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Maine's "Act to Protect Traditional Marriage and Prohibit Same-Sex Marriages": Questions of Constitutionality Under State and Federal Law

Jennifer B. Wriggins
University of Maine School of Law

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Jennifer Wriggins[*]

"Let me not to the marriage of true minds Admit impediments..."[1]

Marriage "is the most important transaction of life. The happiness of those who assume its ties usually depends upon it more than upon anything else."[2]

I. INTRODUCTION

In 1997, Maine's Legislature passed "An Act to Protect Traditional Marriage and Prohibit Same-Sex Marriages" (Act).[3] The summary attached to the bill states that the bill "prohibits persons of the same sex from contracting marriage."[4] The bill was the verbatim text of an initiative petition.[5] The petition was one of a number of measures presented in various states in response to the Hawaii Supreme Court's 1993 decision in *Baehr v. Lewin*.[6] Maine was the only New England

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* Associate Professor of Law, University of Maine School of Law; B.A. Yale College; J.D., Harvard Law School.

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1. William Shakespeare, Sonnet CXVI.

2. Whitehouse v. Whitehouse, 129 Me. 24, 26, 149 A.2d 572, 573 (Me. 1930).

3. ME. REV. STAT. ANN. tit. 19-A, §§ 650 & 701(1-A), (5) (West 1998).

4. L.D. 1017 (118th Legis. 1997).

5. Me. Const. art. IV, pt. 3, § 18. Under the Maine Constitution, when an initiative petition has sufficient signatures and the legislature defeats or changes it, it shall go out to referendum. If the legislature passes it, it shall not go out to referendum. See id. The petition was circulated by Concerned Maine Families, a group that earlier sponsored a ballot initiative that would have provided that the Maine Human Rights Act could not be amended to outlaw discrimination on the basis of sexual orientation or on other bases. That measure was defeated by the voters in November 1995. *See* Steven G. Vegh, *Same-Sex Marriage Ban En Route to Legislature, Concerned Maine Families Gets the Signatures to Advance Its Initiative*, PORTLAND PRESS HERALD, Feb. 8, 1997, at A1.

6. The Hawaii Supreme Court's decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), *modified by* 852 P.2d 74 (Haw. 1993), held that the state's ban on marriage by same-gender couples had to be justified by a compelling state interest in order to be constitutional. *See id.* at 67. The

state to pass such a provision. Although couples of the same gender for over twenty-five years have been asserting the right to legally marry,[7] *Baehr v. Lewin* for the first time presented the strong possibility that restrictions on marriage by same-gender couples would be struck down under a state constitution.[8] This in turn presented the possibility that couples of the same gender would legally marry in Hawaii and then move or travel to other states. The Hawaii Supreme Court's final decision on the issue is expected at any time. Cases about whether a state can constitutionally forbid couples of the same gender from marrying also are pending before the Vermont Supreme Court,[9] and in New York.[10] In February 1998, an Alaska Superior Court judge held that the right to choose one's life partner is fundamental under the state's constitution.[11]

Civil marriage in Maine and other states is regulated by state statute,[12] and marriage regulation is generally considered to be within the state's police power.[13] However, the state's power to regulate marriage is subject to constitutional limitations.[14]

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same-gender marriage ban was held to be a classification based on gender and subject to strict scrutiny under the state constitution. *See id.* On remand, the trial court indeed found that restrictions on same-sex marriage were unconstitutional. *See* Baehr v. Miike, Civ. No. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996). The case is currently on appeal to the Hawaii Supreme Court. For other states' statutes regarding same-sex marriage, see *Appendix: State Anti-Same-Sex Marriage Statutes*, 16 QUINNIPIAC L. REV. 134 (Spring & Summer 1996). Bills outlawing marriages by same-gender couples were defeated in a number of states. Andrew Koppelman, *Same-sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIPIAC L. REV. 105, 106 & n.2 (1996). Several Governors vetoed bills. *See Ban Against Gay Unions Draws Veto*, PORTLAND PRESS HERALD, Mar. 26, 1996, at A4 (referring to veto by Governor Roy Romer of Colorado); *Let Maine Tell World: We Won't Discriminate, Same-Gender Marriage Isn't Even an Issue in Maine*, MAINE SUNDAY TELEGRAM, Feb. 23, 1997, at C4 (referring to Washington Governor Gary Locke's veto of a law banning marriage by same-gender couples).

7. *See, e.g.*, Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971) (stating that marriage by same-gender couples is not marriage).

8. *See supra* note 6.

9. *See* Baker v. Vermont, No. S1009-97 (Vt. Super. Ct. Dec. 19, 1997), *appeal docketed*, No. 98-32 (Vt. Jan. 15, 1998).

10. Storrs v. Holcomb, 666 N.Y.S.2d 835 (1997), *refiled as* Storrs v. Holcomb, No. 98-164 (N.Y. Sup. Ct. Apr. 1998).

11. *See* Brause v. Bureau of Vital Statistics, No. 3AN-95-0562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998) (holding that because the right to choose one's life partner is fundamental, a ban on marriage by couples of same gender must be justified by a compelling state interest in order to be constitutional under the state constitution). This case is currently on appeal.

12. *See* Henriksen v. Cameron, 622 A.2d 1135, 1145 (Me. 1993) (Glassman, J., dissenting). For example, Maine does not recognize common law marriages. *See* Pierce v. Secretary of U.S. Dep't of Health, Educ. & Welfare, 254 A.2d 46, 48 (Me. 1969).

13. *See* Loving v. Virginia, 388 U.S. 1, 7 (1967) (citing Maynard v. Hill, 125 U.S. 190 (1888)).

14. *See id.* at 7. No published constitutional challenges to Maine's marriage laws have been decided.

Many lesbians and gay men are in committed, long-term couple relationships[15] and many would marry if they could.[16] Gay couples may wish to marry for the same variety of reasons that heterosexual couples wish to marry: to declare their commitment and love; to reflect that their economic, social, and family lives are intertwined; and to obtain the legal responsibilities and protection for their families that civil marriage provides.[17]

Maine's Act is unique among those passed in the wake of *Baehr*. Like many other state statutes, its practical effect is to ban same-gender marriage from taking place in Maine and to forbid recognition in Maine of same-gender marriages which may take place legally outside Maine.[18] At the same time, one of its stated purposes is "[t]o support and strengthen traditional monogamous Maine families against improper interference from out-of-state influences or edicts."[19] This goal of protecting Maine citizens from out-of-state influences is not found in any other state's anti-same-gender marriage laws published in a recent compilation.[20] Maine's Act is also unique in that the stated "findings" attempt to control the deference courts should give the statute, through the mechanism of declaring certain things to be "compelling [state] interests."[21]

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15. *See* Beth Kaiman, *Embracing Gay Couple, Town Defies Stereotypes*, MAINE SUNDAY TELEGRAM, Apr. 7, 1996, at A1; *see also* Shoshana Hoose, *Growing Number of Gays Support Marriage Rights*, MAINE SUNDAY TELEGRAM, Oct. 13, 1996, at A1; David Foster, *To Have and Hold. They're Just Another Married Couple, Except for One Detail: Their Union Isn't Legal*, MAINE SUNDAY TELEGRAM, June 2, 1996, at C1; David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Couples*, 95 MICH. L. REV. 447, 449 (1996). For example, in one study, 25% of the 560 gay male couples studied and 14% of the 706 lesbian couples studied had lived together for ten or more years. *See* A. Steve Bryant and Demian, *Relationship Characteristics of Gay and Lesbian Couples: Findings from a National Survey* <demian@buddybuddy.com> (an academic presentation of key findings from this survey also appears in 1(2) J. of Gay & Lesbian Social Services (1994)); *see also* Lawrence A. Kurdek, *Lesbian and Gay Couples*, *in* LESBIAN, GAY, AND BISEXUAL IDENTITIES OVER THE LIFESPAN 243, 243 (Anthony R. D'Augelli & Charlotte J. Patterson eds., 1995) (noting survey results that between 45 and 80% of lesbians and between 40 and 60% of gay men are currently involved in a romantic relationship).

16. *See* WILLIAM ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 1-4 (1996) [hereinafter THE CASE FOR SAME-SEX MARRIAGE]; Chambers, *supra* note 15, at 450 n.7.

17. *See infra* Part II.A.

18. *See* ME. REV. STAT. ANN. tit. 19-A, § 701(1-A), (5) (West 1998); *Appendix: State Anti-Same-Sex Marriage Statutes*, *supra* note 6.

19. ME. REV. STAT. ANN. tit. 19-A, § 650(2)(C) (West 1998). See *infra* Part V.F.3.C.

20. *See Appendix: State Anti-Same-Sex Marriage Statutes*, *supra* note 6. The only state where the legislature appears to have made any comparable statement is Louisiana, where the legislature passed a concurrent resolution (referencing the Hawaii case and the concern that the full faith and credit clause of the federal constitution might affect marriage laws throughout the United States) and at the same time passed a law banning marriage by same-gender couples. *See id.*

21. ME. REV. STAT. ANN. tit. 19-A, § 650(1)(4)(West 1998). "[T]he State has a compelling interest to nurture and promote the unique institution of traditional monogamous marriage in the support of harmonious families and the physical and mental health of children; and . . . the State

In addition, the stated "purposes" language concerning marriage and the family is remarkably and uniquely broad and vague.[22]

Maine's Act has two main operational provisions. First, it forbids marriages by persons of the same gender and provides that if such marriages are performed in Maine, they are void.[23] Second, it provides that same-gender marriages legally performed in other states are void in Maine.[24] In addition, it contains various "findings and purposes."[25] This article argues that both operational provisions are unconstitutional under the Maine and Federal Constitutions[26] as a violation of equal protection and anti-discrimination principles[27] and as a denial of fundamental rights.[28] Also, there are strong additional arguments that the second operative provision, which refuses recognition of legal out-of-state marriages,[29] is violative of federal constitutional principles such as full faith and credit, the right of out-of-state people to marry, and the right to travel.[30] These issues, as well as the related issue of the constitution

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has the compelling interest in promoting the moral values inherent in traditional monogamous marriage." Id.

22. For example, "the purposes of this chapter are: A. To nurture, sustain and protect the traditional monogamous family unit in Maine society, its moral imperatives, its economic function and its unique contribution to the rearing of healthy children . . . ." Id.

23. *See id.* § 701(5) ("persons of the same sex may not contract marriage").

24. *See id.* § 701(1-A) ("Any marriage performed in another state that would violate any provisions of [§ 701] subsections 2 to 5 [prohibiting marriages defined as polygamous, within certain degrees of consanguinity, by persons under a mental disability, and persons of the same gender] if performed in this State is not recognized in this State and is considered void if the parties take up residence in this State.").

25. *See id.* § 650. These are set forth in full at Part II.C.

26. In the past twenty years, state supreme courts have become increasingly active in deciding state constitutional issues. See, e.g., JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES 2-4 (2d ed. 1996). Relatively few cases have interpreted Maine's Constitution, but the Maine Constitution has an existence independent of the Federal Constitution. *See, e.g.*, State v. Cadman, 476 A.2d 1148 (Me. 1984); Marshall J. Tinkle, *The Resurgence of State Constitutional Law*, 18 ME. B. BULL. 257 (1984); *Symposium, Emerging Issues in State Constitutional Law*, 50 TEMP. L. REV. 3 (1997).

27. *See infra* Parts V.B., V.D. & V.E.

28. *See infra* Parts V.C. & V.E.

29. *See* ME. REV. STAT. ANN. tit. 19-A § 701 (1-A) (West 1998).

30. *See, e.g.*, Barbara J. Cox, *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?* 1994 WIS. L. REV. 1033 (1994); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (May 1997); Melissa Rothstein, *The Defense of Marriage Act and Federalism: A States' Rights Argument in Defense of Same-sex Marriages*, 31 FAM. L.Q. 571 (1997); Scott Ruskay-Kidd, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435 (1997); Mark Strasser, Loving *the* Romer *out for* Baehr: *On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279 (1997); Beth A. Allen, Comment, *Same-Sex Marriage: A Conflict-of-Laws Analysis for Oregon*, 32 WILLAMETTE L. REV. 619 (1996); Julie L.B. Johnson, Comment, *The Meaning of "General Laws": The Extent of Congress's Power Under the Full Faith and Credit Clause and the Constitutionality of the Defense of Marriage Act*, 145 U. PA. L. REV. 1611 (1997); Thomas M. Keane, Note, *Aloha, Marriage? Constitutional and Choice of Law Arguments for Recognition of Same-Sex Marriages*, 47 STAN. L. REV. 499 (1995); Barbara

ality of the Defense of Marriage Act,[31] are beyond the scope of this Article but have been explored by others.[32]

Marriage has never had a fixed meaning, and constantly evolves over time, reflecting societal changes and needs.[33] Several examples from Maine cases illustrate this point. Interracial marriages in Maine in the past were not considered marriages. In *Bailey v. Fiske*,[34] the Maine Law Court determined that a fifty-nine year marriage deemed to be between people of different races was void because it violated the applicable miscegenation statute;[35] thus, an essential feature of marriage used to be the racial characteristics of the participants. In addition, differential treatment of married men and women used to be a critical element of marriage. For example, it used to be a central feature of marriage that wives in Maine could not hold property or sign contracts. In fact, wives had no legal existence separate from their husbands until nineteenth-century legal reforms.[36] Important gender-based elements of marriage persisted until rather recently. Before the Law Court's 1978 decision in *Beal v. Beal*,[37] only women could get alimony if a marriage ended.[38] Damages for loss of consortium used to be available to a husband if his wife was injured, but not to a wife if her husband was injured because

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A. Robb, Note, *The Constitutionality of the Defense of Marriage Act in the Wake of* Romer v. Evans, 32 NEW ENG. L. REV. 263 (1997); Germaine Winnick Willett, Note, *Equality Under the Law or Annihilation of Marriage and Morals? The Same-Sex Marriage Debate*, 73 IND. L.J. 355 (1997).

31. Pub. L. No. 104-199, 110 Stat. 2419 (codified in 1 U.S.C. § 7, 28 U.S.C. § 1738C).

32. *See* authorities cited *supra* note 30.

33. *See* Baehr v. Lewin, 852 P.2d. 44, 63 (Haw. 1993). Important historical works dealing with changes in marriage and family law include: MICHEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA (1985); LAWRENCE STONE, ROAD TO DIVORCE: ENGLAND 1530-1987 (1990); MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE (1989).

34. 34 Me. 77 (1852).

35. *See id.* at 78. The *Bailey* court was applying the Massachusetts miscegenation statute since the parties were married when Maine was part of Massachusetts. The Massachusetts Act of 1786 forbade the marriage of a white person with any "negro, Indian, or mulatto." 1786 Mass. Acts, ch. 3, § 7. This Act, which was amended in 1810, governed the dissolution of the marriage relationship in Maine until 1820. *See* Henriksen v. Cameron, 622 A.2d 1135, 1145 (Me. 1993) (Glassman, J., dissenting). In 1821, one year after Maine became a state, it passed its own miscegenation statute. *See* Title 5, ch. 59 § 2 (1821) ("No white person shall intermarry with a negro, Indian or mulatto; and no insane person or idiot shall be capable of contracting marriage."). This statute was repealed in 1883. The Massachusetts law was repealed in 1843.

36. *See, e.g.*, Haggett v. Hurley, 40 A. 561 (Me. 1891) (holding that despite changes in the common law removing disabilities of married women, the wife could not form a business partnership with husband). The *Haggett* court noted that, "[b]efore the recent statutes it had been for more than a thousand years the settled legal policy of the Teutonic nations, at least, to exclude a married woman from all participation in business affairs"). *Id.* at 563; *see also* Robinson (appellant of probate decree), 88 Me. 17, 22-23, 33 A. 652, 654-55 (1895).

37. 388 A.2d 72 (1978).

38. *See id.* at 73-74.

a husband, unlike a wife, was entitled to spousal services.[39] Husbands, but not wives, used to have primary liablity for supporting their children.[40] Interspousal immunity used to be an essential element of marriage.[41] The Law Court recognized in a series of decisions in the 1970s,[42] 1980s,[43] and 1990s[44] that this no longer was an essential element of marriage.[45] Marriage is a resilient, ever-changing institution, defined by human beings.[46]

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39. *See* Allen v. Rossi, 128 Me. 201, 204, 146 A. 692, 693 (1929) (explaining that loss of consortium is a property right of the husband in the assistance, society, and comfort of his wife); *see also* Paul Benjamin Linton, *State Equal Rights Amendments: Making a Difference or Making a Statement?*, 70 TEMP. L. REV. 907, 932 (1997). Title 19, section 167-A of the Maine Revised Statutes provided that "[a] married woman may bring a civil action in her own name for loss of consortium of her husband." ME. REV. STAT. ANN. tit. 19, § 167-A (West 1981) (repealed 1995). This law was passed in 1967 in order to change the common law and make each spouse able to file for loss of consortium damages. The legislature made the law gender-neutral in 1995. It now states that "[a] married person may bring a civil action in that person's own name for loss of consortium of that person's spouse." ME. REV. STAT. ANN. tit. 14, § 302 (West 1997). However, at common law, husbands were allowed to bring a civil action for loss of consortium. *See, e.g.*, Britton v. Dube, 154 Me. 319, 147 A.2d 452 (Me. 1958).

40. *See* Pendexter v. Pendexter, 363 A.2d 743, 746 (Me. 1976); *cf. id.* at 750 (Defresne, C.J., concurring in result) (noting that the old common law rule that the father is primarily responsible for the support of children is outmoded and should be discarded).

41. *See* Abbott v. Abbott, 67 Me. 304, 306 (1877) (holding that husband and wife are one person and, therefore, cannot sue each other and dismissing the wife's suit alleging that her husband had kidnapped her and had her confined in a mental institution).

42. *See* Moulton v. Moulton, 309 A.2d 224, 228 (Me. 1973) (holding that interspousal immunity did not bar an action for conduct before marriage but did bar an action for conduct during marriage).

43. *See* MacDonald v. MacDonald, 412 A.2d 71, 75 & n.5 (Me. 1980) (holding that interspousal immunity was abrogated in a motor vehicle case, but that the nature of a special marital relationship may necessitate immunity in some cases).

44. *See* Henriksen v. Cameron, 622 A.2d 1135, 1140 (Me. 1993) (holding that an action for "the intentional infliction of emotional distress through violence and accompanying verbal abuse during the marriage" was not barred by interspousal immunity).

45. *In MacDonald*, the Maine Law Court wrote that by recognizing change,

> we do not undermine the principle of *stare decisis*. Rather, we prevent it from defeating itself; we do not permit it to mandate the mockery of reality and the "cultural lag of unfairness and injustice," which would arise if the judges of the present, who like their predecessors cannot avoid acting when called upon, were requried to act as captives of the judges of the past, restrained without power to break even those bonds so withered by the changes of time that at the slightest touch they would crumble.

MacDonald v. MacDonald, 412 A.2d at 74 (quoting Moulton v. Moulton, 309 A.2d at 228); *see also* Myrick v. James, 444 A.2d 987, 998 (Me. 1982) (noting that where common law rule produces undesirable results, judges have responsibility to change); Pendexter v. Pendexter, 363 A.2d at 748-49 (Dufresne, C.J., concurring in result) (maintaining that "where the reason for the rule . . . no longer exists, the rule itself should cease").

46. Family law in the United States, including marriage law, is civil, rather than religious law. As Professor Lawrence M. Friedman, perhaps the leading historian of United States legal history, notes, "[i]n England, ecclesiastical courts had jurisdiction over marriage and divorce, and the church had an important role in family law. The United States had no such court, and, after the early 19th century, no established churches. Family law was thoroughly secular in the United States." LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 202 (1985).

