the court in *Lawrence* emphasized two principles: the law at issue impermissibly infringed upon the right to privacy; and the law stigmatized homosexuals. *Lawrence* v. *Texas*, supra, 539 U.S. 573–75. Regarding the right to privacy, the court remarked: "The . . . decision [in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)] again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Lawrence* v. *Texas*, supra, 573–74. Thus, the court characterized the right at issue in *Lawrence* as a right of privacy and freedom from government intrusion. Next, the court grounded its decision on the stigma that the Texas statute imposed upon homosexuals as a group, stating that "[w]hen homosexual conduct is made criminal by the law of the [s]tate, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. . . . Its continuance as precedent demeans the lives of

homosexual persons." Id., 575. Connecticut's civil union statute was not enacted, as was the Texas criminal statute, for the purpose of stigmatizing homosexuals.

Thus, the two concerns that informed the court's decision in *Lawrence*, protecting citizens from government intrusion in their right to privacy, and protecting a specific group from stigmatization, are not present in our case. First, the right at issue in the present case is drastically different from that at issue in *Lawrence*. The plaintiffs do not seek protection from governmental intrusion of their privacy; instead, they seek affirmative action on the part of the government—they seek official recognition of the status of a relationship that would require a significant change in a fundamental societal institution. Second, the civil union statute does not stigmatize homosexuals. As I set forth in part I of this dissent, the development of the law in this state dealing with sexual orientation demonstrates that the legislature had no intention, in passing the civil union statute, to encourage discrimination against or to stigmatize homosexuals. On the contrary, that history supports the conclusion that the legislature has been working toward the eventual passage of a gay marriage bill, and that the civil union statute was an important step in that process.

V

APPLICATION OF THE RATIONAL BASIS STANDARD

Having concluded that Connecticut's statutory definition of marriage "does not touch upon either a fundamental right or a suspect [or quasi-suspect] class"; (internal quotation marks omitted) *Contractor's Supply of Waterbury, LLC* v. *Commissioner of Environmental Protection*, 283 Conn. 86, 93, 925 A.2d 1071 (2007); I also conclude that our marriage statutes survive rational basis review.

The paradigm of a rational basis upon which challenged legislation may be sustained is that the legislature is not required to solve all aspects of a social problem, or address all aspects of a social issue, at once. It is entitled to take things one step at a time. Id., 105 ("the legislature has the freedom to craft legislation to accomplish its purpose in gradual steps"). That is precisely the basis on which our marriage and civil union statutes are premised. The legislature has, since 1971, consistently been enacting legislation beneficial to and protective of gay persons. It has been considering the claims of gay persons to secure the right to marry for eleven years, according to Representative Lawlor, who should know. It took a major step, in 2005, by enacting the civil union law, which afforded parties to civil unions all of the rights and obligations of marriage, except the name of the institution. It then had before it a gay marriage bill in 2007, with great political support, on which it deferred action solely to permit public opin-

ion to continue to mount in its favor until, in the opinion of its sponsors, it *would* pass within a year or two, with even greater political support. It is entirely rational for the legislature to address the issue of gay marriage step-by-step, rather than all at once.

I therefore dissent, and would affirm the judgment of the trial court.

[1] Article first, § 1, of the constitution of Connecticut provides: "All men when they form a social compact, are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community."

Article first, § 20, of the constitution of Connecticut, as amended by articles five and twenty-one of the amendments, provides: "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability."

[2] I use the term "heightened scrutiny" in this dissent to refer collectively to strict scrutiny and intermediate level scrutiny.

[3] Like the majority, for convenience and economy of language, I use the term "gay persons" to refer to both gay men and lesbians.

[4] See footnote 2 of the majority opinion for the names of all the plaintiffs involved in this appeal.

