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SAME-SEX "MARRIAGE" UNDER STATE EQUAL RIGHTS AMENDMENTS

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I. INTRODUCTION

Recently, homosexuals have turned to state courts in an effort to force states to recognize same-sex marriages, or the legal equivalent. Not surprisingly, cases have been brought in several states whose constitutions provide that equality of rights shall not be denied on account of sex or which otherwise prohibit discrimination based on sex. This Article explores whether same-sex marriages must be recognized in nineteen states that have adopted equal rights or anti-discrimination provisions. Focusing on these nineteen states is appropriate for two reasons: First, equal rights provisions are the only state constitutional provisions that expressly prohibit discrimination on account of sex, which goes to the heart of the same-sex marriage issue. Second, courts in these states typically apply a more rigorous standard of review to sex-based discrimination than do courts in states without such provisions. If recognition of same-sex marriages is not required by an equal rights provision, then it is unlikely that it would be required by an equal protection guarantee, or a privileges and immunities guarantee. Where it is helpful, this Article also considers equal protection and privileges and immunities jurisprudence in the states that are discussed.

II. A NINETEEN STATE SURVEY

1. Alaska

Article I, section 3, of the Alaska Constitution provides: "No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex, or national origin."[1] On November 3, 1998, the citizens of Alaska approved the adoption of article I, section 25. This provision foreclosed the possibility that article I, section 3, would be interpreted by the Alaska Supreme

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1. ALASKA CONST. art. I, § 3.

Court to require recognition of same-sex marriage. Article I, section 25, of the Alaska Constitution provides: "To be valid or recognized in this State, a marriage may exist only between one man and one woman."[2] Under this amendment to the Alaska Declaration of Rights, no provision of the Alaska Constitution may be interpreted to require state-sanctioned, same-sex marriages.[3]

2. Colorado

Article II, section 29, of the Colorado Constitution provides: "Equality of rights under the law shall not be denied or abridged by the State of Colorado or any of its political subdivisions on account of sex."[4]

It is not entirely clear whether sex-based classifications are subject to strict judicial scrutiny under the state equal rights amendment or only to the intermediate scrutiny already mandated by the federal Equal Protection Clause.[5] The Colorado Court of Appeals held that, under article II, section 29, "a differentiation based on gender must serve an important government objective and be substantially related to that objective."[6] While some decisions of the Colorado Supreme Court provide support for this proposition,[7] other state supreme court decisions suggest that a higher standard of review applies. For example, in *R. McG. v. J.W.*,[8] the Colorado Supreme Court held that a statute that fell short "of satisfying the intermediate level of judicial scrutiny applicable to gender-based classification under [federal] equal

2. *Id.* § 25.

3. In *Brause v. Bureau of Vital Statistics*, an Alaska Superior Court judge held that, under the right of privacy provision guarantee of the Alaska Constitution (Article I, § 22), "the personal choice of a life partner is fundamental and that such a choice may include persons of the same sex." No. 3AN-95-6562 CI, 1998 WL 88743, at *5 (Alaska Super. Ct. Feb. 27, 1998). Because Alaska's marriage statute banning same-sex marriage interfered with the exercise of this right, see ALASKA STAT. § 25.05.011(a) (Michie 2000), the court concluded that the statute was subject to strict judicial scrutiny and could be upheld only if it was necessary to promote a compelling governmental interest. *Brause*, 1998 WL 88743, at *5-6. In dicta, the court also opined that the challenged statute classified on the basis of sex, in violation of the state equal rights amendment, article I, section 3. *Id.* Holding that the statutory prohibition of same-sex marriage was subject to strict scrutiny, the court ordered that further hearings be scheduled "to determine whether a compelling state interest can be shown for the ban on same-sex marriage found in the Alaska Marriage Code." *Id.* at *6. Following the ratification of article I, section 25, the superior court dismissed the plaintiffs' challenge. *See* Brause v. Bureau of Vital Statistics, 1998 WL 88748 (Alaska Super. Ct. Sept. 22, 1999).

4. COLO. CONST, art. II, § 29.

5. Under the latter standard, a classification based upon sex must be "substantially related to the achievement" of an important governmental objective. *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

6. *In re* Estate of Musso, 932 P.2d 853, 855 (Colo. Ct. App. 1997).

7. *See, e.g.*, Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005, 1015 (Colo. 1982) (en banc).

8. R. McG. v. J.W., 615 P.2d 666 (Colo. 1980) (en banc).

protection doctrine" necessarily also failed "to satisfy the *stricter judicial scrutiny standard* applicable to the equal rights amendment of the Colorado Constitution."[9] Furthermore, in *People v. Green*,[10] the Colorado Supreme Court, citing article II, section 29, stated that "legislative classifications based solely on sexual status must receive the closest judicial scrutiny."[11] Decisions in Colorado seem to support arguments that advocate either strict scrutiny or intermediate scrutiny.

Regardless of the applicable standard of review, the Colorado Supreme Court held that although the state's equal rights amendment "prohibits unequal treatment based exclusively on the circumstance of sex, social stereotypes connected with gender, and culturally induced dissimilarities," it "does not prohibit differential treatment among the sexes when . . . that treatment is reasonably and genuinely based on physical characteristics unique to just one sex."[12] "In such a case," the court continued, "the sexes are not similarly situated and thus, equal treatment is not required."[13] In *Salinas*, the court upheld a statutory rape statute that applied only to males.[14] This exception may provide a basis for prohibiting same-sex marriages, even if the prohibition is based on sex.[15]

In *Ross v. Denver Department of Health & Hospitals*,[16] a female social worker challenged a municipal sick-leave policy that allowed an employee to take time off of work to care for an ill spouse and certain other close relatives. This policy made no provision for the employee's "domestic partner."[17] The plaintiff argued that, unlike an unmarried heterosexual employee, as a homosexual employee, she could not marry her same-sex partner[18] and thus qualify for sick leave to take care of her.[19] The court of appeals rejected this argument, stating:

> That distinction, however, does not alter our conclusion that the Career Service Rules do not discriminate on the basis of sexual orientation. In this regard, [plaintiff's] concern is with a perceived unfairness of the state's marital laws.

9. *Id.* at 671-72 (emphasis added).

10. People v. Green, 514 P.2d 769 (Colo. 1973) (en banc).

11. *Id.* at 770; s*ee also* Civil Rights Comm'n v. Travelers Ins. Co., 759 P.2d 1358, 1363 (Colo. 1998) (en banc) (dictum). Citing both *Lujan* and *Musso*, the federal district court has noted the lack of an authoritative state-court determination of the applicable standard of review under section 29. *See* Concrete Workers of Colo., Inc. v. City & County of Denver, 86 F. Supp. 2d 1042, 1063 (D. Colo. 2000).

12. People v. Salinas, 551 P.2d 703, 706 (Colo. 1976) (en banc).

13. *Id.*

14. *Id.*; COLO. REV. STAT. § 40-3-401(1) (1963).

15. *See* discussion *infra* notes 355-72 and accompanying text.

16. Ross v. Denver Dep't of Health & Hosps., 883 P.2d 516 (Colo. Ct. App. 1994).

17. *Id.* at 518.

18. *See* COLO. REV. STAT. ANN. § 14-2-104(1)(b) (West 2001).

19. *Ross*, 883 P.2d at 520.

> The decision to change the marriage laws to permit same-sex marriages, however, is a matter for the legislature, not the courts.[20]

The court added that: "[T]he definition of 'family' is a policy question entrusted to the political branches of government, and we have no judicial authority to substitute our political judgments for those of the other branches."[21] The Colorado state court deferred judgment to the legislature to define marriage.

The Colorado Constitution does not contain an explicit equal protection guarantee. Nevertheless, the due process guarantee of the state constitution[22] has been interpreted to include an equal protection component. In *Lujan v. Colorado State Board of Education*,[23] the Colorado Supreme Court stated:

> The Fourteenth Amendment to the United States Constitution declares that no state shall deny a person equal protection of the law. Although the Colorado Constitution does not contain an identical provision, it is well-established that a like guarantee exists within the constitution's due process clause [citing article II, section 25] and that its substantive application is the same insofar as equal protection analysis is concerned.[24]

Occasionally, state court opinions note that the equal protection component of the state due process guarantee may be given a broader reading than the federal Equal Protection Clause.[25] It does not appear, however, that any statute or ordinance that would pass federal equal protection review has ever failed state equal protection review. More commonly, Colorado courts have said that the equal protection component of article II, section 25, is similar to the Equal Protection Clause,[26] and that the analytical model developed by the United States Supreme Court in construing the Equal Protection Clause is to be followed in interpreting section 25.[27] Following this reasoning, if the Equal Protection Clause does not require state-sanctioned same-sex marriages, neither would the equal protection component of the due process guarantee of the Colorado Constitution.

20. *Id*.

21. *Id*.

22. "No person shall be deprived of life, liberty or property, without due process of law." COLO. CONST. art. II, § 25.

23. Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005 (Colo. 1982) (en banc).

24. *Id*. at 1014; *see also* Kinsey v. Preeson, 746 P.2d 542, 546 (Colo. 1987) (en banc) (following *Lujan*).

25. *See, e.g*., Millis v. Bd. of County Comm'rs, 626 P.2d 652, 657 (Colo. 1981); May v. Town of Mountain Valley, 969 P.2d 790, 792 (Colo. Ct. App. 1998) (citing *Millis*, 626 P.2d at 657).

26. *See, e.g*., Nat'l Prohibition Party v. State, 752 P.2d 80, 83 n.4 (Colo. 1998) (en banc); Colo. Dep't of Soc. Servs. v. Bd. of County Comm'rs, 697 P.2d 1, 13 (Colo. 1985) (en banc).

27. *See, e.g*., Firelock, Inc. v. Dist. Court, 776 P.2d 1090, 1097 (Colo. 1989) (en banc); Tassian v. People, 731 P.2d 672, 674 (Colo. 1987) (en banc).

The Colorado Supreme Court's decisions in *Evans v. Romer*,[28] struck down a citizen-sponsored, state constitutional initiative barring state and local government from conferring "protected status" on the basis of homosexual, lesbian or bisexual orientation.[29] Nothing in *Evans*, however, even remotely suggests that the court would treat homosexuals as a suspect or quasi-suspect class. *Romer*, of course, was decided on federal, not state, constitutional grounds. Significantly, however, the plaintiffs did not appeal the trial court's rejection of their argument that "gay men, lesbians and bisexuals should be found to be either a 'suspect class' or a 'quasi-suspect' class."[30] Given the purpose and interpretation of the Colorado equal rights amendment, it is unlikely that a state court would mandate recognition of same-sex marriages.

3. Connecticut

Article I, section 20, of the Connecticut Constitution provides: "No person shall be denied the equal protection of the law nor be subject 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."[31]

In evaluating sex-based classifications, Connecticut courts have not developed a uniform standard of review. In *Dydyn v. Department of Liquor Control*,[32] the Connecticut Appellate Court rejected an equal rights challenge to a state liquor control commission regulation prohibiting nude and semi-nude female dancing in establishments licensed to serve liquor. *Dydyn* held that the regulation discriminated on account of sex, in that it prohibited exposure of female, but not male, breasts. The court held, however, that the regulation was constitutional because it was "substantially related to an important governmental interest," which included avoiding public disturbances associated with establishments featuring female topless dancers.[33] The court applied an intermediate scrutiny review, rather than strict scrutiny. In *Daly v. DelPonte*,[34] however, the Connecticut Supreme Court held that classifications based on physical or mental disability, two other categories specified in article I, section 20, are constitutionally suspect and subject to a strict scrutiny

28. Evans v. Romer, 854 P.2d 1270 (Colo. 1993) (en banc) (affirming preliminary injunction), *cert. denied*, 510 U.S. 959 (1993); Evans v. Romer, 882 P.2d 1335 (Colo. 1994) (en banc) (affirming permanent injunction), *aff'd*, 517 U.S. 620 (1996).

29. *See Evans*, 854 P.2d 1270; *Evans*, 882 P.2d 1335; COLO. CONST. art. II, § 30b, *held unconstitutional by* Romer v. Evans, 517 U.S. 620 (1996).

30. *Evans*, 882 P.2d at 1341 n.3.

31. CONN. CONST. art. I, § 20. The word, "sex," was added in 1974. *See id*.

32. Dydyn v. Dep't of Liquor Control, 531 A.2d 170 (Conn. App. Ct. 1987).

33. *Id*. at 175.

34. Daly v. DelPonte, 624 A.2d 876 (Conn. 1993).

standard of review.[35] *DelPonte* suggests that the supreme court would also view sex-based classifications as suspect. In a case decided more than twenty-five years ago, the Connecticut Supreme Court referred to "the strict scrutiny test mandated by the equal rights amendment" for sex-based classifications,[36] but did not decide the case on the basis of that test.[37] Given the holding in *DelPonte* and the dictum in *Page*, it is probable that the Connecticut Supreme Court would treat a classification based upon sex as suspect and apply strict scrutiny analysis.

Despite the paucity of authority interpreting the Connecticut equal rights amendment, there are several reasons why the amendment should not mandate same-sex marriages, in violation of its public policy.[38] First, like other state equal rights amendments adopted at the same time, the amendment to article I, section 20, was intended to ensure that women have equal rights with men.[39] Because neither men nor women may marry members of the same sex, there is no inequality between men and women in prohibiting same-sex marriages. Second, the Connecticut Supreme Court has held that a law that applies equally to men and women does not violate the equal rights amendment.[40] Third, Connecticut appears to recognize the "unique physical characteristics" exception to the scope of the state equal rights amendment, which may also justify treating men and women differently for purposes of marriage.[41] In *Dydyn*,[42] the Connecticut Appellate Court held that the state liquor control commission did not violate the state equal rights amendment in promulgating a regulation that prohibited female, but not male, employees of establishments

35. *Id*. at 882-84.

36. Page v. Welfare Comm'r, 365 A.2d 1118, 1124 (Conn. 1976).

37. In *Page*, the supreme court held that welfare department regulations that allowed a legally liable son with a working spouse, but not a legally liable daughter with a working spouse, to take exemptions for minor children when computing monthly contributions for the support of an indigent parent were unconstitutional even under a rational-basis standard of review. *See id*. at 1125.

38. *See* CONN. GEN. STAT. ANN. § 45a-727(a)(4) (West Supp. 2001).

39. *See* Evening Sentinel v. Nat'l Org. for Women, 357 A.2d 498, 503 (Conn. 1975) (dictum) (stating that "[t]he people of this state and their legislators have unambiguously indicated an intent to abolish sex discrimination"); Barbara Lifton, *The Amendment to the State Constitution Prohibiting Discrimination on Account of Sex*, 49 CONN. B.J. 463, 468 (1975) (stating that "[b]ecause of the successful ratification of the amendment to Section 20 prohibiting discrimination on account of sex, women and men in Connecticut now theoretically share equal legal status"); Shirley Raissi Bysiewicz, *Connecticut: ERA*, 51 CONN. B.J. 113, 119 (1977) (providing that the principal objective sought by state equal rights amendment was to "provide equality of rights to Connecticut women").

40. *See* State v. Kelley, 643 A.2d 854, 858 (Conn. 1994) (stating that doctrine allowing constancy of accusation evidence to be used in prosecutions for sex offenses applies "equally to male and female victims" and thus is not "gender biased").

41. *See* discussion *infra* notes 355-72 and accompanying text.

42. Dydyn v. Dep't of Liquor Control, 531 A.2d 170 (Conn. App. Ct. 1987).

selling liquor from exposing their breasts. The court noted that "there can be no doubt that in our society female breasts, unlike the male breasts, constitute an erogenous zone and are commonly associated with sexual arousal."[43] The court also quoted with approval the opinion in *Tolbert v. City of Memphis*,[44] that "[i]n our culture, for the purpose of this type of ordinance, female breasts are a justifiable basis for a gender-based classification."[45] It is doubtful, therefore, that the equal rights amendment mandates same-sex marriages.

Apart from the specific categories enumerated in article I, section 20—religion, race, color, ancestry, national origin, sex, physical or mental disability—the equal protection guarantee of section 20 has the same meaning and the same limitations as the Equal Protection Clause of the Fourteenth Amendment.[46] Accordingly, if the Equal Protection Clause is interpreted not to mandate state recognition of same-sex marriages, article I, section 20, would not be so interpreted.

The Connecticut Appellate Court rejected disparate impact as a basis for invalidating a statute under the equal rights amendment. In *Wendt v. Wendt*,[47] the court held that proof of a discriminatory impact alone would not provide a basis for the wife's equal rights claim. The court found that not allowing for an equal division of marital property in the state property distribution statute did not violate the state equal rights amendment.[48] The prohibition of same-sex marriages, however, would not appear to have a disparate impact on either men or women.

4. Florida

Effective November 3, 1998, the "Basic Rights" provision of the Florida Constitution was amended to read as follows:

> All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship

43. *Id.* at 175.

44. Tolbert v. City of Memphis, 568 F. Supp. 1285 (W.D. Tenn. 1983).

45. *Id.* at 1290; *Dydyn*, 531 A.2d at 175 (quoting *Tolbert*).

46. *See* Broadley v. Bd. of Educ., 639 A.2d 502, 506 n.15 (Conn. 1994) (citing Keogh v. Bridgeport, 444 A.2d 225 (Conn. 1982); Franklin v. Berger, 560 A.2d 444, 447 (Conn. 1989)). *See also* Brunswick Corp. v. Liquor Control Comm'n, 440 A.2d 792, 797 n.5 (Conn. 1981); State v. Angel C., 715 A.2d 652, 670 n.35 (Conn. 1998) (noting that the defendants "concede that the equal protection provisions of the Connecticut constitution [art. 1, §§ 1, 20] have the same scope as the fourteenth amendment to the federal constitution").

