AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 11: The Contemporary Era—– Individual Rights/Personal Freedom and Public Morality/Gay Rights/States Debate Same-Sex Marriage

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Conaway v. Deane, 401 Md. 219 (2007)

In 2004, Gitanjali Deane and Lisa Polyak sought to obtain a marriage license from Frank Conaway, the clerk of the Circuit Court in Baltimore County, Maryland. Conaway refused to issue the license on the ground that both Deane and Polyak were women. Maryland law at the time stated, "Only a marriage between a man and a woman is valid in this State." Deane, Polyak, and other persons in same-sex relationships who wished to be married asked a trial court to have the Maryland marriage law declared unconstitutional. The requirement that a marriage be between a man and a woman, they claimed, violated by the state Equal Rights Amendment and privacy rights protected by the Maryland Constitution. The trial judge agreed that the Maryland marriage law was unconstitutional and Maryland appealed to the state Court of Appeals.

Several prominent professional organizations, liberal religious groups, and liberal advocacy organizations filed amicus briefs urging the state court to declare that persons had a state constitutional right to same-sex marriage. The brief for the American Psychological Association maintained,

> *Ending the prohibition on marriage for same-sex partners is in the best interest of the children being raised by these parents. Empirical research has consistently shown that lesbian and gay parents do not differ from heterosexuals in their parenting skills, and their children do not show any deficits compared to children raised by heterosexual parents. It is the quality of parenting that predicts children's psychological and social adjustment, not the parents' sexual orientation or gender.*

Prominent conservative professors and conservative advocacy groups filed briefs urging the Maryland Courts to reject a constitutional right to same-sex marriage. The amicus brief for the professors asserted,

> *The scientific evidence strongly suggests the prime way marriage benefits children is not by bestowing a set of legal benefits (transferable to other family forms) but by increasing the likelihood that children will be born to and raised by their own mother and father. The vast majority of children born to a married couple begin life with their own mother and father committed to jointly caring for them. Only a minority of children in other kinds of sexual unions do so. Marriage serves many individual needs, but this is its most unique and irreplaceable social function: encouraging men and women to procreate responsibly.*

The Maryland Court of Appeals ruled that the state constitution did not grant same sex couples the right to marry. Justice Harrell's majority opinion held that the state Equal Rights Amendment did not forbid discrimination on the basis of sexual orientation and that bans on same-sex marriage were rational. How did the Maryland Court distinguish bans on same-sex marriage from the ban on interracial marriage declared unconstitutional in Loving v. Virginia *(1967)? Do you find that distinction convincing? Why did the majority think bans on same-sex marriage rational? Do you find that convincing? On the basis of this decision, what rights do you think same-sex couples have in Maryland?*

JUSTICE HARRELL, delivered the opinion of the Court.

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Appellees assert that, because Family Law § 2-201 excludes same-sex couples from marriage, the statute draws an impermissible classification on the basis of sex, in violation of Article 46 of the ERA. Specifically, Appellees reason that "[a] man who seeks to marry a woman can marry, but a woman who seeks to marry a woman cannot. Similarly, a woman who seeks to marry a man can marry, but a man who seeks to marry a man cannot." Thus, because Family Law § 2-201 allows opposite-sex couples to marry but, at the same time, necessarily prohibits same-sex couples from doing so, the statute "makes sex a factor in the enjoyment and the determination of one's right to marry," and is therefore subject to strict scrutiny.

. . .

[W]e believe that Article 46 was not intended by the General Assembly and the Maryland voters who enacted and ratified, respectively, the Maryland ERA in 1972 to reach classifications based on sexual orientation, we conclude that Family Law § 2-201 does not draw an impermissible sex-based distinction.

. . .

The official legislative history, at least for the Maryland ERA, is not particularly instructive as to discrete legislative intent. . . . We were able to locate, however, extrinsic sources created at or about the time of the pendency of the proposed amendment and its promulgation that suggest that the intended scope of Article 46 was to prevent discrimination between men and women as classes.

. . .