[5] In reaching this conclusion, I emphasize that, if I were a legislator voting on legislation, I would recognize the legitimacy of the plaintiffs' aspirations to have the legal status of marriage and would vote accordingly. I am, however, not a legislator; I am a judge, and my analysis of the applicable legal principles leads me to conclude, contrary to the majority, that the legislation at issue is not unconstitutional. That is where my obligation must end, and that of the legislature begin. As Justice Madsen stated, writing for the majority in *Andersen* v. *King County*, 158 Wash. 2d 1, 8, 138 P.3d 963 (2006), "[p]ersonal views must not interfere with the judge's responsibility to decide cases as a judge and not as a legislator."

[6] I also agree with the majority that the plaintiffs are similarly situated with respect to opposite sex couples regarding the right to marry.

[7] The New York Times is reported to have the third largest newspaper circulation in the nation, exceeding one million copies daily. See http://www.huffingtonpost.com/2008/04/28emnew-york-timesem-cirul_n_98991.html (last visited October 8, 2008) (copy contained in the file of this case with the Supreme Court Clerk's Office).

[8] Compare *Brown* v. *Board of Education*, 347 U.S. 483, 493–94, 74 S. Ct. 686, 98 L. Ed. 2d 873 (1954), for example, in which the United States Supreme Court's statement of how racial segregation affected the African-American plaintiffs, by making them feel generally inferior to white persons, was based, not on the Supreme Court's assertion of fact, but on the factual finding of the United States District Court, which was, in turn, based on the famous study, conducted by the sociologist, Kenneth Clark, that had been introduced into evidence in the trial court.

[9] The other state is California, which calls its statutory scheme domestic partnership, rather than civil union. See *In re Marriage Cases*, 43 Cal. 4th 757, 779, 183 P.3d 384, 76 Cal. Rptr. 3d 683 (2008). Nonetheless, I have some doubt that the California domestic partnership statute is truly equivalent to our civil union statute, which equates such a union to marriage in every legal respect but name. By contrast, the California legislation differs from marriage in nine respects. See id., 805 n.24.

[10] In this respect, I also disagree with the majority opinion that the Vermont and New Jersey courts did not address the name of the status that they mandated for same sex couples. See *Baker* v. *State*, supra, 170 Vt. 197–98 ("We hold that the [s]tate is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. *Whether this ultimately takes the form of inclusion within the marriage laws themselves or a parallel 'domestic partnership' system or some equivalent statutory alternative, rests with the* [*l*]*egislature.*" [Emphasis added.]); *Lewis* v. *Harris*, supra, 188 N.J. 423 ("[*t*]*he name to be given to the statutory scheme* that provides full rights and benefits to same-sex couples, *whether marriage or some other term, is a matter left to the democratic process*" [emphasis added]).

Indeed, both the Vermont and New Jersey cases should give one pause

when considering the premise of the majority's opinion, namely, that our civil union statute, by defining marriage as the union of a man and a woman, relegates such a union to second class citizenship. It is difficult to read the thoughtful and sensitive decisions of those two courts and conclude that, by deciding that their state constitutions required civil unions but not marriage for same sex couples, they were denigrating the plaintiffs whose claims they vindicated in large part.

[11] In this regard, I acknowledge the deeply held feelings and perceptions of the plaintiffs that, in their view, a civil union is of lesser social status and inferior to a marriage. I respect those feelings and perceptions. We do not know, however, that this is the prevailing view of the citizenry in general.

[12] Judge Hand, quoting Oliver Cromwell, stated: "I should like to have every court begin, 'I beseech ye . . . think that ye may be mistaken.' " L. Hand, Morals in Public Life (1951), in The Spirit of Liberty 225, 230 (Irving Dillard ed., 1952).

[13] The demographic trend since 1990 of same sex couples living together and identifying themselves as such, and the public acceptance of that trend, appears to track what happened with opposite sex couples living together. According to the Williams Institute of the University of California at Los Angeles (UCLA), which analyzed "trends among same-sex couples using the 1990 and 2000 United States decennial census enumerations along with data from the 2002 through 2006 American Community Surveys," nationally "[t]he number of same-sex couples reporting themselves as 'unmarried partners' has quintupled since 1990 from 145,000 to nearly 780,000." G. J. Gates, "Geographic Trends Among Same-Sex Couples in the U.S. Census and the American Community Survey," The Williams Institute, UCLA School of Law (November 2007) p. 1. This is an increase twenty-one times faster than the United States population increase from 1990 to 2006. Id. One of the two important factors contributing to increases in same sex couples is "[c]oming out. National polls since the early 1990s clearly demonstrate an increased acceptance of lesbian and gay people and same-sex couples in the United States population. This acceptance results in increasing numbers of lesbians and gay men being more forthcoming about their sexual orientation and living arrangements in surveys." Id.