47. Wendt v. Wendt, 757 A.2d 1225 (Conn. App. Ct. 2000).

48. *Id*. at 1243-45.

> may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion, national origin, or physical disability.[49]

In adding the phrase, "female and male alike," in the first sentence after the words, "[a]ll natural persons," the Constitution Revision Commission intended "to secure equality for women in the Constitution."[50] As initially filed, the proposal would have added the term "sex" to the listing of protected classes. Concerns were raised that this language could lead Florida courts to require the recognition of same-sex marriages, as it had in Hawaii. Thus, the Commission revised the proposal to refer to "female and male alike" and inserted the following statement of intent in Journal of the Constitution Revision Commission:

> The intent of . . . [this proposal], as adopted, was to affirm explicitly that all natural persons, female and male alike, are equal before the law. The proposal as adopted is not intended, and should not be construed, to confer any right to same-sex marriages in this state. Many in the body were concerned that the proposal as it was originally proposed, if adopted by the people, would have opened the door to same-sex marriages in Florida. That was not an acceptable result to many members of the Commission. Consequently, the purpose of amending the original proposal and adopting it in its amended form was to assure that the proposal would not be deemed in any way to countenance same-sex marriages.[51]

In light of this official commentary, it cannot reasonably be argued that the 1998 amendment to article I, section 2, of the Florida Constitution mandates recognition of same-sex marriages, in violation of the public policy of the State.[52] Thus, the Constitution Revision Commission officially precluded a court from holding that there is a basic right to a same-sex marriage.

49. FLA. CONST. art. I, § 2. Prior to the amendment, sex was treated as a "quasi-suspect" class under article I, section 2. *See* Purvis v. State, 377 So.2d 674, 676 (Fla. 1979).

50. *See* FLA. CONST. art. I, § 2 commentary (West Supp. 2001). *See also* Beal Bank, SSB v. Almond & Assocs., 780 So. 2d 45, 52 n.7 (Fla. 2001) ("Florida's Constitution now expressly protects the equality of women by providing that 'all natural persons, female and male alike, are equal before the law.'") (quoting article I, section 2).

51. FLA. CONST. art. I, § 2 commentary (West Supp. 2001).

52. *See* FLA. STAT. ANN. § 741.212 (West Supp. 2002). Given the history of the amendment, one Florida court has concluded sex is *not* a suspect classification under article I, section 2. *See* Frandsen v. County of Brevard, 800 So. 2d 757, 758-60 (Fla. Dist. Ct. App. 2001) (rejecting challenge to state statutes and local ordinance "to the extent that they prohibit exposure of the female breast in circumstances where the exposure of the male breast would not be prohibited"). In light of the court's reasoning in *Frandsen*, it is debatable whether the addition of the language, "female and male alike," should be characterized as the equivalent of an equal rights amendment.

5. Hawaii

The Hawaii Constitution contains two equal rights provisions. Article I, section 3, provides: "Equality of rights shall not be denied or abridged by the State on account of sex. The legislature shall have the power to enforce, by appropriate legislation, the provisions of this section."[53]

And article I, section 5, of the Hawaii Constitution provides:

> No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.[54]

The courts in Hawaii were well on their way to requiring the State to recognize same-sex marriages.[55] An amendment made to the state constitution, however, expressly authorizes the legislature to limit marriage to members of the opposite sex. On November 3, 1998, the citizens of Hawaii approved what is now section 23 of the Hawaii Declaration of Rights. Section 23 provides, "The legislature shall have the power to reserve marriage to opposite-sex couples."[56] Following the adoption of section 23, the Hawaii Supreme Court, in an unpublished opinion, reversed the circuit court's judgment declaring the Hawaii marriage statute unconstitutional.[57] As such, Hawaii does not recognize a constitutional right to same-sex marriages.

6. Illinois

Article I, section 18, of the Illinois Constitution provides: "The equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts."[58]

The Illinois equal rights provision was first proposed in the 1970 Illinois Constitutional Convention as an amendment to the report of the Bill of Rights

53. HAW. CONST. art. I, § 3.

54. HAW. CONST. art. I, § 5.

55. In *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), *reconsideration and clarification granted in part*, 875 P.2d 225 (Haw. 1993), a sharply divided Hawaii Supreme Court held that a Hawaii statute restricting marriage to members of the opposite sex, see HAW. REV. STAT. ANN. § 572-1 (Michie 1999), was subject to strict judicial scrutiny under article I, section 5, because, in the view of a plurality of the court, it discriminated on account of sex. *See Baehr*, 852 P.2d at 67. The supreme court remanded the case to the circuit court for a trial on the issue as to whether the statute was narrowly drawn to promote compelling state interests. *Id.* at 68. On remand, following a trial, the circuit court declared the statute unconstitutional. Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996). The next day, the court stayed its ruling pending appeal to the Hawaii Supreme Court. *See* Baehr v. Miike, No. 91-1394-05 (Haw. Cir. Ct. Dec. 4, 1996).

56. HAW. CONST. art. I, § 23.

57. *See* Baehr v. Miike, 994 P.2d 566 (Haw. 1999) (unpublished order entered Dec. 9, 1999).

58. ILL. CONST. art. I, § 18.

Committee.[59] Debate over the amendment focused on the discrimination faced by women in the areas of employment, education and business and for which standard equal protection analysis offered no adequate remedy.[60] There was no discussion, however, of recognizing same-sex marriages or, for that matter, discrimination against homosexuals.

In a case of first impression, the Illinois Supreme Court concluded on the basis of the debates that "the purpose of the amendment was to guarantee rights for females equal to those of males."[61] In light of the explicit language of section 18 and the debates, the supreme court found "inescapable the conclusion that [section 18] was intended to supplement and expand the guaranties of the equal protection provision of the [Illinois] Bill of Rights and requires us to hold that a classification based on sex is a 'suspect classification' which, to be held valid, must withstand 'strict judicial scrutiny.'"[62]

Given the purpose of the Illinois equal rights provision, "to guarantee rights for females equal to those of males,"[63] it is highly implausible that an Illinois state court would interpret article I, section 18, to mandate recognition of same-sex marriages. After all, neither men nor women may marry a member of the same sex. Thus, the Illinois law recognizing marriage as a legal relationship between one man and one woman[64] cannot be said to discriminate against either sex.[65] If the equal rights provision had been intended to require state-sanctioned, same-sex marriage, surely there would have been *some* discussion of such a far-reaching consequence of the provision when it was being considered. Yet, Odas Nicholson, one of the principal sponsors of the amendment told the convention, "I don't see any significant change that will disturb one's way of life brought about by this amendment."[66]

59. *See* V RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 3669 (1972) [hereinafter RECORD OF PROCEEDINGS]. The original proposed language stated: "Equality under the law shall not be denied or abridged on account of sex by the State of Illinois or any of its agents or subdivisions." *Id.* Over the objections of the principal sponsors, the introductory language was amended to read, "The equal protection of the laws." *Id.* at 3674. After undergoing further editorial changes by the Style and Drafting Committee, article I, section 18, emerged in its present form.

60. *Id*. at 3669-3677.

61. People v. Ellis, 311 N.E.2d 98, 100 (Ill. 1974).

62. *Id*. at 101.

63. *Id*. at 100.

64. 750 ILL. COMP. STAT. 5/212(a)(5) (West 2000).

65. In *In re Estate of Hall*, 707 N.E.2d 201 (Ill. App. Ct. 1998), the Illinois Appellate Court declined to decide whether the statutory prohibition of same-sex marriage violates the Equal Protection Clause of the United States Constitution or the equal rights provision of the Illinois Constitution where a declaration of invalidity would not have entitled the plaintiff to the relief she sought, for example, a surviving spouse's share of the estate of her female "life-partner."

66. V RECORD OF PROCEEDINGS, *supra* note 59, at 3672.

The Official Text with explanations stated: "This new section states that no government in Illinois may deny equal protection of the law to anyone because of his or her sex."[67] Consistent with that understanding, state and federal courts have held that laws that affect men and women equally do not offend the Illinois equal rights provision. For example, in *Steffa v. Stanley*,[68] the Illinois Appellate Court rejected an equal rights challenge to the interspousal tort immunity statute,[69] stating: "As to section 18, the bar against tort actions between spouses during coverture applies equally to male and female and cannot therefore be said to discriminate by denying or abridging plaintiff's rights on the basis of sex."[70] And in *O'Connor v. Board of Education*,[71] the Seventh Circuit dissolved a preliminary injunction directing a school board to permit a junior high school girl to try out for the boys' sixth grade basketball team. In its opinion, the court commented that it was "highly unlikely" that the plaintiff could demonstrate that the school board's policy of separate but equal sports programs for boys and girls violated the equal rights provision of the Illinois Constitution.[72]

The Illinois reviewing courts have recognized that sex discrimination may be justified by physiological differences between the sexes. In *People v. Boyer*,[73] the Illinois Supreme Court considered the constitutionality of former statutes dealing with incest and aggravated incest. A woman who had sexual intercourse or performed an act of deviate sexual conduct with a person whom she knew to be her natural son was guilty of simple incest, a Class 3 felony, punishable by a sentence of not less than one nor more than ten years in the penitentiary;[74] a man who engaged in the same conduct with a person he knew to be his natural daughter, or stepdaughter or adopted daughter if she was under the age of 18, was guilty of aggravated incest, a Class 2 felony,

67. VII *id.* at 2688.

68. Steffa v. Stanley, 350 N.E.2d 886 (Ill. App. Ct. 1976).

69. 40 ILL. COMP. STAT. § 1001 (1985). Interspousal tort immunity was abolished by Public Act 85-625, eff. Jan. 1, 1988. *See id.*; 750 ILL. COMP. STAT. § 65/1 (1999).

70. *Steffa*, 350 N.E.2d at 889. *See* Vogel v. Robison, 399 N.E.2d 688 (Ill. App. Ct. 1980) (following *Steffa*). *But see* Wheeler v. City of Rockford, 387 N.E.2d 358 (Ill. App. Ct. 1979). In *Wheeler*, the appellate court held unconstitutional a municipal ordinance that prohibited employees of commercial massage parlors from giving massages to members of the opposite sex. The ordinance, which allowed masseurs to give massages only to men, and masseuses to give massages only to women, was held to violate article I, section 18. *Id*. at 359.

71. O'Conner v. Bd. of Educ., 645 F.2d 578 (7th Cir. 1981).

72. *Id*. at 582.

73. People v. Boyer, 349 N.E.2d 50 (Ill. 1976).

74. 38 ILL. COMP. STAT. § 11-11 (1975); 38 ILL. COMP. STAT. § 1005-8-1(b)(4), (c)(4) (1975).

punishable by a term of not less than one nor more than twenty years in prison.[75]

In *Boyer*, the supreme court reversed an appellate court decision declaring invalid the statutory distinction between aggravated incest and simple incest.[76] Without deciding whether the legislative classification of incest was based on sex, and therefore subject to strict scrutiny, the court held that "the State has demonstrated an interest which justifies, under either standard, the classification at issue."[77]

> [A] female victim of a father-daughter incestuous relationship is exposed to potential harm to which male victims of incestuous relationships are not exposed. . . . The possibility that the female victim may become pregnant . . . adds considerably to the potential harm that may result from a father-daughter incestuous relationship. A female who is impregnated by her father is confronted with a traumatic experience beyond the experience of the incestuous act itself. The female must either endure the pregnancy and give birth to a baby or make the decision to have an abortion. If a child is born as a result of the incest, the female victim must either care for the child herself or give the baby up for adoption. The physical change in a female who becomes pregnant could in itself be a source of trauma to the female. The potential psychological damage to the victim of a father-daughter incestuous relationship is admittedly difficult to estimate, but it is surely existent and considerable. Additionally, a pregnant woman is exposed to some physical dangers.[78]

The supreme court agreed with the State that "the physical and psychological dangers of incest are greater when the offense is committed by a male and the victim is his daughter," and held that "the State's interest in protecting potential victims of incestuous relationships justifies the statutory classification at issue."[79]

In *People v. Medrano*,[80] the appellate court upheld the legislature's power to define rape as a crime which may be directly committed only by a male.[81] Rejecting the defendant's argument that the classification violated article I, section 18, the court found that "the statute . . . is both rationally related to a legitimate governmental objective . . . and that there is a compelling reason, for

75. 38 ILL. COMP. STAT. § 11-10 (1975); 38 ILL. COMP. STAT. § 1005-8-1(b)(3), (c)(3) (1975).

76. *Boyer*, 349 N.E.2d at 52.

77. *Id.* at 51.

78. *Id*. at 51-52.

79. *Id*. at 52. *See also* People v. Yocum, 361 N.E.2d 1369 (Ill. 1977) (following *Boyer*); People v. York, 329 N.E.2d 845, 846-47 (Ill. App. Ct. 1975) (noting that the vast majority of incest cases have involved a father's abuse of a daughter); People v. Williams, 336 N.E.2d 26, 28-30 (Ill. App. Ct. 1975).

80. People v. Medrano, 321 N.E.2d 97 (Ill. App. Ct. 1974).

81. 38 ILL. COMP. STAT. § 11-1 (1973).

example, the physical differences between men and women, which . . . makes essential the crime of rape as being an offense which may only be committed directly by a male."[82] The Illinois courts' recognition of unique physical characteristics as an exception to the scope of the equal rights provision may support the prohibition of same-sex marriage, even assuming that that prohibition is viewed as one based on sex.[83]

In *People v. Adams*,[84] the Illinois Supreme Court held that a statute mandating HIV testing for persons convicted of prostitution did not violate the equal rights provision merely because of its disparate impact upon female offenders where the statute itself is gender-neutral on its face and there was no evidence of an intent by the legislature to discriminate against female offenders.[85] Similarly, the prohibition of same-sex marriages is gender neutral and does not have even a disparate impact on either men or women.

Article I, section 2, of the Illinois Constitution provides: "No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws."[86] The Illinois Supreme Court has repeatedly held that the same analysis applies to equal protection claims brought under article I, section 2, of the Illinois Constitution, and to equal protection claims brought under the United States Constitution.[87] Given this equivalency of interpretation, if the Equal Protection Clause is not interpreted to require recognition of same-sex marriages, then, presumably, neither will the equal protection guarantee of article I, section 2, of the Illinois Constitution.

7. Iowa

Article I, section 1, of the Iowa Constitution provides: "All men and women are by nature, free and equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness."[88]

The words, "and women," were added by an amendment to the constitution adopted on November 3, 1998.[89] No Iowa cases to date have interpreted this new language. As a result, it is unclear whether the additional language is

82. *Medrano*, 321 N.E.2d at 98.

83. *See* discussion *infra* notes 355-72 and accompanying text.

84. People v. Adams, 597 N.E.2d 574 (Ill. 1992).

85. *Id*. at 585.

86. ILL. CONST. art. I, § 2.

87. *See In re* Detention of Samuelson, 727 N.E.2d 228, 234-35 (Ill. 2000); People v. Fisher, 705 N.E.2d 67, 72 (Ill. 1998); Jacobson v. Dep't of Pub. Aid, 664 N.E.2d 1024, 1028 (Ill. 1996); Nevitt v. Langfelder, 623 N.E.2d 281, 284 (Ill. 1993).

88. IOWA CONST. art. I, § 1.

89. *See* 1997 Iowa Acts 216; 1995 Iowa Acts 222.

merely stylistic or was intended to effect a change in the manner in which sex-based classifications are reviewed under the Iowa Constitution.

Article I, section 6, of the Iowa Constitution provides: "All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges and immunities which, upon the same terms shall not equally belong to all citizens."[90]

The Iowa Supreme Court applies the same analysis in considering a state privileges and immunities claim as it does in considering a federal equal protection claim.[91] In light of this parallel construction, the privileges and immunities provision should not be interpreted to require recognition of same-sex marriages in violation the public policy of the State of Iowa,[92] if the Equal Protection Clause is not so interpreted.

There is some indication that the Iowa Supreme Court would not consider evidence of disparate impact alone as sufficient to establish an unconstitutional denial of the privileges and immunities provision. In *Sherman v. Pella Corporation*,[93] a woman challenged the classification of carpal tunnel syndrome as a "scheduled" injury under Iowa's workers' compensation statute on the ground that the classification violated the privileges and immunities provision. According to the plaintiff, the classification was discriminatory because "scheduled" injuries generally receive less compensation than "unscheduled" injuries and carpal tunnel syndrome is more common in women than in men.[94] Noting that the statute was gender neutral on its face, the Iowa Supreme Court rejected this argument, stating that plaintiff had provided no evidence that other scheduled injuries were more prevalent among women than among men.[95] The court did not reach the issue of disparate impact, but clearly implied that, absent proof of a legislative intent to discriminate against women, it would not have invalidated the statute even if disparate impact had been proven.[96] The decision in *Sherman* suggests that the Iowa Supreme Court would not regard evidence of disparate impact, standing alone, as sufficient to sustain a challenge brought to a statute under the amended section 1, either.