Based on our precedents interpreting Article 46, we conclude that the Legislature's and electorate's ultimate goal in putting in place the Maryland ERA was to put men and women on equal ground, and to subject to closer scrutiny any governmental action which singled out for disparate treatment men or women as discrete classes. As we stated . . .

[t]he cases construing equal rights amendments share a common thread; they generally invalidate governmental action which imposes a burden on one sex but not the other, or grants a benefit to one but not the other. . .

. . . Unless the statute under scrutiny grants, either on its face or in application, rights to men or women as a class, to the exclusion of an entire subsection of similarly situated members of the opposite sex, the provisions of the ERA are not implicated and the statutory classification under review is subjected to rational basis scrutiny, unless there exists some other reason to apply heightened scrutiny.

. . .

Turning to the language of Family Law § 2-201, it becomes clear that, in light of the aforementioned purpose of the ERA, the marriage statute does not discriminate on the basis of sex in violation of Article 46. The limitations on marriage effected by Family Law § 2-201 do not separate men and women into discrete classes for the purpose of granting to one class of persons benefits at the expense of the other class. Nor does the statute, facially or in its application, place men and women on an uneven playing field. Rather, the statute prohibits equally both men and women from the same conduct. A legislative enactment "should be construed according to the ordinary and natural import of the language used without resorting to subtle or forced interpretations for the purpose of limiting or extending its operation." . . . To accept Appellees' contention that Family Law § 2-201 discriminates on the basis of sex would be to extend the reach of the ERA beyond the scope intended by the Maryland General Assembly and the State's voters who enacted and ratified, respectively, the amendment. . . .

. . . Perhaps most persuasive here is the growing body of case law from foreign jurisdictions flatly rejecting the argument that statutes that limit marriage to unions between a man and woman discriminate impermissibly on the basis of sex. . . .

. . .

We must concede at the outset that the mere equal application of a statute does not shield automatically a discriminatory statute from constitutional review under either the Equal Protection Clause of the Fourteenth Amendment, the equal protection provisions embodied in Article 24 of the

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Maryland Declaration of Rights, or the ERA. . . . By the same token, however, a statute does not become unconstitutional simply because, in some manner, it makes reference to race or sex. . . .

In *Loving*, the issue before the Court was the constitutionality of a Virginia statutory scheme prohibiting marriage between non-Caucasians and Caucasians, and providing for criminal penalties for violations. . . . The Supreme Court was able to see beyond the superficial neutrality of the legislative enactment, however, and determined that "[t]he fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy." . . .

"The test to evaluate whether a facially gender-neutral statute discriminates on the basis of sex is whether the law 'can be traced to a discriminatory purpose.'" . . . And while "[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States," . . . the primary purpose behind Article 46 is to frustrate state action that separates men and women into discrete classes for disparate treatment as between the sexes. Absent some showing that Family Law § 2-201 was "designed to subordinate either men to women or women to men as a class," . . . we find the analogy to *Loving* inapposite. . . .

. . .

. . . That Family Law § 2-201 draws a distinction based on sexual orientation is undisputed. The actual controversy here, therefore, is what level of constitutional scrutiny should be applied to a statute that treats citizens differently on that basis (i.e., whether sexual orientation constitutes a suspect or quasi-suspect class, thereby triggering one of the heightened levels of scrutiny iterated above). . . . We find that sexual orientation is neither a suspect nor quasi-suspect class, and Family Law § 2-201 therefore is subject to rational basis review. . . .

There is no bright line diagnostic, annunciated by either this Court or the U.S. Supreme Court, by which a suspect or quasi-suspect class may be recognized readily. There are, however, several indicia of suspect or quasi-suspect classes that have been used in Supreme Court cases to determine whether a legislative classification warrants a more exacting constitutional analysis than that provided by rational basis review. These factors include: (1) whether the group of people disadvantaged by a statute display a readily-recognizable, "obvious, immutable, or distinguishing characteristics . . ." that define the group as a "discrete and insular minorit[y];" (2) whether the impacted group is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process;" and (3) whether the class of people singled out is "subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities [to contribute meaningfully to society]."

. . . The majority of other courts, both federal and state, that have addressed the issue hold that gay, lesbian, and bisexual persons neither are members of suspect nor quasi-suspect classifications. . . . We shall join those courts and hold that sexual orientation has not come of age as a suspect or quasi-suspect classification.