In the New England states, there has been a 398 percent increase in the number of same sex couples living together from 1990 to 2006. Id., p. 10. In Connecticut, the increase is generally in line with that percentage increase: the number of same sex unmarried partner couples has increased from 2088 in 1990, to 9540 in 2006. Id., p. 17. This nationwide trend, mirrored in our state and our neighboring New England states, undermines the majority's certainty that a civil union, which is the legal equivalent of marriage for all of those same sex couples, is undoubtedly of lesser social status than a marriage.

[14] Accordingly, the majority's suggestion that my interpretation of the political power factor as it applies to this case would mean that neither women nor African-Americans would be entitled to heightened scrutiny is both wrong and irrelevant. That is, as I explain more fully in part II of this dissent, under our state constitution classifications based on gender or race are specifically entitled to strict scrutiny. Therefore, the majority's suggestion that my analysis of the political factor under the state constitution would mean that neither women nor African-Americans would be entitled to heightened scrutiny is unwarranted.

Moreover, I am deciding this case as a justice of the Connecticut Supreme Court in 2008 under our state constitution. I am not deciding, and have no authority to decide, the different cases of gender discrimination in 1973, or racial discrimination in 1954, as a justice of the United States Supreme Court under the federal constitution—although I agree that in both cases, the court correctly accorded heightened scrutiny to those classes. Consequently, the majority's criticism of how my analysis in the present case under the state constitution would or would not have decided those cases is simply beside the point. Engaging in retroactive hypothetical decision making does not strike me as a useful method of adjudication. I further note that race classifications were accorded "heightened" scrutiny before the court had even evolved a tiered analysis of equal protection claims, and before the court had set forth its four-pronged inquiry in *Frontiero* v. *Richardson*, 411 U.S. 677, 686 n.17, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973). See *Brown* v. *Board of Education*, 347 U.S. 483, 79 S. Ct. 686, 98 L. Ed. 2d 873 (1954).

[15] General Statutes § 53a-181j provides: "(a) A person is guilty of intimidation based on bigotry or bias in the first degree when such person maliciously, and with specific intent to intimidate or harass another person because of

the actual or perceived race, religion, ethnicity, disability, sexual orientation or gender identity or expression of such other person, causes serious physical injury to such other person or to a third person.

"(b) Intimidation based on bigotry or bias in the first degree is a class C felony."

General Statutes § 53a-181k provides: "(a) A person is guilty of intimidation based on bigotry or bias in the second degree when such person maliciously, and with specific intent to intimidate or harass another person because of the actual or perceived race, religion, ethnicity, disability, sexual orientation or gender identity or expression of such other person, does any of the following: (1) Causes physical contact with such other person, (2) damages, destroys or defaces any real or personal property of such other person, or (3) threatens, by word or act, to do an act described in subdivision (1) or (2) of this subsection, if there is reasonable cause to believe that an act described in subdivision (1) or (2) of this subsection will occur.

"(b) Intimidation based on bigotry or bias in the second degree is a class D felony."

General Statutes § 53a-181*l* provides: "(a) A person is guilty of intimidation based on bigotry or bias in the third degree when such person, with specific intent to intimidate or harass another person or group of persons because of the actual or perceived race, religion, ethnicity, disability, sexual orientation or gender identity or expression of such other person or persons: (1) Damages, destroys or defaces any real or personal property, or (2) threatens, by word or act, to do an act described in subdivision (1) of this subsection or advocates or urges another person to do an act described in subdivision (1) of this subsection, if there is reasonable cause to believe that an act described in said subdivision will occur.

"(b) Intimidation based on bigotry or bias in the third degree is a class A misdemeanor."