Considerable evidence has emerged that marriages by same-gender couples have been recognized in various societies and historical periods.[47] The societal meaning of marriage has been changing in the United States.[48] In addition, a number of industrialized nations in the past ten years have enacted legislation recognizing same-sex relationships, or are considering such legislation; there is, in fact, a worldwide movement seeking recognition of marriages of same-gender couples.[49]

The economic, societal, and emotional functions of marriage in the United States have changed drastically in the last hundred and fifty years. In the past, the economic and procreative aspects were critically important; now, the emotional aspects are seen as central to its meaning.[50] The primacy of the emotional aspects of marriage casts doubt on justifications for limiting it to persons of the opposite sex.

This Article will proceed in the following manner. First, I will review the Act and the legal ramifications of preventing persons of the same gender from marrying. Second, I will briefly introduce the applicable constitutional theories under both federal and state law. I will discuss in some detail the equal protection, civil rights, and nondiscrimination provisions of the Maine Constitution contained in Article I, section 6-A. Third, I will apply these theories to the Act. I maintain that "heightened scrutiny"[51] should be applied to the Act because the Act creates a gender-based classification,[52] burdens fundamental rights,[53] and discriminates on the basis of sexual orientation.[54] The Act would not survive heightened scrutiny.[55] In addition, if the less exacting "rational basis scrutiny" test is applied to the Act, it would not survive that scrutiny either, particularly applying the ideas contained in *Romer v.*

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47. *See, e.g.*, JOHN BOSWELL, SAME-SEX UNIONS IN PREMODERN EUROPE (1994); William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993).

48. For example, several churches, including the Unitarian Universalist and the Universal Fellowship of Metropolitan Community Churches, have celebrated thousands of marriages by same-sex couples. See ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE, *supra* note 16, at 193-97 (containing excerpts of letters written by the Reverend Elder Troy D. Perry and the Reverend Scott W. Alexander to the Hon. Shellie Bowers).

49. *See, e.g.*, E.J. Graff, *The Inevitability of Same-Sex Marriage*, BOSTON GLOBE, Feb. 12, 1998, at A27; Doug Ireland, *Remembering Herve: Defense of Marriage Act*, THE NATION, June 24, 1996 at 6; ESKRIDGE, *supra* note 16, at 49-50.

50. *See* GLENDON, *supra* note 33, at 292-93; *see also* ESKRIDGE, *supra* note 16, at 96-98, 129-30; MARY ANN GLENDON, THE NEW FAMILY AND THE NEW PROPERTY, 12-13 (1981); *see generally* E.J. GRAFF, WHAT IS MARRIAGE FOR? (forthcoming 1999) (manuscript on file with Author).

51. *See* discussion *infra* Part V. There are several forms of heightened scrutiny. See note 261 for an abbreviated description of the types discussed in this Article; see parts V.B-V.D for a more detailed discussion.

52. *See* discussion *infra* Part V.B.

53. *See* discussion *infra* Part V.C.

54. *See* discussion *infra* Part V.D.

55. *See* discussion *infra* Part V.E.

Evans.[56] This analysis will demonstrate that the Act is unconstitutional and should either be repealed or struck down.

II. THE "ACT TO PROTECT TRADITIONAL MARRIAGE AND PROHIBIT SAME-SEX MARRIAGES"

A. The In-State Provision and the Legal Implications of Exclusion

One operative provision, which I will call the in-state provision, pertains to marriages contracted within Maine, and states that "[p]ersons of the same sex may not contract marriage."[57] This provision is added to the existing provisions of Maine's law on civil marriages, which forbid marriages within certain degrees of consanguinity, polygamy, and marriages by people impaired by mental illness or mental retardation.[58] An existing statute provides that marriages performed in Maine which run afoul of the consanguinity, polygamy, and disability restrictions are void; the Act puts marriage by same-gender couples in the same category.[59]

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56. 116 S. Ct. 1620 (1996).

57. ME. REV. STAT. ANN. tit. 19-A, § 701(5) (West 1998).

58. ME. REV. STAT. ANN. tit. 19-A, § 701(2)-(5) (West 1998) provides as follows:

2. Prohibitions based on degrees of consanguinity; exceptions. This subsection governs marriage between relatives.

A. A man may not marry his mother, grandmother, daughter, granddaughter, sister, brother's daughter, sister's daughter, father's sister, mother's sister, the daughter of his father's brother or sister or the daughter of his mother's brother or sister. A woman may not marry her father, grandfather, son, grandson, brother, brother's son, sister's son, father's brother, mother's brother, the son of her father's brother or sister or the son of her mother's brother or sister.

B. Notwithstanding paragraph A, a man may marry the daughter of his father's brother or sister or the daughter of his mother's brother or sister, and a woman may marry the son of her father's brother or sister or the son of her mother's brother or sister as long as, pursuant to sections 651 and 652, the man or woman provides the physician's certificate of genetic counseling.

3. Persons under disability. A person who is impaired by reason of mental illness or mental retardation to the extent that that person lacks sufficient understanding or capacity to make, communicate or implement responsible decisions concerning that person's property or person is not capable of contracting marriage. For the purposes of this section:

A. "Mental illness" means a psychiatric or other disease that substantially impairs a person's mental health; and

B. "Mental retardation" means a condition of significantly subaverage intellectual functioning resulting in or associated with concurrent impairments in adaptive behavior and manifested during the developmental period.

4. Polygamy. A marriage contracted while either party is not divorced from a living wife or husband is void.

5. Same sex marriage prohibited. Persons of the same sex may not contract marriage.

59. ME. REV. STAT. ANN. tit. 19-A, § 751 (West 1998) ("The following marriages are void and dissolved without legal process: . . . A marriage prohibited in section 701, if solemnized in this State.").

The prohibition on same-gender couples marrying excludes them from receiving a wide range of rights and benefits, as well as from taking on a multitude of responsibilities.[60] Statutory provisions regarding marriage recognize the emotional bonds that can be part of marriage; others deal with and define financial aspects of the relationship, and still others deal with a combination of emotional and financial aspects.

For example, Maine's Family and Medical Leave Act allows leave for employees to care for only a seriously ill spouse, parent, or child.[61] Maine's wrongful death statute allows recovery only by a spouse or blood relation.[62] Loss of consortium protections apply only to spouses.[63] Moreover, a privilege to keep confidences silent without legal reprisal is granted in the rules of evidence only to those who are legally married.[64] Spouses have a duty to support one another and a right to be supported; unrelated individuals do not.[65] Interspousal property transfers of any amount generally are tax-free; transfers between non-spouses of amounts greater than $10,000 are taxable in some circumstances.[66] Under Maine's intestate succession laws, only spouses and blood relatives are granted rights of inheritance.[67] In addition, if a married person domiciled in Maine dies, a surviving spouse has the right to take an elective share of the decedent's estate.[68]

Numerous other provisions turn on marriage.[69] No comprehensive

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60. For a general discussion of laws pertaining to marriage, see Chambers, supra note 15.

61. ME. REV. STAT. ANN. tit. 26, § 843(4)(D) (West Supp. 1997-1998).

62. ME. REV. STAT. ANN. tit. 18-A, § 2-804 (West 1998).

63. ME. REV. STAT. ANN. tit. 14, § 302 (West Supp. 1997-1998).

64. ME. R. EVID. 504.

65. ME. REV. STAT. ANN. tit. 19-A, § 1652(1) (West 1998) (the spouse may petition the court to order the non-supporting spouse to contribute support); ME. REV. STAT. ANN. tit. 17-A, § 552 (West 1983) (failure to support spouse is a Class E crime).

66. 26 U.S.C. § 1041 (1994); ME. REV. STAT. ANN. tit. 26, § 2503 (gifts greater than $10,000 are taxable); ME. REV. STAT. ANN. tit. 26, § 4641(C)(4) (deeds between husband and wife are exempt from State real estate transfer tax). *See* BORIS I. BITTKER AND LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 123.3.1, P-123-5 (2d ed. 1993).

67. ME. REV. STAT. ANN. tit. 18-A, §§ 2-102, 2-103 (West 1998). In fact, if no spouse or blood relative exists to claim the inheritance, the estate of the intestate passes to the state, regardless of the presence of a same-sex partner. *Id.* § 2-105. While one may argue that these are not actually burdens since they can be "cured" by a person making a will, there are several problems with that argument. First, there is a heightened risk that estate plans by gay men and lesbians will be challenged by family members, *see* Chambers, *supra* note 15, at 458 n.38, and second, gay men and lesbians are like other people in that they mean to make wills, *see id.* at 456 n.33, but often do not.

68. ME. REV. STAT. ANN. tit. 18-A, § 2-201 (West 1998).

69. For a few examples, see ME. REV. STAT. ANN. tit. 24-A, § 2927 (West 1998) (authorized driver for personal auto insurance rental coverage includes spouse), ME. REV. STAT. ANN. tit. 22, § 2843A (West 1997-1998) (custody of remains of a deceased person shall be given to the spouse or next of kin unless the deceased directed otherwise), and ME. REV. STAT. ANN. tit. 5, § 18454 (West 1989) (local districts may supply certain state retirement benefits where beneficiary is limited to surviving spouse or dependent children). The failure to recognize same-gender relationships means that disclosure of such relationships appears not to be required by governmental ethics law. See ME. REV. STAT. ANN. tit. 1, § 1012, ME. REV. STAT. ANN. tit. 5, § 19 (West 1989 & West Supp.

study of all statutes mentioning marriage has been done in Maine to my knowledge, but a federal study by the General Accounting Office found 1049 federal statutes under which marital or spousal status affects an entitlement, right, or obligation.[70] Federal law restricts immigration by foreign-born nationals, except if the foreign-born national has a valid marriage to a United States citizen.[71] Divorce also provides important ordering principles for persons whose marriages fail.[72] Despite the importance of marriage and its responsibilities, there is almost no state review of who can enter the institution and no attempt to educate would-be spouses as to its implications.[73]

B. The Out-of-State Provision

The Act's second provision, which I will call the out-of-state provision, states that "any marriage performed in another state that would violate any provisions of subsections 2 to 5 if performed in this State is not recognized in this State and is considered void if the parties take up residence in this State."[74] Subsections 2 through 5 are the provisions forbidding marriages within certain degrees of consanguinity, polygamy, and marriages of people under disability, as well as the new prohibition on persons of the same gender marrying in Maine.[75]

This provision declares that marriages of persons who marry legally in one state, and later move to Maine, are invalid in Maine, regardless

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1997-1998). Neither the definition of immediate family, *see id.* § G, nor the definition of relatives, *see id.* § I, would include a gay employee's life partner.

70. Rept. No. GA01, OCG 97-16, 1997 WL 67783 (Jan. 31, 1997).

71. *See* 3 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 36.02 (rev. ed. 1996); Chambers, *supra* note 15, at 458 n.39.

72. In *Boddie v. Connecticut*, 401 U.S. 371 (1971), the Supreme Court held that the state could not require indigent persons seeking divorce to pay a filing fee, in view of the importance of marriage and divorce, and in view of the fact that individuals had no other way besides divorce to resolve their disputes. Maine's premarital agreement statute permits an agreement regarding future support, division of property, and other aspects of a couple's breakup, to be made only by those who are "prospective spouses" and that such an agreement is effective only "upon marriage." ME. REV. STAT. ANN. tit. 19-A, § 602(1) (West 1998). Another ordering principle can be found in "spousal support," formerly known as "alimony," which is available only to those who were legally married. ME. REV. STAT. ANN. tit. 19-A, § 951 (West 1998). Equitable distribution of property is also only available to persons who are married. ME. REV. STAT. ANN. tit. 19-A, § 722-A (West 1998).

73. There is little restriction on entry into marriage and no statutory effort to educate people seeking to enter this institution on the rights or responsibilities of marriage. There is a three-day waiting period before a license may be issued, *see* ME. REV. STAT. ANN. tit. 19-A, § 652(1) (West 1998), which may be waived. *See id.* § 652 (4). The only information that couples are given when they obtain a marriage license is a brochure about the effects of alcohol and drugs on fetuses. *Id.* § 652(5). As Professor Mary Ann Glendon points out, "it is not too much of an exaggeration to say that the present legal regulation of marriage in the United States is already just a matter of licensing and registration." Mary Ann Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 681 (1976).

74. ME. REV. STAT. ANN. tit. 19-A, § 701(1-A) (West 1998).

75. *See id.* § 701(2)-(5).

of any circumstances including how long the couple was married.[76] This provision is targeted at same-gender couples in general,[77] and the Hawaii marriage case in particular.[78] If Hawaii or another state allows marriage by same-gender couples, such couples who reside in and marry in that state will reasonably consider themselves married and rely on the legal consequences of being married.[79] If they move to Maine, they are stripped of the responsibilities and rights of marriage under the Act.[80] Prior Maine law, by contrast, invalidated certain marriages when a couple got married out of state *in order to evade* Maine law.[81]

C. *The Findings and Purposes*

The Act contains several "findings" and "purposes" that are entirely new to Maine law. It provides that municipal clerks and courts have a duty to construe the provisions of Maine's marriage laws in accordance with the following findings and purposes:

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76. *Id.* There are major legal questions about whether Maine can constitutionally do this without violating the Full Faith and Credit Clause, the right to travel, and other federal constitutional provisions or rights. *See* sources cited *supra* note 30. The Defense of Marriage Act (DOMA) provides that states can ignore other states' decrees allowing same-gender marriage, but DOMA may be unconstitutional. *See* sources cited *supra* note 30.

77. *See* L.D. 1017 (118th Legis. 1997) (summary of the bill states that it "prohibits persons of the same sex from contracting marriage").

78. The text of the Maine bill was taken from a petition sponsored by Concerned Maine Families, which obtained enough signatures that the bill would have had to be on the ballot in November 1997 if the legislature did not pass it. Me. Const. art. IV, pt. 3, § 18. The chair of Concerned Maine Families, Carolyn Cosby, stated that the bill was necessary because of the pending Hawaii case. Paul Carrier, *Maine Group Seeks to Ban Gay Wedlock*, PORTLAND PRESS HERALD, May 2, 1996, at A1. The 1993 Hawaii Supreme Court ruling in *Baehr* was cited repeatedly as a reason for introduction of the legislation. *Gay Rights Opponents File Legislation Targeting Same-Sex Marriage*, BANGOR DAILY NEWS, May 3, 1996, *available in* 1996 WL 219203; Lawrence Lockman, *Same-Sex Marriages a Legislative Matter*, BANGOR DAILY NEWS, July 2, 1996, *available in* 1996 WL 10702445 (Lockman is the Vice Chair of Concerned Maine Families), *Petition Drive Success Claimed Gay-Marriage Could Be on Ballot*, BANGOR DAILY NEWS, Nov. 13, 1996, *available in* 1996 WL 10710237; Francis X. Quinn, *Same-Sex Marriage Petition Cleared Legislature to Vote on Citizen Initiative*, BANGOR DAILY NEWS, Feb. 8, 1997, *available in* 1997 WL 4757645.

79. While state laws vary considerably about what goes along with marriage, there are certain basic similarities such as provisions for support of a spouse during the marriage, intestate succession, privilege, wrongful death, loss of consortium, as well as provisions for divorce, alimony (also known as spousal support), and property division in the event of divorce. *See generally* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES (2d ed. 1987); Chambers, *supra* note 15, at 447-91.

80. *See* ME. REV. STAT. ANN. tit. 19-A, § 701(1-A) (West 1998). As noted above, this Article does not deal with specific constitutional issues about restricting the validity of such out-of-state marriages. *See supra* note 30.

81. ME. REV. STAT. ANN. tit. 19-A, § 701(1) (West 1998). This is what is known as a "marriage evasion statute," which numerous states have. *See* Cox, *supra* note 30, at 1078 & n.262. This evasion statute remains on the books; the Act seems to broaden Maine's non-recognition of out-of-state marriages by not requiring any intent to evade Maine law before declaring a marriage void.

> 1. Findings. The people of the State of Maine find that:
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> A. The union of one man and one woman joined in traditional monogamous marriage is of inestimable value to society; the State has a compelling interest to nurture and promote the unique institution of traditional monogamous marriage in the support of harmonious families and the physical and mental health of children; and that the State has the compelling interest in promoting the moral values inherent in traditional monogamous marriage.
>
> 2. Purposes. The purposes of this chapter are:
>
> A. To encourage the traditional monogamous family unit as the basic building block of our society, the foundation of harmonious and enriching family life;
>
> B. To nurture, sustain and protect the traditional monogamous family unit in Maine society, its moral imperatives, its economic function and its unique contribution to the rearing of healthy children; and
>
> C. To support and strengthen traditional monogamous Maine families against improper interference from out-of-state influences or edicts.[82]

This provision requires clerks and courts to construe Maine's "marriage laws" in accordance with the findings and purposes. But it does not define "Maine's marriage laws," although, as noted above, many Maine laws pertain to marriage.[83] It appears, however, that the term refers to Title 19-A, chapter 23, which is entitled "Marriage."[84]

III. A BASIC INTRODUCTION TO CONSTITUTIONAL ANALYSIS OF STATUTES

Part of the task of legislating is drawing lines and making classifications; statutory classifications generally burden some members of society.[85] Statutes are presumed to be constitutional,[86] but there are various reasons why a law may be unconstitutional. Every person is entitled to the "equal protection of the laws";[87] if a law violates equal

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82. ME. REV. STAT. ANN. tit. 19-A, §§ 650(1), (2) (West 1998).

83. *See supra* Part II.A.

84. Title 19-A, chapter 23 contains three subchapters: first, "General Provisions," second, "Restrictions," and third, "Void Marriages and Annulment."

85. *See* Romer v. Evans, 116 S. Ct. 1620, 1627 (1996) ("The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must co-exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.").

86. *See, e.g.*, Irish v. Gimbel, 1997 ME 50, ¶ 6, 691 A.2d 664, 669.

87. *See* U.S. CONST. amend. XIV, § 1: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Me. Const. art. 1, § 6-A: "No person shall be . . . denied the equal protection of the laws, nor be denied the enjoyment of [that person's] civil rights or be discriminated against in the exercise thereof." This introduction to constitutional analysis of statutes deals primarily with federal equal protection law; relevant sections of Maine's Constitution are discussed more fully in Part IV.

protection, it is unconstitutional.[88] Laws are supposed to treat similarly situated people in a similar manner; if they do not they may be unconstitutional for violating equal protection.[89] In determining whether a law violates equal protection, courts in most circumstances apply a standard that is very deferential towards legislative decisions, called "rational basis scrutiny." However, laws based on certain classifications, such as race or gender, and laws burdening fundamental rights, receive some form of "heightened scrutiny" which means that courts appraise such statutes more critically. Such a standard typically requires the state to show that the challenged provision furthers an important or compelling state interest and is narrowly tailored to further only that interest.

Laws which classify explicitly on the basis of race, for example, are automatically "suspect,"[90] receive strict scrutiny, and are rarely upheld.[91] "Strict scrutiny" means that the challenged law must be based on a compelling state interest and must be narrowly tailored to further only that interest.[92] Laws which contain gender classifications, as opposed to racial classifications, have been at times accorded "intermediate scrutiny," which is less rigorous than "strict scrutiny."[93] In 1996, the Supreme Court held in *United States v. Virginia*[94] that gender-based classifications were unacceptable unless they could be supported by an "exceedingly persuasive justification."[95] In Part V.B, I argue that the Act makes a gender-based classification and that heightened scrutiny should apply.

Laws which distribute benefits and burdens in a way that is inconsistent with fundamental rights also receive strict scrutiny.[96] For example, strict scrutiny applies to laws penalizing the fundamental right to

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88. Important debates persist concerning equal protection law, and the appropriate role of courts in democracy. *See generally* Jane S. Schacter, Romer v. Evans *and Democracy's Domain*, 50 VAND. L. REV. 361 (1997); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (Harv. U. Press 1980); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1436-37 (2nd ed. 1988).

89. *See* Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985).

90. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) (holding that legal restrictions curtailing civil rights of a racial group are immediately suspect and subject to rigid scrutiny; involuntary resettlement and internment of Japanese citizens during World War II satisfies such scrutiny).

91. *See* TRIBE, *supra* note 88, at 1451.

92. *See, e.g.*, Shaw v. Hunt, 116 S. Ct. 1894, 1899 (1996) (holding that a North Carolina redistricting plan did not survive strict scrutiny because it was "not narrowly tailored to serve a compelling state interest").

93. Intermediate scrutiny has required that legislation be aimed to further an important—not necessarily a compelling—state interest, and that it relate substantially to the important objective. *See* Craig v. Boren, 429 U.S. 190, 197-98 (1976). It is thus harder to satisfy than rational basis scrutiny but easier to satisfy than strict scrutiny.

94. 116 S. Ct. 2264 (1996).

95. *See id.* at 2271 (citing Mississippi University for Women v. Hogan, 958 U.S. 718, 724 (1982)).

96. *See* TRIBE, *supra* note 88, at 1454.

interstate travel.[97] Supreme Court cases such as *Loving v. Virginia*,[98] *Zablocki v. Redhail*,[99] and *Turner v. Safley*[100] have established that the right to marry is of fundamental importance. The Supreme Court has held that laws which directly and substantially burden the right to marry receive heightened scrutiny.[101] *Griswold v. Connecticut*[102] recognized a right to privacy inherent in marriage. An Alaska Superior Court decision recently held that the right to choose one's own life partner was fundamental and protected by the right of privacy.[103] I argue, then, in Part V.C, that the Act denies the fundamental right to marry and privacy rights to a specific group—gay men and lesbians—and that heightened scrutiny should apply.

Courts have also applied heightened scrutiny to classifications based on other characteristics besides race and gender. For example, distinctions based on out-of-wedlock birth receive "intermediate scrutiny."[104] The Supreme Court has never fully explained the characteristics which justify intermediate review.[105] This type of analysis originates with Justice Stone's famous footnote in *United States v. Carolene Products Co.*,[106] where he wrote that

> legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, [may] be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most

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97. *See id.* at 1455-57; *see also, e.g.*, Shapiro v. Thompson 394 U.S. 618 (1969) (holding that the right to travel is fundamental; the state's purpose in limiting immigration by indigents is not legitimate; a one-year waiting period for welfare benefits for new arrivals is unconstitutional).

98. 388 U.S. 1, 12 (1967) (invalidating a law against racial intermarriage on the grounds that it violated the equal protection and due process clauses; marriage is "one of the basic civil rights of man").

99. 434 U.S. 374 (1978) (holding classifications directly and substantially interfering with the right to marry are subject to rigorous scrutiny; statute requiring non-custodial parents who wanted to marry to prove that they were up-to-date on child support was unconstitutional).

100. 482 U.S. 78 (1987) (holding regulation allowing inmates to marry only when the superintendent determines compelling reasons are present is an unconstitutional deprivation of inmates' marriage rights).

101. Zablocki v. Redhail, 434 U.S. at 386. The standard of review of marriage classifications set forth in *Zablocki* may be "marginally less demanding than traditional strict scrutiny" but it also may be indistinguishable from strict scrutiny. *See Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1250 n.12 (1980).

102. 381 U.S. 479 (1965) (holding that the privacy right in marriage is fundamental; criminal law forbidding use of contraceptives is held unconstitutional).

103. Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *5-6 (Alaska Super. Ct., Feb. 27, 1998).

104. *See* Mills v. Habluetzel, 456 U.S. 91, 99 (1982) (stating that rules based on illegitimacy must be "substantially related to a legitimate state interest" to be upheld). Similarly, rules discriminating against foreign nationals are subject to scrutiny more exacting than other rules, but less exacting than rules discriminating on the basis of race. *See* Mathews v. Diaz, 426 U.S. 67, 81-82 (1976).

105. *See* TRIBE, *supra* note 88, at 1614.

106. 304 U.S. 144 (1938).

> other types of legislation. . . . [S]imilar considerations [may] enter into the review of statutes directed at particular religious, . . . or national, . . . or racial minorities . . . *prejudice against discrete and insular minorities may be a special condition*, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which *may call for a correspondingly more searching judicial inquiry.*[107]

Much discussion has taken place about the implications of these words.[108] Some courts[109] and many commentators[110] have concluded that statutes directed at gay men and lesbians should receive heightened scrutiny, since prejudice against that group tends to curtail the operation of the political processes normally to be relied upon to protect minorities. I assert, then, in Part V.D, that laws classifying on the basis of sexual orientation, such as the Act, should be accorded heightened scrutiny.

Next, after reviewing these three theories, I argue in Part V.E that if heightened scrutiny, whether strict, intermediate, or some other variety, is applied to the Act, it would be held unconstitutional.

Finally, in circumstances other than where fundamental rights or dubious classifications are involved, when a litigant claims that a law violates his right to equal protection, courts generally will apply "rational basis scrutiny" to the law.[111] This means that courts will uphold the law if two conditions are met: first, it must be based on a legitimate state interest, and second, it must be rationally related to furtherance of that interest.[112] This standard is intended to be extremely deferential to the legislature, but is not a rubber stamp.[113] For example, the United States Supreme Court in 1996 in *Romer v. Evans*, using rational basis scrutiny, held that Colorado's Amendment 2 to its Constitution violated equal protection principles.[114] Amendment 2 provided that no state or local government could pass or enforce any

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107. *Id.* at 152-53 n.4 (emphasis added).

108. *See generally* ELY, *supra* note 88, at 153; Lea Brilmayer, Carolene, *Conflicts, and the Fate of the "Inside-Outsider,"* 134 U. PA. L. REV. 1291 (1986); Jane S. Schacter, Romer v. Evans *and Democracy's Domain*, 50 VAND. L. REV. 361 (1997).

109. *See infra* note 237.

110. *See infra* note 239.

111. *See* TRIBE, *supra* note 88, at 1439-43.

112. *See id.*

113. *See, e.g.*, Zobel v. Williams, 457 U.S. 55, 65 (1982) (holding Alaska's statutory formula for dividing shares of surplus oil-boom wealth to state residents in direct proportion to the length of post-statehood residence in Alaska unconstitutional because no legitimate state interest supported a distinction between residents based on how long they have lived in state); Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 455 (1985) (holding a zoning ordinance that, as applied, required a special use permit in residential areas for institutions housing mentally retarded person unconstitutional where circumstances suggested their exclusion resulted from an irrational prejudice against the retarded).

114. *See* Romer v. Evans, 116 S. Ct. 1620, 1628 (1996).

laws banning discrimination on the basis of "homosexual, lesbian, or bisexual orientation."[115] In the last part of this Article, I assert that the Act lacks even a rational basis; it is not rationally related to furthering a legitimate state interest.[116]

IV. ASPECTS OF THE MAINE CONSTITUTION

A. *The Independent Vitality of the Maine Constitution*

Maine must provide at least the level of protection for constitutional rights mandated by federal law,[117] whatever that might be. Maine's Constitution has independent vitality,[118] and federal interpretations of parallel federal provisions are not binding on Maine courts in their interpretations of Maine constitutional provisions.[119] Maine's courts have held that the Maine Constitution provides additional guarantees beyond those contained in the Federal Constitution,[120] as have many

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115. *Id.*

116. *See* Part V.F.

117. *See* U.S. CONST. art. VI: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land."

118. *See generally* MARSHALL J. TINKLE, THE MAINE STATE CONSTITUTION: A REFERENCE GUIDE (1992) (exploring the history and explaining the various provisions of the Maine State Constitution).

119. *See, e.g.*, State v. Flick, 495 A.2d 339, 343 (Me. 1985) (stating that interpretation of Maine Constitution's double jeopardy clause does not depend on interpretation of federal double jeopardy clause); Morris v. Goss, 147 Me. 89, 97-98 (1951) (stating that Maine courts, in interpreting the Maine Constitution, are not bound by other courts' interpretations of their constitutions).

120. *See e.g.*, State v. Sklar, 317 A.2d 160, 169 (Me. 1974) (noting that the state constitution, but not the Federal Constitution, guarantees trial by jury for all criminal offenses and similar language of federal and state provisions is not dispositive); Danforth v. State Dep't of Health and Welfare, 303 A.2d 794, 800 (Me. 1973) (holding that the state constitution protects parent's right to custody of child and that parent has due process right under the state constitution to court-appointed counsel although the Federal Constitution may not guarantee that right). The status of the privilege against self-incrimination is less clear; in *State v. Caouette*, 446 A.2d 1120 (Me. 1982), the Law Court held that the Maine constitutional privilege against self-incrimination prohibited statements made by a defendant if not the "exercise of his own free will and rational intellect." *Id.* at 1123. Although the *Caouette* court did not expressly state that its interpretation indicated that the state privilege against self-incrimination was broader than the federal privilege, its holding seemed to indicate this. In fact, the court in *Caouette* appeared to recognize that its holding would create a state constitutional privilege broader in scope than the federal privilege: "[F]ederal decisions do not serve to establish the complete statement of controlling law but rather to delineate a constitutional minimum or universal mandate for the federal control of every State." *Id.* at 1122. In *State v. Eastman*, 691 A.2d 179 (Me. 1997), however, the Law Court stated that it had "consistently interpreted the Maine privilege co-extensively with the federal privilege" in terms of the substance of the privilege. *Id.* at 183. For a recent discussion, see Donald W. Macomber, *A Call for Consistency:* State v. Caouette *is No Longer Viable in Light of* Colorado v. Connelly *and* State v. Eastman, 50 ME. L. REV. 1, 61 (1998).

other states' courts, such as New Hampshire,[121] Vermont,[122] and Massachusetts.[123] Decisions by the Maine Supreme Judicial Court, sitting as the Law Court, which rest on separate, adequate, and independent state grounds are not subject to federal review.[124]

Many state supreme courts have used the analytical approach of first determining whether there is a state constitutional violation before considering whether there is a federal constitutional violation.[125] Reasons for this include logic,[126] judicial economy, comity, and responsibility of state judges for their state's law.[127] The Law Court in 1984 announced that it would adopt this "state law first" approach,[128] and has reiterated it several times.[129] In *State v. Rundlett*,[130] the court stated that it was using the standard of *Craig v. Boren*[131] as only a "guide to the degree of scrutiny required" for gender-based classifications.[132] However, as Maine constitutional law specialist Marshall Tinkle pointed out in 1992, "the habit of relying exclusively on federal constitutional law had become so ingrained—both on the part of the judges and on the

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121. *See* State v. Ball, 471 A.2d 347 (N.H. 1983) (analyzing state constitutional claim before turning to Federal Constitution, and concluding state constitution's limitations on search and seizure were stricter than federal limitations).

122. *See* State v. Kirchoff, 587 A.2d 988 (Vt. 1991) (stating that the Vermont Constitution provides more protection against government searches and seizures than does the Federal Constitution).

123. *See* Attorney General v. Desilets, 636 N.E.2d 233 (Mass. 1994) (interpreting the Massachusetts Constitution's free exercise of religion clause as broader than federal protections).

124. *See* Michigan v. Long, 463 U.S. 1032 (1983) (stating that state court decisions based on separate, adequate, and independent state law are not subject to federal review). The Hawaii Supreme Court's decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), rested entirely on state constitutional grounds and therefore was not subject to federal review.

125. At least twelve state supreme courts have adopted the practice. *See* FRIESEN, *supra* note 26, at 27-30; *see also* Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 383 (1980).

126. One particularly influential explanation of the logical reason for this sequence is as follows:

> [T]he proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim. This is required, not for the sake of either parochialism or of style, but because the state does not deny any right claimed under the Federal Constitution when the claim before the court in fact is fully met by state law.

Sterling v. Cupp, 625 P.2d 123, 126 (Or. 1981).

127. *See* FRIESEN, *supra* note 26, at 119-20.

128. *See* State v. Cadman, 476 A.2d 1148, 1150 (Me. 1984) (stating that the court will examine claims for state constitutional violation first; if claim fails, Federal Constitution will be analyzed).

129. *See* State v. Flick, 495 A.2d 339, 343 (Me. 1985) (stating that interpretation of the Maine Constitution's double jeopardy clause does not depend on interpretation of the federal double jeopardy clause); Portland v. Jacobsky, 496 A.2d 646, 648 (Me. 1985) (stating that the court will refrain from ruling on federal constitutional questions when state constitutional provisions resolve the matter).

130. 391 A.2d 815 (Me. 1978).

131. 429 U.S. 190 (1976).

132. State v. Rundlett, 391 A.2d at 818.

part of the lawyers who framed the issues for adjudication—that few decisions so far have in fact rested on 'adequate and independent' state constitutional grounds."[133] As Tinkle rightly observed, there is much room for development of constitutional jurisprudence under the Maine Constitution.[134]

B. Maine's Equal Protection Clause and the Forgotten Civil Rights/Nondiscrimination Clauses

Maine is one of thirteen states which has a constitutional provision containing an explicit, mandatory equal protection clause.[135] The Law Court has characterized the equal protection guarantee of the Maine Constitution as "coextensive with," "equal to," "the same as," and "no more stringent than," the federal equal protection guarantee.[136] The language of Maine's constitutional anti-discrimination provision, however, is more extensive than that of the federal equal protection clause. Maine's provision states that "[n]o person shall be . . . denied the equal protection of the laws, *nor be denied the enjoyment of that person's civil rights or be discriminated against in the exercise thereof.*"[137] The phrases pertaining to enjoying civil rights and not being discriminated against in the exercise thereof are not present in the Federal Constitution.[138]

Section 6-A was added in 1963, upon the recommendation of the Second Constitutional Commission of the State of Maine.[139] The

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133. TINKLE, *supra* note 118, at 16 (quoting Michigan v. Long, 463 U.S. 1032 (1983)). The Vermont Supreme Court, in *State v. Jewett*, 500 A.2d 233 (Vt. 1985), usefully described the process of bringing state constitutional claims.

134. TINKLE, supra note 118, at 16.

135. *See* Me. Const. art I, § 6-A; FRIESEN, *supra* note 26, at 148 n.7.

136. *See* Choroszy v. Tso, 647 A.2d 803, 808 (Me. 1994) (upholding the constitutionality of statute of limitations; state equal protection guarantee is "equivalent" to federal guarantee); Peters v. Saft, 597 A.2d 50, 52 n.1 (Me. 1991) (upholding the Liquor Liability Act damage cap and stating that federal and state guarantees are "coextensive"); School Admin. Dist. No. 1 v. Comm'r, Dep't of Educ., 659 A.2d 854 (Me. 1995); Tri-State Rubbish, Inc. v. Town of New Gloucester, 634 A.2d 1284, 1287 n.3 (Me. 1993) (upholding recycling ordinance and stating that Maine and Federal Constitutions guarantee "the same right to equal protection"); Beaulieu v. City of Lewiston, 440 A.2d 334, 338 n.4 (Me. 1982) (holding that ordinance allowing rental assistance but not mortgage assistance did not violate equal protection; state equal protection guarantee "no more stringent" than federal guarantee); State v. Richardson, 285 A.2d 842, 844 (Me. 1972); *see also* Blount v. Dep't of Educational and Cultural Services, 551 A.2d 1377 (Me. 1988) (holding that state equal protection clause gave no protection beyond that of the free exercise clause of the United States Constitution to parents challenging state's authority to give prior approval to home schooling program).

137. Me. Const. art. I, § 6-A (emphasis added).

138. Article 1, § 6-A of the Maine Constitution also lacks a state action requirement, which is present in the Fourteenth Amendment to the United States Constitution. *See* U.S. CONST. amend. XIV, § 1.

139. *See* L.D. 33 (101st Legis. 1963), *reprinted in* REPORTS OF THE MAINE CONSTITUTIONAL COMMISSION (1963). The Commission's report stated that,"[a] due process clause, similar to that which appears as the 14th amendment to the United States Constitution and which would forbid

original language of the proposed amendment contained a prohibition on a person being "denied the enjoyment of . . . civil rights or be[ing] discriminated against *because of race, religion, sex or ancestry.*"[140]

However, the final language of section 6-A does not limit the protection of civil rights to classifications on the basis of sex, race, religion or ancestry, as the original draft did.[141] Some legislators feared the consequences of outlawing sex discrimination, and so drafted an amendment removing the limitations.[142] One legislator questioned what the limitations were on the nondiscrimination principle, given that the limitations on sex and other specific types of discrimination had been removed.[143] In response, one legislator made the point that the Federal

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discrimination against any person because of race, religion, sex or ancestry, should be added to the Maine Constitution." *Id.* at 2. After quoting the proposed language, the Report proceeds:

> We do not believe that anyone will challenge the desirability of amending the Constitution along the lines above suggested. It may well be said that in various places within the Declaration of Rights, as the same is now written, much of the protection given by the proposed new due-process clause appears. However, the rights with which we are here concerned are so fundamental and so important that if there is a second or repeat guarantee, such underwriting of protection is, we believe, all to the good.

Id. The Second Constitutional Commission did not discuss the issue in any detail. *See* SAMUEL SILSBY, JR., PROCEEDINGS OF THE SECOND CONSTITUTIONAL COMMISSION OF THE STATE OF MAINE, 118-19, 243-44, 253-54 (1963).

140. L.D. 1448 (101st Legis. 1963) (presented by Senator Whittaker of Penobscot) (emphasis added). A series of 1962 articles by Professor Edward F. Dow in the Maine Sunday Telegram entitled *Our Unknown Constitution* suggested adding a due process clause and a statement that no one would be "denied the equal protection of the laws, nor denied civil rights or be discriminated against because of sex, race, religion or ancestry." EDWARD F. DOW, OUR UNKNOWN CONSTITUTION (1962). These articles were distributed to the Commission. They appear to have played a role in adoption of section 6-A. *See* SILSBY, *supra* note 139, at 139. *See* Tinkle, *supra* note 118, at 38.

141. Committee Amendment A to S.P. 527, L.D. 1448 (Filing No. S-275) removed the words "because of race, religion, sex or ancestry." Committee Amendment A also specified that the referendum question would be "shall the constitution be amended as proposed by a resolution of the Legislature Forbidding Discrimination Against Any Person?" Committee Amendment A to S.P. 527, L.D. 1448.

142. As Rep. Pease remarked,

> the Committee's seven members who reported "ought to pass," found it necessary to do some amending to take out specifically among other things, the word sex . . . it had to be called to the attention of the commission present at the hearing of the fact that what might happen for example at Bowdoin College if this part of the Constitutional Amendment were left in and a qualified young lady presented herself for admission.

Legis. Rec., House, 3113-14 (1963) (statement of Rep. Pease).

143. Rep. Easton raised the question of

> recalling that the Senate Amendment eliminates the language which specifies the type of discrimination, i.e., race, religion, sex, or ancestry which is forbidden, remembering this, I am curious to know what the term discrimination would really mean. Without discrimination by reason of say sex, or any other limiting factor, we perhaps are thrown to the dictionary definition of the word which means to be particular. . . . I don't understand what the words civil rights mean.

Id. at 3111 (statement of Rep. Eastman). Rep. Smith stated that the amendment with the words removed "is a statement of a fundamental principle to guarantee civil rights even as they are guaranteed in the Federal Constitution." *Id.* at 3112 (statement of Rep. Smith).