90. IOWA CONST. art. I, § 6.

91. *See In re* Detention of Morrow, 616 N.W.2d 544, 547 (Iowa 2000); State v. Mann, 602 N.W.2d 785, 792 (Iowa 1999); State v. Ceaser, 585 N.W.2d 192, 196 (Iowa 1998); Norland v. Grinnell Mut. Reinsurance Co., 578 N.W.2d 239, 242 (Iowa 1998); State v. Bell, 572 N.W.2d 910, 911 (Iowa 1997); Kelly v. State, 525 N.W.2d 409, 411 (Iowa 1994); Exira Cmty. Sch. Dist. v. State, 512 N.W.2d 787, 792-93 (Iowa 1994); Bruns v. State, 503 N.W.2d 607, 609-11 (Iowa 1993); Klein v. Dep't of Revenue & Fin., 451 N.W.2d 837, 842 (Iowa 1990).

92. *See* IOWA CODE ANN. § 595.2(1) (West 2001).

93. Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998).

94. *Id.* at 316-18.

95. *Id.* at 317-18.

96. *Id.* (following Personnel Adm'r v. Feeney, 442 U.S. 256 (1979) (holding that evidence of disparate impact, without proof of an intent to discriminate, does not violate the Equal Protection Clause)).

Iowa's prohibition of same-sex marriage does not have even a disparate impact on men or women.

8. Louisiana

Article I, section 3, of the Louisiana Constitution provides:

> No person shall be denied the equal protection of the laws. No law shall discriminate against a person because or race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.[97]

A law that classifies on the basis of any of the six grounds identified in the third sentence of section 3—birth, age, sex, culture, physical condition, or political ideas or affiliations—does not enjoy a presumption of constitutionality. When such a law is under review, "the burden is on the proponent of the classification, and the standard of review is heightened, requiring the proponent to establish that the classification is not arbitrary, capricious or unreasonable because it substantially furthers an appropriate governmental objective."[98]

The addition of the word, "sex," to the third sentence of article I, section 3, was clearly intended to eliminate discrimination in the law in favor of men and against women (as well as legal discrimination in favor of women and against men).[99] A commentary written for the proposed Louisiana Constitution noted that the supporters of the equal rights language of article I, section 3, argued that "denial of equal rights for women in the past has been used as the basis for legal, financial, social and political discrimination."[100] One witness who testified before the Committee on the Bill of Rights and Elections stated that, "[w]omen must have rights and privileges of first class citizens . . . for the state and nation as a whole to achieve the economic and social progress to which all

97. LA. CONST. art. I, § 3.

98. Manuel v. State, 692 So. 2d 320, 324 (La. 1996). *See also* Pierce v. LaFourche Parish Council, 762 So. 2d 608, 611-12 (La. 2000) (following *Manuel*); Moore v. RLCC Techs., Inc., 668 So. 2d 1135, 1140-41 (La. 1996).

99. *See* LEE HARGRAVE, THE LOUISIANA CONSTITUTION: A REFERENCE GUIDE 25 (Greenwood Press 1991) ("[t]he mention of sex [in article I, section 3] was designed to establish equal rights for women, a subject of intense interest in the Committee on Bill of Rights and Elections"). The convention's concern with discrimination against women was reflected in the floor debate on article I, section 3. *See* VI RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973 at 1021-30 (Edward Hardin ed. 1977) (hereinafter "RECORDS").

100. PUBLIC AFFAIRS RESEARCH COUNCIL, CONSTITUTIONAL COMMENTARY, No. 6, at 203 (1973).

citizens aspire."[101] Because the Louisiana statutes prohibiting same-sex marriages[102] do not discriminate against women or men—neither may marry a member of the same sex—those statutes would not appear to violate article I, section 3.

Louisiana recognizes a unique physical characteristics exception to the scope of the third sentence of article I, section 3. In a series of cases, Louisiana courts have rejected state and federal equal protection challenges to a former provision of the "carnal knowledge of a juvenile" statute,[103] which applied only to males. Under subsection (1) of that statute, carnal knowledge of a juvenile was committed when, "[A] male over the age of seventeen has sexual intercourse, with consent, with any unmarried female of the age of twelve years or more, but under the age of seventeen, when there is an age difference of greater than two years between the two persons."[104] In *State v. Bell*,[105] the Louisiana Supreme Court rejected an equal protection challenge to the statute, expressing the view that "protection of young females from pregnancy, from possible injury to their reproductive systems as well as the possibility of lingering mental impairment, is a legitimate area of state concern justifying the sex classification involved in [the] statute."[106] Although *Bell* upheld the statutory provision under a rational basis standard of review, two later court of appeals decisions, applying an intermediate standard of review, relied on *Bell* and sustained the same provision.[107]

In *State v. Fletcher*,[108] the Louisiana Supreme Court rejected an equal protection argument that the former rape statute, which defined the offense as one which could be committed only by a male against a female,[109] "unconstitutionally discriminate[d] against a male because it does not similarly

101. Louis Jenkins, *The Declaration of Rights*, 21 LOY. L. REV. 9, 17 n.44 (1975) (quoting testimony of Elsie J. Allen to Committee on Bill of Rights and Elections on April 6, 1973, in Baton Rouge, Louisiana).

102. *See* LA. CIV. CODE ANN. art. 86 (West 1999) (defining marriage as "a legal relationship between a man and a woman created by civil contract"); LA. CIV. CODE ANN. art. 89 (West Supp. 2001) (prohibiting same-sex marriage and refusing to recognize such "marriages" contracted in other jurisdictions). *See also In re* D.M., 704 So. 2d 786, 791 n.2 (La. Ct. App. 1997) (citing LA. CIV. CODE ANN. art. 86).

103. LA. REV. STAT. ANN. § 14:80 (West 1986).

104. LA. REV. STAT. ANN. § 14:80(A)(1) (West 1986). In 1995, this subsection was amended to make it gender neutral. *See* 1995 La. Acts 241, § 1, *codified as* LA. REV. STAT. ANN. § 14:80(A)(1) (West Supp. 2001).

105. State v. Bell, 377 So. 2d 303 (La. 1979).

106. *Id*. at 306.

107. *See* State v. Vining, 609 So. 2d 984 (La. Ct. App. 1992) (applying intermediate scrutiny); State v. Miller, 663 So. 2d 107, 109 (La. Ct. App. 1995).

108. State v. Fletcher, 341 So. 2d 340 (La. 1976).

109. *See* LA. REV. STAT. ANN. § 14:41 (West 1975). In 1978, the statute was amended to make it gender neutral. *See* 1978 La. Acts 239, § 1, *codified as* LA. REV. STAT. ANN. § 14:41 (West 1997).

punish the rape of a male by a female."[110] Putting to one side "the physical difficulty of the latter feat," the court said: "[W]e do not find this legislative classification of males as punishable by the crime unreasonable, not an invidious discrimination against males so as to deny them the equal protection of the laws: female rapes of males do not represent a social problem, although male rapes of females do."[111] Louisiana's acceptance of a unique physical characteristics exception to the scope of the equal protection provision of the state constitution may significantly affect its stance towards the recognition of same-sex marriages.[112]

The Louisiana Supreme Court has determined that a gender-neutral law is not subject to challenge under the third sentence of article I, section 3, merely because it has a disparate impact on homosexuals. In *State v. Baxley*,[113] the supreme court held that a facially neutral statute making it a crime to solicit another with the intent to engage in unnatural carnal copulation for compensation was not unconstitutional. The court held that even though it allegedly discriminated against homosexuals, there was no evidence that the law had been enacted with the purpose of discriminating against homosexuals.[114] Similarly, there is no evidence that the prohibition of same-sex marriage, which is gender neutral on its face, was intended to discriminate against homosexuals.

9. Maryland

Article 46 of the Maryland Declaration of Rights provides, "Equality of rights under the law shall not be abridged or denied because of sex."[115] Early Maryland cases quite clearly adopted an "absolutist" position, holding that article 46 forbids *all* sex-based discrimination, without exceptions.[116] Later

110. *Fletcher*, 341 So. 2d at 348.

111. *Id*.

112. *See* discussion *infra* notes 355-72 and accompanying text.

113. State v. Baxley, 656 So. 2d 973 (La. 1995).

114. *Id*. at 978. *See also* State v. Smith, 766 So. 2d 501, 508-10 (La. 2000) (stating that state privacy guarantee did not confer right to engage in acts of anal or oral sex). One of the delegates at the Louisiana Constitutional Convention of 1973 noted that homosexuals were *not* a protected class under the language of article I, section 3. *See* VI RECORDS, *supra* note 99, at 1024 (quoting Delegate Arnette as remarking, "How about sexual beliefs, homosexuals, you are not protecting them in any way whatsoever, maybe they ought to be listed as a class?").

115. MD. CONST., Declaration of Rights, art. 46 (1981).

116. *See* Rand v. Rand, 374 A.2d 900, 903 (Md. 1977) (stating that "language mandating equality of rights can only mean that sex is not a factor" regarding child support obligations); Bell v. Bell, 379 A.2d 419, 421 (Md. Ct. Spec. App. 1977) (deciding that the common law presumption that the husband is the dominant figure in the marriage relationship cannot stand under the Equal Rights Amendment); Kline v. Ansell, 414 A.2d 929, 933 (Md. 1980) ("Maryland's law [allowing action for criminal conversation to be brought only by the husband] provides different benefits for and imposes different burdens upon its citizens based solely upon

cases, however, backed away from this absolutist position, and have adopted a strict scrutiny standard.[117] The shift from an absolutist standard, allowing no sex-based classifications, other than those based on physical differences between the sexes, to the strict scrutiny standard began in *State v. Burning Tree Club, Inc.*, in 1988.[118] Two years before, the Maryland Court of Special Appeals, after reviewing the earlier cases cited above, stated: "The Maryland Court of Appeals has held . . . that the Equal Rights Amendment of the Maryland Constitution prescribes an 'absolute standard' and not a balancing test. Therefore, once discrimination is proved, a court cannot consider arguments attempting to 'balance' the discriminatory practice against other concerns."[119]

The Maryland Court of Appeals has repeatedly stated that the purpose of the state equal rights amendment was to eliminate discrimination in the law between the treatment of men and the treatment of women. In *Rand v. Rand*,[120] the court of appeals, referring to the equal rights amendment, said that "the people of Maryland are fully committed to equal rights for men and women."[121] What this means, according to the court, is that "'[t]he law will not impose different benefits or different burdens upon the members of society based on the fact that they may be man or woman.'"[122] In *Kline v. Ansell*,[123] the court of appeals held that the common law rule allowing only a man to sue

sex. Such a result violates the ERA."); Turner v. State, 474 A.2d 1297, 1301 (Md. 1984) (stating that "a law that imposes different benefits and different burdens upon persons based solely upon their sex violates the Maryland ERA" and striking down "Female Sitters Law," which made it unlawful for certain businesses to employ "female sitters," women employees who would solicit customers to buy food and beverages from them); Burning Tree Club, Inc. v. Bainum, 501 A.2d 817, 822 (Md. 1985) (providing that "the E.R.A. flatly prohibits gender-based classifications, either under legislative enactments, governmental policies, or by application of common law rules, in the allocation of benefits, burdens, rights and responsibilities as between men and women"); *id.* at 825 (stating that "the Maryland E.R.A. absolutely forbids the determination of such 'rights,' as may be accorded by law, solely on the basis of one's sex, i.e., sex is an impermissible factor in making any such determination").

117. *See* Tyler v. State, 623 A.2d 648, 651 (Md. 1993) ("sex, like race, is a suspect classification subject to strict scrutiny") (use of peremptory challenges); Murphy v. Edmonds, 601 A.2d 102, 109, n.7 (Md. 1992) ("In Maryland . . . classifications based on gender are suspect and subject to strict scrutiny."); Briscoe v. P.G. County Health Dep't, 593 A.2d 1109, 1115 n.7 (Md. 1991); State v. Burning Tree Club, Inc., 554 A.2d 366, 387 (Md. 1988) (stating that "state action providing for segregation based upon sex, absent substantial justification, violates the E.R.A." and that "[a]ny statute which discriminates on the basis of sex requires justification").

118. *Burning Tree Club*, 554 A.2d 366.

119. Peppin v. Woodside Delicatessen, 506 A.2d 263, 267 (Md. Ct. Spec. App. 1986) (upholding county ordinance banning sex discrimination in places of public accommodation).

120. Rand v. Rand, 374 A.2d 900 (Md. 1977).

121. *Id.* at 905. In *Rand*, the court of appeals held that the legal obligation to provide child support extends to both men and women. *See id.*

122. *Id.* at 903 (quoting Henderson v. Henderson, 327 A.2d 60, 62 (Pa. 1974)).

123. Kline v. Ansell, 414 A.2d 929 (Md. 1980).

or be sued for criminal conversation could not be reconciled with article 46 because the rule "provides different benefits for and imposes different burdens upon [Maryland] citizens based solely upon their sex."[124] Also, in *Turner v. State*,[125] the court struck down Maryland's "Female Sitters Law," which made it unlawful for certain businesses to employ "female sitters," women employees who would solicit customers to buy food and beverages from them, on the ground that a law that imposes different benefits and different burdens upon persons based solely upon their sex violates the Maryland ERA.[126] As the court noted in *Burning Tree Club, Inc. v. Bainum*,[127] "[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."[128]

The Maryland statute prohibiting same-sex marriages[129] does not "impose[] a burden on one sex but not the other, or grant[] a benefit to one but not the other"[130] because neither men nor women may marry a person of the same sex. Before "the protection afforded by the E.R.A. is triggered," the court of appeals has said, "there must be a denial or abridgement of equal rights under the law as between men and women."[131] "Absent such a denial or abridgement, the provisions of the E.R.A. simply have no application."[132] Because the prohibition of same-sex marriages does not discriminate "as between men and women," the state equal rights amendment is simply inapplicable.[133]

That the Maryland equal rights amendment does not require recognition of same-sex marriage is evident also in the court of appeals' explanation of purpose of the adopted amendment. Speaking of equal rights amendments generally, the court stated: "That equal rights amendments to state constitutions were prompted by a long history of denial of equal rights for

124. *Id.* at 933 (abolishing common law cause of action for criminal conversation).

125. Turner v. State, 474 A.2d 1297 (Md. 1984).

126. *Id*. at 1302. *See also* Burning Tree Club, Inc. v. Bainum, 501 A.2d 817, 822 (Md. 1985) (plurality opinion) (stating that "the E.R.A. flatly prohibits gender-based classifications, either under legislative enactments, governmental policies, or by application of common law rules, in the allocation of benefits, burdens, rights and responsibilities as between men and women").

127. *Bainum*, 501 A.2d 817.

128. *Id*. at 822 (plurality opinion).

129. MD. CODE ANN., FAM. LAW, § 2-201 (1999).

130. *Bainum*, 501 A.2d at 825.

131. *Id.*

132. *Id.*

133. *See* 57 Op. Att'y Gen. 71 (Md. 1972) (explaining that Maryland law does not allow same-sex marriage). Without discussing the possible application of the state equal rights amendment, the Maryland Court of Special Appeals has observed, in dicta, that "Maryland does not recognize a marriage between persons of the same sex." Jennings v. Jennings, 315 A.2d 816, 820 n.7 (Md. Ct. Spec. App. 1974).

women is well recognized."[134] "[T]he subordinate status of women in our society has for all too many years been firmly entrenched in our legal system, with women being excluded by law from various rights, obligations or responsibilities."[135] The prohibition of same-sex marriage does not "exclude" either women or men from a "right" available to the other sex. Neither may marry someone of the same sex, but both may marry someone of the opposite sex.

Although there is little case law on the point, Maryland courts appear to recognize a "unique physical characteristics" exception to the scope of the equal rights amendment. In *Brooks v. State*,[136] the Maryland Court of Special Appeals rejected an equal rights challenge to the common law definition of rape as an offense which could be committed directly only by a male against a female. The court stated: "[P]rotection of females from rape is both a legitimate and essential legislative objective. Since only males can perpetrate that crime as principals in the first degree, the limitation of culpability to males constitutes a rational classification directly related to the objective of the criminal penalty."[137] "The equality of the sexes," the court commented, "expresses a societal goal, not a physical metamorphosis."[138] "It would be anomalous, indeed, if our aspirations toward the ideal of equality under the law caused us to overlook our disparate human vulnerabilities."[139] *Brooks* was cited with approval in *Burning Tree Club, Inc. v. Bainum*,[140] where a plurality of the court of appeals noted that "[d]isparate treatment on account of physical characteristics unique to one sex is generally regarded as beyond the reach of equal rights amendments."[141] Recognition of this exception may be significant in defending the State's prohibition of same-sex marriages, even on the assumption that that prohibition is viewed as one based upon sex.[142]

The Maryland Declaration of Rights does not include an equal protection provision. Nevertheless, "it is settled that the Due Process Clause of the

134. *Bainum*, 501 A.2d at 822.

135. *Id*. The Maryland Court of Special Appeals noted that the equal rights amendment is "a two-edged sword in that it excises discrimination because of sex, but it does not halt with eliminating discrimination only against females," but also eliminates discrimination against males. Hofmann v. Hofmann, 437 A.2d 247, 249 (Md. Ct. Spec. App. 1981) (adding that women, like men, may be ordered to pay alimony in appropriate cases).

136. Brooks v. State, 330 A.2d 670 (Md. Ct. Spec. App. 1975).

137. *Id*. at 673.

138. *Id.*

139. *Id*.

140. Burning Tree Club, Inc. v. Bainum, 501 A.2d 817 (Md. 1985).

141. *Id*. at 822 n.3 (citing *Brooks*). A fourth judge, writing for himself and two other members of the court, acknowledged that "because of the inherent differences between the sexes, some sex-based classifications may be justified after such scrutiny [referring to the strict scrutiny standard of review]." *Id.* at 840 (Eldridge, J., concurring and dissenting).

142. *See* discussion *infra* notes 355-79 and accompanying text.