. . .

It is clear that homosexual persons, at least in terms of contemporary history, have been a disfavored group in both public and private spheres of our society. The State, furthermore, has not provided evidence to the contrary in the present case, arguing instead that, because every other jurisdiction, both before and after Lawrence, rejected the notion that homosexuals are a suspect class, so should Maryland. While other jurisdictions' dispositions of equal protection claims similar to the one advanced in the present case are persuasive and reinforce our own analysis, we do not accept them simply as conclusive. This Court nevertheless finds that, in light of the other indicia used by this Court and the Supreme Court in addressing equal protection claims, a history of unequal treatment does not require that we deem suspect a classification based on sexual orientation. . . .

In spite of the unequal treatment suffered possibly by Appellees and certainly a substantial portion of other citizens similarly situated, we are not persuaded that gay, lesbian, and bisexual persons are so politically powerless that they are entitled to "extraordinary 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

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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.

. . .

While gay, lesbian, and bisexual persons in recent history have been the target of unequal treatment in the private and public aspects of their lives, and have been subject to stereotyping in ways not indicative of their abilities, among other things, to work and raise a child, recent legislative and judicial trends toward reversing various forms of discrimination based on sexual orientation underscore an increasing political coming of age. . . .

. . .

Based on the scientific and sociological evidence currently available to the public, we are unable to take judicial notice that gay, lesbian, and bisexual persons display readily-recognizable, immutable characteristics that define the group such that they may be deemed a suspect class for purposes of determining the appropriate level of scrutiny to be accorded the statute in the present case.

. . .

It is beyond doubt that the right to marry, in the abstract, is a fundamental right recognized by both the Federal and this State's Constitutions. While we deem fundamental this latitudinously-stated right to marry, it is nevertheless a public institution that historically has been subject to the regulation and police powers of the State. . . .

. . .

. . . We are not aware of any case from Maryland, the U.S. Supreme Court, or elsewhere domestically in which the issue has been framed in terms of whether the fundamental right to marry encompasses, for example, "the fundamental right to marry a person of one's choosing without government interference, even if that other person is lineally and directly related to the citizen asserting their fundamental right to marry," such that strict scrutiny was deemed the appropriate standard of constitutional review to analyze the relevant statute.

The principle of defining precisely the asserted liberty interest is not limited to the analytical context of marriage. When the scope of an asserted liberty interest becomes relevant to determining the fundamental nature of that right, we have sought to define narrowly that right and identify precisely the group asserting the liberty interest. . . .

Our task, therefore, is to determine whether the right to same-sex marriage is so deeply embedded in the history, tradition, and culture of this State and Nation that it should be deemed fundamental. We hold that it is not.

. . .

It is well-established that the concepts of equal protection and due process embodied in Article 24, similar to the Fourteenth Amendment, are viewed as somewhat flexible and dynamic in order to accommodate advancements in the contemporary political, economic, and social climate. . . . Mere acquiescence for any length of time, however, will not serve as an adequate foundation for the constitutionality of a particular legislative enactment. We therefore consider the current economic, political, and social climate in order to determine whether same-sex marriage is a fundamental right.

There is no doubt that the legal landscape surrounding the rights of homosexual persons is evolving. A trend toward gay, lesbian, and bisexual persons gaining more rights seems evident within Maryland . . . as well as in the laws of the Nation as a whole. . . . Despite this expanding library of statutory and judicial authorities acknowledging a growing awareness of the need to protect gay, lesbian, and bisexual persons in broader society, acceptance alone does not require that the State or we recognize the asserted fundamental right that Appellees seek.

. . .

. . . Even a quick glance at the laws of Maryland indicate that this State has long regarded marriage as a union between a man and a woman. The consanguinity statute, for example, addresses only those marriages with a certain degree of blood relation as between members of the opposite sex. . . .

In spite of the changing attitudes about what constitutes a "nuclear family," Congress, as well as nearly every state in the Nation, has taken legislative action or otherwise enacted constitutional

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amendments limiting explicitly the institution of marriage to those unions between a man and a woman. With the exception of Massachusetts,[1] virtually every court to have considered the issue has held that same-sex marriage is not constitutionally protected as fundamental in either their state or the Nation as a whole. . . .