Constitution was drafted in broad and general terms so that as new problems arose, the document would be flexible enough to deal with them and argued that the Maine Legislature should do the same thing and approve the amendment.[144]

The final amendment, then, not only has an equal protection clause, but, in addition, states, first, that no one will "be denied the enjoyment of his civil rights," and second, that no one will "be discriminated against in the exercise thereof." [145] Further, it does not limit the types of impermissible denials of "civil rights" to those based on race, sex, religion or ancestry, but rather, it leaves "civil rights" unlimited by qualifiers. No Law Court cases have explicitly interpreted these provisions; rather, Law Court equal protection cases have only discussed the explicit "equal protection" guarantee.[146]

No other state's equal protection provision has identical language to Maine's provision; in fact, Maine's provision is broader than that of other states since it has both an explicit equal protection guarantee and a nondiscrimination civil rights guarantee.[147] The additional "civil rights" and "discrimination" language in Maine's amendment creates a strong textual basis for finding that the civil rights and nondiscrimination provisions of the Maine Constitution's section 6-A actually are broader than those of the Fourteenth Amendment to the United States Constitution.[148]

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144. Rep. Smith also stated that

> when the Federal Constitution was adopted and fundamental rights were set forth in the Constitution, many, many problems did not then exist. . . . They were anticipated by the founders of our Constitution and this Legislature should be far-seeing enough and basic in its thinking so that it now must and should anticipate problems; and this is merely a reiteration of the basic truths which are in our state and also in our State and Federal Constitutions.

Id.

145. Me. Const., art. I, § 6-A.

146. *See supra* note 136.

147. In the states which have explicit equal protection guarantees, the provisions tend to fall into one of two categories. One type of provision simply states that people have a right to be free from denials of equal protection. *See, e.g.*, GA. CONST. art. I, § 1, ¶ 2 ("No person shall be denied the equal protection of the laws"). A second type of provision states that people have a right to be free from denials of equal protection and in addition states that people have a right to be free from discrimination in the exercise of their civil rights on the basis of race, color, sex, or various other categories. *See, e.g.*, CONN. CONST. art. I, § 20, ("No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability"). Maine's-provision is unique and broader, for it forbids denials of equal protection and forbids discrimination in the exercise of civil rights, but does not limit the anti-discrimination protection simply to discrimination on the basis of race, color, sex or other characteristics.

148. Section 6-A of Maine's Constitution, as noted here, contains both an equal protection clause and distinct civil rights and anti-discrimination protections. Generally in this Article, for ease of reference, I will refer to these protections together, as equal protection rights.

C. Maine's Natural Rights Clause

In addition, Maine's Constitution contains Article I, section 1, which concerns "[n]atural rights." It states: "Natural Rights. All people are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness."[149] This provision has no federal analogue. Prior to the 1963 passage of Article I, section 6-A, this "natural rights" provision was at times seen as similar to the equal protection clause of the Fourteenth Amendment.[150] Legislation which does not benefit a legitimate public purpose has been struck down under this provision.[151] Since the 1963 passage of Article I, section 6-A, it has fallen into disuse. Nonetheless, it presents a basis for review of legislation which interferes with individuals' "inherent rights."[152] Several state courts have found that almost identically worded provisions form the basis of state privacy claims.[153] Maine's Constitution is the only state constitution which contains both an equal protection clause and a natural rights clause.[154] Placing the broad language of Article I, section 6-A, with its equal protection, civil rights and anti-discrimination language, alongside the natural rights clause of Article I, section 1, creates an expanded foundation for the conclusion that Maine's Constitution provides broader protections for individual rights than does the Federal Constitution.

V. CONSTITUTIONAL ANALYSIS OF THE ACT

A. Introduction

There are three major theories under which the Act could receive heightened scrutiny if challenged in court. First, the Act creates a

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149. Me. Const. art. I, § 1.

150. *See* TINKLE, *supra* note 118, at 25.

151. *See id.* at 24-25; State v. Old Tavern Farm, 180 A. 473, 133 Me. 468 (1935) (holding the statute requiring operators of milk gathering stations to give bond to secure payment of purchases of milk and cream unconstitutional as invalid exercise of police power and violation of Article I, § 1); State v. Union Oil Company of Maine, 120 A.2d 708, 151 Me. 438 (1956) (holding that the statute prohibiting retail gas dealers from displaying price signs except signs of limited size was not reasonably necessary for accomplishment of legitimate police power purpose and thus was a violation of Article I, § 1 and the Fourteenth Amendment to the United States Constitution).

152. Another provision is Article 1, section 24, a "saving clause." Me. Const. art. I, § 24. ("Other rights not impaired. The enumeration of certain rights shall not impair nor deny others retained by the people."). Tinkle points out that "[l]ike the first section of this article, the last section may be used as a vehicle for recognizing rights that are or ought to be protected at common law." TINKLE, supra note 118, at 54. No Maine cases have been decided under this provision.

153. *See infra* note 220.

154. *See generally* FRIESEN, *supra* note 26.

gender-based classification. Second, the Act directly and substantially interferes with fundamental marriage and privacy rights. Third, the Act targets gay and lesbian individuals, who should be declared members of a protected class for equal protection purposes. Applying any form of heightened scrutiny to the Act, it would fail. In addition, applying deferential "rational basis" scrutiny, the Act fails since it is not based on a legitimate state interest and is not reasonably related to fulfillment of that interest. Each of these arguments will be discussed seriatum.

B. Gender-Based Classification Analysis

1. The Gender-Based Classification of the Act

One analysis is that the Act forbids people from marrying on the basis of their gender.[155] Under the terms of the Act, a man can not marry a man, but a woman can marry a man.[156] This is a gender-based classification.[157] As Judge Michalski of the Alaska Superior Court recently wrote:

> That [the statute forbidding marriage by same-gender couples] is a sex-based classification can readily be demonstrated: if twins, one male and one female, both wished to marry a woman and otherwise met all of the Code's requirements, only gender prevents the twin sister from marrying under the present law. Sex-based classification can hardly be more obvious.[158]

Access to marriage is thus conditioned on the gender-based classification contained in the statute, according to this argument.[159] The Hawaii Supreme Court in *Baehr* adopted this approach, applying the analysis of race-based marriage classifications in *Loving v. Virginia*[160] to gender-based marriage classifications.[161] Heightened scrutiny indubitably

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155. ME. REV. STAT. ANN. tit. 19-A, § 701(5) (West 1998) ("Persons of the same sex may not contract marriage.").

156. Thus, a man who wants to marry a man is similarly situated to a woman who wants to marry a man. However, because of his gender, the man who wants to marry a man is forbidden from doing so.

157. This analysis was adopted in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), and was one of the theories endorsed by the court in *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998).

158. Brause v. Bureau of Vital Statistics, 1998 WL 88743, at *6.

159. *See id.*

160. 388 U.S. 1 (1967). *Loving v. Virginia* was decided both on equal protection and on due process grounds. The due process aspect of *Loving* is discussed more fully *infra* notes 202-03. *See Developments in the Law—The Constitution and the Family*, supra note 101, at 1249.

161. *See* Baehr v. Lewin, 852 P.2d at 62-64. This analogy was initially put forward, but rejected, in a right-to-marry case in 1974. *See* Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974), *appeal denied*, 84 Wash.2d 1008 (Wash. 1974) (holding that the prohibition against same-gender marriage is not a gender-based classification under the state's Equal Rights Amendment). In the 1980s, the argument was first developed in academic literature by Professors Andrew Koppelman and Sylvia Law. *See* Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*,

applies to gender-based classifications under both the federal[162] and state[163] constitutions.

A counterargument as to why the statute does not create a gender-based classification might go as follows: men and women can both marry, so there is no gender-based classification.[164] The fallacy of that argument was discussed at length in the Hawaii Supreme Court's first decision in *Baehr*.[165] The court analyzed the reasoning of *Loving*, and analogized it convincingly to the issue of same-gender marriage.[166] Under the statutory scheme struck down in *Loving*, a marriage between a black woman and a black man would be legal, but one between a white woman and a black man was not.[167] In *Loving*, the statute did not forbid blacks from marrying, or forbid whites from marrying; rather it forbade them from marrying each other. Virginia had argued that because the statute provided for the same penalties against whites as it did against blacks, it did not create unacceptable race-based classifications.[168] This is precisely the same reasoning that suggests that laws against same-gender marriage do not create gender-based classifications. This reasoning was decisively rejected by the Supreme Court in *Loving*, where the Court noted that even though the prohibition applied both to blacks and whites, it was a race-based classification subject to strict scrutiny.[169] Similarly, the idea that since men can marry, and women can

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1988 WIS. L. REV. 187 (1988); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); *see also* Andrew Koppelman, *The Miscegnation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988); Claudia A. Lewis, *From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage*, 97 YALE L.J. 1783 (1988).

162.. *See, e.g.*, United States v. Virginia, 116 S. Ct. 2264, 2275-76 (1996); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982).

163. *See, e.g.*, State v. Houston, 534 A.2d 1293 (Me. 1987) (applying intermediate scrutiny and vacating gender-specific criminal sentencing decision as unconstitutional).

164. An example of a gender-based classification in this context would be a law stating that the age below which women could not marry was higher than for men (or vice versa). *See* Phelps v. Bing, 316 N.E.2d 775, 776-77 (Ill. 1974) (striking down a statutory scheme where male had to be 21 to marry without parental consent, but female only had to be 18 to marry without parental consent).

165. Baehr v. Lewin, 852 P.2d at 62-64.

166. *See id.*

167. *See* VA. CODE ANN. §§ 20-57, 20-58 (1960 Repl. Vol.) (repealed 1968); Loving v. Virginia, 388 U.S. 1, 4 & n.3 (1966). The Virginia statutes at issue in *Loving* also provided that white people could only marry white people, or persons, with white and American Indian blood, and did not forbid other races from intermarrying. *See* VA. CODE ANN. §§ 20-54 (1960 Repl. Vol.) (repealed 1968).

168. *See* Loving v. Virginia, 388 U.S. at 8. Section § 20-59 of the Virginia Code provided the same penalty (between one and five years in jail) for a "white person" who intermarried with a "colored person" as for a "colored person" who intermarried with a "white person." *See* VA. CODE ANN. §§ 20-59 (1960 Repl. Vol.) (repealed 1968). "Colored person" was defined as anyone "in whom there is ascertainable any Negro blood." *Id.* § 1-14.

169. *See* Loving v. Virginia, 833 U.S. at 10-11. That same reasoning was rejected by the California Supreme Court in 1948 when the Court struck down California's miscegenation law. *See*

marry, the Act does not create a sex-based classification, is incorrect. Whether a person has the right to marry, under the Act, depends on his or her gender, as shown by the Alaska court's twin example.

2. *The Idea of Marriage*

Some argue marriage by couples of the same gender is not "marriage."[170] Therefore, since marriage by same-gender couples is not "marriage," a man who wants to marry a man is not similarly situated to a man who wants to marry a woman. Thus, there is no equal protection problem with limiting marriage to opposite sex partners. In a 1973 same-gender marriage decision, *Jones v. Hallahan*,[171] the Kentucky Court of Appeals held that no constitutional issues were involved because what the female couple who wanted to get married actually wanted was "not a marriage."[172] This notion that same gender couples simply cannot marry is similar to the trial court's statement in *Loving*:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.[173]

The Hawaii Supreme Court aptly characterized this passage as declaring that "interracial marriage simply could not exist because the Deity had deemed such a union intrinsically unnatural, and, in effect, because it had theretofore never been the 'custom' of the state to recognize mixed marriages, marriage 'always' having been construed to presuppose a

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Perez v. Sharp, 198 P.2d 17, 25-27 & 29 (Cal. 1948). Miscegenation laws were not limited to the south and west. *See supra* note 35.

170. *See, e.g.*, David Orgon Coolidge, *Same-Sex Marriage? Baehr v. Miike and the Meaning of Marriage*, 38 S. TEX. L. REV. 1, 51-55 (1997) (arguing that marriage must be between persons of the opposite sex by virtue of the nature of marriage); Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 38-39 (1996) (arguing that the nature of marriage is heterosexual and that heterosexual marital relationships are uniquely valuable).

171. 501 S.W.2d 588 (Ky. Ct. App. 1973).

172. *Id.* at 590. No equal protection issues were raised in *Jones*. Other early same-gender marriage decisions made similar points. *See, e.g.*, Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972) (marriage by same-gender couples is not marriage); Singer v. Hara, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974), *appeal denied*, 84 Wash.2d 1008 (Wash. 1974) (holding that prohibition against marriage by same-gender couples is not gender-based classification under the state's Equal Rights Amendment); De Santo v. Barnsley, 476 A.2d 952, 955-56 (Pa. Super. Ct. 1984) (common law marriage cannot be formed between two men). It is noteworthy that all these decisions preceded the United States Supreme Court's decisions in *Zablocki v. Redhail*, 434 U.S. 374 (1978), and *Turner v. Safley*, 482 U.S. 78 (1987), discussed more fully *infra* text accompanying notes 204-206 and 210-14.

173. Loving v. Virginia, 388 U.S. at 3 (quoting the trial judge).

different configuration."[174] The Hawaii court noted that this reasoning was "tautological and circular."[175] It is tautological and circular because it, in effect, says that marriage is marriage, with no reference to any definitional characteristics other than the very one that is being questioned. As the judge in *Brause* wrote: "[I]t is not enough to say that 'marriage is marriage' and accept without any scrutiny the law before the court. It is the duty of the court to do more than merely assume that marriage is only, and must only be, what most are familiar with."[176] Thus, the Act cannot avoid constitutional analysis by defining marriage in a certain way any more than the Virginia courts could avoid equal protection analysis by defining marriage a certain way in *Loving*.

In sum, the Act creates a gender-based classification by forbidding people of the same gender to marry. As such, it is subject to the standard of review that applies to gender-based classifications.

3. Applicable Standard of Review

The issue of the level of scrutiny to be applied to gender-based classifications under federal law has been the subject of much Supreme Court jurisprudence.[177] The most recent decision is *United States v. Virginia*,[178] requiring the men-only Virginia Military Institute (VMI) to admit women. In that case, Justice Ginsberg wrote, repeating language from *Mississippi Univ. for Women v. Hogan*,[179] that gender-based classifications must be based on an "exceedingly persuasive justification"[180] to be constitutional. She also reiterated the familiar, "intermediate scrutiny" standard that gender-based classifications must "serve important governmental objectives" and that the discriminatory means employed must be "substantially related to the achievement of those objectives."[181] Justice Rehnquist concurred, specifying that intermediate scrutiny applied, and that the "exceedingly persuasive justification" language referenced by Justice Ginsberg did not change the applicable intermediate scrutiny standard.[182] Justice Scalia dissented, accusing the

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174. Baehr v. Lewin, 852 P.2d 44, 63 (Haw. 1993) (citations omitted).

175. *Id.*

176. Brause v. Bureau of Vital Statistics, No. 3AN-95-0562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998).

177. *See* United States v. Virginia, 116 S. Ct. 2264 (1996); Frontiero v. Richardson, 411 U.S. 677 (1973); Craig v. Boren, 429 U.S. 190 (1976). In *Baehr v. Lewin*, the Hawaii Supreme Court interpreted its Equal Rights Amendment and decided that strict scrutiny was the appropriate level of scrutiny for gender-based classifications. *See* Baehr v. Lewin, 852 P.2d at 63-64.

178. 116 S. Ct. 2264 (1996).

179. 458 U.S. 718 (1982).

180. United States v. Virginia, 116 S. Ct. at 2274-75 (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. at 724).

181. *Id.* at 2275 (quoting Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980)).

182. *See id.* at 2288 (Rehnquist, J., concurring).

majority of instituting strict scrutiny without saying so.[183] While the Supreme Court's opinion in *Virginia* is not crystal-clear, it does seem that the level of scrutiny of gender-based classifications has been heightened by the *Virginia* decision, although it may not be at the level of strict scrutiny.[184] As the result in *Virginia* suggests, an "exceedingly persuasive justification"[185] may be more difficult for the state to establish, than a standard requiring simply "important governmental objectives" and discriminatory means which are "substantially related to the achievement of those objectives."[186] Debate is likely to continue as to whether this is strict scrutiny, intermediate scrutiny, or something in between, but it is at least intermediate scrutiny and arguably something more.

Maine courts must follow federal equal protection law, but it is instructive to review the Law Court's treatment of gender-based classifications since the Law Court's jurisprudence has been forward-thinking in this area. The Law Court generally has applied intermediate scrutiny to gender-based governmental actions since 1978.[187] As noted above, the standard formulation of intermediate scrutiny is that a classification subject to it must be substantially related to an important governmental objective.[188] For example, in *State v. Rundlett*,[189] the court upheld a gender-specific statutory rape law challenged on state and federal constitutional grounds in a decision that predated the U.S. Supreme Court's decision in *Michael M. v. Superior Court of Sonoma County*.[190] The justification of deterring unwanted teen pregnancy and preventing injury to female teens from premature sexual intercourse was sufficient to support the gender specificity of the statute.[191] In *State v. Houston*,[192] the Law Court's most recent decision reviewing gender-based government actions, the court also applied intermediate scrutiny,

183. *See id.* at 2294-95 (Scalia, J., dissenting).

184. *See* Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 302 (1998); Eric J. Stockel, Note, U.S. v. Virginia: *Does Intermediate Scrutiny Still Exist?*, 13 TOURO L. REV. 229, 257 (1996); Karen L. Kupetz, Note, *Equal Benefits, Equal Burdens: "Skeptical Scrutiny" for Gender Classifications After* United States v. Virginia, 30 LOY. L.A. L. REV. 1333, 1371 (1997); Yanet Perez, Note, *Women Win the War at VMI*, 28 SETON HALL L. REV. 233, 278-79 (1997).

185. United States v. Virginia, 116 S. Ct. at 2276.

186. Craig v. Boren, 429 U.S. 190, 197 (1976).

187. *See* State v. Rundlett, 391 A.2d 815, 818 (Me. 1978) (quoting Craig v. Boren, 429 U.S. at 197); *see also* State v. Houston, 534 A.2d 1293, 1296 (Me. 1987).

188. *See id.*; *see also* State v. Houston, 534 A.2d at 1296.

189. 391 A.2d 815 (Me. 1978).

190. 450 U.S. 464 (1981).

191. *See* State v. Rundlett, 391 A.2d at 819; *see also* Michael M. v. Superior Court of Sonoma County, 450 U.S. at 470.

192. 534 A.2d 1293 (Me. 1987).

and struck down on state and federal constitutional grounds a sentence that the court deemed gender-discriminatory.[193]

Prior to *Rundlett*, the court in *Beal v. Beal*[194] applied rational basis scrutiny to a state statute that provided that alimony could only be ordered for women, finding it unacceptable under the state and federal constitutions.[195] The court thus did not need to reach the issues of whether gender is a suspect classification and the degree of scrutiny appropriate to gender-based classifications.[196] The court found that administrative convenience was not a sufficient basis for perpetuating sex discrimination.[197] This important decision also correctly anticipated the Supreme Court's decision the next year striking down a gender-specific alimony provision in *Orr v. Orr*[198] on equal protection grounds.[199] It also demonstrates a Maine judicial tradition of examining gender-based classifications skeptically, even using rational basis scrutiny.[200] Maine's Constitution, as noted above, broadly forbids "discrimination" in the "exercise of civil rights," as well as forbidding "equal protection" violations, so Maine could provide more exacting scrutiny of gender-based classifications than is required by federal law.[201]

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193. *See id.* at 1296 (holding that the sentencing judge's general policy of applying a minimum two-day jail term of assault when the defendant/assailant was male and the victim was female was a violation of defendant's equal protection rights).

194. 388 A.2d 72 (Me. 1978).

195. *See id.* at 74-75.

196. *See id.* at 74.

197. *See id.*

198. 440 U.S. 268 (1979).

199. *See id.* at 271. In *Orr v. Orr*, the Supreme Court applied intermediate scrutiny to the classification at issue. *See id.* at 279.

200. *See* Beal v. Beal, 388 A.2d at 74. Administrative convenience or reduction of administrative costs is frequently a legitimate state interest. *See Developments in the Law: The Constitution and the Family*, *supra* note 101, at 1200-01, yet in *Beal*, administrative convenience was rejected as a valid rationale.