Maryland Constitution, contained in Article 24 of the Declaration of Rights[], embodies the concept of equal protection to the same extent as the Equal Protection Clause of the Fourteenth Amendment."[143] Because Maryland has no express equal protection clause, "Article 24 has been interpreted to apply 'in like manner and to the same extent as the [Equal Protection Clause] of the Fourteenth Amendment of the Federal Constitution.'"[144] Thus, although the Court of Appeals of Maryland may interpret the equal protection concept embodied in article 24 independently from the United States Supreme Court's interpretation of the Equal Protection Clause, "especially with respect to the development of equal protection jurisprudence, the Court of Appeals has virtually adopted Supreme Court precedent as controlling authority in the interpretation of corresponding State constitutional law."[145] This "adoption" of Supreme Court precedent strongly suggests that the Maryland court of appeals would not recognize a right to same-sex marriage under article 24 of the Maryland Declaration of Rights unless the United States Supreme Court recognized such a right under the Equal Protection Clause.

10. Massachusetts

Part 1, article 1, of the Massachusetts Constitution provides:

> All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.[146]

It is well established in Massachusetts case law that a statutory classification based upon sex is subject to strict judicial scrutiny under the state equal rights amendment and will be upheld "only if a compelling interest justifies the classification and if the impact of the classification is limited as narrowly as possible consistent with its proper purpose."[147] The Massachusetts

143. Murphy v. Edmonds, 601 A.2d 102, 107 (Md. 1992). Article 24 states: "That no man sought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." MD. CONST., Declaration of Rights, art. 24 (1981).

144. Att'y Gen. v. Waldron, 426 A.2d 929, 941 (Md. 1981) (quoting U.S. Mortgage Co. v. Matthews, 173 A. 903, 909 (Md. 1934), *rev'd on other grounds*, 293 U.S. 232 (1934)). *See also* Gilchrist v. State, 667 A.2d 876, 884 n.3 (Md. 1995).

145. Manikhi v. Mass Transit Admin., 733 A.2d 372, 387 (Md. Ct. Spec. App. 1999).

146. MASS. CONST. pt. 1, art. 1. The equal rights amendment was added in 1976. *Id.*

147. Lowell v. Kowalski, 405 N.E.2d 135, 139 (Mass. 1980). *See also* Op. of Justices to House of Reps., 371 N.E.2d 426, 428 (Mass. 1977) ("We believe that the application of the strict scrutiny-compelling State interest test is required in assessing any governmental classification

Supreme Judicial Court held that the equal rights amendment does not apply to statutes that affect men and women equally. In *Commonwealth v. King*,[148] the court determined that the strict scrutiny standard of review mandated by the state equal rights amendment for sex-based classifications did not apply to a prostitution statute that made it a crime for both males and females to engage in acts of prostitution.[149] This is consistent with the supreme judicial court's understanding of the purpose of the equal rights amendment. Speaking of state equal rights amendments generally, the court said:

> Indeed, even if equal rights provisions could be viewed primarily as a means of eradicating discrimination against women, they tend to protect men as well, because disadvantages suffered by males are often premised on a "romantic paternalism" stigmatizing to women. Although women have been the usual victims of sex discrimination, there are significant exceptions to this generality, for example, legislation imposing harsher criminal penalties on men.[150]

Apparently, the Massachusetts Supreme Judicial Court views state equal rights amendments as intended to eradicate both legal discrimination against women in favor of men and discrimination against men in favor of women. Nothing in the public policy of the non-recognition of same-sex marriages violates this intention.

In *Opinion of Justices to House of Representatives*,[151] the court said that a proposed bill prohibiting women from participating with men on football and wrestling teams would constitute impermissible sex discrimination.[152] "A prohibition of all females from voluntary participation in a particular sport under every possible circumstance serves no compelling State interest."[153] Significantly, however, the court "decline[d] to express a view whether it would be permissible under [the equal rights amendment] if equal facilities were available for men and women in a particular sport which was available separately to each sex."[154]

In *Attorney General v. Massachusetts Interscholastic Athletic Association*,[155] the Massachusetts Supreme Court held that an athletic association rule, which provided that no boy could play on a girls' team

based solely on sex."); Commonwealth v. King, 372 N.E.2d 196, 206 (Mass. 1977) ("[W]e conclude that the people of Massachusetts view sex discrimination with the same vigorous disapproval as they view racial, ethnic, and religious discrimination.").

148. *King*, 372 N.E.2d 196.

149. *Id*. at 204 n.10.

150. Att'y Gen. v. Mass. Interscholastic Athletic Ass'n, 393 N.E.2d 284, 290 (Mass. 1979).

151. *See Op. of Justices*, 371 N.E.2d 426.

152. *Id*. at 429-30.

153. *Id.* at 430.

154. *Id*.

155. Att'y Gen. v. Mass. Interscholastic Athletic Ass'n, 393 N.E.2d 284 (Mass. 1979).

although a girl could play on a boys' team if that sport was not offered for girls, violated the state equal rights amendment.[156] Nevertheless, the court minimized the impact of its decision, stating: "It can be expected that the present decision will make little practical difference in the traditional conduct of interscholastic athletic competition, for that will proceed in the great majority of instances on a basis of 'separate but equal' teams whose validity is assumed here."[157] The court's casual assumption that "separate but equal" access does not violate the state equal rights amendment suggests that the court would not consider the public policy against same-sex marriages in the same way as it would a prohibition of interracial marriage.[158]

Massachusetts recognizes a unique physical characteristics exception to its equal rights amendment. In *Lowell v. Kowalski*,[159] the supreme judicial court said: "A distinction between rights to inherit from a natural father and rights to inherit from a natural mother may properly be based on the greater difficulty of proving paternity than of proving maternity."[160] This exception may have significance in whether the state must recognize same-sex marriages.[161]

A gender-neutral law is not subject to an equal rights challenge solely on the basis that it affects members of only one sex. In *Commonwealth v. King*,[162] the supreme court held that a gender neutral prostitution statute was not subject to the strict scrutiny mandated by the state equal rights amendment merely because "most prostitutes are women."[163] Of course, limiting marriage to members of the opposite sex does not "primarily affect" either sex. Given the intent and construction of the state equal rights amendment, it is unlikely that the Massachusetts Supreme Judicial Court would mandate state recognition of same-sex marriages.

11. Montana

Article II, section 4, of the Montana Constitution provides:

> The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise

156. *Id.* at 296.

157. *Id*.

158. *See infra* notes 284-99 and accompanying text for the discussion of *Lawrence v. State*, 41 S.W.3d 349 (Tex. Crim. App. 2001) (en banc).

159. Lowell v. Kowalski, 405 N.E.2d 135 (Mass. 1980).

160. *Id*. at 140 (relying upon Commonwealth v. MacKenzie, 334 N.E.2d 613, 617-18 (Mass. 1975)).

161. *See* discussion *infra* notes 355-72 and accompanying text.

162. Commonwealth v. King, 372 N.E.2d 196 (Mass. 1997).

163. *Id*. at 204 n.10.

> of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.[164]

Article II, section 4, was approved as part of the Bill of Rights at the Montana Constitutional Convention of 1971-1972. The Bill of Rights Committee noted "the need to include sex in any equal protection or freedom from discrimination provisions" and "saw no reason for the state to wait for the adoption of the federal Equal Rights Amendment" in order to accomplish that objective.[165] The committee's report was restated on the floor of the convention.[166] Although the language of section 4 reaches private, as well as public, acts of discrimination, the Chairman of the Bill of Rights Committee, Wade Dahood, denied that the proposal would affect the membership policies of single-sex organizations.[167] There was no indication in the debate over article II, section 4, that the convention intended or believed that section 4 would affect the authority of the State to define marriage as a relationship between one man and one woman.[168]

The limited utility of section 4 as a tool to strike down the State's prohibition of same-sex marriages[169] may have been indicated by the Montana Supreme Court's decision in *Gryczan v. State*.[170] In *Gryczan*, the supreme court declared unconstitutional the State's "deviate sexual conduct" statute[171] as it applies to private, noncommercial homosexual conduct between consenting adults. The court based its decision on the state constitution's right of privacy provision,[172] not the equal protection and anti-discrimination provisions of article II, section 4.[173] Over the dissent of Chief Justice Turnage,[174] the majority opinion expressly refused to rest its decision on article II, section 4.[175]

164. MONT. CONST. art. II, § 4.

165. II PROCEEDINGS OF THE MONTANA CONSTITUTIONAL CONVENTION OF 1971-1972, at 628, *available at* http://www.lawlibrary.state.mt.us/dscgi/ds.py/View/Collection-1929 (last visited June 19, 2002).

166. V *id*. at 1642.

167. *Id*. at 1644.

168. *Id.* at 1642-1646.

169. MONT. CODE ANN. § 40-1-401(1)(d) (2001).

170. Gryczan v. State, 942 P.2d 112 (Mont. 1997).

171. The statute prohibits any person from knowingly engaging in deviate sexual relations or causing another to engage in deviate sexual relations. *See* MONT. CODE ANN. § 45-5-505 (2001). "Deviate sexual relations," in turn, is defined as "sexual contact or sexual intercourse between two persons of the same sex or any form of sexual intercourse with an animal." MONT. CODE ANN. § 45-2-101(20) (2001).

172. MONT. CONST. art. II, § 10.

173. *See Gryczan*, 942 P.2d at 120-26.

174. *Id*. at 126-28 (Turnage, C.J., concurring and dissenting).

175. *Id.* at 115.

The Montana Supreme Court's decision in *Gryczan* might suggest an unwillingness to view homosexuals as a suspect or quasi-suspect class under the state constitution and a disinclination to mandate same-sex marriages. This finds support in the supreme court's decision in *In re Estate of Kujath*,[176] where the court held that a statute affecting men and women equally does not violate either the Equal Protection Clause of the federal constitution or article II, section 4, of the Montana Constitution.

The Montana Supreme Court has not clearly articulated a standard of review for sex discrimination under article II, section 4. The court recognizes that the United States Supreme Court applies "intermediate scrutiny" to sex-based classifications.[177] It has also fashioned its own "middle-tier" test where specific directives in the Montana Constitution protect interests in education and welfare.[178] The court, however, has not yet determined which level of scrutiny applies to sex-based classifications under article II, section 4, of the Montana Constitution.[179]

In an early decision interpreting article II, section 4, the Montana Supreme Court rejected a challenge to Montana's former rape statute, which defined the crime as one which could be directly committed only by a male against a female.[180] The supreme court noted that the vast majority of rapes were committed by men.[181] The court's tacit acceptance of the "unique physical characteristics" exception may have some significance with respect to the State's prohibition of same-sex marriages.[182]

176. *In re* Estate of Kujath, 545 P.2d 662 (Mont. 1976).

177. *See* Butte Cmty. Union v. Lewis, 712 P.2d 1309, 1312 (Mont. 1986) (citing *Craig v. Boren*, 429 U.S. 190 (1976), for proposition that classification must be substantially related to important government objective). *See also* Arneson v. State, 864 P.2d 1245, 1247-48 (Mont. 1993) (restating intermediate scrutiny test but refusing to apply the test to age-based classification absent constitutionally based directive).

178. *See* State *ex rel*. Bartmess v. Bd. of Trs., 726 P.2d 801, 804-05 (Mont. 1986) (holding educational rights subject to constitutional protection thereby triggering "middle-tier" scrutiny); Deaconess Med. Ctr. of Billings, Inc. v. Dep't of Soc. & Rehab. Servs., 720 P.2d 1165, 1168 (Mont. 1986) (holding abridgement of welfare demands more than rational basis review); *Butte Cmty. Union*, 712 P.2d at 1313-14 (finding article XII, section 3(3) of the Montana Constitution mandates greater protection of welfare rights). *See also In re* Wood, 768 P.2d 1370, 1375 (Mont. 1989) (recognizing that Montana employs a three-tier equal protection analysis).

179. *See* McKamey v. State, 885 P.2d 515, 521 (Mont. 1994) (stating that strict scrutiny applies to classifications based on race or national origin); Meech v. Hillhaven W., Inc., 776 P.2d 488, 502 (Mont. 1989) (identifying race and national origin as suspect classes); Cottrill v. Cottrill Sodding Serv., 744 P.2d 895, 897 (Mont. 1987); Oberg v. City of Billings, 674 P.2d 494, 495 (Mont. 1983) (identifying "wealth, race, nationality and alienage" as "[e]xamples of suspect criteria").

180. MONT. REV. CODE ANN. § 94-5-301(1) (Smith 1947).

181. State v. Craig, 545 P.2d 649, 653 (Mont. 1976).

182. *See* discussion *infra* notes 355-72 and accompanying text.

The Montana Supreme Court has held that evidence of disparate impact, standing alone, is insufficient to establish a violation of article II, section 4. In *State v. Spina*,[183] the court said that "it is a basic equal protection principle that the invidious quality of a law claimed to be discriminatory must ultimately be traced to an impermissibly discriminatory purpose."[184] The public policy prohibiting same-sex marriages does not appear to discriminate between men and women or have a disparate impact on either men or women.

Although rights of persons under the state equal protection clause "may be greater than rights founded on the federal [equal protection] clause,"[185] the Montana Supreme Court "has consistently followed the lead of the United States Supreme Court in interpreting the equal protection clauses of both the state and federal constitutions."[186] This may suggest that the Montana Supreme Court will apply the federal intermediate scrutiny standard to sex-based classifications challenged under the Montana equal rights amendment.

The absence of a developed body of law interpreting the state equal rights provision makes it difficult to predict how the Montana Supreme Court would evaluate a claim that article II, section 4, requires the State to sanction same-sex marriages. Nevertheless, given the purpose of the provision and the supreme court's recognition of the unique physical characteristics exception, the public policy of restricting marriage to one man and one woman should withstand challenge.

12. New Hampshire

Part 1, article 2, of the New Hampshire Constitution provides:

> All men have certain natural, essential, and inherent rights–among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin.[187]

183. State v. Spina, 982 P.2d 421 (Mont. 1999).

184. *Id*. at 437 (interpreting Equal Protection Clause and article II, section 4, of the Montana Constitution). *See also* Crabtree v. Mont. State Library, 665 P.2d 231, 235 (Mont. 1983) (stating that gender-neutral statute giving veterans preferences in public employment did not discriminate against women merely because the vast majority of the military who would be entitled to the preference is comprised of men).

185. Pfost v. State, 713 P.2d 495, 500 (Mont. 1985), *rev'd on other grounds*, Meech v. Hillhaven W., Inc., 776 P.2d 488, 501 (Mont. 1989).

186. *In re* Mont. Pac. Oil & Gas Co., 614 P.2d 1045, 1048 (Mont. 1980). *See also In re* C.H., 683 P.2d 931, 938 (Mont. 1984) ("The equal protection provisions of the federal and state constitutions are similar and provide generally equivalent but independent protections."); Emery v. State, 580 P.2d 445, 449 (Mont. 1978); McKamey v. State, 885 P.2d 515, 521 (Mont. 1994) (equating review under article II, section 4, with review under the Equal Protection Clause).

187. N.H. CONST. pt. 1, art. 2. The second sentence was added in 1974 to "insure that all men and women, all ethnic and racial groups in New Hampshire are treated equitably and, most

The New Hampshire Supreme Court applies the strict scrutiny standard of review to sex-based classifications. In *Cheshire Medical Center v. Holbrook*,[188] the court discussed the common law doctrine of necessaries, under which a husband is legally responsible for necessities provided to his wife, but a wife is not similarly responsible for necessities provided to her husband.[189] The doctrine could not be reconciled with the judicial scrutiny mandated by the second sentence of article 2. The court stated that "[i]n order to withstand scrutiny under this provision [part 1, article 2], a common law rule that distributes benefits or burdens on the basis of gender must be necessary to serve a compelling State interest."[190] Rather than abolishing the doctrine, the court chose to extend its benefits and burdens to husbands and wives equally.[191]

In *In re Opinion of the Justices*,[192] the New Hampshire Supreme Court found no state or federal constitutional impediment to a proposed bill that would prohibit homosexuals from adopting children or being licensed as adult members of foster families.[193] Addressing the federal equal protection issue first, the supreme court observed that "homosexuals do not constitute a suspect class, nor are they within the ambit of the so-called 'middle tier' level of heightened scrutiny, as sexual preference is not a matter necessarily tied to gender, but rather to inclination, whatever the source thereof."[194] After noting

importantly, have some recourse in our courts in case of discrimination." N.H. CONVENTION TO REVISE THE CONSTITUTION 153 (May 1974) (presenting comments of Delegate Schlesinger); *see also id.* at 154-156 (providing comments of Delegates Gratton, Raiche and Arnold).

188. Cheshire Med. Ctr. v. Holbrook, 663 A.2d 1344 (N.H. 1995).

189. Under this doctrine, "a husband has the duty to support his wife and is responsible for the cost of necessary goods and services furnished to his wife by third parties if he has failed to provide the necessaries himself." Mark S. Brennan, *The New Doctrine of Necessaries in Virginia*, 19 U. RICH. L. REV. 317, 317 (1985). Because "the husband and the wife were considered one legal entity–their two identities merging upon marriage so that the husband's identity subsumed that of the wife," the married woman was "legally incapable of incurring any obligations independent of her husband so that she was completely dependent upon him for providing items necessary to her maintenance." *Id*. at 318-19. The husband's duty to support his wife included the cost of necessaries provided to his wife by third parties. "Liability was based on the husband's presumed failure to provide the necessaries himself, or upon the theory that the wife was acting as his agent when she bought the necessaries." *Id*. at 319. Accordingly, "[a] creditor could sell necessaries to the wife and rely upon the law to force the husband to pay for them." *Id.* A wife, however, was not liable for necessaries provided to her husband who could contract for them himself. *Id*.