. . .

Because Family Law § 2-201 does not discriminate on the basis of sex, burden significantly a fundamental right, or otherwise draw a classification based on suspect or quasi-suspect criteria, rational basis review is the correct standard of constitutional review under which we consider the Maryland marriage statute. . . .

. . .

We agree that the State's asserted interest in fostering procreation is a legitimate governmental interest. . . . In light of the fundamental nature of procreation, and the importance placed on it by the Supreme Court, safeguarding an environment most conducive to the stable propagation and continuance of the human race is a legitimate government interest.

The question remains whether there exists a sufficient link between an interest in fostering a stable environment for procreation and the means at hand used to further that goal, i.e., an implicit restriction on those who wish to avail themselves of State-sanctioned marriage. We conclude that there does exist a sufficient link. As stated earlier in this opinion, marriage enjoys its fundamental status due, in large part, to its link to procreation. . . This "inextricable link" between marriage and procreation reasonably could support the definition of marriage as between a man and a woman only, because it is that relationship that is capable of producing biological offspring of both members (advances in reproductive technologies notwithstanding). . . .

. . .

A legislative enactment reviewed under a rational basis standard of constitutional review need not be drawn with mathematical exactitude, and may contain imperfections that result in some degree of inequality. . . . Looking beyond the fact that any inquiry into the ability or willingness of a couple actually to bear a child during marriage would violate the fundamental right to marital privacy, . . . the fundamental right to marriage and its ensuing benefits are conferred on opposite-sex couples not because of a distinction between whether various opposite-sex couples actually procreate, but rather because of the possibility of procreation. In such a situation, so long as the Legislature has not acted wholly unreasonably in granting recognition to the only relationship capable of bearing children traditionally within the marital unit, we may not "substitute [our] social and economic beliefs for the judgment of legislative bodies. . ."

. . .

Because Family Law § 2-201 does not abridge the fundamental right to marriage (as we understand that right), does not discriminate on the basis of sex in violation of Article 46, and does not otherwise implicate a suspect or quasi-suspect class, the marriage statute is subject to rational review. As such, it carries a strong presumption of constitutionality. Under rational review, "[w]here there are 'plausible reasons' for [the General Assembly's] action, 'our inquiry is at an end.' . . . In declaring that the State's legitimate interests in fostering procreation and encouraging the traditional family structure in which children are born are related reasonably to the means employed by Family Law § 2-201, our opinion should by no means be read to imply that the General Assembly may not grant and recognize for homosexual persons civil unions or the right to marry a person of the same sex.

. . .

JUSTICE RAKER, concurring in part and dissenting, in which CHIEF JUSTICE BELL, joins in part:

. . .

I would hold that denying rights and benefits to committed same-sex couples that are given to married heterosexual couples violates the equal protection guarantee of Article 24 of the Maryland

[1] In the following years, other state courts recognized same sex marriage.

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Declaration of Rights. . . . I would find that "to comply with this constitutional mandate, the Legislature must either amend the marriage statutes to include same-sex couples or create a parallel statutory structure, which will provide for, on equal terms, the rights and benefits enjoyed and burdens and obligations borne by married couples."

. . . [R]ational basis is the proper standard for reviewing Family Law § 2-201.

[D]iscrimination on the basis of sexual orientation is against the law in this State. This context is important for analyzing whether the State's proffered interest is legitimate, and whether the State's means fit sufficiently the ends sought by the statute.

. . .

Over the past decade, Maryland has sought to eliminate discrimination based on sexual orientation and to reduce the disparate treatment of people based on sexual orientation, particularly in the areas of family law, criminal law, and anti-discrimination legislation.

. . .

Despite Maryland's recent statutory, regulatory, and case law that has evolved to equalize some legal protections of heterosexuals and homosexuals, same-sex couples are denied the protection of hundreds of laws simply because they are not yet entitled to the rights and benefits flowing from marriage. Appellees have directed us to over 425 statutory protections that are afforded to married couples and, as a result, to their children under state law, protections that appellees are denied. . . .