Maine has had several cases involving men and women's prisons where men unsuccessfully claimed sex discrimination. In these cases, male prisoners claiming sex discrimination since escaping from prisons where men were held were treated more seriously than those male prisoners escaping from prisons where women were held. *See, e.g.*, State v. Emery, 357 A.2d 878 (Me. 1976); Wark v. Robbins, 458 F.2d 1295 (D. Me. 1972); Wark v. State, 266 A.2d 62 (Me. 1970), *cert. denied*, 400 U.S. 952 (1970). These challenges were unsuccessful; men and women were not similarly situated since other differences in addition to gender differentiated them; for example, in *Wark*, men and women were in different institutions which were designed for different purposes. *See* Wark v. Robbins, 458 F.2d at 1298. These cases should not pose a problem in this context because the only difference between the sexes set forth in the Act is the text of the Act itself; but for his gender, a male could marry a male.

201. *See supra* Part IV.B.

C. Fundamental Rights Analysis

1. The Fundamental Right of Marriage

The freedom to marry is recognized by the United States Supreme Court as of fundamental importance. For example, in *Loving*, the United States Supreme Court held that miscegenation laws arbitrarily deprived the Lovings of the freedom to marry, which was a fundamental liberty protected by the Due Process Clause.[202] The Court wrote: "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the basic 'civil rights of man,' fundamental to our very existence and survival."[203] In *Zablocki v. Redhail*, the Court struck down a state law which effectively prohibited indigent, non-custodial parents from remarrying, stating that "our past decisions make clear that the right to marry is of fundamental importance."[204] The Court concluded, after reviewing its history of protection of the marriage right, that the law, because it interfered directly and substantially with the right of a class of people to marry, could only be upheld if supported by sufficiently important state interests, and if narrowly tailored to effectuate those interests.[205] The law failed to meet that test.[206]

The Supreme Court in *Griswold v. Connecticut* [207] declared, striking down a criminal anticontraception law:

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is

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202. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967). The Supreme Court first referred to marriage as fundamental in *Skinner v. Oklahoma*: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (holding that Oklahoma's law requiring sterilization of some criminals but not others violates Equal Protection Clause of Fourteenth Amendment).

203. Loving v. Virginia, 388 U.S. at 12 (quoting Skinner v. Oklahoma, 316 U.S. at 541). The *Loving* Court also struck down the statute on equal protection grounds. *See id.* at 11-12; *see also supra* Part V.B.

204. Zablocki v. Redhail, 434 U.S. 374, 383 (1970).

205. *See id.* at 387-88.

206. The law failed to meet that test for several reasons. If the goal of the law was collecting child support, other means of collecting child support were available that did not infringe on the marriage right. See id. at 389-90. Also, if the goal was preventing non-custodial parents from incurring new child support obligations, the law was underinclusive, since such parents could incur other new obligations of any sort other than those arising from marriage. *See id.* at 390. The law was overinclusive too, since a new spouse might improve a non-custodial parent's finances. *See id.*

207. 381 U.S. 479 (1965).

> an association for as noble a purpose as any involved in our prior decisions.[208]

Griswold reflects a notion of privacy in relationships beyond simply individual privacy.[209]

The most recent U.S. Supreme Court case on the right to marry is *Turner v. Safley*, in which the court struck down a prison regulation restricting prisoners' right to marry.[210] The Court held that prisoners retained the right to marry set forth in *Zablocki*, subject to substantial restrictions as a result of incarceration, but that "[m]any important attributes of marriage remain, however, after taking into account the limitations imposed by prison life."[211] The attributes of marriage that remained included the following:

> First, inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated. Finally, marital status often is a precondition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock). These incidents of marriage, like the religious and personal aspects of the marriage commitment, are unaffected by the fact of confinement or the pursuit of legitimate corrections goals.[212]

In *Turner*, the Court struck down the restrictions on the right to marry as not reasonably related to legitimate penological objectives.[213] The Court's description of the attributes of marriage focuses on the emotional, spiritual, and financial aspects of marriage; Justice O'Connor notes that consummation is not an essential aspect of marriage, showing that the constitutionally protected right to marry is not based on the ability to procreate within that relationship.[214]

These federal cases recognize that there is a fundamental right to marry. Not all restrictions on the right to marry are subject to strict scrutiny, however—in *Zablocki*, the Court wrote that "reasonable

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208. *Id.* at 486.

209. Also, it is interesting to note that in *Griswold*, by striking down the anticontraception law, the Court was protecting a married couple's right *not* to procreate.

210. Turner v. Safley, 482 U.S. 78, 99-100 (1987).

211. *Id.* at 95.

212. *Id.* at 95-96.

213. *See id.* at 96-99.

214. *See id.* at 95-96.

regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed."[215] However, as we have seen, heightened scrutiny applies to some marriage-related classifications.[216]

The Maine Constitution also provides an independent basis for recognition of the fundamental right to marry in its natural rights clause. Article 1, section 1 of the Maine Constitution provides:

> All people are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.[217]

While there is little Maine case law under this provision,[218] the right to marry may be deemed part of each person's inherent and inalienable right to pursue happiness under this provision.[219] The Kentucky Supreme Court found that its almost identically worded constitutional provision was a basis for holding that a right of privacy existed under the Kentucky Constitution that was broader than the federal privacy right.[220] Moreover, Article 1, section 6-A of the Maine Constitution protects "civil rights" and forbids "discrimination" against anyone in the "enjoyment" or "exercise thereof."[221] Since, as the *Loving* court noted, marriage is "one of the 'basic civil rights of man,'"[222] this provision may provide an additional basis, under the state constitution, for holding that marriage is a fundamental right.

Thus, individuals possess an inherent, fundamental, constitutional right to marry.[223] Restrictions which directly and substantially burden

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215. Zablocki v. Redhail, 434 U.S. 374, 386 (1978).

216. *Id.* at 387-88.

217. Me. Const. art. I, § 1.

218. *See supra* notes 152-54 and accompanying text.

219. *Cf.* Whitehouse v. Whitehouse, 129 Me. 24, 25, 149 A. 572, 573 (1930).

220. *See* Commonwealth v. Wasson, 842 S.W.2d 487, 493 (Ky. 1993) (holding sodomy statute unconstitutional as denial of equal protection principles and right to privacy under state constitution). New Jersey also held that its almost identical constitutional provision embraces a right to privacy. *See* Greenberg v. Kimmelman, 494 A.2d 294, 304 (N.J. 1985); *see also* FRIESEN, *supra* note 26, § 2-2(b), at 70 n.20. Maine has not developed a significant jurisprudence on the right to privacy under the state constitution.

221. Me. Const. art. 1 § 6-A.

222. Loving v. Virginia, 388 U.S. 1, 12 (1967) (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

223. It is somewhat unclear whether, under prior Maine statutes before passage of the Act, couples of the same gender could claim a right to marry. Prior law did not explicitly bar marriage by same-gender couples. However, the consanguinity restrictions, ME. REV. STAT. ANN. tit. 19-A, § 701(2) (West 1998), seem to contemplate opposite sex marriage. If such a claim had been brought prior to the passage of the Act, principles of statutory interpretation would have had to be used to interpret whether the existing statutes barred marriage by same-gender couples and, if so, whether that ban was constitutional. The constitutional principles and broader policies enunciated in this

the right to marry must be justified by sufficiently important state interests and must be closely tailored to effectuate only those interests.[224]

2. Applicable Standard of Review

The Act places a direct and substantial burden on the right to marry, and as such is subject to heightened scrutiny under *Zablocki*. The Act states that persons of the same gender may not marry at all,[225] which is a direct and substantial burden placed on persons who might want to marry someone of the same gender. In addition, the Act provides that certain marriages, legal when entered into by the participants in other states, are void in Maine.[226] This also directly and substantially burdens those persons who are participants in such marriages.[227]

The Act is radically different from other provisions of Maine law which regulate marriage. For example, the Maine statutes list a number of categories of people who can solemnize marriages,[228] and list requirements[229] and procedures[230] for licenses. These types of regulations are incidental regulations that do not significantly interfere with the decision to marry, and thus are subject to rational basis scrutiny under *Zablocki*.[231] In sum, heightened scrutiny would be applied to the Act because it directly and substantially interferes with the fundamental right to marry.

D. Sexual Orientation Protected Class Analysis

1. The Sexual Orientation Classification of the Act

A third theory which supports the conclusion that heightened scrutiny should be applied to the Act is that it classifies on the basis of sexual orientation and such classifications should be accorded heightened scrutiny.

Article, I believe, mean that marriage should not be limited to couples of the opposite sex, even in the absence of the Act.

224. *See* Zablocki v. Redhail, 434 U.S. 374, 387-88 (1978).

225. *See* ME. REV. STAT. ANN. tit. 19-A, § 701(5) (West 1998).

226. *See id.* § 701(1-A).

227. Given that the right to marry is fundamental, heightened scrutiny would be applied to challenges to the provisions of Maine law limiting marriage on the basis of consanguinity, polygamy, and mental disability, since those provisions directly and substantially interfere with the right to marry. For further analysis, see *Developments in the Law—The Constitution and the Family*, *supra* note 101, at 1248-64; *see also* Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-sex Marriage*, 75 N.C. L. REV. 1502 (1997).

228. Title 19-A, § 665(1)(A) of the Maine Revised Statutes lists justice or judge, lawyer, justice of the peace, or notary public. *See* ME. REV. STAT. ANN. tit. 19-A, § 655(1)(A) (West 1998); Section 655(1)(B) lists ministers, clerics, and persons licensed to preach by a church or ecclesiastical body. *See id.* § 655(1)(B). Section 658 lists Quakers and members of the Baha'i faith who solemnize marriages according to the practice of those faiths. *See id.* § 658.

229. *See id.* § 656.

230. *See id.* § 652.

231. 434 U.S. 374, 386 (1978).

The effect of the statute is to prohibit gay men from marrying each other, and similarly to forbid lesbians from marrying each other. For example, the Act states that one of its purposes is "to support and strengthen traditional monogamous Maine families against improper interference from out-of-state influences and edicts."[232] The "out-of-state edict" which may "improperly influence" Maine is the Hawaii Supreme Court's decision in *Baehr v. Lewin*, according to the sponsors of the intiative.[233] *Baehr* is widely recognized as a case about marriage by gay couples.[234] Although the Act also conceivably could disadvantage other marriages,[235] its primary effect is to prohibit marriages by same-gender couples. That this is the sole aim of the Act is also shown by the summary of the bill, which states only that the Act "prohibits persons of the same sex from contracting marriage."[236] Thus, it is clear that the statute creates a classification aimed to exclude gay men and lesbians from marriage.

2. *Standard of Review for Classifications Based on Sexual Orientation*

Various state and federal courts have held that classifications on the basis of sexual orientation should be given heightened scrutiny;[237] others

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232. *See* ME. REV. STAT. ANN. tit. 19-A § 650(C) (West 1998).

233. *See supra* note 78.

234. *See, e.g.*, Paul Carrier, *Maine Group Seeks to Ban Gay Wedlock*, PORTLAND PRESS HERALD, May 2, 1996, at 1.

235. For example, many states including Rhode Island allow first cousin marriages. *See* R.I. GEN. LAWS §§ 15-1-1, 15-1-2 (1996). Maine only allows such marriages if a physician has provided genetic counseling. *See* ME. REV. STAT. ANN. tit. 19-A, § 701(2)(B) (West 1998). Thus, theoretically, if a first cousin couple married in Rhode Island moves to Maine, their marriage would be void. However, it is implausible that they would ever be detected; for example, no proof relating to consanguinity is required when couples apply for a marriage license.

236. L.D. 1017 (118th Legis. 1997); *see* Franklin Property Trust v. Foresite, Inc., 438 A.2d 218, 223 (1981) (noting that statement of fact attached to legislative document is a "proper and compelling aid" in determining legislative intent); *see also* State v. Lewis, 590 A.2d 149, 157 (1991) (same).

237. *See* Able v. United States, 968 F. Supp. 850, 863-64 (E.D.N.Y. 1997) (holding that gay men and lesbians are a suspect class and a law conditioning their retention in military service on non-disclosure of their sexual orientation is subject to heightened scrutiny under the Equal Protection Clause of the Fifth Amendment); Commonwealth v. Wasson, 842 S.W.2d 487, 500-02 (Ky. 1992) (holding that sexual orientation discrimination must be based on a substantial governmental interest and a law criminalizing same-gender sodomy was unconstitutional under state constitution); Watkins v. United States Army, 847 F.2d 1329 (9th Cir. 1988), (holding that Army regulations barring homosexuals from military service violated equal protection), *reh'g granted*, 847 F.2d 1362 (1988) (en banc), 875 F.2d 699, 725 (9th Cir. 1989) (*cert. denied*, 498 U.S. 957 (1990); Gay Law Students Ass'n v. Pacific Telephone & Telegraph Co., 595 P.2d 592 (Ca. 1979) (holding that the state constitution's equal protection provision barred the public utility from discriminating against homosexual employees); *see also* Gay Rights Coalition v. Georgetown University, 536 A.2d 1 (D.C. 1987).

have held that only rational basis review applies.[238] Numerous commentators have argued that heightened scrutiny should apply to classifications on the basis of sexual orientation and that gay men and lesbians should be considered a "suspect class."[239] The Supreme Court has stated that:

> [A] suspect class is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." ... [These groups have] been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.[240]

The Court has further explained the idea behind treating some classifications as "suspect" as follows:

> Some classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law. Classifications treated as suspect tend to be irrelevant to any proper legislative goal.... The experience of our Nation has shown that prejudice may manifest itself in the treatment of some groups. Our response to that experience is reflected in the Equal Protection Clause of the Fourteenth Amendment.[241]

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238. *See, e.g.*, High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 570-73 (9th Cir. 1990) (holding that homosexuality is not a class subject to heightened scrutiny under the Federal Constitution); Ben-Shalom v. Marsh, 881 F.2d 454, 464 n.8 (7th Cir. 1989) (noting that heightened scrutiny is reserved for equal protection challenges based on race, alienage, national origin, gender, or illegitimacy); Padula v. Webster, 822 F.2d 97, 102-04 (D.C. Cir. 1987) (finding that homosexuality was not a suspect class under the federal guarantee of equal protection).

239. *See, e.g.*, Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985); Harris M. Miller II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797 (1984); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 740-46 (1985); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1427 (1988).

240. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (quoting San Antonio Independent Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).

241. Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982) (citations omitted). The Court decided not to designate "illegal aliens" as a suspect class, but struck down a state law withholding education funding for the benefit of children not legally admitted into the United States. *See id.* at 223. The Supreme Court in *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), described the previously established suspect classifications of race, alienage, and national origin as follows:

> These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.

Id. at 440.

From the applicable Supreme Court precedents, there are three criteria for heightened scrutiny: first, historical disadvantage;[242] second, a lack of relation between the "ability to perform or contribute to society" and the trait defining the group;[243] and third, a position of relative political powerlessness within the majoritarian legislative sphere.[244] As discussed below, all three of these criteria are present regarding gay men and lesbians; therefore, heightened scrutiny should apply under federal and state law.[245]

Because Maine's Constitution has an explicit equal protection clause,[246] constitutional language protecting civil rights and prohibiting discrimination,[247] and a natural rights provision,[248] there is a basis for holding that sexual orientation is a suspect classification under Maine law even if federal courts do not do the same.[249] In *Solmitz v. Maine Sch. Administrative Dist. Number 59*,[250] the Law Court left open the possibility that sexual orientation could be considered a suspect classification under state law.[251]

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242. This means whether the group has been burdened with "purposeful unequal treatment" or subjected to "disabilities on the basis of stereotyped characteristics" and hostility. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. at 440; Massachusetts Bd. of Retirement v. Murgia, 427 U.S. at 313; San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. at 28.

243. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 686 (1973); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. at 440-41.

244. *See* San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. at 23; Plyler v. Doe, 457 U.S. at 216-17 n.14.

245. Justice Brennan agreed that gay men and lesbians satisfy the criteria for heightened scrutiny:

> [H]omosexuals constitute a significant and insular minority of this country's population. Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena. Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is "likely . . . to reflect deep-seated prejudice rather than . . . rationality." State action taken against members of such groups based simply on their status as members of the group traditionally has been subjected to strict, or at least heightened, scrutiny by this Court.

Rowland v. Mad River Local Sch. Dist., 730 F.2d 444 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting (citations omitted)).

246. Me. Const. art. I, § 6-A.

247. *Id.* ("No person shall . . . be denied the enjoyment of his civil rights or be discriminated against in the exercise thereof.").

248. *Id.* art. I, § 1.

249. *See* Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992) (holding that protections of homosexuals under the Kentucky Constitution are more extensive than under the Federal Constitution).

250. 495 A.2d 812 (1985).

251. *See id.* at 820. In *Solmitz*, the court held that even if the lesbian speaker scheduled to speak at a cancelled school Tolerance Day event was a member of a protected class, her rights were not violated because the entire event was cancelled. *See id.* at 820-21. In *State v. Rush*, 324 A.2d 748 (Me. 1974), the Law Court rejected poverty as a suspect classification, following the Supreme Court's lead in *Rodriquez*. *See id.* at 756-57 (referring to San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973)).

Gay men and lesbians meet the criteria for a suspect classification. First, gay men and lesbians have historically been, and continue to be, a disadvantaged group against which there has been and continues to be a great deal of prejudice, as the Law Court[252] and others[253] have noted. Thus, the first criterion is satisfied. Second, the trait of being gay or lesbian has nothing to do with an individual's ability to participate in and contribute to society.[254] It has nothing to do with an individual's ability to perform on the job.[255] It has nothing to do with an individual's ability to participate in a committed relationship, to share, or to love.[256] It has nothing to do with an individual's ability to raise children.[257] Third, Maine's lesbian and gay citizens are a minority, which, because of historical discrimination and prejudice, is not sufficiently protected by

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252. The Law Court has noted that "the existence of anti-homosexual bias in our society requires voir dire directed at such prejudice if the evidence [in a criminal trial] might suggest that the defendant is homosexual." State v. Lambert, 528 A.2d 890, 892 (Me. 1987) (citing State v. Lovely, 451 A.2d 900 (Me. 1982)).

253. *See, e.g.*, Able v. United States, 968 F. Supp. 850, 852-55 (E.D.N.Y. 1997); Evan Wolfson, *Civil Rights, Human Rights, Gay Rights: Minorities and the Humanity of the Different*, 14 HARV. J.L. & PUB. POL'Y 21, 30-33 (1991); Gregory M. Herek, *Myths about Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 LAW & SEX. 133, 142-43 (1991); *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1503 (1989); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1286 (1985); Alan Wolfe, *The Homosexual Exception*, N.Y. TIMES, Feb. 8, 1998 (Magazine), at 46. This is not to say the type of disadvantage experienced by gay men and lesbians is similar to the type of disadvantages experienced by racial minorities. There are many important differences and each is *sui generis*.

254. In 1973, the American Psychological Association and the American Psychiatric Association rejected the notion of homosexuality as a mental illness, stating that "[h]omosexuality, per se, implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." John J. Conger, Proceedings of the American Psychological Association, Incorporated, for the Year 1974, AM. PSYCHOLOGIST, June 1975, at 620; *see also* American Psychiatric Association, *Gay and Lesbian Issues* (visited Apr. 24, 1998) <http://www.psych.org/public_info/HOMOSE~1.HTM>.

255. *See* Gary B. Melton, *Public Policy and Private Prejudice*, 44 AM. PSYCHOLOGIST, June 1989, at 933 ("Gay people have an overall potential to contribute to society similar to that of heterosexual people, including in the workplace."); Herek, *supra* note 253, at 138-148 (1991).

256. *See* Herek, *supra* note 253, at 161 (1991); *see also supra* note 15.