[16] I recognize that, as the majority points out, General Statutes § 46a-81r provides that none of the nondiscrimination statutes mentioned previously "shall be deemed or construed (1) to mean that the state . . . condones homosexuality [as a] lifestyle, (2) to authorize the promotion of homosexuality . . . in educational institutions or require [its] teaching . . . as an acceptable lifestyle, (3) to authorize . . . affirmative action programs [based on] homosexuality . . . (4) to authorize [same sex marriage], or (5) to establish sexual orientation as a specific and separate cultural classification in society." I disagree with the majority, however, that the inclusion of this section in the gay rights act means that the legislature has declared, "as a matter of state policy, that same sex relationships are disfavored." First, § 46a-81r must be viewed in the context of the act as a whole, which represented the most significant advancement in the movement for gay rights in the history of this state. Second, the subsequent enactment of the civil union statute belies any notion that Connecticut disfavors same sex relationships. Third, as I explain later in this footnote, this assertion by the majority ignores the more recent perceptions of influential legislators about the current state of the views of the citizenry toward same sex couples. Finally, I read § 46a-81r as what it says: the state is neutral, not hostile, toward homosexuality. In other words, the inclusion of this section makes clear that, although the gay rights act was intended to remedy past discrimination against gay persons, it was not intended to *favor* the group over any other.

Indeed, the remarks of Representative Richard D. Tulisano, in explaining § 46a-81r on the floor of the House of Representatives in 1991, are consistent with that view. He indicated that "in this political document, there is no intent here to say that . . . by passing and expressing our desire to protect people . . . it is . . . necessarily [to] mean to say we affirmatively vote for that particular lifestyle, and as a political document that is left there to tell people, that is something for each individual to make up for themselves, but the state is not going to be doing it in that particular area." 34 H.R. Proc., Pt. 7, 1991 Sess., pp. 2616–17. Representative Tulisano also explained that this language was inserted to rebut "false . . . pieces of literature" that had suggested to the contrary, and that "[the act] deals with stopping acts against people, to protect people from others, to make sure people aren't held back from their rights as individuals, as humans that they should be entitled to, not to grant particular rights." Id., p. 2525.

In this connection, I also note that the majority cites, as evidence of "a development that many view as reflecting widespread opposition to equal rights for gay persons," the fact that twenty-five states have passed constitutional amendments prohibiting same sex marriage. I disagree with the majori-

ty's use of this as evidence of such opposition. It is simply unfair to conflate opposition to same sex marriage with bigotry, as the majority suggests. Persons may have deeply and conscientiously held views about the desire to retain the traditional definition of marriage without being guilty of opposing equal rights for gay persons based on their sexual orientation. "Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of [a] different sex. A court should not lightly conclude that everyone who held [or holds] this belief was [or is] irrational, ignorant or bigoted." *Hernandez* v. *Robles*, 7 N.Y.3d 338, 361, 855 N.E.2d 1, 821 N.Y.S.2d 770 (2006). The majority's insistence that the votes of the people of twenty-five states to retain the traditional definition of marriage means that they are guilty of opposing equal rights for gay persons, calls to mind the saying: "To a hammer, everything looks like a nail."

[17] The other state is California. See footnote 9 of this opinion.

[18] Indeed, in 2005, the judiciary committee had raised a gay marriage bill; Judiciary Committee Raised Bill No. 963, "An Act Concerning Marriage Equality"; but reported out of committee the civil union bill instead.

[19] More specifically, when asked about this, Representative Lawlor remarked that, everyone "in the building" was of the opinion that passage of a gay marriage bill was "inevitable." Videotape: Capitol News Briefing with the Chairs of the Judiciary Committee on the Same Sex Marriage Bill, supra.

[20] In listing this demonstration of political support for the bill, I have attempted to confine myself to public officials and to groups that would not ordinarily be considered to be partisan on the issue of gay marriage. In addition, however, support was registered by three groups that could be considered to be partisan, namely, Love Makes A Family, the Hartford Gay and Lesbian Health Collaboration, and Parents, Families, Friends of Lesbians and Gays, as well as twenty named individuals. Registering opposition were two partisan groups, namely, The Institute for Marriage and Public Policy, and the Hartford Chapter of the Family Institute of Connecticut, as well as two members of the clergy and seventeen named individuals.