190. *Cheshire Med. Ctr.*, 663 A.2d at 1347 (citing LeClair v. LeClair, 624 A.2d 1350, 1355 (N.H. 1993) (stating, in dicta, that sex-discrimination is subject to the strict scrutiny standard of review)).

191. *Cheshire Med. Ctr.*, 663 A.2d at 1346-47.

192. *In re* Op. of Justices, 30 A.2d 21 (N.H. 1987).

193. The court, however, found that a provision in the bill prohibiting homosexuals from operating child care agencies would not pass constitutional muster. *See id.* at 25-26.

194. *Id*. at 24.

that there is no "fundamental right to engage in homosexual sodomy,"[195] the court concluded that because "no suspect or quasi-suspect class or fundamental right is involved, the proper test to apply in determining the bill's constitutionality for federal equal protection purposes is whether the legislation is 'rationally related to a legitimate governmental purpose.'"[196]

In proposing House Bill 70, the New Hampshire House of Representatives found that, "'as a matter of public policy, the provision of a healthy environment and a role model for our children should exclude homosexuals . . . from participating in governmentally sanctioned programs of adoption, foster care and day care.'"[197] The House found further that "'being a child in such programs is difficult enough without the added social and psychological complexities that a homosexual lifestyle could produce.'"[198] The New Hampshire Supreme Court determined that, with respect to the prohibition of homosexuals adopting children or being licensed as adult members of foster families, the bill was rationally related to its stated purpose, being "to provide appropriate role models for children."[199] The legislature, in the court's view, "can rationally act on the theory that a role model can influence the child's developing sexual identity."[200] "[I]t is in those living situations . . . that the role model theory provides a rational basis on which to exclude homosexuals . . . because it is in the familial context that the theory of learned sexual preference is most likely to be true."[201]

The New Hampshire Supreme Court's analysis of the state equal protection issue mainly followed its federal equal protection analysis. The court reiterated that "no suspect class is involved, nor is heightened scrutiny requiring application of the fair and substantial relationship test . . . appropriate."[202] The court determined that the proper test under the state constitution was the rational relationship test and again found that the proposed legislation was "rationally related to a legitimate governmental purpose [to avoid homosexual influence on the child's developing sexual identity] insofar as it applies to adoption and foster care."[203]

The New Hampshire Supreme Court's opinion in *In re Opinion of the Justices* strongly suggests that the state's prohibition of same-sex marriages[204]

195. *Id*. (citing Bowers v. Hardwick, 478 U.S. 186 (1986)).
196. *Id*. (citation omitted).
197. *In re Op. of Justices*, 530 A.2d at 23 (quoting N.H. H.R. Res. 32).
198. *Id.* (citation omitted).
199. *Id*. at 25.
200. *Id*.
201. *Id*. at 26.
202. *In re Op. at Justices*, 530 A.2d at 26 (citation omitted).
203. *Id.*
204. *See* N.H. REV. STAT. ANN. §§ 457:1, 457:2 (1992). In 1997, the New Hampshire legislature amended its civil rights statutes to include protection from discrimination on account

does not violate the equal rights guarantee contained in part 1, article 2 of New Hampshire's Constitution. Although the court's emphasis in *In re Opinion of the Justices* was on the impact of adult homosexuality upon children, in either adopted or in foster care, the court's unwillingness to view homosexuals as a suspect class or even deserving of "middle tier" scrutiny indicates that an asserted claim to homosexual marriage would be resolved on the rational basis standard of review. Moreover, the state's prohibition of same-sex marriages reinforces the concerns raised in *In re Opinion of the Justices* that adopted children be given appropriate role models in developing their sexual identity. Finally, David Souter, now a Member of the United States Supreme Court, concurred in the majority opinion in *In re Opinion of the Justices* when he was a justice of the New Hampshire Supreme Court.[205] In light of the decision in *In re Opinion of the Justices*, it is implausible that the New Hampshire Supreme Court would compel the State to recognize same-sex marriages.

13. New Mexico

Article II, section 18, of the New Mexico Constitution provides: "No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person."[206]

In *New Mexico Right to Choose/NARAL v. Johnson*,[207] the New Mexico Supreme Court held that the 1972 amendment to article II, section 18, which added the second sentence, mandated the strict scrutiny standard of judicial review for gender-based classifications.[208] The supreme court determined that the equal rights amendment was intended to provide "a legal remedy for the invidious consequences of the gender-based discrimination that prevailed under the common law and civil law traditions that preceded it."[209] The "gender-based discrimination" to which the court referred was historical discrimination against women.[210] Given the court's explanation of the genesis and purpose of section 18, which was to provide equal rights for women, it does not appear that the public policy of prohibiting same-sex marriages runs

of sexual orientation. 1997 N.H. Laws 88-93, ch. 108. The bill in question, however, expressly provided: "Nothing in this act shall be interpreted to permit adoptions by homosexuals or to allow marriage of persons of the same sex." 1997 N.H. Laws 93, ch. 108, § 17. The statutory prohibition of adoption by homosexuals, see N.H. REV. STAT. ANN. § 170-B:4 (1994), was repealed in 1999. *See* 1999 N.H. Laws 43, ch. 18, § 2.

205. *In re* Op. of Justices, 530 A.2d 21, 28 (N.H. 1987) (noting concurrences).

206. N.M. CONST. art. II, § 18.

207. N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841 (N.M. 1998).

208. *Id.* at 853-54, 856, 857. In *New Mexico Right to Choose*, the court struck down an administrative regulation restricting public funding of abortion. *Id.*

209. *Id.* at 853.

210. *Id.* at 852-55.

afoul of the amendment. The prohibition of same-sex marriages, after all, affects men and women equally: Neither may marry members of the opposite sex.

Apart from certain language in the New Mexico Supreme Court's decision in *New Mexico Right to Choose*,[211] there is little precedent in New Mexico's equal rights jurisprudence that distinct physical characteristics between the sexes will support a difference in treatment directly related to those characteristics. Other sources interpreting the intent of the amendment's sponsors and the public's understanding of the amendment, however, are more revealing. Like other states, New Mexico provides an official summary of arguments for and against proposed constitutional amendments. One of the arguments made in favor of the amendment was that it would "prohibit the state from enacting any law or having any law on its books which imposes legal distinctions based on sex."[212] The same argument conceded, however, that "[t]he proposed amendment does not pretend to eliminate natural physiological differences between the sexes."[213] This was confirmed in a newspaper interview with Senator Tibo Chavez, one of the sponsors of the bill that put the equal rights amendment on the ballot. Senator Chavez denied that the amendment, if ratified, would require the state to recognize single-sex marriage.[214]

The contemporary understanding of the sponsors and the public that the amendment would not preclude distinctions based on actual physical differences between the sexes is supported by the academic literature. Introducing a symposium issue on the implications of the equal rights amendment, written before the amendment was ratified, but published afterwards, Professor Leo Kanowitz noted that the amendment would not apply "in those very rare and narrowly defined circumstances where discernable sex-based biological differences clearly justify sex distinctions in the law."[215]

211. The court acknowledged that "not all classifications based on physical characteristics unique to one sex are instances of invidious discrimination." *N.M. Right to Choose/NARDL*, 975 P.2d at 854. Nevertheless, "a classification based on a unique physical characteristic" may not be used as a pretext to impose "restrictions on women's ability to work and participate in public life." *Id.* The court's acknowledgment that *some* classifications based on unique physical characteristics may not offend the state equal rights amendment may have some bearing on the whether the State must recognition same-sex marriage. *See* discussion *infra* notes 355-72 and accompanying text.

212. NEW MEXICO LEGISLATIVE COUNCIL SERVICE, CONSTITUTIONAL ARGUMENTS: AMENDMENTS PROPOSED BY THE 1972 LEGISLATURE AND ARGUMENTS FOR AND AGAINST 9, ¶ 10 (1972).

213. *Id.*

214. *See Women's Equal Rights Resolution Clears Final Legislative Hurdle*, ALBUQUERQUE J., Feb. 16, 1972, at A-5.

215. Leo Kanowitz, *The New Mexico Equal Rights Amendment: Introduction and Overview*, 3 N.M. L. REV. 1, 7 (1973). Professor Kanowitz expressed the same view in a newspaper interview

Writing in the same symposium issue, Professor Charles Daniels expressed the view that state abortion statutes "could be upheld against an Equal Rights challenge on the basis of the 'unique physical characteristics' test."[216] Not one contributor to the issue suggested that the amendment would require recognition of same-sex marriages.

Apart from the equality of rights language in the second sentence of article II, section 18, it is unlikely that the equal protection language in the first sentence of section 18 will be interpreted more broadly than the Equal Protection Clause of the Fourteenth Amendment. Thus, in *Richardson v. Carnegie Library Restaurant, Inc.*,[217] the New Mexico Supreme Court stated that "[t]he tests for reviewing equal protection challenges generally are the same under New Mexico and federal law."[218] Furthermore, in *Garcia v. Albuquerque Public Schools Board of Education*,[219] the New Mexico Court of Appeals held, "[t]he standards for violation of the equal protection clauses of the United States and New Mexican Constitutions are the same."[220] The New Mexico Supreme Court later adopted the reasoning in *Garcia*, stating, "New Mexico has long applied the same tests of reasonableness and relationship [to equal protection challenges brought under article II, section 18] as has the United States Supreme Court [to challenges brought under the Equal Protection Clause]."[221] In light of this parallel construction, if the recognition of same-sex marriages is not required by the Equal Protection Clause, then it would not be required under its state equivalent.

14. Pennsylvania

Article I, section 28, of the Pennsylvania Constitution provides: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."[222] Although, as the Third Circuit Court of Appeals has observed, "the Supreme Court of Pennsylvania has not addressed the proper level of scrutiny under the

published before the ratification vote. *See* Susanne Burks, *Wide Impact Seen For Amendment*, ALBUQUERQUE J., Feb. 18, 1972, at B-1.

216. Charles W. Daniels, *The Impact of the Equal Rights Amendment on the New Mexico Criminal Code*, 3 N.M. L. REV. 106, 111 n.32 (1973).

217. Richardson v. Carnegie Library Rest., Inc., 763 P.2d 1153 (N.M. 1988), *overruled on other grounds*, Trujillo v. City of Albuquerque, 965 P.2d 305, 315 (N.M. 1998).

218. *Richardson*, 763 P.2d at 1158. *See also* Gallegos v. Southwest Cmty. Health Servs., 872 P.2d 899, 905 (N.M. Ct. App. 1994) (stating that "the tests for reviewing equal protection challenges are the same under New Mexico and federal law") (citing *Richardson*); Mieras v. Dyncorp, 925 P.2d 518, 525 (N.M. Ct. App. 1996).

219. Garcia v. Albuquerque Pub. Schs. Bd. of Educ., 622 P.2d 699 (N.M. Ct. App. 1981), *writ quashed*, 622 P.2d 1046 (N.M. 1981).

220. *Garcia*, 622 P.2d at 701.

221. Meyer v. Jones, 749 P.2d 93, 96 (N.M. 1988).

222. PA. CONST. art. I, § 28.

E.R.A.,"[223] the case law strongly suggests that Pennsylvania follows an "absolutist" approach to sex-based classifications, so that if the classification is based on sex, it is invalid unless it is based upon physical differences between the sexes.

In *Henderson v. Henderson*,[224] the Pennsylvania Supreme Court, relying upon article I, section 28, declared unconstitutional a former statute that allowed the payment of temporary alimony, attorney fees and expenses to the wife in a divorce action, but not the husband.[225] The court explained:

> [A]s it is appropriate for the law where necessary to force the man to provide for the needs of a dependent wife, it must also provide a remedy for the man where circumstances justify an entry of support against the wife. In short, the right of support depends not upon the sex of the petitioner but rather upon need in view of the relative financial circumstances of the parties.[226]

Furthermore, the court stated that "[t]he sex of citizens of this Commonwealth is no longer a permissible factor in the determination of their legal rights and legal responsibilities."[227] In *Commonwealth v. Butler*,[228] the supreme court, in striking down discriminatory parole eligibility rules, said that "sex may no longer be accepted as an exclusive classifying tool."[229] But in *Fischer v. Department of Public Welfare*,[230] the court rejected a challenge to statutory restrictions on public funding of abortions, explaining that the restrictions were aimed at abortion as a medical procedure, not women as a class, and that the ability of only women to conceive and bear children took the restrictions out of the scope of the equal rights amendment:

> [W]e cannot accept [the] appellants' rather simplistic argument that because only a woman can have an abortion then the statute [restricting public funding of abortion] necessarily utilizes "sex as a basis for distinction" . . . . To the contrary, the basis for the distinction here is not sex but abortion, [ ] and the statute does not accord varying benefits to men and women because of their sex, but accords varying benefits to one class of women, as distinct from another, based on a voluntary choice made by the women [whether to carry the child to term or have an abortion].
>
> The mere fact that only women are affected by this statute does not necessarily mean that women are being discriminated against on the basis of sex. In this world there are certain immutable facts of life which no amount of

223. Williams v. Sch. Dist. of Bethlehem, 998 F.2d 168, 179 (3d Cir. 1993).

224. Henderson v. Henderson, 327 A.2d 60 (Pa. 1974) (referring to this provision as article I, section 27, by mistake in the majority opinion).

225. *Id.* at 62.

226. *Id.*

227. *Id.*

228. Commonwealth v. Butler, 328 A.2d 851 (Pa. 1974).

229. *Id.* at 855.

230. Fischer v. Dep't of Pub. Welfare, 502 A.2d 114 (Pa. 1985)

> legislation may change. As a consequence there are certain laws which necessarily will only affect one sex. Although we have not previously addressed this situation, other ERA jurisdictions have; and the prevailing view amongst our sister state jurisdictions is that the E.R.A. "does not prohibit differential treatment [between] the sexes when, as here that treatment is reasonably and genuinely based on physical characteristics unique to one sex."[231]

Summarizing these cases, the Pennsylvania Commonwealth Court stated: "The only types of sexual discrimination that have been permitted in this Commonwealth are those which are "reasonably and genuinely based on physical characteristics unique to one sex. [citing *Fischer v. Dep't of Public Welfare*, 502 A.2d 114, 125 (Pa. 1985)]. All other types of sexual discrimination have been outlawed in this Commonwealth."[232]

Given the Pennsylvania Supreme Court's explanation of the purpose of the state equal rights amendment, it would not appear that the amendment could be used to establish a state constitutional right to same-sex marriage. In *Commonwealth v. Butler*,[233] the Pennsylvania Supreme Court said that "the purpose of this constitutional provision was to end discriminatory treatment on account of sex."[234] In *Hopkins v. Blanco*,[235] the supreme court stated: "The obvious purpose of the Amendment was to put a stop to the invalid discrimination which was based on the sex of the person. The Amendment gave legal recognition to what society had long recognized, that men and women must have equal status in today's world."[236]

Also, in *Henderson v. Henderson*,[237] the court said:

> The thrust of the Equal Rights Amendment is to insure equality of rights under the law and to eliminate sex as a basis for distinction. The sex of citizens of this Commonwealth is no longer a permissible factor in the determination of their legal rights and legal responsibilities. The law will not impose different

231. *Id*. at 125 (citations and footnote omitted). The supreme court's recognition of the "unique physical characteristics" test may provide a basis for upholding the State's prohibition of same-sex marriages, even if the prohibition is viewed as one based on sex. *See* discussion *infra* notes 355-72 and accompanying text.

232. Bartholomew v. Foster, 541 A.2d 393, 397 (Pa. Commw. Ct. 1988) (citations omitted), *aff'd by an equally divided court*, 563 A.2d 1390 (Pa. 1989). *See also* George v. George, 409 A.2d 1, 1 (Pa. 1979) (stating there is no "domestic relations" exception to the scope of the state equal rights amendment).

233. Commonwealth v. Butler, 328 A.2d 851 (Pa. 1974).

234. *Id*. at 855.

235. Hopkins v. Blanco, 320 A.2d 139 (Pa. 1974).

236. *Id.* at 140 (extending common law right to recover damages for loss of consortium to wives, as well as to husbands).

237. Henderson v. Henderson, 327 A.2d 60 (Pa. 1974).

> benefits or different burdens upon the members of a society based on the fact that they may be man or woman.[238]

The Pennsylvania reviewing courts have recognized that a statute or judicial doctrine that favors neither men nor women does not violate the equal rights amendment.[239] Thus, in *Laspino v. Rizzo*,[240] the Pennsylvania Commonwealth Court reversed and remanded for further proceedings a trial court order entering summary judgment in favor of the plaintiff. *Laspino* involved a challenge to a municipal ordinance prohibiting massage parlor employees from massaging persons of the opposite sex. The commonwealth court held that the lower court erred in applying "Pennsylvania's absolute E.R.A. standard" to strike down a "facially neutral ordinance."[241] Moreover, the Commonwealth's statute prohibiting of same-sex marriages would not appear to violate the state equal rights amendment because the statute is facially neutral and was not enacted with the intent to discriminate against either men or women.