257. *See* Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *21 (Haw. Civ. Ct. Dec. 3, 1996) ("Defendant has failed to present sufficient credible evidence which demonstrates that the public interest in the well-being of children . . . or the optimal development of children would be adversely affected by same-sex marriage."). An increasingly large body of research demonstrates that children of same-sex couples are not harmed by being raised by same-gender couples and, in fact, do as well as children raised in other settings. *See, e.g.*, AMERICAN PSYCHOLOGICAL ASSOCIATION, LESBIAN AND GAY PARENTING 2-3 (1995); Mike Allen & Nancy Burrell, *Comparing the Impact of Homosexual and Heterosexual Parents on Children: Meta-Analysis of Existing Research*, 32(2) J. HOMOSEXUALITY 19, 30 (1996); Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025 (1992); FREDERICK W. BOZETT, GAY AND LESBIAN PARENTS (1987); Susan Golombok et al., *Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal*, 24 J. CHILD PSYCHOL. AND PSYCHIATRY 551 (1983); FIONA L. TASKER & SUSAN GOLOMBOK, GROWING UP IN A LESBIAN FAMILY 135-36 (1997).

the political process.[258] The voters' February 1998 repeal of the amendment to the Maine Human Rights Act that had extended civil rights protection to gay men and lesbians may demonstrate this.[259] In the campaign, a major spokesperson for the repeal argued explicitly that landlords and employers should be able to discriminate against gay men and lesbians.[260] Under these circumstances, classifications on the basis of sexual orientation should be given heightened scrutiny.

E. Application of Heightened Scrutiny

Under any of the three theories outlined above, gender-based classification, fundamental right to marry, or protected classification, the Act must satisfy heightened scrutiny. There are various permutations of heightened scrutiny, as the reader has perceived.[261] In any version, the

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258. Arguments about "immutability" of sexual orientation tend to surface in this area. Some claim that homosexuality is not an "immutable" characteristic, that it is simply a behavior choice, and as such there should not be anti-discrimination protections. This argument is rather beside the point for several reasons. First, a trait need not be immutable for classifications which burden the group to obtain heightened judicial scrutiny. For example, distinctions based on alienage receive heightened scrutiny, yet alien status is often within the control of the individual. *See* Graham v. Richardson, 403 U.S. 365 (1971). The Supreme Court has never held that immutability is a necessary prerequisite for heightened scrutiny. *See* Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 n.10 (1985). The causes of sexual orientation are unknown. There is some evidence that for some it may be genetic. RICHARD A. POSNER, SEX AND REASON 101 (1992). As Professor Laurence Tribe notes, sexual orientation (whether heterosexual or homosexual) is often very important to individuals' identities and if it is changeable at all, it is very difficult to change. *See* TRIBE, *supra* note 88, at 1616. Whatever the origins of sexual orientation are, what should be most critical for equal protection analysis is the lack of correlation between the sexual orientation of being gay or lesbian and an ability to perform in society. *See* Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994) (noting the dangers of resting heightened scrutiny on scientific evidence of genetic origins of sexual orientation).

259. Peter Pochna, *Repeal Prevails: Conservatives Score a Dramatic Victory as Voters Overturn Maine's Gay-Rights Law*, PORTLAND PRESS HERALD, Feb. 11, 1998, at A1.

260. Michael Heath, Executive Director of the Maine Christian Civic League, wrote in a November 1997 fundraising letter:

> We believe that it IS appropriate to discriminate against people if they are wrong. We believe that this is especially true for the small businessman and landlord. They should be afforded the freedom to make decisions for themselves, unless the cumulative effect of their decisions causes widespread social problems for people. If a Maine businessman or landlord wants to discriminate against a person because of their sexual orientation, they should be able to do so.

Bill Nemitz, *Heath Knows How Jesus Would Vote*, PORTLAND PRESS HERALD, Jan. 9, 1998, at B1 (quoting fundraising letter of Michael Heath).

261. In a nutshell, the standard for gender-based classifications is that they must further "important governmental objectives," the means employed must be "substantially related to the achievement of those objectives" and "[t]he justification must be genuine." United States v. Virginia, 116 S. Ct. 2264, 2275 (1996) (citations omitted). *See supra* Part V.B. For restrictions that directly and substantially burden the right to marry, they must be based on "sufficiently important state interests" and be "closely tailored to effectuate only those interests." Zablocki v. Redhail, 434 U.S. 374, 388 (1978); *see supra* Part V.C. For heightened scrutiny based on protected

Act's restrictions must be supported by important state interests and must be narrowly tailored to further only those interests or be substantially related to furtherance of those interests. Throughout this analysis, it is critical to keep in mind the Supreme Court's statement in *Palmore v. Sidoti*,[262] responding to private racial prejudice, that "[t]he Constitution cannot control [private racial] prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[263]

1. Important or Compelling State Interests

To satisfy heightened scrutiny, the Act's restrictions must further at least an "important state interest."[264] Since no litigation has been filed, it is difficult to predict what "important interest" the state might proffer if the Act was challenged. Hawaii's litigation may offer some guidance. In *Baehr*, the trial court on remand was required to apply strict scrutiny,[265] which meant that the state had to establish that the marriage ban furthered a "compelling state interest" and to prove that the law was narrowly drawn to avoid unnecessary abridgment of constitutional rights.[266] The state tried to establish at trial that the marriage ban furthered various compelling state interests, such as the need to protect traditional marriage as the fundamental structure in society, the interest in "fostering procreation within a marital setting,"[267] and the interest in "protecting the health and welfare of children and other persons."[268] However, after a trial replete with expert testimony, the court found that the state "has not demonstrated a basis for its claim of the existence of compelling state interests sufficient to justify withholding the legal status of marriage from [p]laintiffs"[269] and that the "[d]efendant has failed to present sufficient credible evidence which demonstrates that the public interest in the well-being of children and families, or the optimal

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classifications, strict scrutiny should apply so that the classification must serve a compelling governmental interest and be narrowly tailored to further only that interest. *See* Watkins v. U.S. Army 847 F.2d 1329 (9th Cir. 1988); *supra* Part V.D.

262. 466 U.S. 429 (1984).

263. *Id.* at 433. In *Palmore*, a child's parents had divorced and the mother, who had custody, began living with a black man. The lower court transferred the child to the father's custody, partly in view of the potential stigmatization she might face from others, coming from a mixed race household. The Supreme Court reversed the lower court's decision because of the improper role that race played in it. *See id.* at 434.

264. *See supra* note 261.

265. *See supra* note 5.

266. *See* Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993). The Hawaii Supreme Court's opinion put the burden of proof on the defendant to show that the act was constitutional. *See id.*

267. Baehr v. Miike, CIV No. 91-1394, 1996 WL 694235, at *3 (Haw. Cir. Ct. Dec. 3, 1996) (quoting Defendant's First Amended Pretrial Statement, May 13, 1996).

268. *Id.*

269. *Id.* at *21.

development of children, would be adversely affected by same-sex marriage."[270] This ruling, as mentioned above, is on appeal.[271]

In considering what important state interest might be the basis of the Act's restrictions, one could simply say that the state always has an important interest in regulating marriage since marriage regulation is considered to be within the police powers of the state.[272] However, the important state interest that is furthered by the particular classification at issue must be articulated more specifically.[273] For the state to defend a claim of unconstitutionality, it must be possible to articulate the interest at stake. The state would have to show that it has an important interest in limiting the gender of couples who marry, for some particular reason.[274] Such a reason appears difficult to articulate or justify without relying on animus towards gay men and lesbians, which should no longer be considered an acceptable basis for legislation.[275]

The Act itself lists two "compelling state interests" in its findings. The first is "to nurture and promote the unique institution of traditional monogamous marriage in the support of harmonious families and the physical and mental health of children."[276] The second is that: "[t]he state has the[277] compelling interest in promoting the moral values inherent in traditional monogamous marriage."[278] The Act never defines

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270. *Id.*

271. Alaska will also have to defend its marriage ban as based on a compelling state interest, according to the superior court's decision in *Brause*. *See* Brause v. Alaska Bureau of Vital Statistics, 3AN-95-0562CI 1998 WL 88743, at *13 (Alas. Sup. Ct. Feb. 27, 1998).

272. *See* Loving v. Virginia, 388 U.S. 1, 7 (1966).

273. For example, in *Zablocki*, the state argued that two interests were served by the challenged law; first, the law gave the state the opportunity to counsel the would-be marriage entrant; second, the law protected the welfare of children not in the custody of a biological parent. *See* Zablocki v. Redhail, 434 U.S. 374, 388 (1978). The Court's analysis seemed to assume that these interests were important or at least legitimate but that the statute lacked the necessary fit between means and ends. *See id.* at 388-90.

274. In applying intermediate scrutiny, courts often limit their review to the rationale actually advanced by the state, refusing to supply their own rationales. Another technique used in intermediate scrutiny is to reject after-the-fact rationalizations and instead look at the reasons for the rule at the time of its enactment. See TRIBE, *supra* note 88, 1604-06; *see also* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 730 (1982); United States v. Virginia, 116 S. Ct. 2264, 2275 (1996) ("The justification must be genuine, not hypothesized or invented post hoc in response to litigation."). *See supra* Part V.F.

275. *See* Romer v. Evans, 116 S. Ct. 1620, 1628-29 (1996); *see also supra* Part V.F.1. The actual purpose and history of the legislation is an important part of this inquiry. While in statutory interpretation cases courts generally analyze legislative history and legislative intent only when there is an ambiguity in the statutory language, *see* O'Neal v. City of Augusta, 1998 ME 48, ¶ 4, 706 A.2d 1042, 1043-44, in equal protection cases, legislative intent is generally critical to the inquiry. *See* Hunter v. Erickson, 393 U.S. 385 (1969); *see generally* Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89 (1997).

276. ME. REV. STAT. ANN. tit. 19-A, § 650(1)(A) (West 1998).

277. It is not clear why this word is "the." It would seem that "a" would be more appropriate because "the" implies that there is only one compelling state interest, and the statute itself lists two.

278. ME. REV. STAT. ANN. tit. 19-A, § 650(1)(A) (West 1998).

"traditional monogamous marriage"; nor does it define what "moral values" are "inherent in" such a marriage. These "compelling state interests" appear to be listed in the Act to present a justification for it if it is challenged. A challenger might claim that the Act violates his fundamental right to marry. The state's response could be that it is justified by either or both of these stated "compelling state interests."

But the legislature cannot force a court to defer to an unconstitutional statute by defining something as a "compelling state interest." In *City of Boerne v. Flores*, the Supreme Court rejected an attempt by Congress to control the standard of review that would be applied to determine whether certain state actions were constitutional.[279] The Maine legislature, by declaring certain "compelling state interests," is trying also to control the nature of review that courts would give the Act. However, determining constitutionality is a task for the courts.[280] In addition, these interests are simply too amorphous to be defined as important or compelling for constitutional purposes. They also are not directly related to the exclusion, as discussed below.[281]

The Law Court has identified various interests as "compelling state interests" but has not discussed in detail what constitutes "important state interests." Compelling state interests identified include providing a jury trial,[282] prohibiting sale and use of illegal drugs,[283] freedom of religion,[284] ensuring that all citizens are adequately educated,[285] avoiding the appearance of coercion which results in every solicitation on behalf of law enforcement agents,[286] conserving natural resources such as clams,[287] and free exercise of speech.[288]

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279. 117 S. Ct. 2127, 2170 (1997) (holding the Religious Freedom Restoration Act, which required government actions that infringed on religion to be justified by strict scrutiny, unconstitutional).

280. *See* Marbury v. Madison, 5 U.S. 137, 177 (1 Cranch) (1803).

281. *See* Part V.E.2.

282. *See* Butler v. Supreme Judicial Court, 611 A.2d 987, 992 (Me. 1992) (holding that the state can impose a fee on litigants demanding jury trial).

283. *See* Rupert v. City of Portland, 605 A.2d 63, 66 (Me. 1992) (holding that the city can retain pipe that citizen claims is used for religious use of marijuana in view of state interest in preventing illegal drug use).

284. *See* Blount v. Department of Educ. and Cultural Serv., 551 A.2d 1377, 1381 (Me. 1988) (stating that freedom of religion and education are compelling state interests, and upholding the state's home schooling plan despite religious objections).

285. *See id.*

286. *See* State v. Maine State Troopers Ass'n, 491 A.2d 538, 542-43 (Me. 1985) (holding that the ban on solicitation by troopers based on a compelling state interest of avoiding appearance of coercion satisfies First Amendment).

287. *See* State v. Norton, 335 A.2d 607, 615 (Me. 1975) (finding that a compelling state interest in clam conservation justifies regulation distinguishing between residents and non-residents of town).

288. *See* Opinion of the Justices, 306 A.2d 18, 21 (Me. 1973) (opining that proposed legislation making it a crime to publish an unsigned editorial was an unconstitutional denial of free speech).

In several cases, the Law Court has rejected so-called "compelling state interests" that government entities put forward to justify their actions. For example, a speech restriction that applied to a union was struck down in *Association of Independent Professionals v. Maine Labor Relations Board*.[289] The state claimed that the "compelling state interest" that justified the restriction was preserving labor peace and avoiding disruption of public educational institutions through labor activity.[290] The court found that these could be compelling state interests, but that the state had not shown in this case that they actually were compelling.[291] In a 1973 *Opinion of the Justices*,[292] the court found that interference with the right to vote through residency requirements had to be justified by a compelling state interest, and where the only state interest was the administrative task of registration, the interference had to be limited.[293]

In sum, the Act's declarations of "compelling state interests" do not mean that the Act furthers an actual, compelling, or important state interest. Further, given the nature of previously recognized compelling state interests, it is unlikely that the state could show that the Act's restriction, which simply excludes and disadvantages lesbians and gay men, furthers a compelling or sufficiently important state interest.[294]

2. The "Narrow Tailoring" or "Substantial Relationship" Requirement

Let us assume for the purposes of discussion that the Act's exclusion furthers important or compelling state interests, such as "promoting the moral values inherent in traditional monogamous marriage" set forth in the Act or some other analogous broad goal. The next question is whether it is "closely tailored to effectuate only those interests."[295] In *Baehr v. Miike*, the trial court concluded that even if the state had shown that banning marriage by same-gender couples furthered a compelling state interest, the state had failed to show that the ban was "narrowly drawn to avoid unnecessary abridgements of constitutional rights."[296]

The problem is that the Act's wholesale ban on marriage by same-

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289. 465 A.2d 401, 410 (Me. 1983).

290. *See id.*

291. *See id.* at 410-11.

292. 303 A.2d 452 (Me. 1973).

293. *See id.* at 456; *see also* Dotter v. Maine Employment Sec. Comm'n, 435 A.2d 1368 (Me. 1981) (finding that agency failed to establish a compelling state interest for denying unemployment benefits to an employee who resigned as a result of conflict with his employer concerning his exercise of his religion).

294. As I argue in the next section, the exclusion is not based on a legitimate state interest. Given that this is so, it is obviously not based on an important or compelling state interest.

295. Zablocki v. Redhail, 434 U.S. 374, 388 (1978). See *supra* note 261 for summaries of the varieties of heightened scrutiny.

296. Baehr v. Miike, Civ. No. 91-1394, 1996 WL 694235, at *19 (Haw. Cir. Ct. Dec. 3, 1996) (citations omitted).

gender couples cannot be narrowly tailored "to promote the moral values . . . in traditional monogamous marriage";[297] nor can it be substantially related to such a goal. The Act is over-inclusive in that it leaves in place the liberal entry-into-marriage laws which allow persons to marry who may not in any way "promote the moral values in traditional monogamous marriage," as long as they are of opposite sexes.[298] It is also under-inclusive, since some couples of the same sex who marry may in fact promote the moral values of traditional monogamous marriage, yet all are excluded from marriage. The purported "compelling interests," which the Act is supposed to further, are so amorphous that it is impossible for any law to be narrowly tailored to further only those goals or for any law to be substantially related to those goals.[299]

3. *The "Exceedingly Persuasive Justification" Test*

Heretofore, I have combined the discussion of the application of the types of heightened scrutiny for the sake of simplicity. I will now turn to the specific analytical framework of *United States v. Virginia*[300] because it is illuminating when applied to the gender-based aspect of the Act. In *United States v. Virginia,* the defense claimed that excluding women from the Virginia Military Institute provided educational benefits, and that VMI would have to modify its unique educational approach if it were to admit women.[301] The state claimed that inclusion of women was contradictory to the educational mission of the institution and would in fact "destroy" the institution.[302] Further, the defense argued that a separate women's college for military training was sufficient for women, so that the presence of the men-only VMI was not discriminatory.[303]

These were not sufficiently persuasive justifications for the Court.[304] The majority found that Virginia's argument that it excluded women from VMI in order to further educational diversity was ungrounded in the reality and history of education in Virginia, and disregarded that supposed justification.[305] The separate women's college was found to be

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297. ME. REV. STAT. ANN. tit. 19-A, § 650(1)(A) (West 1998).

298. Of course, some married opposite sex couples will promote traditional moral values of monogamous marriage and some will not. *See* Legis. Rec. 396 (1997) (statement of Sen. Cathcart):

> I do believe in marriage but I have to point out that this is a state where between 1990 and 1995, 51% of all the homicides were related to families, they're domestic violence homicides. And, I would bet you, without looking at the names and actual families, that these were mostly homicides in traditional, monogamous families[.]

299. *See infra* note 261.

300. 116 S. Ct. 2264 (1996).

301. *See id.* at 2276.

302. *See id.* at 2279.

303. *See id.* at 2282.

304. *See id.* at 2286-87.

305. *See id.* at 2284.

"no cure at all for the opportunities and advantages withheld from women who want a VMI education and can make the grade."[306] The implementing methodology of VMI was not "inherently unsuitable to women" even though most women (and most men) would not want such an education.[307] The Court analyzed the question as being "whether the State can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords,"[308] and answered this question in the negative.[309]

With respect to the Act, the issue should be, to paraphrase Justice Ginsberg, whether the state has an exceedingly persuasive justification for denying, on the basis of gender, to people who have the will and capacity, the responsibilities and rights that marriage uniquely affords. Arguments parallel to Virginia's in *United States v. Virginia* could be advanced to support the Act: that allowing gay men and lesbians to enter the institution of marriage will destroy it, and that alternatives like domestic partnership should be sufficient.[310]

The Supreme Court's responses to the idea that allowing women to enter VMI will destroy it are interesting when applied to marriage. Virginia argued that "the adversative method of training provides

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306. *Id.* at 2286.

307. *Id.* at 2269, 2284.

308. *Id.* at 2280.

309. Implicit in the opinion seems to be the analysis that the Court accepted the major VMI goal of "producing citizen-soldiers" as an important state interest, but that the exclusionary practice was deemed not substantially related to that goal. Interestingly, once Virginia lost the decision, apparently VMI began preparing for the entry of women and, according to the New York Times, preparations went well. Editorial, *Women Arrive, Finally, at V.M.I.*, N.Y. TIMES, Aug. 24, 1997, *available in* 1997 WL 8000661.

310. Proponents of the Act have not argued that there should be domestic partnership instead of marriage for gay men and lesbians, so that committed couples could take on some of the rights and responsibilities of married people but still be excluded from the institution of marriage. In fact, proponents of the Act mentioned their opposition to the University of Maine's domestic partnership program. *See* Written testimony of Carolyn Cosby, Chairman, Concerned Maine Families, March 12, 1997. Domestic partnership programs for public and private employees have been expanding at a rapid pace in recent years. *See Craig A. Bowman & Blake M. Cornish, A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1164-65 (1992); *Recognizing Non-Traditional Families, Special Rep. Series on Work & Family* (BNA) No. 38 (Feb. 1991). Several Representatives appeared to mention their support for legislation recognizing same-sex relationships but still outside the framework of marriage.

> I do not believe that the current institution of marriage is the proper place for this [recognition of same sex unions or of unions of two elderly people of opposite sexes]. I would support and I would be willing to sponsor legislation that would allow a contracted union that is strictly civil and has limitations upon it that are similar to the institution of marriage.