[21] The majority criticizes me for citing both the news conference accompanying the introduction of the 2007 gay marriage bill and the press release of the cochairs of the judiciary committee following the favorable action on it by the committee. I acknowledge that my use of these materials is unusual, but I see nothing in them that seems to be the stuff of factual controversy. As the majority states, in quoting Justice Felix Frankfurter in *Watts* v. *Indiana*, 338 U.S. 49, 52, 69 S. Ct. 1347, 93 L. Ed. 1801 (1949), "we 'should not be ignorant as judges of what we know as men [and women].' " Furthermore, the majority feels no similar compunction about citing numerous websites for factual assertions in support of its argument.

[22] The decision of the Hawaii Supreme Court in 1993, which was subsequently rendered ineffectual by virtue of a state constitutional amendment, does not belong in this category. See *Baehr* v. *Lewin*, 74 Haw. 530, 852 P.2d 44, reconsideration granted in part, 74 Haw. 650, 875 P.2d 225 (1993). That case was decided on the ground of the state's prohibition against sex discrimination. Id., 561. I discuss in part III of this opinion why our state's corresponding provision does not apply in the present case.

[23] Thus, the majority's reference to the passage of gay rights legislation in California is irrelevant, because under California constitutional law, the political power factor is irrelevant. Indeed, that point is underscored by the fact that the California Supreme Court did not even mention the passage of that legislation in its state equal protection analysis. See *In re Marriage Cases*, supra, 43 Cal. 4th 831–56.

[24] Other courts have registered their understanding that the legislative record is highly relevant evidence of the political power of gay persons in determining that gay persons should not be accorded protected status for purposes of equal protection analysis. See, e.g., *Conaway* v. *Deane*, supra, 401 Md. 286 (Rejecting the plaintiffs' argument that they were so "politically powerless" that they required "protection from the majoritarian political process. To the contrary, it appears that, at least in Maryland, advocacy to eliminate discrimination against gay, lesbian, and bisexual persons based on their sexual orientation has met with growing successes in the legislative and executive branches of government. Maryland statutes protect against discrimination based on sexual orientation in several areas of the law, including public accommodation, employment, housing, and education." [Internal quotation marks omitted.]); *Andersen* v. *King County*, supra, 158 Wash. 2d 21 (rejecting, based on recent legislative developments, claim that

plaintiffs were politically powerless, noting: "[t]he enactment of provisions providing increased protections to gay and lesbian individuals in Washington shows that as a class gay and lesbian persons are not powerless, but, instead, exercise increasing political power"); *High Tech Gays* v. *Defense Industrial Security Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990) (citing to antidiscrimination legislation passed by numerous states, and regulations enacted by many cities and counties, as basis for conclusion that gay persons are not politically powerless).

Furthermore, the majority's insistence that a *Frontiero* analysis of the political power factor controls the analysis of that factor in the present case suggests that the plaintiffs would have been granted suspect or quasi-suspect class status under the federal constitution. That suggestion is belied by the fact that the plaintiffs asserted no claim under the federal constitution whatsoever. If the plaintiffs believed that they were entitled to elevated status under federal constitutional law, we would have expected them to have raised such a claim.

[25] The majority presents as support for its dismissal of the political power factor the fact that, despite the increased political power of women since *Frontiero*, that case has not been overruled. As I indicate in the accompanying text of this opinion, no one has ever suggested that it should be, and neither do I. Its holding that courts should accord heightened scrutiny to equal protection claims based on gender discrimination was correct, and remains correct. It is also true, however, that the court relied on *Frontiero* to apply heightened scrutiny to an equal protection claim based on gender discrimination, where the group claiming discrimination consisted of men; see *Craig* v. *Boren*, 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976); despite the fact that men share none of the factors of discrimination that motivated the court to decide *Frontiero*. The most plausible explanation for this is that, once a court grants heightened protection to a particular class—e.g., gender—it must logically extend that protection to any subgroup of that class even if that subgroup has never been the subject of discrimination. Similarly, once a court has granted heightened protection to a class, it simply will not go back and revisit that protection based on the notion that one or more of the factors that motivated the grant in the first place might no longer be present. Moreover, I emphasize that we are deciding this case under the *state* constitution, and gender discrimination is already afforded strict scrutiny thereunder. Thus, the question of why, if the political power factor is important, the court has never considered overruling *Frontiero*, is purely academic under our state constitution.