. . .

. . . [T]here are significant differences in the benefits provided to married couples and same-sex couples in the areas of taxation, business regulation, secured commercial transactions, spousal privilege and other procedural matters, education, estates and trusts, family law, decision-making regarding spousal health care, insurance, labor and employment, child care and child rearing, pensions, and the responsibilities attendant to spousal funeral arrangements. Significantly, the inequities directed to individuals in same-sex couples have an impact on their children. Children in same-sex couple households are treated differently—because their care providers are denied certain benefits and rights—despite comparable needs to children of married couples. . . .

. . .

Under our equal projection jurisprudence, a law will survive rational basis scrutiny, generally, if the distinction it makes rationally furthers a legitimate state purpose. As the majority acknowledges, the classification established in Family Law § 2-201 is both over-inclusive and under-inclusive. The statute is over-inclusive because children may be born into same-sex relationships through alternative methods of conception, including surrogacy, artificial insemination, in vitro fertilization, and adoption. Conversely, the statute is under-inclusive because not all opposite-sex couples choose to procreate, not all opposite-sex couples are able to have children, and many opposite-sex couples utilize the same alternative methods of conception as same-sex couples. We have recognized, however, that a classification subject to rational basis review having "some reasonable basis need not be made with mathematical nicety and may result in some inequality." . . . The question, in this case, is whether the State has a reasonable basis for its classification in Family Law § 2-201, particularly in light of the extensive inequality that results from the classification and its impacts on vital interests. . . .

Maryland public policy supports procreation that occurs in both opposite-sex and same-sex couple environments. Maryland appears to grant adoptions to both homosexual and heterosexual couples, and adoption agencies "may not deny an individual's application to be an adoptive parent because . . . [o]f the applicant's . . . sexual orientation." . . . These laws do not demonstrate that Maryland has an interest in favoring heterosexual parents over homosexual couples with regard to procreation and child rearing. Indeed, the State specifically treats homosexual couples and heterosexual couples similarly in this context.

Despite the fact that Maryland provides some rights and benefits in the area of procreation to same-sex couples, the State asserts it has a rational basis for excluding same-sex couples from the full benefits of marriage. This is not a rational assertion. There is no doubt that the State has a legitimate interest in promoting procreation and child rearing, but it cannot rationally further this interest by only

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granting the full rights of marriage to opposite-sex couples when it already provides some legal protections regarding procreation and child rearing to same-sex couples.

What is striking, in fact, is that the State's proffered interest—providing a stable environment for procreation and child rearing—is actually compromised by denying same-sex families the benefits and rights that flow from marriage. That is, there is not a sufficient link between the State's proffered legitimate interest and the means utilized by the State to further that interest.

. . .

The reality of Maryland today is that heterosexual couples are not the only people that participate in procreation and child rearing. Maryland's laws recognize and promote this reality, and each child raised in a household headed by a committed same-sex couple in Maryland needs and is entitled to the same legal protections as a child of heterosexual married parents. Thus, in order for the State to rationally further procreation and child rearing, the benefits and rights incident to marriage must be equally available to both committed same-sex and committed opposite-sex couples.

. . .

The State has not demonstrated a rational relationship between denying committed same-sex couples the benefits and privileges given to their married heterosexual counterparts and the legitimate government purpose of promoting procreation and child-rearing. Under the equal protection guarantee of Article 24 of the Maryland Declaration of Rights, the State must provide committed same-sex couples, on equal terms, the same rights, benefits, and responsibilities enjoyed by married heterosexual couples.

It is up to the General Assembly to meet the equal protection guarantee of Article 24 of the Maryland Declaration of Rights. It is not this Court's role to craft a constitutional statutory scheme, but the General Assembly could satisfy the constitutional mandate by creating a separate statutory structure similar to the civil union or domestic partnership laws present in our sister jurisdictions.

. . .

Chief Judge Bell authorizes me to state that he agrees with, and joins this dissenting opinion to the extent that it endorses and advocates that committed same-sex couples are entitled to the myriad statutory benefits that are associated with and flow from marriage. He does not join the part of this opinion that accepts the majority's analysis and determination that rational basis review is the appropriate standard to be applied in this case. See Bell, C.J., dissenting opinion.