In a pair of recent cases currently under review by the Pennsylvania Supreme Court, the Pennsylvania Superior Court held, as a matter of statutory interpretation, that one homosexual domestic partner may not adopt the children of the other partner unless that partner relinquishes his or her own

238. *Id*. at 62. *See also* Swidzinski v. Schultz, 493 A.2d 93, 95 (Pa. Super. Ct. 1985) (stating the Equal Rights Amendment was "not meant merely to benefit women," a deceased husband's estate was insufficient to pay his funeral expenses, those expenses, to the extent of the insufficiency, should be charged to his surviving wife, as her share in the burdens arising out of the marital relationship); DeRosa v. DeRosa, 60 Pa. D. & C.2d 71, 73-74 (1972) (finding that regarding the proposed federal Equal Rights Amendment and the adopted state equal rights amendment, "[b]oth amendments recognize the fact that heretofore women in American society have been assigned to a different status than men and have not been accorded the same legal rights, opportunities or responsibilities as men").

239. *See, e.g*., Commonwealth v. Finnegan, 421 A.2d 1086, 1089-90 (Pa. Super. Ct. 1980) (finding a gender neutral prostitution statute did not implicate the equal rights amendment); Smith v. Smith, 361 A.2d 756 (Pa. Super. Ct. 1976) (upholding interspousal tort immunity doctrine). *See also* Hon. Phyllis W. Beck & Joanne Alfano Baker, *An Analysis of the Impact of the Pennsylvania Equal Rights Amendment*, 3 WIDENER J. PUB. L. 743, 798 (1994) (stating the Equal Rights Amendment "equalized the legal burdens and benefits of men and women").

240. Laspino v. Rizzo, 398 A.2d 1069 (Pa. Commw. Ct. 1979).

241. *Id*. at 1073. *See also* Colorado Springs Amusements, Ltd. v. Rizzo, 524 F.2d 571 (3d Cir. 1975) (rejecting federal constitutional challenge to same ordinance); Vorchheimer v. Sch. Dist. of Philadelphia, 532 F.2d 880 (3d Cir. 1976), *aff'd* 430 U.S. 703 (1977) (rejecting federal equal protection challenge to local school board policy of maintaining all male and all female public schools). *But see* Newberg v. Bd. of Pub. Educ., 26 Pa. D. & C.3d 682, 709 (1983) (invalidating separate public high schools for boys and girls, "under Pennsylvania's ERA, the separate-but-equal concept . . . does not have currency"); Commonwealth v. Pa. Interscholastic Athletic Ass'n, 334 A.2d 839, 842 (Pa. Commw. Ct. 1975) (dictum) (stating equality of rights under the law is denied to high school girls who are capable of playing on boys' teams, but are denied the opportunity to do so, "even where separate teams are offered for boys and girls in the same sport").

parental rights.[242] Although the court did not address any constitutional issues in either opinion, in each case it did note the "strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman."[243] It also noted the statutory definition of marriage as "a 'civil contract by which one man and one woman take each other for husband and wife.'"[244] In the course of each opinion, the court said that it was for the legislature, not the courts, to determine whether same-sex marriage should be permitted.[245]

Pennsylvania has two other constitutional provisions in its Declaration of Rights that guarantee equal protection. Article I, section 1, provides that "[a]ll men are born equally free and independent."[246] Article I, section 26, provides: "Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right."[247] The Pennsylvania Supreme Court held that "[t]he equal protection provisions of the Pennsylvania Constitution are analyzed by this Court under the same standards used by the United States Supreme Court when reviewing equal protection claims under the Fourteenth Amendment."[248] Given the similarity of standards, article I, sections 1 and 26, of the Pennsylvania Constitution most likely will not be interpreted to confer a right to same-sex marriages unless the Equal Protection Clause of the Fourteenth Amendment is so interpreted.

15. Texas

The Texas equal rights amendment provides: "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national

242. *See In re* Adoption of C.C.G. & Z.C.G., 762 A.2d 724 (Pa. Super. Ct. 2000), *allocatur granted*, Aug. 8, 2001; *In re* Adoption of R.B.F. & R.C.F., 762 A.2d 739 (Pa. Super. Ct. 2000), *allocatur granted*, Aug. 8, 2001.

243. *In re Adoption of C.C.G.*, 762 A.2d at 728 (citing 23 PA. CONS. STAT. ANN. § 1704 (West 2001)); *In re Adoption of R.B.F.*, 762 A.2d at 742 (citing 23 PA. CONS. STAT. ANN. § 1704 (West 2001)).

244. *In re Adoption of C.C.G.*, 762 A.2d at 728 (citing 23 PA. CONS. STAT. ANN. § 1102 (West 2001)); *In re Adoption of R.B.F.*, 762 A.2d at 742 (citing 23 PA. CONS. STAT. ANN. § 1102 (West 2001)).

245. *In re Adoption of C.C.G.*, 762 A.2d at 728; *In re Adoption of R.B.F.*, 762 A.2d at 743. In *De Santo v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984), the Pennsylvania Superior Court held that Pennsylvania does not recognize same-sex, common law marriages. *Id.* at 953-56. The court declined to decide whether the Commonwealth's refusal to recognize such "marriages" violates the state equal rights amendment because the plaintiffs had not raised that issue in the lower court. *Id.* at 956.

246. PA. CONST. art. I, § 1.

247. PA. CONST. art. I, § 26.

248. Love v. Borough of Stroudsburg, 597 A.2d 1137, 1139 (Pa. 1991).

origin."[249] In *In re McLean*,[250] the Texas Supreme Court held that sex-based classifications are subject to strict scrutiny.[251] In so ruling, the court refused to adopt "a *per se* standard which would automatically invalidate gender-based distinctions."[252]

Texas courts consistently recognize a unique physical characteristics exception to the equality of rights mandate of article I, section 3a.[253] In *Finley v. State*,[254] the Texas Court of Criminal Appeals rejected an equal rights challenge to the former Texas rape statute.[255] Under that statute, only a man, and not a woman, could be the "actual perpetrator" of the offense[256] and only women, and not men, could be the victims. The court noted that rape is a crime more likely to be committed by men than by women, and that such sexual assaults "carry with them the danger of serious bodily injury."[257] Additionally, the court held that "a unique characteristics test can be applied to justify the statutory classification."[258] "Hymen and uterine injury to female rape victims, the possibility of pregnancy, and the physiological difficulty of a woman forcing a man to have sexual intercourse with her all suggest a justification for the sexual distinction embodied in [the rape statute]."[259]

In *Mercer v. Board of Trustees of North Forest Independent School District*,[260] the Texas Court of Appeals held that a dispute over a hair-length regulation that applied only to high school boys, and not to high school girls, was nonjusticiable.[261] In the course of its opinion, however, the court,

249. TEX. CONST. art. I, § 3a.

250. *In re* McLean, 725 S.W.2d 696 (Tex. 1987).

251. *Id*. at 698. In *McLean*, the supreme court struck down a statute making it more difficult for men than for women to legitimate illegitimate children.

252. *Id*.

253. As to the possible significance of this exception with respect to the question of same-sex marriages, see discussion *infra* notes 355-72 and accompanying text.

254. Finley v. State, 527 S.W.2d 553 (Tex. Crim. App. 1975), *disavowed in part*, *Ex parte* Groves, 571 S.W.2d 888, 892 (Tex. Crim. App. 1978) (en banc), *reaffirmed*, Carpenter v. State, 639 S.W.2d 311, 314 (Tex. Crim. App. 1982).

255. TEX. PENAL CODE ANN. § 21.02 (Vernon 1974), *repealed by* 1983 Tex. Gen. Laws ch. 997, § 12. *See* TEX. PENAL CODE ANN. § 22.011 (Vernon 1994) (prohibiting offense of sexual assault).

256. TEX. PENAL CODE ANN. § 21.01(3) (Vernon 1974) (providing the definition of "sexual intercourse" to be "any penetration of the female sex organ by the male sex organ").

257. *Finley*, 527 S.W.2d at 556.

258. *Id*.

259. *Id*.

260. Mercer v. Bd. of Trs., 538 S.W.2d 201 (Tex. Civ. App. 1976).

261. *Id*. at 206-07. *See also* Barber v. Colo. Indep. Sch. Dist., 901 S.W.2d 447, 449-51 (Tex. 1995) (holding that controversies over hair-length regulations in public schools are not justiciable under the state equal rights amendment); Bd. of Trs. v. Toungate, 958 S.W.2d 365, 372-73 (Tex. 1997) (declining to reconsider and overrule *Barber*).

anticipating the Texas Supreme Court's later decision in *In re McLean*,[262] rejected the view that the state equal rights amendment "admits of no exception to its prohibition of sex discrimination."[263] One exception the court recognized in *Mercer* was a classification required by "physical characteristics."[264] With respect to this exception, the court stated that it was "simply recognizing the facts of life."[265] The court also provided: "For us to adjudicate that women are men would be as futile as it would be absurd. Neither the ERA nor the rights established by it require us to construe it so as to deny sexual or reproductive differences between the sexes."[266]

A pair of Texas cases challenged a Dallas municipal ordinance restricting the location of sexually oriented businesses. The Texas Court of Appeals refined the physical characteristics test adopted in *Mercer*. In *MJR's Fare of Dallas, Inc. v. City of Dallas*[267] and *Messina v. State*,[268] the court of appeals held that the party challenging a law based on the state equal rights amendment must show that the contested law discriminates against one sex solely on the basis of gender. The proponent of the law can overcome that requirement if he shows that physical characteristics form the sex-based distinction. If the proponent cannot overcome the initial premise, then the proponent must show that "no other means exist to protect the state's compelling interest."[269]

In both cases, the court of appeals rejected a challenge to a Dallas zoning ordinance restricting the area in which sexually oriented businesses could operate. The ordinance defined a sexually oriented business as an adult cabaret,[270] which in turn was defined as a bar regularly featuring persons performing in a state of nudity.[271] "State of nudity" included dress that failed to cover opaquely the areola of the female breast.[272] In *MJR's Fare of Dallas, Inc*., the court held that the ordinance's inclusion of the term, "areola of the female breast" without a similar requirement for male performers did not unconstitutionally discriminate against females in violation of the equal rights amendment. "Dallas introduced undisputed expert testimony that (1) physiological and sexual distinctions exist between the male and female breast;

262. *In re* McLean, 725 S.W.2d 696 (Tex. 1987).
263. *Mercer*, 538 S.W.2d at 206.
264. *Id.*
265. *Id*.
266. *Id*.
267. MJR's Fare of Dallas, Inc. v. City of Dallas, 792 S.W.2d 569 (Tex. App. 1990).
268. Messina v. State, 904 S.W.2d 178 (Tex. App. 1995).
269. *MJR's Fare of Dallas, Inc*., 792 S.W.2d at 575. *See also Messina*, 904 S.W.2d at 181.
270. DALLAS, TEX., CITY CODE § 41A-2(3) (1993).
271. *Id.* § 41A-2(3)(A).
272. *Id.* § 41A-2(15)(B).

(2) female breasts differ both internally and externally from male breasts; and (3) the female breast, but not the male breast, is a mammary gland."[273]

The court agreed with the City of Dallas that, because the plaintiff had offered no evidence to rebut this testimony, the plaintiff had failed to show that the ordinance discriminated against females solely on the basis of gender.[274] In *Messina*, the court of appeals rejected a second challenge to the same ordinance on the basis of its earlier decision.[275]

In *Boutwell v. State*,[276] the Texas Court of Criminal Appeals considered a challenge to the sexual abuse of child statute that provided, as a defense to prosecution, that the victim was of the opposite sex, fourteen years old or older at the time of the offense and had previously engaged promiscuously in sexual intercourse or deviate sexual intercourse.[277] In *Boutwell*, the defendant claimed that the statutory defense violated the federal Equal Protection Clause and the state equal rights amendment because the defense was available only in cases where the victim was of the opposite sex, and not also in cases where the perpetrator and the victim were of the same sex.[278] The court noted that "a female defendant situated similarly to appellant–that is, a female who had engaged in deviate sexual intercourse with a child 14 years or older who was of the same sex–would likewise be denied the 'promiscuity' defense."[279] Additionally, the court found that defendant's argument "proceeds upon a fallacy of amphiboly: his complaint is not that he is discriminated against on the basis of 'sex' in the sense of 'gender;' but rather, that his 'sex' act is entitled to protection equal to that given heterosexual conduct under the law as stated in s[ection] 21.10(b)."[280] The court rejected the defendant's argument because it found no authority on which to hold that "homosexual conduct is a constitutionally protected activity under the Equal Protection Clause or the State Equal Rights Amendment."[281]

273. *MJR's Fare of Dallas, Inc.*, 792 S.W.2d at 575.

274. *Id*.

275. Messina v. State, 904 S.W.2d 178, 181 (Tex. App. 1996). *But see* Williams v. City of Forth Worth, 782 S.W.2d 290 (Tex. App. 1989) (holding a similar ordinance unconstitutional where the defendant city presented no evidence that prohibiting exposure of female, but not male, breasts, was justified by physical differences between men and women).

276. Boutwell v. State, 719 S.W.2d 164 (Tex. Crim. App. 1985) (en banc), *disavowed on other grounds*, Vernon v. State, 841 S.W.2d 407, 411 (Tex. Crim. App. 1992) (en banc).

277. See TEX. PENAL CODE ANN. § 21.10(b) (1974), *repealed by* 1983 Tex. Gen. Laws ch. 997, § 12.

278. *Boutwell*, 719 S.W.2d at 167-69.

279. *Id*. at 169.

280. *Id*.

281. *Id*. In *State v. Morales*, 826 S.W.2d 201, 203-05 (Tex. App. 1992), the Texas Court of Appeals declared unconstitutional the state sodomy law on the ground that the statute violated an implied right of privacy. *See* TEX. PENAL CODE ANN. § 21.06 (Vernon 1994). The Texas Supreme Court reversed the court of appeals and remanded the case to the district court with

More recently, the Texas Court of Appeals considered a multifaceted attack on the Texas sodomy statute. Under that statute, a person commits the offense of "homosexual conduct" when he "engages in deviate sexual intercourse with another individual of the same sex."[282] "Deviate sexual intercourse," in turn, is defined as "any contact between any part of the genitals of one person and the mouth or anus of another person" or "the penetration of the genitals or the anus of another person with an object."[283]

In *Lawrence v. State*,[284] the Texas Court of Criminal Appeals upheld section 21.06 against an array of state and federal constitutional challenges. Importantly, the defendants argued that the sodomy statute discriminates on account of sex in violation of the state equal rights amendment because it prohibits only homosexual, and not also heterosexual, deviate sexual conduct.[285] The State defended the statute on the ground that it applies equally to men and women, stating that "two men engaged in homosexual conduct face the same sanctions as two women."[286] The defendants replied that a similar rationale was expressly rejected in *Loving v. Virginia*,[287] where the Supreme Court struck down Virginia's anti-miscegenation statute.[288] The court of appeals rejected the *Loving* analogy:

> [W]hile the purpose of Virginia's miscegenation statute was to segregate the races and perpetuate the notion that blacks are inferior to whites, no such sinister motive can be ascribed to the criminalization of homosexual conduct. In other words, we find nothing in the history of Section 21.06 to suggest [that] it was intended to promote any hostility between the sexes, preserve any unequal treatment as between men and women, or perpetuate any societal or cultural bias with regard to gender. Thus, we find [defendants'] reliance on *Loving* unpersuasive.[289]

directions to dismiss the complaint because the court lacked equity jurisdiction to consider a constitutional challenge to a criminal statute in the context of a declaratory judgment action. State v. Morales, 869 S.W.2d 941, 948 (Tex. 1994). A judgment that a court lacked jurisdiction to enter cannot be considered a precedent. In any event, there is an obvious distinction between limitations on the State's power to criminalize noncommercial sexual conduct engaged in by consenting adults in private and its obligation to give public recognition to a homosexual relationship. *See* Boulding v. State, 719 S.W.2d 333 (Tex. Crim. App. 1986) (en banc) (per curiam) (reversing court of appeals holding that statute limiting promiscuity defense to heterosexual assaults violated the Equal Protection Clause).

282. TEX. PENAL CODE ANN. § 21.06(a) (Vernon 1994).

283. TEX. PENAL CODE ANN. § 21.01(1) (Vernon 1994).

284. Lawrence v. State, 41 S.W.3d 349 (Tex. Crim. App. 2001) (en banc).

285. *Id*. at 357.

286. *Id*.

287. *Id.*; Loving v. Virginia, 388 U.S. 1 (1967).

288. *See Loving*, 388 U.S. at 12; *Lawrence*, 41 S.W.3d at 357.