[26] I also disagree with the majority that "removing the barrier to same sex marriage is no different than the action taken by the United States Supreme Court in *Loving* v. *Virginia*, [388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967)], when it invalidated laws barring marriage between persons of different races." The two cases are in no way similar. First, it is clear from the court's reasoning in *Loving* that the right to marry that it was considering was that between a man and a woman; hence the court's reliance on the institution of marriage as necessary to the survival of the human race. Id., 12. Second, the court in *Loving* correctly determined that the antimiscegenation statute in question there was clearly aimed at the perpetuation of white supremacy. It cannot reasonably be contended that our marriage statutes, which have existed for centuries along with those of every other state, were aimed at perpetuating heterosexual, rather than homosexual, supremacy. See *Baker* v. *State*, supra, 170 Vt. 226–27 ("[p]laintiffs have not demonstrated that the exclusion of same-sex couples from the definition of marriage was intended to discriminate against . . . lesbians and gay men, as racial segregation was designed to maintain the pernicious doctrine of white supremacy"). Third, the statute in *Loving* excluded mixed race opposite sex couples from entering a social institution that, by all other traditional criteria, they were entitled to enter. Thus, the decision in *Loving* did not expand the preexisting institution of marriage; it merely removed a racial barrier to entry. Our marriage and civil union statutes do no such thing. They simply retain the traditional definition of marriage, and reflect the fact that the state has not yet chosen to expand the right to enter into it to same sex couples.

[27] Most of the exceptions are simply to avoid duplication of terminology where the statutes already include a reference to civil union as well as marriage. These are: General Statutes § 7-45 (certificate of marriage or civil union); General Statutes § 17b-137a (requiring social security number on marriage or civil union license); General Statutes §§ 46b-20 to 46b-34, inclusive (marriage license provisions); and General Statutes § 46b-150d (permit-

ting emancipated minor to marry or enter civil union). The other exceptions are: General Statutes § 45a-727a (4) (current public policy of state now limited to marriage between man and woman); and General Statutes § 46b-38nn (marriage defined as union of man and woman).

[28] The plaintiffs also rely on article first, § 10, of the constitution of Connecticut, which provides: "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." That constitutional provision, however, does not provide support for the plaintiffs' claim. "We have interpreted article first, § 10, as a provision protecting access to our state's courts, which does not itself create new substantive rights." *Moore* v. *Ganim*, supra, 233 Conn. 573. "We generally have held that article first, § 10, prohibits the legislature from abolishing or significantly limiting common law and certain statutory rights that were redressable in court as of 1818, when the constitution was first adopted, and which were incorporated in that provision by virtue of being established by law as rights the breach of which precipitates a recognized injury . . . ." (Internal quotation marks omitted.) Id., 573–74. In sum, this constitutional provision provides no support for the plaintiffs' claim that the fundamental right to marry includes the right to same sex marriage.

[29] See footnote 28 of this opinion for the text of article first, § 10, of the constitution of Connecticut.

Article first, § 8, of the constitution of Connecticut provides in relevant part: "No person shall . . . be deprived of life, liberty or property without due process of law . . . ."

[30] In this connection, I note my agreement with Justice Zarella's trenchant criticism of the majority's *Geisler* analysis in part IV of his dissenting opinion.

[31] I emphasize here that this conclusion means only that the civil union statute, which defines marriage as the union of a man and woman; General Statutes § 46b-38nn; does not deprive the plaintiffs of a fundamental right. The legislature is free, of course, to expand the legal definition of marriage to include persons of the same sex.