JUSTICE BATTAGLIA, dissenting.

. . .

Our cases stand for the proposition that all state action that draws sex-based distinctions, regardless of whether such action "directly impos[es] a burden or confer[s] a benefit entirely upon either males or females" . . . implicates the ERA and must be subjected to strict scrutiny. . . .

. . .

. . . [W]e have consistently interpreted the ERA to require that the rights of any person cannot depend on sex-based classifications, unless the State demonstrates a compelling governmental interest, and then only if the classification is narrowly tailored and precisely limited to achieving that compelling interest. Today this Court denies the commitment to equal rights made by the General Assembly and ratified by the People of this State in 1972. . . . [T]he analysis must focus on the individual whose rights are infringed by the sex-based classification, because rights accrue to the individual, not to couples, or to some abstract group entity. We emphasized that equal rights between the sexes are personal, not group, rights. . . .

. . .

. . . [T]he words of the ERA are clear and unambiguous and can only mean that the rights of any person under the law cannot be abridged because of sex. The majority today pursues a results-based jurisprudence that distorts our case law construing the ERA, and in so doing, dilutes its effect.

. . .

. . . [I]t has been held that a contemporaneous construction placed upon a particular provision of the Maryland Constitution by the legislature, acquiesced in and acted upon without ever having been

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questioned, followed continuously and uniformly from a very early period, furnishes a strong presumption that the intention is rightly interpreted.

I find this argument unpersuasive in the present context. The relevant time frame in the instant case extends only to 1972, not to "a very early period," because "[t]he adoption of the E.R.A. in this state was intended to, and did, drastically alter traditional views of the validity of sex-based classifications." . . . . Therefore, the undeniable fact that marriage has always been recognized only between a man and a woman, although undoubtedly "acquiesced in and acted upon without ever having been questioned, followed continuously and uniformly from a very early period," carries no greater legal weight in light of the ERA than the multitude of sex-based common law rules and presumptions that have been invalidated since 1972. . . .

. . . Although the majority asserts that Family Law Section 2-201 draws classifications based on sexual orientation, on its face the statute actually classifies on the basis of sex, not sexual orientation. Section 2-201 does not prohibit homosexuals from marrying; in fact, a homosexual male may marry either a heterosexual or homosexual female, and a homosexual female may marry either a heterosexual or homosexual male. Only by virtue of a person's sex is he or she prohibited from marrying a person of the same sex. Clearly, Section 2-201 draws distinctions based on sex and thus, the issue of sexual orientation simply does not enter into an ERA analysis.

. . .

. . . [T]here is sex discrimination at the level of the individual who wishes to marry but is precluded from doing so because of the statute. Thus, a man who wishes to marry another man is prevented from choosing his marriage partner purely on the basis of sex; likewise, a woman who wishes to marry another woman is prevented from choosing her marriage partner purely on the basis of sex. Manifestly, Section 2-201 classifies on the basis of sex; because it would be necessary to consider the underlying legislative intent only if the same-sex marriage ban did not draw sex-based distinctions, the question of legislative intent is irrelevant. Just as in *Loving*, it is the nature of the classifications themselves that implicates strict scrutiny.

. . .

I turn now to consider whether Family Law Section 2-201 ("Only a marriage between a man and a woman is valid in this State."), survives strict scrutiny. A statutory classification will be upheld under strict scrutiny only if it "further[s] a compelling state interest," and "if it is deemed to be suitably, or narrowly, tailored" to achieving that goal. . . . Regardless of the strength of the governmental interest at stake, statutory classifications subject to strict scrutiny must "'"fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate . . . prejudice or stereotype.'" . . . .

. . .