289. *Lawrence*, 41 S.W.3d at 357-58. The *Loving* analogy seems inapt on purely logical grounds. The statute struck down in *Loving* prohibited marriages between members of *different*

Noting that "[t]he mere allusion to gender is not a talisman of constitutional invalidity,"[290] the court of appeals held that "[i]f a statute does not impose burdens or [confer] benefits upon a particular gender, it does not subject individuals to unequal treatment."[291] Although section 21.06 "includes the word 'sex,' it does not elevate one gender over the other. Neither does it impose burdens on one gender not shared by the other."[292] Because the sodomy statute is "gender-neutral on its face," the court held that defendants had the burden "of showing [that] the statute has had an adverse effect upon one gender and that such disproportionate impact can be traced to a discriminatory purpose."[293] The defendants, however, made no attempt to establish, nor did they even claim, that "Section 21.06 has had any disparate impact between men and women."[294] "Rather, [defendants] complain only that the statute has had a disparate impact between homosexuals and heterosexuals. While we recognize [that] the statute may adversely affect the conduct of male and female homosexuals, this simply does not raise the specter of gender-based discrimination."[295] Adverting to its earlier discussion of "sexual orientation,"[296] the court held that "[t]o the extent [that] the statute has a disproportionate impact on homosexual conduct, the statute is supported by a legitimate state interest," such as "preserving public morals."[297] The State's

races, not between members of the *same* race. The equivalent, in the area of sex, of an anti-miscegenation statute would *not* be a statute prohibiting marriage between members of the *same* sex, but one prohibiting marriage between members of the *opposite* sex, an absurdity that no state has ever contemplated. The equivalent, in the area of race, of a statute prohibiting same-sex marriage, would be a statute that prohibited marriage between members of the *same* race. Laws banning marriages between members of the same race would be unconstitutional, not because they would "segregate the races and perpetuate the notion that blacks are inferior to whites," but because there could be no possible rational basis for such laws. *Id.* Laws against same-sex marriages, on the other hand, are supported by a multitude of reasons. As Professor Richard Duncan has observed, "[c]onventional marriage laws reasonably advance many legitimate governmental interests," which may include safeguarding public morality, encouraging childbirth within marriage, promoting the undeniable advantages of dual-gender parenting, not placing society's "stamp of approval" on homosexual relationships and avoiding a slippery slope of intended and unintended consequences of recognizing same-sex marriages. Richard F. Duncan, *The Narrow and Shallow Bite of* Romer *and the Eminent Rationality of Dual-Gender Marriage: A (Partial) Response to Professor Koppelman*, 6 WM. & MARY BILL OF RTS. J. 147, 158-165 (1997).

290. *Lawrence*, 41 S.W.2d. at 359.
291. *Id*.
292. *Id*.
293. *Id.*
294. *Id*.
295. *Lawrence*, 41 S.W.2d. at 359.
296. *Id.* at 353-57.
297. *Id*. at 359.

prohibition of same-sex marriages would easily satisfy this more relaxed standard of judicial review.

Clearly, *Lawrence* supports the prohibition of same-sex marriages. If the State can criminalize homosexual conduct without implicating the equal rights amendment, then it necessarily has the authority to limit marriage to one man and one woman. Like the statute making homosexual sodomy a crime, the statute prohibiting same-sex marriages[298] is gender-neutral on its face. Moreover, nothing in the history of that statute suggests that the prohibition was "intended to promote any hostility between the sexes, preserve any unequal treatment as between men and women, or perpetuate any societal or cultural bias with regard to gender."[299]

The Texas Supreme Court has not yet determined whether, for purposes of the state equal protection guarantees,[300] evidence of a foreseeable, but unintended, disproportionate impact alone is sufficient to prove a discriminatory classification. It has, however, expressed doubt that such evidence is ever allowable.[301] Nevertheless, two court of appeals decisions have indicated that such evidence is *not* germane in an equal protection or equal rights challenge.

In *Bailey v. City of Austin*,[302] the court of appeals considered a state equal protection and equal rights challenge to a referendum amendment of the Austin city charter that eliminated employee benefits for "domestic partners." Although the amendment was facially gender neutral, the plaintiffs, who were several city employees and their same-sex domestic partners, argued that the amendment would have a disproportionate effect on homosexuals. They argued such impact existed because "*all* homosexual employees with domestic partners are deprived of benefits for their partners while only a *portion* of heterosexual employees with domestic partners, those who *choose* not to marry, are similarly deprived of benefits."[303] The court of appeals rejected this argument.

"Evidence of a disproportionate burden alone," the court stated, "is not enough to warrant analysis under the alleged classification [homosexuals] rather than the statutory classification . . . Evidence of an *intent* to classify on the basis of the alleged class is also necessary."[304] The court found that there was insufficient evidence from which it could conclude that "the underlying

298. *See* TEX. FAM. CODE ANN. § 2.001(b) (Vernon 1998).

299. *Lawrence*, 41 S.W.3d at 358.

300. TEX. CONST. art. I, §§ 3, 3a.

301. *See* Richards v. LULAC, 868 S.W.2d 306, 313-14 (Tex. 1993); *see also In re* McLean, 725 S.W.2d 696, 697 (Tex. 1987) ("Our . . . inquiry is whether equality was denied *because of* a person's membership in a protected class of sex, race, color, creed, or national origin.").

302. Bailey v. City of Austin, 972 S.W.2d 180 (Tex. App. 1998).

303. *Id*. at 186.

304. *Id*.

intent behind the passage of [the referendum] was to discriminate against the narrow class of homosexuals as opposed to the broader class of all unmarried partners."[305] Holding that the classification at issue consisted of "all unmarried domestic partners," the court determined that the referendum was rationally related to a legitimate purpose, which was the city's interest in recognizing legal relationships, including marriages.[306] Also, in *Lawrence v. State*,[307] as previously noted, the court of appeals rejected an equal rights challenge to the state sodomy statute. The court stated that where a statute is gender-neutral on its face, those who challenge it "bear the burden of showing [that] the statute has had an adverse effect upon one gender and that such disproportionate impact can be traced to a discriminatory purpose."[308] Advocates of homosexual marriage cannot show that laws restricting marriage to one man and one woman adversely affect either men or women.

Article I, section 3, of the Texas Constitution provides, in pertinent part: "All free men . . . have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public service."[309] The Fifth Circuit Court of Appeals has observed that "the same requirements are applied to equal protection challenges under the Texas Constitution as to those under the United States Constitution."[310] In *State v. Richards*,[311] the Texas Supreme Court stated that a "classification must be based on a real and substantial difference having relation to the subject of the particular enactment,"[312] but added, "if there is a reasonable ground therefore and the law operates equally on all within the same class, it will be held

305. *Id*. at 187.

306. *Id.* at 187-90.

307. Lawrence v. State, 41 S.W.3d 349 (Tex. Crim. App. 2001) (en banc).

308. *Id*. at 359.

309. TEX. CONST. art. I, § 3.

310. Reid v. Rolling Fork Public Utility Dist., 979 F.2d 1084, 1089 (5th Cir. 1992) (citing Rose v. Doctors Hosp., 801 S.W.2d 841, 846 (Tex. 1990)) (stating that equal protection cases decided under the Texas Constitution "echo federal standards when determining whether a statute violates equal protection under either provision"); Goheen v. Koester, 794 S.W.2d 830, 834 n.3 (Tex. App. 1990) (noting that "[t]he equal protection clause of the United States Constitution has been held to be co-extensive with article I, section 3 of the Texas Constitution"); Twiford v. Nueces County Appraisal Dist., 725 S.W.2d 325, 328 n.5 (Tex. App. 1987) (noting that the "same requirements" apply to equal protection challenges under the Texas and United States Constitutions). *See also* Garay v. State, 940 S.W.2d 211, 216 (Tex. App. 1997) (stating that "[t]he Texas equal protection provision traditionally corresponds to the federal provision"); Rodriguez v. Motor Express, Inc., 909 S.W.2d 521, 526 (Tex. App. 1995) ("Equal protection challenges under the Texas and United States Constitutions are analyzed in the same manner."), *rev'd on other grounds*, Motor Express, Inc. v. Rodriguez, 925 S.W.2d 638 (Tex. 1996); Hogan v. Hallman, 889 S.W.2d 332, 338 (Tex. App. 1994) ("Texas cases follow federal standards when determining whether a statute violates equal protection under either provision.").

311. State v. Richards, 301 S.W.2d 597 (Tex. 1957).

312. *Id*. at 600-01.

valid."[313] As Texas Supreme Court Chief Justice Thomas Phillips has noted, "Texas courts have traditionally adopted the federal equal protection analysis in interpreting our own equal protection provision."[314] Given this interpretation, it is unlikely that the Texas Supreme Court would interpret the state equal protection guarantee to require recognition of same-sex marriages unless the Equal Protection Clause is so interpreted.

16. Utah

Article IV, section 1, of the Utah Constitution provides: "The rights of citizens of the State of Utah to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges."[315] This section, which was part of the original constitution of the State of Utah, appears in an article of the state constitution dealing with elections and the right of suffrage. Perhaps not surprisingly, the focus of the debates in the constitutional convention was on female suffrage.[316]

Utah courts have not agreed on a standard of review for sex-based classifications. An early decision of the Utah Supreme Court did apply the rational-basis standard in interpreting article IV, section 1.[317] A later decision of the Utah Court of Appeals, however, observed that the Utah Supreme Court had not yet determined the appropriate standard of review, and opined that the state standard is "at least as stringent as the [federal] equal protection intermediate review for gender discrimination."[318]

Regardless of the applicable standard of review, however, the wording of the second sentence of article IV, section 1, would not appear to support a right to same-sex marriage.[319] Men and women enjoy equal rights with respect to

313. *Id*. at 601.

314. Lucas v. United States, 757 S.W.2d 687, 703 (Tex. 1988) (Phillips, C.J., dissenting from opinion striking down statute limiting personal injury damage awards under the "open courts" guarantee of the Texas Constitution).

315. UTAH CONST. art. IV, § 1. The language of this provision was taken from article 6, section 1, of the Wyoming Constitution. *See* WYO. CONST. art. 6, § 1.

316. *See* 1 OFFICIAL REPORT OF THE PROCEEDINGS & DEBATES OF THE CONSTITUTION ASSEMBLED AT SALT LAKE CITY ON THE FOURTH DAY OF MARCH, 1895, TO ADOPT A CONSTITUTION FOR THE STATE OF UTAH 420-91, 496-601, 679-767 (State Printing Co. 1898).

317. *See* Stanton v. Stanton, 517 P.2d 1010, 1012 (Utah 1974) (upholding statute establishing different ages of majority for men and women).

318. Estate of Scheller v. Pessetto, 783 P.2d 70, 77 (Utah Ct. App. 1989) (preventing fathers from inheriting from illegitimate children, unless they have openly treated the children as their own, does not violate either the state or federal constitution). *See also* Redwood Gym v. Salt Lake County Comm'n, 624 P.2d 1138, 1147 (Utah 1981) (not deciding whether "a classification based on sex . . . is or should be inherently suspect under Utah law").

319. UTAH CONST. art. IV, § 1 (stating that "[b]oth male and female citizens of this state shall equally enjoy all civil, political and religious rights and privileges").

the right of marriage. Both men and women may marry a member of the opposite sex; neither may marry a member of the same sex. Inequality is not found in the statute that prohibits same-sex marriages.[320] This is confirmed by the Utah Supreme Court's decision in *Redwood Gym v. Salt Lake County Commission*.[321] In *Redwood Gym*, the supreme court rejected an equal protection and sex discrimination challenge to a Salt Lake County ordinance prohibiting opposite-sex massages by employees of commercial massage parlors.[322] Without specifically mentioning article IV, section 1, the court stated:

> Plaintiffs suggest that the ordinance provision creates a classification based on sex, which is or should be inherently suspect under Utah law. Without ruling upon the latter portion of this contention, we observe that no sex classification is created. Not all legal provisions which take gender into consideration create such sex-based classifications. The terms of the opposite-sex massage provision do not place either sex at an inherent legal disadvantage vis-a-vis the other. Men and women are afforded an equal right to practice as licensed masseurs, or to patronize massage parlors. Only the massage of a member of one sex by a member of the other sex is forbidden. It is true that the makeup of the clientele may, as a practical matter, determine the gender of massage parlor employees, and vice versa. Such distinctions, however, are not creatures of law, and their existence does not offend equal protection.[323]

The court's reasoning has obvious implications for the recognition of same-sex marriages.

In a series of cases, two of which were later reversed by the Supreme Court on federal constitutional grounds, the Utah Supreme Court displayed a willingness to recognize biological differences between the sexes as a valid basis for a difference in treatment.[324] In *Stanton v. Stanton*,[325] the Utah Supreme Court held that a statute setting different ages of majority for men and women did not violate either the state or federal constitution, noting that "girls tend generally to mature physically, emotionally and mentally before boys, and . . . generally tend to marry earlier."[326] In *Turner v. Department of Employment Security*,[327] the court held that a statute declaring a person ineligible for unemployment compensation for twelve weeks before and six weeks after the expected date of childbirth, and during any week of unemployment when it was found that her total or partial unemployment was

320. UTAH CODE ANN. § 30-1-2(5) (1998).
321. *See Redwood Gym*, 624 P.2d at 1147.
322. *See id*.
323. *Id*.
324. *See* discussion *infra* notes 355-72 and accompanying text.
325. Stanton v. Stanton, 517 P.2d 1010 (Utah 1974).
326. *Id*. at 1012.
327. Turner v. Dept. of Employment Sec., 531 P.2d 870 (Utah 1975).

due to pregnancy, did not violate article IV, section 1, of the Utah Constitution.[328] The court commented that "[i]t is just as bad to treat unequal things as equals as it is to treat equal things unequally."[329] In *Swayne v. L.D.S. Social Services*,[330] the Utah Supreme Court upheld the validity of a statute that required the consent of the mother to the adoption of an illegitimate child, but not of the natural father unless, prior to the adoption, he had filed an acknowledgment of paternity with the state health department. The court rejected both state and federal constitutional challenges to the statute.[331] With respect to the plaintiffs' Equal Protection Clause claim, the court stated:

> Utah's registration statute was designed to facilitate permanent and secure placement of illegitimate children whose unwed mothers wish to give them up for adoption and whose unwed fathers take no steps to officially identify themselves and acknowledge paternity. Because the identity of a mother of an illegitimate child is usually readily ascertainable, an unwed mother is forced to either immediately assume legal responsibility for the physical care of her child or relinquish her parental rights. Paternity, however, is more difficult to establish. Even a father who informally acknowledges his responsibility for a pregnancy may later deny paternity and possibly avoid legal liability for his child's care. Thus, a reasonable basis for the different classification of unwed fathers and unwed mothers in [the statute] is the fact that while identification of both parents of an illegitimate child is necessary, identification of a child's mother is automatic because of her role in the birth process, while identification of the father is not. A reasonable basis for the different classification of filing and nonfiling fathers is the state's need to distinguish those fathers who have accepted legal responsibility for the care of their children from those fathers who have not. Whether [the statute] utilizes the best means for accomplishing this purpose involves policy issues which lie within the prerogative of the legislature to address. Nevertheless, we are sufficiently convinced that there are reasonable bases for the classifications in [the statute] and that the classifications are reasonably calculated to serve a proper governmental objective.[332]

With respect to the plaintiff's argument under article IV, section 1, the supreme court stated that even if it accepted the proposition that the Utah Constitution defines gender as an "inherently suspect classification," plaintiff's claim would fail.[333] It further stated that because "'the mere existence of a

328. *Id.* at 871 (basing its reasoning on the idea that "[i]n the matter of pregnancy there is no way to find equality between men and women").

329. *Id.*

330. Swayne v. L.D.S. Soc. Servs., 795 P.2d 637 (Utah 1990).

331. *See id.*

332. *Id.* at 641 (footnotes omitted).

333. *See id.*

biological link' by itself has not been deemed to create a fundamental right in an unwed father to parent his illegitimate child."[334]

In *State v. Housekeeper*,[335] the Utah Supreme Court rejected a challenge to the former statutory rape statute which applied only to males.[336] The court stated that the legislature's decision to define the offense as one which could be committed only by a male against a female was justified by the need to address the problem of adolescent pregnancy.[337] Moreover, the court justified the statute by the fact that adult males are more sexually aggressive than adult females and more likely to take advantage of immature girls than adult females are likely to take advantage of immature boys.[338]

Utah has two provisions in its Declaration of Rights that have been treated as equal protection guarantees. Article I, section 2, provides: "All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require."[339] Additionally, article I, section 24, provides that "[a]ll laws of a general nature shall have uniform operation."[340] Both provisions have been determined to provide the guarantee of equal protection to individuals.

The Utah Supreme Court held that, although article I, section 2, "uses the language 'equal protection,' [and] . . . is relevant to the construction of Article I, [section] 24, it is more a statement of a purpose of government than a legal standard that can be used to measure the legality of governmental action."[341] Article I, section 24, is "generally considered the equivalent of the Equal Protection Clause of the [Fourteenth] Amendment, [of the] U.S. Constitution."[342] Accordingly, section 24 would not be interpreted to recognize same-sex marriages unless the Equal Protection Clause were so interpreted.

334. *Id*. (citation omitted). *See also In re* Adoption of B.B.D., 984 P.2d 967, 972 (Utah 1999) (following *Swayne*).

335. State v. Housekeeper, 588 P.2d 139 (Utah 1978).

336. *See* UTAH CODE ANN. § 76-5-401 (1999).

337. *See Housekeeper*, 588 P.2d at 141.

338. *Id.*

339. UTAH CONST. art. I, § 2.

340. UTAH CONST. art. I, § 24.

341. Malan v. Lewis, 693 P.2d 661, 669 n.13 (Utah 1984).

342. Liedtke v. Schettler, 649 P.2d 80, 81 n.1 (Utah 1982). *See also* Blue Cross & Blue Shield v. State, 779 P.2d 634, 637 (Utah 1989) (stating that "[t]he principles and concepts embodied in the federal equal protection clause and [article I, section 24] are substantially similar"); Redwood Gym v. Salt Lake County Comm'n, 624 P.2d 1138, 1146 (Utah 1981) (refusing to apply a more rigid standard with respect to Utah's equal protection provision).