Legis. Rec. 332 (1997) (statement of Rep. Vedral). "I am also going to commit to working together on a civil bill that will protect the rights of all because I think we have to get past the negative here." Legis. Rec. 333 (1977) (statement of Rep. Meres). In Hawaii, a commission was appointed to study the issue of domestic partnership for same-sex couples, and the majority of the commission concluded that the appropriate step was to extend marriage to same-sex couples. Report of the Commission on Sexual Orientation and the Law, Dec. 8, 1996.

educational benefits that cannot be made available, unmodified, to women" so that inclusion of women will "destroy" the program.[311] The majority found it important that all parties agreed that "some women can meet the physical standards [VMI] now impose[s] on men," and that "VMI's implementing methodology is [not] inherently unsuitable to women."[312] Given the exclusion, the remedy called for is admitting women, even if that may result in changing aspects of VMI. In the marriage context, the responses may be similar; there is nothing inherent in marriage that justifies a categorical gender-based exclusion. Not all gay men and lesbians will want to marry but some will and some will be qualified for it.[313] Second, even if the admission of gays and lesbians ultimately results in changes in marriage, that does not mean that excluding them is legal. Changing an institution is distinct from destroying it,[314] and marriage constantly changes.[315]

It is critical to remember that in this analysis, the goal of the legislation cannot be the exclusion itself; rather, the goal must be distinct from the exclusion.[316] Thus, in *United States v. Virginia*, it was not sufficient for Virginia to say that the exclusion (single sex education) was in effect the goal (single sex education). Here, the state cannot say that the exclusion (no same gender marriage) is in effect the goal (no same gender marriage). Such an analysis is circular. In this instance, the most plausible reading of the statute is that the exclusion (no same gender marriage) is identical to the goal (no same gender marriage). This is unacceptable. However, even if we accept the purposes of the statute at face value, the exclusion (no same gender marriage) is not narrowly tailored or substantially related to achievement of an important government interest (protecting and nurturing traditional monogamous Maine families).

4. Conclusion

Heightened review of the Act is called for since the Act makes a gender-based classification, directly and substantially burdens a fundamental right, and is a sexual orientation-based classification. The Act would not survive such review, since it is not based on a sufficiently important state interest and is neither narrowly tailored to effectuate only

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311. United States v. Virginia, 116 S. Ct. 2264, 2271 (1996) (quoting the trial court's findings of fact).

312. *Id.* at 2272 (quoting the lower appellate court's reasoning).

313. *E.g.*, will meet the statutory requirements of age, not being too closely related, and so forth. *See, e.g.*, ME. REV. STAT. ANN. tit. 19 §§ 652, 701(2)-(5) (West 1998).

314. *See supra* notes 33-50.

315. *See id.*

316. This is true both with respect to heightened scrutiny and rational basis scrutiny. *See* Romer v. Evans, 116 S. Ct. 1620, 1627 (1996); *see also infra* text accompanying note 337.

that interest nor substantially related to furthering that interest. Nor is it based on an exceedingly persuasive justification.

F. Application of Rational Basis Scrutiny

Assuming for purposes of discussion that heightened scrutiny will not apply to the Act, and instead that the more deferential rational basis scrutiny is applied, the Act would not withstand even rational basis scrutiny review.

1. More on Rational Basis Review under the Maine Constitution and Romer v. Evans

Having provided a very brief introduction to "rational basis" scrutiny earlier,[317] I will now discuss its application to the Act. Rational basis scrutiny applies to most statutory equal protection challenges.[318] Each statute must bear a rational relationship to a legitimate governmental purpose.[319] Statutes are presumed constitutional, and doubts about constitutionality are resolved in favor of constitutionality.[320]

The application of the rational basis test depends upon the factual circumstances of each case. When illegitimate state interests play a role in a challenged classification, courts often will set these interests aside and also carefully review other claimed interests to ensure that impermissible state goals were not actually the sole basis for the classification.[321] By contrast, when a court is dealing with an economic classification and has no reason to believe that impermissable state interests play a part in enactment of legislation, it will supply a reason for the law if any conceivable set of facts supports it.[322] This can be seen in the Law

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317. *See* Part III.

318. *See, e.g.*, Heller v. Doe, 509 U.S. 312, 319 (1993); McBreairty v. Commissioner of Admin. and Fin. Serv., 663 A.2d 50, 53 (Me. 1995) (stating that the statute need only have a rational relationship to a legitimate goal); Musk v. Nelson, 647 A.2d 1198, 1202 (Me. 1994) (same); Dishon v. Maine State Retirement Sys., 569 A.2d 1216, 1217 (Me. 1990) (same); *see also* TRIBE, *supra* note 34, at 1439-43.

319. *See* Romer v. Evans, 116 S. Ct. 1620, 1627 (1996). The Court seems to use legitimate state interests, *see id.* at 1627, synonymously with legitimate governmental purpose, *see id.* at 1628; *see also* Heller v. Doe, 509 U.S. at 319-20.

320. *See* Irish v. Gimbell, 1997 ME 50, ¶ 19, 691 A.2d 664, 673 (upholding medical malpractice screening panel, applying a presumption in favor of constitutionality); State v. Stinson Canning, 161 Me. 320, 322 (1965).

321. *See* Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448-50 (1985). In such cases, the Court does not on its own attempt to conceive of a legitimate, rational explanation for the classification, but rather considers only the government purposes put forward by the state. *See, e.g., id.* at 449-50; Zobel v. Williams, 457 U.S. 55, 61-65 (1982); United States Dept. Of Agric. v. Moreno, 413 U.S. 528, 534-38 (1973).

322. By contrast, where there is no indication that improper state purposes or irrational prejudice played a part in the classification, the Court will examine whether "there is any reasonably

Court's jurisprudence by contrasting *Aseptic Packaging Council v. State*[323] with *Beal v. Beal*.[324] In *Aseptic Packaging*, where the Law Court was dealing with an economic and environmental law concerning recycling, it considered whether there was any reasonably conceivable state of facts that could provide a rational basis for the recycling law at issue in that case.[325] By contrast, in *Beal v. Beal*, dealing with a gender-specific alimony law, the court noted the possibility that such a law could be based on outmoded and improper stereotypes and looked only at the reason proffered for it—administrative convenience—in analyzing its constitutionality.[326] There are indications that, at a minimum, improper state purposes and irrational prejudice played a part in the passage of the Act;[327] therefore, a court should not apply the "any conceivable state of facts" test to it.

In *Romer v. Evans*, the Supreme Court applied rational basis scrutiny to Amendment 2 of the Colorado Constitution and struck it down as violative of the Equal Protection Clause of the Fourteenth Amendment.[328] Amendment 2 provided that no state or local government could pass or enforce any laws banning discrimination on the basis of "homosexual, lesbian or bisexual orientation."[329] The Court found that the law was both too broad and too narrow and was suspicious since it singled out a single class for disfavored treatment,which laws rarely do.[330] The Court made the additional point that this type of law "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."[331] The Court further wrote that "[i]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[332] In addition, the Supreme Court held that the state's justifications for the law summarized below were not rationally related to the law. The breadth of the law, and its lack of a concrete objective, were mentioned as reasons why the requisite "fit" was lacking.[333] *Romer*

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conceivable state of facts that could provide a rational basis for the classification." FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993).

323. 637 A.2d 457 (Me. 1994).

324. 388 A.2d 72 (Me. 1978).

325. *See* Aseptic Packaging Council v. State, 637 A.2d at 459 (citing FCC v. Beach Communications, Inc., 113 S. Ct. 2096, 2101-02 (1993)).

326. *See* Beal v. Beal, 388 A.2d at 75.

327. Discussed more fully *infra* Part V.F.3.

328. *See* Romer v. Evans, 116 S. Ct. 1620, 1629 (1996).

329. *Id.* at 1623.

330. *See id.* at 1628.

331. *Id.*

332. *Id.* (quoting United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

333. *See id.* at 1628-29.

is an important decision, but its implications are not yet clear.[334] Attempting to apply *Romer* to the Act results in a conclusion that no rational basis exists; there is no fit between means and ends, and the only reason for this law is the desire to harm a politically unpopular group, which is not a legitimate governmental interest.[335]

As mentioned above, the United States Constitution sets a minimum standard below which protection of individual rights cannot fall. The Maine Constitution has not only similar but additional constitutional provisions concerning protection of individual rights.[336]

Rational basis scrutiny requires both that a law be based on a legitimate governmental purpose and that it be reasonably calculated to further that interest. This section will argue first that, even if the Act is based on a legitimate governmental purpose, there is no rational relationship between the purpose and the Act. Second, I will argue that the law is not based on a legitimate governmental purpose.

2. *The Issue of Rational Relationship Between the Act and a Legitimate Governmental Purpose*

Even if the Act is based on a legitimate state purpose, it lacks a rational relationship to that purpose. The *Romer* Court wrote "even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained."[337] It went on to state that "[b]y requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law."[338] The State claimed that the rationale for the Amendment was "respect for other citizens' freedom of association" and "conserving resources to fight discrimination against other groups."[339] The Court found that "[t]he breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them."[340] The Court found that "[e]ven laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which

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334. The outpouring of scholarship about *Romer* is remarkable. For a small sample, see, e.g., Ann Laguer Estin, *When* Baehr *Meets* Romer*: Family Law Issues After Amendment* 2, 68 U. COLO. L. REV. 349 (1997); Janet E. Halley, Romer v. Hardwick, 68 U. COLO. L. REV. 429, 430-32 (1997); Joseph S. Jackson, *Persons of Equal Worth:* Romer v. Evans *and the Politics of Equal Protection*, 45 UCLA L. REV. 453 (1997); Andrew Koppelman, Romer v. Evans *and Invidious Intent*, 6 WM. & MARY BILL OF RTS. J. 89 (1997); Barbara A. Robb, Note, *The Constitutionality of the Defense of Marriage Act in the Wake of* Romer v. Evans, 32 NEW ENG. L. REV. 263 (1997).

335. *See* Romer v. Evans, 116 S. Ct. at 1628.

336. Me. Const. art. 1, §§ I, 6-A, 24.

337. Romer v. Evans, 116 S. Ct. at 1627.

338. *Id.*

339. *Id.* at 1629.

340. *Id.*

justify the incidental disadvantages they impose on certain persons,"[341] but that Amendment 2 was not in that category.

The Maine Act was on its face "enacted for broad and ambitious purposes," as was Amendment 2. The Act states that it is intended to "encourage," "nurture," "sustain," "protect," "support," and "strengthen traditional monogamous Maine families."[342] It must be able to "be explained by reference to legitimate public policies which justify the ["]incidental["] disadvantages [it] impose[s] on certain persons."[343]

In this instance, the stated broad public policy of strengthening traditional monogamous Maine families is effectuated through the direct disadvantage imposed by the law on gay and lesbian citizens by excluding them from marriage. This disadvantage is not "incidental"; rather this disadvantage, like Amendment 2, is the whole point of the legislation.

Yet, excluding gay men and lesbians from marriage does not ease the burdens on married, opposite-sex Maine couples in any discernable way. It does not nurture the traditional monogamous Maine family to say that marriage is only between opposite-gendered people. Declaring other states' marriages invalid in Maine does not protect the traditional monogamous Maine family. Conversely, allowing gay and lesbian couples to marry will not take away any of the rights, responsibilities, or functions of traditional monogamous married Maine couples. The stated "public policies" of the Act simply are not related to the actual operation of the Act. Moreover, the concrete provisions of the Act are so far removed from the justifications for them (protecting the family and the other purposes) that the justifications, as in *Romer*, are implausible.

In *Baker v. Vermont*, where rational basis scrutiny was applied, the court rejected many of the State's proffered interests in its prohibition on same-gender marriage that were rather similar to the purported purposes of the Act.[344] The court concluded that the "State's interest in preserving the institution of marriage for no other reason than to preserve a time-honored institution is invalid,"[345] and that the State's "proclaimed interests in uniting men and women to 'bridge their differences' and to promote a setting which provides both male and female role models are invalid because they are clearly premised upon improper presumptions about the roles of men and women."[346] The only purported interest that the court found valid was that in "further[ing] the link between procre-

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341. *Id.* at 1628.

342. ME. REV. STAT. ANN. tit. 19-A, § 650 (West 1998).

343. Romer v. Evans, 116 S. Ct. at 1628.

344. *See* Baker v. Vermont, No. S1009-97 (Vt. Super. Ct. Dec. 19, 1997), *appeal docketed*, No. 98-32 (Vt. Jan. 15, 1998). This case involves a challenge to Vermont's marriage laws under its state constitution, including its public purpose clause. *See id.*

345. *Id.* at 15.

346. *Id.*

ation and child rearing."[347] This ruling under the Vermont Constitution, which lacks a specific equal protection clause and other provisions found in the Maine Constitution, is on appeal.[348] I believe this conclusion is incorrect since it is implausible to argue that preventing same-gender couples from marrying in some way promotes child-rearing by married parents.[349]

With respect to the Act, the statutory justifications simply are not related in a rational manner to the actual operation of the Act.

3. *The Issue of Legitimate Governmental Purpose*

Romer v. Evans analyzed whether the disadvantage imposed by a statute is born of animosity toward the class of persons affected.[350] Such animosity, according to the Supreme Court, is not a legitimate state interest.[351] In the context of Maine's Act, this analysis compels consideration of the disadvantage imposed by the Act and whether it is based on animosity toward the class of persons affected.

a. The Exclusion from Marriage

The Act prohibits same-gender couples from marrying in Maine and prohibits persons legally married out of state according to other states' laws from being considered married in Maine, as discussed earlier.[352] The concrete exclusions are important, but it does not seem that the Act was motivated by the concern that the possibility of including same-gender couples in the benefits and burdens of marriage would somehow

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347. *Id.* at 17.

348. Vermont did not amend its marriage statutes when *Baehr* was decided, so the court was dealing with a preexisting marriage law.

349. The reasons why I think it is implausible to claim that preventing same-gender couples from marrying in some way promotes childrearing by married parents include the following: first, procreation is not essential to marriage and entry into marriage is not in any way tied to the actual ability or willingness to procreate. *See supra* notes 209, 214, & 363. Second, the relationship between protection and childrearing is governed by laws concerning parental rights and responsibilities, not marriage laws. *See* ME. REV. STAT. ANN. tit. 19-A, §§ 1654 (when parents live apart, either can file for determination of parental rights and responsibilities), 1653 (standards for determination of parental rights and responsibilities), 1001 (when court awards divorce it may make an order determining parental rights and responsibilities). In addition, the presumption of paternity in marriage does not even apply if the biological evidence suggests the husband is not the father and can be rebutted in any event. *See* M.R. Evid. 302 (rebuttable presumption of paternity in marriage); ME. REV. STAT. ANN. tit. 19-A § 1564 (circumstances where presumption does not apply). Thus, since neither procreation nor parenting is linked by law to opposite sex marriage, it makes little sense to say that limiting marriage to opposite sex couples furthers any purported link between procreation and childrearing.

350. *See* Romer v. Evans, 116 S. Ct. at 1628-29.

351. *Id.*; *see also* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

352. *See* ME. REV. STAT. ANN. tit. 19-A, § 701(1-A) (West 1998); *see also supra* Part II.

make marriage law unworkable.[353] For example, it would not undermine the operation of the wrongful death statute to allow same-gender marriage. It would not make the intestacy statute less workable. It might even result in greater tax revenues because married couples filing jointly generally pay more taxes.[354] Financial issues were not offered as reasons for being opposed to same gender marriage by those supporting the Act; indeed the financial impact of the Act was not discussed at all.[355]

The importance of marriage has been emphasized by the Law Court; in *Whitehouse v. Whitehouse*, the Court stated that "[i]t is the most important transaction of life. The happiness of those who assume its ties usually depends upon it more than upon anything else."[356] The state has a strong interest "in maintaining and preserving the marriage relation," and because of that interest, it "virtually becomes a third party in all divorce proceedings."[357]

To fully understand the nature of the disadvantage, it is necessary to think more fully about marriage and about relationships.[358] To exclude a group from marriage is to make a negative statement about the members of that group. For example, during slavery, no Southern state recognized marriages between slave women and men.[359] This was an important part of maintaining the subordination of the group.[360] Today, the right to marry is so taken for granted by heterosexuals and is such a pervasive part of the culture that it is almost invisible, like the air we breathe. Yet, imagine a law stating that "residents of Somerset County shall not be permitted to contract marriage." It would seem remarkably unfair and irrational, and this highlights the importance of the institution and the injustice of the exclusion from the institution.[361]

The injustice of the exclusion of same-gender couples from marriage is highlighted by the relaxed legal treatment of marriage by opposite-sex couples. There are few restrictions on entering marriage.[362] The exercise

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353. There was no debate on that issue, and there was no written testimony that involved such arguments.

354. *See* Chambers, *supra* note 15, at 478.

355. No legislator mentioned the financial implications of the Act.

356. Whitehouse v. Whitehouse, 129 Me. 24, 26, 149 A. 573 (1930) (quoting Randall v. Kreiger, 90 U.S. (23 Wall.) 137, 147 (1874)).

357. Dionne v. Dionne, 155 Me. 377, 378, 156 A.2d 393, 394 (1959).

358. *See* discussion *supra* Part V.C.

359. *See* PETER KOLCHIN, AMERICAN SLAVERY: 1619-1877, 122 (1993).

360. *See id.* Of course, I am not maintaining that the situation of gay men and lesbians today is equivalent to that of slaves.

361. Some might argue that if marriage by same-gender couples is allowed, polygamy must also be allowed. Professor Maura Strassberg argues that valid grounds for the distinction between polygamy and same-gender marriage exist, and that legalization of marriage by same-gender couples is consistent with and critical in maintaining the important role of marriage in the modern state. *See generally* Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501 (1997); *see also* ESKRIDGE, *supra* note 48, at 144, 148-49.

362. *See* discussion *supra* note 73.

of the marriage right for opposite-sex couples is not conditioned upon them procreating or agreeing to procreate.[363] It does not require any special living arrangement or physical relationship. It is a status that carries with it important benefits and responsibilities and that is available by application to people who have no interest in having children or even living together as well as to people who already have children. People who are sterile or are long past child bearing age, or who have no interest in any kind of sexual relationship with each other, are entitled to marry under Maine's marriage laws. The disadvantage imposed by the Act is significant, stigmatizing, and central.

b. The Motivation for the Act

It is necessary to consider whether the Act furthers a legitimate state interest; part of this inquiry is to determine whether the disadvantage imposed by the Act is born of prejudice and animosity.[364] In this section I will argue that the disadvantages imposed by the Act are based on prejudice and animosity toward gay men and lesbians and particularly toward their possible exercise of rights to marry, and that this is not a legitimate state purpose. While the Act does not state it is based on animosity towards gay men and lesbians, it does not have to do so for the conclusion to be drawn that it is not based on a legitimate state purpose.[365] The Law Court has recognized that government [d]iscriminatory intent or purpose

> may appear on the face of the action taken with respect to a particular class or person, or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself.[366] . . . Thus, an invidious intent to discriminate may be inferred from the totality of relevant facts.[367]

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363. It is noteworthy that once same-gender couples have claimed a right to marry, the justification for marriage becomes procreation, the one aspect of marriage which gay couples cannot do with each other. *See* Baehr v. Miike, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. 1996). Yet, prior to same-gender couples claiming the right to marry, there was consensus that marriage was not defined by consummation or procreation. *See supra* Part V.C. This in turn suggests that bans on marriage by same-gender couples are motivated by animus. *See supra* Part V.F.3; *see also* Barbara A. Robb, *The Constitutionality of the Defense of Marriage Act in the Wake of* Romer v. Evans, 32 NEW ENG. L. REV. 263, 317 (1998).

364. *See* Romer v. Evans, 116 S. Ct. 1620, 1628 (1996); Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448-50 (1985); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534-38 (1973).

365. *See* Hunter v. Erickson, 393 U.S. 385 (1969). The amendment in *Romer* also did not say that it was based on animosity towards lesbians and gay men. Romer v. Evans, 116 S. Ct. at 1620.