Because the early equal protection cases typically examined racial classifications, subsequent jurisprudence in the area of gender discrimination necessarily analogized to the precedents involving racial discrimination. One point of attack by opponents of equal rights for women has been to emphasize the limitations of the analogy between race and sex classifications; equal rights opponents have distinguished racial discrimination from sex-based discrimination on the basis of the inherent differences between the sexes. . . . Evolution of the law in this area has been, in no small measure, a process of sifting truly substantial gender differences from distinctions that masquerade as such but in reality merely embody "traditional, often inaccurate, assumptions about the proper roles of men and women." . . . The movement among the several states to enact equal rights amendments was motivated, in part, to counteract the tendency of courts to extend deference to sexual stereotypes cloaked as truly substantial differences. . . .

The only operative distinction between sex-based and race-based classifications obtains from "the inherent differences between the sexes"; thus, some sex-based classifications may survive strict scrutiny "whereas comparable race-based classifications could not be sustained." . . . However, this distinction has been construed narrowly, generally applying only to cases of obvious anatomical differences. For example, the ERA has been interpreted to permit separate bathrooms for each sex in public accommodations, and rape statutes that punish only men. . . .

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The implications of the "inherent differences" between males and females for the present case are unclear. There would appear to be a colorable argument that traditional marriage arose out of an inchoate recognition that reproduction of our species and thus, the very future existence of society, is inextricably linked to the state interest in promoting the formation of stable, nurturing families beginning with the intimate sexual union of a man and a woman. . . .

. . .

The compelling interests asserted in the State's brief are (1) maintaining the same definition of marriage as that mandated by the Federal DOMA (Defense of Marriage Act); (2) ensuring that dramatic cultural changes be adopted through vigorous public debate culminating in legislative decisions; and (3) maintaining the traditional institution of marriage because it is so deeply ingrained in our history and traditions.

The first state interest expresses a general public policy of promoting comity in relations with our sister states and the federal government; undoubtedly that interest could comport with rational basis review, because the desire to conform Maryland laws with those of other jurisdictions has been a touchstone of our jurisprudence in many areas of the law. . . .

The fundamental difficulty with the State's argument, however, is that it has pointed to no case, nor am I aware of a single case, where this Court has held that the desire to conform our laws to those of other jurisdictions rises to the level of a compelling interest. Indeed, the State's position inverts the fundamental legal hierarchy, because the values embodied in the Maryland Constitution take precedence over every Act of the General Assembly. The only recognized exception, inapplicable to the present case, is where our organic law conflicts with the U.S. Constitution itself. . . .

The State's argument that there is "a compelling interest in ensuring that social and economic change of this type is accomplished through a robust public debate, through the legislative process" is wholly without merit. If we were to accept this argument, we would be ignoring the fact that "robust public debate" resulted in the adoption of the ERA. . . .

The power of determining finally on the validity of the acts of the Legislature cannot reside with the Legislature, because such power would defeat and render nugatory, all the limitations and restrictions on the authority of the Legislature, contained in the Bill of Rights and form of government, and they would become judges of the validity of their own acts, which would establish a despotism, and subvert that great principle of the Constitution, which declares that the powers of making, judging, and executing the law, shall be separate and distinct from each other.

. . .

The final argument posed by the State is the public's "direct interest" in marriage "as an institution of transcendent importance to social welfare." . . . Undoubtedly, until the recent advances in assisted reproductive technology, there was a close albeit imperfect fit between opposite-sex marriage and the inherent biological fact that reproduction of our species could result only from the sexual union of a man and a woman. "What had not been fathomed exists today," however. . . . The correspondence between opposite-sex marriage and biological necessity has never been more tenuous than it is today. What had always been an imperfect fit between marriage and procreation is now called into question.

Although infertility is not a bar to marriage, it is nonetheless true that traditional marriage remains the only way to create families in which children are biologically related to both parents. Certainly it is true that opposite-sex couples can and do cohabit and produce offspring and thus create non-traditional families, but that very fact points to the substantiality of the state interest: the State asserts a strong interest in encouraging opposite-sex couples to formally recognize their child-bearing unions. The difficulty faced by the State is that this interest has been posed and defended successfully only under the deferential rational basis standard. . . . Likewise, the argument that the State has an interest in promoting marriage between opposite-sex couples because their careless sexual unions pose a significant possibility of creating offspring and all the attendant burdens and duties, whereas same-sex couples cannot reproduce without extensive, expensive outside intervention that evinces a far greater level of responsibility and commitment, has been upheld only under rational basis scrutiny. . . .