17. Virginia

Article I, section 11, of the Virginia Constitution provides that "the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination."[343] The Virginia Supreme Court has consistently held that the anti-discrimination clause of article I, section 11, is no broader than the Equal Protection Clause of the Fourteenth Amendment.[344] Given this interpretation, Virginia's prohibition of same-sex marriages[345] would not violate article I, section 11, unless it also violated the federal Equal Protection Clause. It is unlikely, therefore, that the Virginia Supreme Court would invalidate the public policy against same-sex marriages on the authority of section 11. This conclusion is reinforced by the court's holdings that a mother or father in an openly homosexual relationship is not a fit parent to have custody of minor children.[346]

18. Washington

Article XXXI, section 1, of the Washington Constitution provides: "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex."[347]

343. VA. CONST. art. I, § 11. The legislative debates on article I, section 11, do not particularly illuminate the reasons for the legislature's inclusion of sex among the prohibited grounds of discrimination (through an "oversight," the category of sex had been left out of the draft of section 11 proposed by the Constitutional Revision Commission), but they do reflect a concern that discrimination against women in the past, as opposed to discrimination against blacks, had not been adequately addressed by the federal Equal Protection Clause. *See* PROCEEDINGS AND DEBATES OF THE VIRGINIA HOUSE OF DELEGATES PERTAINING TO AMENDMENT OF THE CONSTITUTION, Extra Session 1969, Regular Session 1970 at 482, 671 (Charles K. Woltz, ed.) (comments of Delegate McDiarmid); *Id.* at 534 (comments of Sen. Howell noting that "[t]he University of Virginia has at last seen the light in preparing to admit women to the first year classes" and stating that "the women of Virginia are entitled to full participation in the educational process of this State").

344. *See* Archer v. Mayes, 194 S.E.2d 707, 711 (Va. 1973) (rejecting challenge to "opt-out" statutes allowing women, but not men, to be automatically excused from jury duty if they are needed to take care of minor children or disabled persons); Schilling v. Bedford County Mem'l Hosp., Inc., 303 S.E.2d 905, 907 (Va. 1983) (abolishing common law doctrine of necessaries, which benefited women, but not men). *See also* Boyd v. Bulala, 647 F. Supp. 781, 785-86 (W.D. Va. 1986), *aff'd in part, rev'd in part and questions certified*, 877 F.2d 1191 (4th Cir. 1989).

345. *See* VA. CODE ANN. § 20-45.2 (Michie 2000).

346. *See* Bottoms v. Bottoms, 457 S.E.2d 102, 108 (Va. 1995) (although "a lesbian mother is not *per se* an unfit parent," the "[c]onduct inherent in lesbianism is punishable as a . . . felony [and] . . . that conduct is another important consideration in determining custody"); Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985) ("The father's continuous exposure of the child to his immoral and illicit [homosexual] relationship renders him an unfit and improper custodian *as a matter of law*.") (emphasis added).

347. WASH. CONST. art. XXXI, § 1.

Washington, like Pennsylvania, applies an "absolutist" standard of review to sex-based classifications in the law. If the classification is based on sex, it is invalid, except in three narrow circumstances. In *Darrin v. Gould*,[348] the Washington Supreme Court held that the state equal rights amendment was "intended to do more than repeat what was already contained in the otherwise governing constitutional provisions, federal and state, by which discrimination based on sex was permissible under the rational relationship and strict scrutiny tests" and absolutely prohibits discrimination based on sex.[349] The supreme court, however, acknowledged that three possible exceptions to this blanket rule would be "the regulation of cohabitation in sexual activity between unmarried persons; protection of fundamental rights of privacy; and dissimilar treatment on account of a characteristic unique to one's sex."[350] The Washington Supreme Court relied on the last exception to uphold a municipal ordinance prohibiting women, but not men, from appearing topless in public.[351] In *City of Seattle v. Buchanan*, the court stated that "there is a real difference between the sexes with respect to breasts, which is reasonably related to the preservation of public decorum and morals."[352] That difference, according to the court, is that "the female breasts, . . . unlike the male breasts, constitute an erogenous zone and are commonly associated with sexual arousal."[353] Because the ordinance "applies alike to men and women, requiring both to cover those parts of their bodies which are intimately associated with the procreation function," it "does not classify or discriminate on the basis of sex" and, therefore, does not violate the state equal rights amendment.[354]

In *Singer v. Hara*,[355] the Washington Court of Appeals considered an appeal from a trial court order refusing to compel the county auditor to issue a marriage license to two males. After interpreting the State's marriage statutes

348. Darrin v. Gould, 540 P.2d 882 (Wash. 1975) (en banc).

349. *Id*. at 889. In *Darrin*, the court struck down a high school athletic association rule forbidding female high school students from playing on interscholastic football teams without regard to their individual abilities. *Id*. at 883-84. *See also* Nat'l Elec. Contractors Ass'n v. Pierce County, 667 P.2d 1092, 1102 (Wash. 1983) ("The ERA absolutely prohibits discrimination on the basis of sex and is not subject to even the narrow exceptions permitted under traditional 'strict scrutiny.'") (quoting *Darrin*, 540 P.2d at 886); *In re* Welfare of Hauser, 548 P.2d 333, 337 (Wash. Ct. App. 1976) (stating that state equal rights amendment "is an absolute prohibition against discrimination [*b*]*ased on sex*") (citing *Darrin*, 540 P.2d at 882) (emphasis added).

350. *Darrin*, 540 P.2d at 890 n.8.

351. City of Seattle v. Buchanan, 584 P.2d 918, 920 (Wash. 1978).

352. *Id*.

353. *Id*.

354. *Id*. at 921.

355. Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974).

not to allow same-sex marriages,[356] the court turned to the plaintiffs' state and federal constitutional claims. The State argued that the prohibition of same-sex marriages did not violate the state equal rights amendment because the prohibition affects men and women equally, since neither may marry members of the same sex.[357] The plaintiffs countered that the State's position could not be reconciled with the United States Supreme Court's decision in *Loving v. Virginia*,[358] striking down Virginia's anti-miscegenation statutes.[359] The court of appeals found *Loving* to be distinguishable because the laws struck down in that case "were founded on an impermissible racial classification."[360] By way of contrast, the relationship described by the term marriage has always been understood as "the legal union of one man and one woman."[361] Unlike the laws at issue in *Loving*,

> [t]here is no analogous sexual classification involved in the instant case because [plaintiffs] are not being denied entry into the marriage relationship because of their sex; rather, they are being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex.[362]

The plaintiffs' claim of discrimination was not supported by the state equal rights amendment, whose "primary purpose" was "to overcome discriminatory legal treatment as between men and women 'on account of sex.'"[363] "To accept the [plaintiffs'] contention that the ERA must be interpreted to prohibit statutes which refuse to permit same-sex marriages," the court cautioned, "would be to subvert the purpose for which the ERA was enacted by expanding its scope beyond that which was undoubtedly intended by the majority of the citizens of this state who voted for the amendment."[364] Rejecting this interpretation, the court stated:

> We are of the opinion that a commonsense reading of the language of the ERA indicates that an individual is afforded no protection under the ERA unless he or she first demonstrates that a right or responsibility has been denied solely because of that individual's sex. [Plaintiffs] are unable to make such a showing because the right or responsibility they seek does not exist. The ERA does not

356. *Id.* at 1189 (construing WASH. REV. CODE ANN. §§ 26.04.010-26.04.250 (West 1997)). More recently, the prohibition of same-sex "marriage" has been made explicit. *See* WASH. REV. CODE ANN. § 26.04.020(1)(c) (West 1997 & Supp. 2002).

357. *Singer*, 522 P.2d at 1190-91.

358. Loving v. Virginia, 388 U.S. 1 (1967).

359. *Singer*, 522 P.2d at 1191.

360. *Id.*

361. *Id.*

362. *Id.* at 1192.

363. *Id.* at 1194 (quoting WASH. CONST. art. 31, § 1).

364. *Singer*, 522 P.2d at 1194.

> create any new rights or responsibilities, such as the conceivable right of persons of the same sex to marry one another; rather, it merely insures that existing rights and responsibilities, or such rights and responsibilities as may be created in the future, which previously might have been wholly or partially denied to one sex or to the other, will be equally available to members of either sex.[365]

The prohibition of same-sex marriages does not deny either men or women a right available to members of the opposite sex, but a right to "marry" someone of the same sex.[366] The court explained:

> [I]t is apparent that the state's refusal to grant a license allowing the [plaintiffs] to marry one another is not based upon [their] status as males, but rather it is based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children. This is true even though married couples are not required to become parents and even though some couples are incapable of becoming parents and even though not all couples who produce children are married. These, however, are exceptional situations. The fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race. Further, it is apparent that no same-sex couple offers the possibility of the birth of children by their union. Thus the refusal of the state to authorize same-sex marriages results from such impossibility of reproduction rather than from an invidious discrimination "on account of sex." Therefore, the definition of marriage as the legal union of one man and one woman is permissible as applied to [plaintiffs], notwithstanding the prohibition contained in the ERA, because it is founded upon the unique physical characteristics of the sexes and [plaintiffs] are not being discriminated against because of their status as males per se. In short, we hold that the ERA does not require the state to authorize same-sex marriage.[367]

The court of appeals also rejected the plaintiffs' federal equal protection claim, finding that plaintiffs had not made out a case of sexual discrimination.[368] "[Plaintiffs] were not denied a marriage license because of their sex; rather, they were denied a marriage license because of the nature of marriage itself."[369] The court found no greater merit in the plaintiffs' alternative federal claim. In responding to the argument that the marriage laws discriminate against them as homosexuals, the court agreed with the State that "to define marriage to exclude homosexual or any other same-sex relationships is not to create an inherently suspect legislative classification requiring strict

365. *Id*.
366. *Id*.
367. *Id.* at 1195.
368. *Id*. at 1195-97.
369. *Singer*, 522 P.2d at 1196.

judicial scrutiny to determine a compelling state interest."[370] The reservation of marriage to opposite sex couples easily satisfied the rational-basis standard of judicial review:

> Although . . . married persons are not required to have children . . . marriage is so clearly related to . . . the growth of children that we are unable to say that there is not a rational basis upon which the state may limit the protection of its marriage laws to the legal union of one man and one woman."[371]

Accordingly, the court concluded, "although the legislature may change the definition of marriage within constitutional limits, the constitution does not require the change sought by appellants."[372]

Singer v. Hara is consistent with a number of Washington state court decisions explaining the purpose and effect of the state equal rights amendment. For example, in *Marchioro v. Neal*,[373] the Washington Supreme Court said that "[t]he thrust of the equal rights amendment [was] to end special treatment for or discrimination against either sex."[374] The amendment, the court stressed, does not permit "exclusionary statutes which apply to one sex only."[375] The prohibition of same-sex marriages, of course, applies to both sexes. In *City of Seattle v. Buchanan*,[376] the court said that the equal rights amendment was "designed to protect the *substantial* rights of women."[377] Those rights are not affected by the State's prohibition of same-sex marriages. Finally, in *Irwin v. Coluccio*,[378] the Washington Court of Appeals referred to the "right of every woman to be treated as an equal member of society" under the state equal rights amendment.[379] That right is not threatened by a ban on same-sex marriages.

19. Wyoming

Article 6, section 1, of the Wyoming Constitution provides: "The rights of citizens of the State of Wyoming to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this state shall equally enjoy all civil, political and religious rights and privileges."[380]

370. *Id*.
371. *Id*. at 1197.
372. *Id*.
373. Marchioro v. Neale, 582 P.2d 487 (Wash. 1978), *aff'd*, 442 U.S. 191 (1979).
374. *Marchioro*, 582 P.2d at 491.
375. *Id*. at 492.
376. City of Seattle v. Buchanan, 584 P.2d 918 (Wash. 1978).
377. *Id*. at 921.
378. Irwin v. Coluccio, 648 P.2d 458 (Wash. Ct. App. 1982).
379. *Id*. at 460 (abolishing actions for criminal conversation).
380. WYO. CONST. art. 6, § 1. Article 1, section 2, contains a more general statement of equality: "In their inherent right to life, liberty and the pursuit of happiness, all members of the human race are equal." WYO. CONST, art. 1, § 2. Finally, article 1, section 3, guarantees equality

In *Ward Terry & Company v. Hensen*,[381] the Wyoming Supreme Court stated that the "[c]ivil rights mentioned [in article 6, section 1] include the rights of property, marriage, protection by the laws, freedom of contracts, trials by jury."[382] Does the civil right of marriage secured by article 6, section 1, extend to same-sex marriage?[383] The phrasing of the second sentence of section 1 would seem to indicate that it does not. Section 1 provides, in part, that "[b]oth male and female citizens of this state shall equally enjoy all civil, political and religious rights and privileges."[384] Men and women enjoy equal rights with respect to the civil right of marriage. Both may marry a member of the opposite sex and neither may marry a member of the same sex.[385] Thus, there is no inequality in the marriage law.

In *State v. Yazzie*,[386] the court affirmed that inequality does not exist in marriage laws. In *Yazzie*, the court upheld a statute providing that both men and women, similarly qualified, are competent to serve on juries. Referring to the "equality" provisions of the state constitution, including article 1, section 3, and article 6, section 1, the court emphasized that "women in Wyoming are men's equals before the law."[387] Nothing in the prohibition of same-sex marriages contravenes this principle.

The Wyoming Supreme Court has acknowledged the various equal protection standards employed by the United States Supreme Court, but has not determined which standard applies to sex-based classifications under article 1, sections 2 and 3, and article 6, section 1, of the Wyoming Constitution.[388] Nevertheless, the court has recognized that a legislative classification based on a physical characteristic unique to one sex does not violate article 6, section 1. In *A v. X, Y & Z*,[389] the Wyoming Supreme Court held that the natural father of a child born to a woman married to another man

of "political rights and privileges." WYO. CONST. art. 1, § 3. Because the right to marry is a civil, not a political right, see *Ward Terry & Co. v. Hensen*, 297 P.2d 213, 215 (Wyo. 1956), article 1, section 3, would not appear to have any bearing on the issue of same-sex marriages. There was virtually no debate on either article 1, section 2, or article 1, section 3, at the Wyoming Constitutional Convention. *See* JOURNAL AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF WYOMING 718-21, 723-29, 847-48 (Daily Sun, Book & Job Printing 1893) [hereinafter JOURNAL AND DEBATES].

381. *Ward Terry & Co.*, 297 P.2d at 213.

382. *Id.* at 215.

383. The debates surrounding the adoption of article 6, section 1, which focused on female suffrage, sheds no light on this question. *See* JOURNAL AND DEBATES, *supra* note 380, at 344-59.

384. WYO. CONST. art. 6, § 1.

385. *See* WYO. STAT. ANN. § 20-1-101 (Michie 2001).

386. State v. Yazzie, 218 P.2d 482 (Wyo. 1950).

387. *Id.* at 483.

388. *See* Johnson v. State Hearing Exam'rs Office, 838 P.2d 158, 164-67 (Wyo. 1992) (discussing various standards).

389. A v. X, Y & Z, 641 P.2d 1222 (Wyo. 1982).

did not have either a statutory or a constitutional right to bring an action to determine paternity, even though the mother had a statutory right to bring such an action against the natural father. In its opinion, the court explained why there is an obvious biological justification for requiring greater evidence of paternity than of maternity:

> The classification here made is not "entirely unrelated to any differences between men and women." The differences are the very foundation of the classification. Here, they are obvious. The woman carries the child through pregnancy. When born of her, the fact of motherhood is obvious. Not so the man. The proof of fatherhood, or the proof of the lack thereof, must come from an external source. The entire classification within the . . . act is premised on this basic and obvious distinction, it is not invidious, but "realistically reflects the fact that the sexes are not similarly situated" in the circumstances. Men do not bear children and give birth to them.
>
> Furthermore, to word the enactment without gender classification would result as a purpose for the enactment to be a determination of the existence or nonexistence of a *presumed* mother in addition to that of a presumed father. Such result would be an absurdity. Nature identifies the mother at the time of birth. There is no need to engage in presumptions.[390]

With respect to the general equal protection guarantee of the Wyoming Constitution,[391] the Wyoming Supreme Court held that "the Wyoming Constitution offers more robust protection against legal discrimination than the federal constitution."[392] In the absence of a "suspect class" or a "fundamental right," however, the court applies the rational relationship test.[393] There is no basis in Wyoming constitutional law for treating homosexuals as a "suspect class" or the right of one homosexual to "marry" another as a fundamental right.

III. CONCLUSION

Nothing in the text, history or interpretation of state equal rights provisions even remotely suggests that those provisions should invalidate state policies against same-sex marriages. The unmistakable purpose of these provisions was to eradicate discrimination in the law in favor of men and against women, as well as discrimination in favor of women and against men. Under state equal rights provisions, the law may not benefit or burden men or women in a manner not applicable to members of the opposite sex. Clearly, laws

390. *Id*. at 1225. The supreme court's recognition of this exception to the scope of article 6, section 1, may have significance with respect to the issue of same-sex marriages. *See* discussion *supra* notes 355-72 and accompanying text.

391. *See* WYO. CONST. art. 1, § 2.

392. Allhusen v. State, 898 P.2d 878, 884 (Wyo. 1995) (citations omitted).

393. *Id*. at 885.

prohibiting same-sex marriages do not benefit or burden either sex to the advantage or disadvantage of the other. Moreover, such laws are gender neutral and do not have a discriminatory impact on either men or women.

The notion that state equal rights provisions would affect the State's ability to define marriage as a legal relationship between one man and one woman finds no support in the circumstances surrounding the adoption of these provisions. Such a suggestion would come as a surprise to the constitutional convention delegates and legislators who proposed them and the voters who approved them. No state court of final jurisdiction has held that a prohibition of same-sex marriages violates a state equal rights provision. Moreover, no state court has held that homosexuals are a suspect or quasi-suspect class under such provision. In sum, there is no principled basis on which a state court could interpret a state equal rights provision to require recognition of same-sex marriage in violation of the public policy of the state. The choice to recognize such relationships rests with the legislatures of the states, not their courts.