366. Aucella v. Town of Winslow, 583 A.2d 215, 216-17 (Me. 1990) (quoting Snowden v. Hughes, 321 U.S. 1, 8 (1944)).

367. *Id.* at 217 (quoting Washington v. Davis, 426 U.S. 229, 241-242 (1976)). For example, in *Beal v. Beal*, 388 A.2d 72 (Me. 1978), *Ace Tire v. Waterville*, 302 A.2d 90 (Me. 1973), and

In this instance, many factors can lead to the conclusion that the Act is based on animosity. These factors include the exclusion itself, discussed above, as well as the language of its findings and the circumstances of its passage discussed below.

c. *The Third Purpose Stated in the Act*

The third stated purpose of the statute is "to support and strengthen traditional monogamous Maine families against improper interference from out-of-state influences or edicts."[368] As noted above, it was consistently stated by the sponsors of the initiative petition that the "out-of-state influence or edict" which may "improperly influence" Maine families is the Hawaii Supreme Court's decision in *Baehr v. Lewin*.[369] The intent behind this provision is to avoid the influence of the *Baehr* decision and other out-of-state court decisions, and thus to prevent gay men and lesbians from marrying.[370] The language seeks to protect certain Maine families (the traditional, monogamous ones) from "out-of-state *influences or edicts*."[371] This loaded, xenophobic language is surprising in a federalist system, because it does not reflect a vision of the United States as one nation. Its tone implies that there is something sinister about out-of-state influences, which may be indicative of bias and animosity. In examining other recent statutes on same-gender marriage I have found no such language. The goal of protecting Maine families from "improper interference from out-of-state influences or edicts" is of dubious legitimacy in our federalist system.[372]

McNicholas v. York Beach Village Corp., 394 A.2d 264 (Me. 1978), the Law Court did not require a showing of discriminatory intent to show that the classifications were unsatisfactory.

368. ME. REV. STAT. ANN. tit. 19-A, § 650(2)(C) (West 1998).

369. *See supra* note 78.

370. This situation is thus very different from that faced by the Law Court in *Solmitz v. Maine Sch. Admin. Dist. Number 59*, 495 A.2d 812 (Me. 1985), where school officials cancelled a Tolerance Day program at which openly lesbian Dale McCormick was to speak. School officials testified that the reason they did so was to prevent disruption of education that might happen if community threats of sabotage were carried out. *See id.* at 818. The plaintiffs asked the Law Court to find that the officials' actual motive was the same as that of the citizens who lobbied them in opposition to having a homosexual speak at school. *See id.* The Law Court accepted the trial court's conclusion that the actual cancellation reason was that testified to by the officials. *See id.* In this instance, the drafters of the law were very clear what "out-of-state edicts" meant, and the legislature passed the identical law. Without contrary legislative history, it is clear that hostility to the Hawaii decision and other such decisions is the actual meaning of the third purpose of the statute.

371. *See* ME. REV. STAT. ANN. tit. 19-A, § 650(2)(C) (West 1998) (emphasis added). The phrase "monogamous family" is puzzling because normally "monogamy" refers to a couple's relationship, not a family.

372. *See generally* Shapiro v. Thompson, 394 U.S. 618 (1969); Zobel v. Williams, 457 U.S. 55 (1982). The other findings and purposes, although less explicit, are not actually promoted by the Act, so they may safely be discarded. In addition, the references to "out-of-state" edicts have overtones of state-imposed orthodoxy, which is incompatible with the First Amendment. *Cf.* West

d. The Context, History, and Origins of the Act

The Act, as described earlier, originated as an initiative petition to inoculate the state against *Baehr v. Lewin.*[373] After an emotional hearing before the Judiciary Committee,[374] a majority of the Committee voted "Ought to Pass" and added a Committee Amendment consisting of a fiscal note stating that if the bill is enacted it will have no fiscal impact, but if it has to go out to referendum the estimated cost to the Secretary of State is $95,000.[375] Written testimony at the hearing included statements by a range of religious leaders and others in favor of the bill,[376] while others argued against it.[377]

Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 642 (1942) ("if there is any fixed star in our constellation, it is that no official . . . can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion"); Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ("the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge").

373. *See supra* notes 5 and 78; Paul Carrier, *Maine Group Seeks to Ban Gay Wedlock*, PORTLAND PRESS HERALD, May 2, 1996, at A1.

374. Paul Carrier, *Speakers Clash Over Gay Marriage Issue. Maine Lawmakers Hear Passionate Debate about the Effect of Same-Sex Marriage and the Family*, PORTLAND PRESS HERALD, Mar. 13, 1997 at A1.

375. *See* Comm. Amend. A to L.D. 1017, No. H-104 (118th Legis. 1997).

376. Pastor Rick Stoops of the First United Pentecostal Church of Augusta submitted written testimony quoting from Romans 1:18-32 and stating, "I know that the wording in the Bible is direct and candid concerning the act of homosexuality, however, remember, this is the Word of God and not just an opinion." He further asked the Legislature to "allow[] the Bible to guide your decision on the subject at hand." Paul B. Madore's written testimony rhetorically asked, "Can anyone here today convince me that same sex marriage will contribute to our society in a positive way and not bring it to the fulfillment of what can only be termed as 'the homosexualization of our culture?' I don't think so!" He went on to note that "allowing Same Sex Marriage will only serve to condone and codify this distorted ideology and condition that homosexuality promotes." He then quoted from Ezekiel and remarked, "You legislators present here today, elected in most cases by a vast majority of Maine citizens within your district have been entrusted by them, from a Christian perspective, to be this voice [referred to in Ezekiel, dissuading the wicked man from his way]." Christopher Ring's testimony stated, "From my bible I can definitely say that Jesus Christ would not allow Same Sex marriage at any time or anywhere on earth." Harvey Lord reminded legislators that "this nation was founded upon Judeo-Christian principles" and urged legislators to "consider the strong and repeated condemnation of homosexual behavior that is in the Bible. . . . [W]e must certainly speak out against any proposed legal recognition of the unnatural, unhealthy, perverse behavior which has, among other things, been the primary cause of an awesome and deadly disease known as A.I.D.S." Rev. David Lang of the Northern New England District Council of the Assemblies of God wrote, "as our culture embraces unnatural, unbiblical lifestyles the family suffers . . . we believe the law of Maine ought to uphold this God-ordained and time-honored tradition." Rev. Donald R. Miller of Emmanual Reformed Presbyterian Church wrote that

> marriage is not the product of an ever-changing evolutionary process. No group's notions that they are a minority deserving of special treatment, that homosexuality is normal and healthy, and that they are like everyone else, have any merit or any relevance whatsoever. Marriage was instituted by God Himself and is not subject to alteration.

Carolyn Cosby, Chairman of Concerned Maine Families, wrote

> today the issue before you is same-sex marriage, but I say to you that the demand by gay

Many legislators in debate mentioned that the Act was based on bigotry and discrimination against lesbians and gay men.[378] Several

militants in this country for legalized homosexual unions can be likened to the magician's skillful hand waving a red scarf for the purpose of diverting the public's attention away from the real action: in this case, seizing the long sought-after goal of gaining special "minority" status. Whether it be "marital" status or "sexual orientation" status—the goal of the gay militants for the past 30 years has not changed: to utilize any means to qualify for the status and benefits of special minority status by falsely portraying themselves as an oppressed minority in America contrary to the overwhelming evidence of their power and wealth.

377. Written testimony included the following: Peter Mercer, minister of a United Church of Christ parish in Saco, and a member of the Religious Coalition Against Discrimination, stated:

> I consider myself a biblical Christian and need to emphasize that I encounter the essence of the biblical faith very differently from most making a 'Christian' case for this bill. I hear the gospel including those who have religiously and socially been defined out to the margins, challenging those who are moralistically restrictive, and encouraging those who would claim their authentic God-given creation. The qualities which make for a healthy supportive household have nothing to do with heterosexual or homosexual, and everything to do with mutual loving commitment to the care, growth, and well-being of each person. . . .

Anne Underwood of the Religious Coalition Against Discrimination wrote of her concern about

> the so-called "religious position" on who may enter a marriage covenant. There is not "a" definitive position based on Hebrew or Christian scripture and tradition. There is sincere, reasoned disagreement within and among denominations and faith communities regarding the moral contours of marriage. . . . I believe it is contrary to the founding principles of our nation, to allow one particular reading of Hebrew or Christian scripture, or one version of "religious tradition" to dictate to this legislature the contours of "morality." . . . Many people of faith believe that our scriptures and tradition call us to honor a covenant of marriage between any two adult persons who profess their love, fidelity and commitment each to the other.

Rabbi Paul Cohen of Congregation Bet Ha'am wrote, "the stamp of the divine is found in the souls of all God's children—gay, lesbian and straight. The love that God calls us to, the love that binds two people in a loving and devoted commitment, is accessible to all God's children. . . . This legislation betrays those values." Rev. Mark Worth, a Unitarian Universalist minister, wrote that the bill was "anti-marriage" and that his denomination "encourages ministers to perform same-gender marriages, and has voted in our national General Assembly last June to endorse the legalization of such marriages." Rev. Marvin Ellison, Professor of Christian Ethics at Bangor Theological Seminary, stated, "As a minister, I trust that love is love, no matter where it happens. In a similar way, marriage is marriage, no matter the gender of the partners." Rev. Eleanor Mercer, a United Church of Christ Minister, wrote that "there are some among us who would say that Jesus condemned those who loved people of the same sex. The truth is he never speaks about homosexuality. He speaks about love between and among persons. . . . I am a woman who knows that to exclude gay and lesbian people from the institution of marriage is a completely UN-Christian act. It contradicts everything Jesus modeled about love and community."

378. *See, e.g.*, Legis. Rec. H-330 (1997) (statement of Rep. Powers) (asserting: "This bill is loaded with moralistic language and cultural bias. I think this has occurred because when it comes to referencing homosexuality there is enormous fear stirred up, both of sexuality and of difference."); *see id.* at H-332 (statement of Rep. Bull) (declaring: "We are singling out a sector of society for discrimination with this act."); *see id.* at H-330 (statement of Rep. Watson) (proclaiming: "I can never support legislation that intends to single out and blatantly discriminate against any group of people based on a religious prejudice, in my view."); *see id.* at H-331 (statement of Rep. Dunlap) (arguing: "[The bill] is not a stand for morality, it is the very mask of

mentioned that they thought the bill might be unconstitutional.[379] With one exception,[380] all those legislators who spoke in the debate, who ultimately voted for the Act, stated that they feared the consequences of a divisive referendum should they defeat the Act.[381] No legislator claimed that the Act actually would fulfill its stated purposes; *i.e.*, no one claimed that the bill would strengthen traditional Maine families. Governor King let the bill become law without his signature.[382]

The circumstances of the Act's passage described above show that something may be amiss with the political process that led to its passage. Reasoned legislative debate on the legislation and its implications did not take place.[383] There are indicia that illegitimate state interests may be

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bigotry."); Legis. Rec. S-392 (1997) (statement of Sen. Longley) (stating: "I believe this citizen referendum is filled with fear, ignorance, bigotry and smear."); *see id.* at S-396 (statement of Sen. Cathcart) (declaring: "I don't see that I'm threatened, or my marriage is threatened, by any gay people or lesbian couples who are wanting to be married."); *see id.* at S-394 (statement of Sen. Abromson) (proclaiming: "This bill is mean-spirited, it's homophobic, it's intrusive.").

379. *See* Legis. Rec. H-332 (1997) (statement of Rep. Jones) (arguing: "To say [same-sex marriage] is illegal violates the equal protection clause of the United States Constitution in the Fourteenth Amendment. It also violates 6A of the Maine Constitution."); *see id.* (statement of Rep. Brennan) (stating: "I hope that all of us can look back in five years or 10 years and see that we voted for something that is probably unconstitutional, unnecessary and almost certainly discriminatory."); Legis. Rec. S-394 (statement of Sen. Abromson) (asserting: "I believe that this bill, if challenged under the 'Full Faith and Credit' clause of the U.S. Constitution, might well be deemed to be unconstitutional. . . . I shall pray for its being declared null and void by the third branch of government."); *see id.* (statement of Sen. Cleveland) (declaring: "I as well, share the opinion that it may well be unconstitutional.").

380. Rep. Vedral stated that two persons of the same gender or "two elderly people who decide to spend the remainder of their life [sic] together" should not be allowed to marry but "should have the same protections as the rest of us," supporting the idea of legislation extending protections to such relationships. Legis. Rec. H-332 (1997).

381. Rep. Cowger made the following statement: "I will reluctantly be voting in support of the prevailing motion in order to avoid this issue going out to a divisive state-wide referendum." *Id.* at H-331; H-33, Rep. Barth stated, "My personal feeling is if we [sic] avoid a costly and divisive referendum which will give Maine a bigger black eye than the mere passage of this tonight." *Id.* at H-333; Rep. Meres opined, "My personal feeling is that this bill should not be here, period." *Id.* Rep. Meres noted the negative consequences of a referendum, and promised to work on an alternative bill to "protect the rights of all." *Id.* Sen. Abromson stated that "defeat [of L.D. 1017] could mark the beginning of a long, expensive, hate-filled referendum campaign. . . . I wish to avoid that." *Id.* at S-394. Sen. Benoit testified, "I don't want to send it out to referendum . . . . [A]t the hearing, people came in with their bibles on both sides of the issue with a lot of passion, and I can just picture a summer of conflict that we don't need." *Id.*

382. *See* Nancy Perry, *King Won't Sign Bill to Ban Same-Sex Marriages*, PORTLAND PRESS HERALD, Apr. 1, 1997, at A1. Governor King apparently also expressed the view that the Act was unconstitutional. *See* Bill Nemitz, *King's Stand Spoils Cosby's Celebration*, PORTLAND PRESS HERALD, Apr. 2, 1997.

383. For example, as I have pointed out, the Act in theory broadens Maine's nonrecognition of legally performed out-of-state marriages. Maine already had an evasion statute to deal with situations where couples married out of state to avoid state law. *See* ME. REV. STAT. ANN. 19-A, § 701(1) (West 1998). The Act makes a potentially significant change in the state's policy about recognizing other states' marriage laws, yet leaves the evasion law on the books. The evasion law will no longer have any meaning since any violations of the Act's provision about out-of-state

behind the legislation, as discussed in *Cleburne*,[384] *Romer*,[385] and *Moreno*.[386] Indeed, considering all of the circumstances, it appears that the Act is based on the plainly illegitimate "desire to harm a politically unpopular group."[387]

4. Conclusion

The Act's prohibition on gay men and lesbians from having the responsibilities and rights of marriage does not further any "independent and legitimate legislative end"[388] as is required to satisfy even deferential rational basis scrutiny. Rather, the Act furthers the desire to harm a politically unpopular group. In addition, the means chosen by the Act bear no rational relationship with any possible legitimate state interest. This type of legislative targeting should be particularly questionable given Maine's constitutional protections for civil rights, natural rights, and against discrimination.[389]

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marriages, *see id.* § 701(1-A), will also be a violation of the evasion statute. *See id.* There was no discussion of any of these implications.

384. 473 U.S. 432, 440 (1985).

385. 116 S. Ct. 1620, 1627-28 (1996).

386. 413 U.S. 528, 534-35 (1973). In this context, the question inevitably arises as to the significance of *Bowers v. Hardwick*, 478 U.S. 186 (1986), as it relates to *Romer v. Evans*. In *Bowers*, the Supreme Court upheld against a due process challenge Georgia's criminal sodomy law outlawing private, adult, consensual sex between persons of the same sex. The court defined the question as whether there was a right for adults to engage in homosexual sodomy and found that there was no such right rather than recognizing that its prior privacy cases dealt with broad issues of humanity, like dignity and autonomy. *See id.* at 190-92. For a sample of scholarship, see Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 YALE L.J. 1073 (1988); Brett J. Williamson, Note, *The Constitutional Privacy Doctrine After* Bowers v. Hardwick*: Rethinking the Second Death of Substantive Due Process*, 62 S. CAL. L. REV. 1297 (1989); *see also*, TRIBE, *supra* note 88, at 1430-31. The decision in *Bowers* was five-to-four, with Justice Powell providing the swing vote in favor of the state. After retiring, Justice Powell stated that he regretted his vote in that case. *See* Ruth Marcus, *Powell Regrets Backing Sodomy Law*, WASH. POST, Oct. 26, 1990, at A3. In 1996, the Court decided *Romer* on equal protection grounds, as noted above, not even mentioning *Bowers*, which was decided on due process grounds. Scalia, in dissent, claimed that the majority was overruling *Bowers* without saying so; some have agreed with that assessment. *See, e.g.*, Robb, *supra* note 363, at 330-31. As noted above, *Romer's* inquiry into intent casts doubt on all statutes based on anti-gay animus. *But see* Andrew Koppelman, Romer v. Evans *and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89 (1997). Even if not overruled by *Romer*, it has been persuasively argued that *Bowers* does not have negative implications for sexual orientation claims that are based on equal protection rather than due process. *See* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988). This analysis was adopted in *Able v. United States*, 968 F. Supp. 850 (1997).

387. *See* Romer v. Evans, 116 S. Ct. at 1628; U.S. Dept. of Agric. v. Moreno, 413 U.S. at 534.

388. Romer v. Evans, 116 S. Ct. at 1628.

389. *See* Me. Const. art. I, §§ I, 6A, 24.

VI. CONCLUSION

Marriage is a centrally important institution in civil society, which may account for the passionate battles about its meaning that erupt periodically in this country. It is also an institution which has undergone radical changes in the past one hundred and fifty years. The nationwide, and indeed worldwide, quest of gay men and lesbians to take on the responsibilities and rights of marriage has met with a severe backlash, manifested in Maine in the "Act to Protect Traditional Marriage and Prohibit Same-Sex Marriages."

The essence of the Act is to exclude gay men and lesbians from marrying. However, all laws must have a legitimate justification. This one does not appear to have such a justification. As I have argued, the Act classifies on the basis of gender, burdens the fundamental right to marry, and classifies on the basis of sexual orientation. Thus, the Act must be based on a sufficiently important state interest and must be narrowly tailored to further only that interest or substantially related to furtherance of that interest. The Act is not based on an articulable, sufficiently important or compelling state interest and is not sufficiently closely related to furtherance of that interest.

Moreover, the legal landscape regarding classifications based on sexual orientation arguably has changed since *Romer v. Evans*. No longer should prejudice against or animosity towards gay people constitute a legitimate state interest. The Act's explicit goal of avoiding "out-of-state influences"[390] betrays its impropriety in a federalist system. Broad bans must be justified by specific policies and must be tailored towards articulable goals. As I have argued in this Article, the Act does not further its stated purposes. It does not help or protect married couples in any discernable manner. And it is not based on a legitimate state interest.

Maine's Constitution contains uniquely broad language protecting civil rights and forbidding discrimination in the exercise of civil rights.[391] The Law Court has not specifically interpreted this language. The Maine Constitution also contains an explicit equal protection clause and a natural rights clause. These constitutional provisions provide a textual basis for a jurisprudence that may be more protective of individual rights than federal jurisprudence has been. The Act may provide a good starting place for the Law Court to put those tools to use.

The same policies that support marriage, such as promoting stable families and supporting couples' commitments to each other, support recognition of marriages by same-gender couples.[392] The same policies

390. ME. REV. STAT. ANN. tit. 19-A, § 650(2)(C) (West 1998).

391. *See* Me. Const. art. I, § 6-A.

392. *See* Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871, 1934-42 (1997) (emphasizing normative value of

that support restricting governmental intrusions on the decision to marry, such as respect for individuals' intimate decisions and autonomy, support striking down, or repealing, the restrictions contained in the Act.[393]

same-sex relationships and arguing that gay men and lesbians must be allowed to marry as a way of gaining actual personal autonomy).

393. *See id.*