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. . . The State's contention that the same-sex marriage ban arises organically from the nature of marriage itself, and that the much later codification accomplished by Section 2-201 merely clarifies society's compelling interest in "the historic family unit as a mechanism for protecting the progeny of biological unions," actually asserts the state interest in promoting an orderly, stable society. . . . On the present state of the record, I believe neither party has explored this issue in the depth appropriate to an issue of such permanent, transcendent magnitude.

Under our authority to order a remand so "that justice will be served by permitting further proceedings," . . . I would remand this case to the Circuit Court for a full evidentiary hearing. Without expressing an ultimate opinion on whether the State could meet its burden, I believe the State's unrebutted contention regarding the broad societal interest in retaining traditional marriage presents an issue of triable fact that requires a remand. . . .

CHIEF JUSTICE BELL, dissenting.

. . . As Judge Battaglia carefully and correctly explains, sex-based classifications are analogous to race-based classifications and Maryland law, unlike federal law, by refusing to apply intermediate scrutiny to the review of sex-based classifications, does not draw a distinction between them. . . . It, therefore, is clear that an equal application approach cannot render constitutional a discriminatory sex-based classification any more than it could do so for a discriminatory race-based classification.

To justify its rejection of the enhanced standard of review, strict scrutiny, that this Court has applied to the review of gender-based classifications, the majority dismisses, an undisputed but extensive history of pervasive prejudice and discrimination targeted at homosexuals. . . . It then concludes, as a result, that (1) homosexuals have enough political power to effect the eventual establishment, by statute, of marriage or civil unions for same-sex couples; and (2) this political power precludes their characterization as a suspect class. Id.

I am not persuaded. The fact is that Maryland has not adopted, and it may safely be said, is not on the verge of adopting, a comprehensive statewide domestic partnership scheme for same-sex couples that approximates the institution of civil marriage, and thereby confers upon such couples the approximate rights and responsibilities of married heterosexual couples. Moreover, the laudable, though piecemeal, civil advances that the majority references and on which it relies . . . occurred because marriage has remained an exclusive benefit of heterosexuality. . . . Thus, the conditioning of advances that benefit same-sex couples on the limitation that homosexuals shall not acquire the right to marry belies any argument that the right to marry, or its functional equivalent, is imminent, or likely to be, not to mention, inevitable, for same-sex couples.

In any event, a due process analysis requires that we reach a different result than the majority does. The majority determines that same-sex marriage is not deeply rooted in this State or in the United States, and, therefore, does not implicate a fundamental liberty interest. . . . That determination, however, only recognizes and gives voice and substance to an undisputed prejudice and objection—against and to homosexuality—that is not legally cognizable; it does not address, never mind resolve, the real issue. . . .

. . .

. . . The right to marry, encompassing as it does the related and critically important element of choice—the freedom to choose whom to marry, to select the "lucky" person—is not inherently party-centric. Neither is it either hetero- or homo-sexual. I agree with Chief Judge Kaye, to construe the right to marry as narrowly as does the majority, i.e., based on sexual orientation, makes inevitable the conclusion that this fundamental right, by virtue of historical prejudice, does not exist for same-sex couples. . . .

To be sure, there are important differences between the African American experience and that of gay men and lesbians in this country, yet many of the arguments made in support of the antimiscegenation laws were identical to those made today in opposition to same-sex marriage and, as in Loving, their goal is to restrict the right of an individual to marry the person of his or her choice. Consequently, the reasoning of Loving requires rejection of the petitioners' argument.

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. . . [I]t is disingenuous indeed to surmise that the "possibility of procreation" creates a reasonable relationship in this context. . . . "[M]arriage is about much more than producing children," and yet the majority leaves open gaping questions such as "how offering only heterosexuals the right to visit a sick loved one in the hospital . . . conceivably furthers the State's interest in encouraging opposite-sex couples to have children." . . . The sheer breadth of the benefits appurtenant to marriage that are, pursuant to Family Law § 2-201, made unavailable to same-sex couples renders justification "impossible to credit."

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