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Conaway v. Deane: to Have and to Hold, from This Day Forward—Maryland's Unfit Marriage to Federal Equal Protection Analysis

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Recent Decisions

THE COURT OF APPEALS OF MARYLAND

CONAWAY v. DEANE: TO HAVE AND TO HOLD, FROM THIS DAY FORWARD—MARYLAND'S UNFIT MARRIAGE TO FEDERAL EQUAL PROTECTION ANALYSIS

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In *Conaway v. Deane*,[1] the Court of Appeals of Maryland addressed for the first time the constitutionality of a statutory prohibition on same-sex marriage in Maryland.[2] The *Conaway* majority upheld the statute under rational basis review after finding that sexual orientation does not establish "suspect class" status for equal protection purposes,[3] despite Maryland's two-part definition of suspectness, which compelled a different result.[4] In denying suspect class status on the basis of sexual orientation, the majority unreflectively adopted two new federal Fourteenth Amendment indicia of suspectness into its own definition, even though prior Maryland courts had elected not to incorporate those factors into Maryland's suspectness test.[5] In doing so, the court defeated Maryland's long-celebrated independence from the federal Constitution's equal protection analysis and may have locked Maryland courts into step with an increasingly conservative Supreme Court of the United States.[6] Moreover, not only did the *Conaway* majority unjustly deprive same-sex couples of deserved suspect classification, but it also divested future Maryland groups seeking sus-

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1. 401 Md. 219, 932 A.2d 571 (2007).

2. *See infra* Part I.

3. *See infra* Part III.B. *Conaway* also analyzed the statute in the context of gender discrimination and fundamental rights, concluding that the statute neither made a gender-based distinction nor implicated a fundamental right. *See infra* Part III.A, C. This Note addresses only the court's equal protection analysis.

4. *See infra* Parts II.C, IV.A.

5. *See infra* Part IV.

6. *See infra* Part IV.B.

pect classification of the potentially greater equal protection Maryland's own constitution has historically provided.[7] Instead, the court should have applied, or at least given due weight to, Maryland's own suspect class definition and deemed same-sex couples a suspect class.[8]

I. THE CASE

In June and July 2004, nine same-sex couples, appellees, sought marriage licenses from courts in Baltimore City and several counties in Maryland.[9] Each time, the clerks of those courts denied the couples' applications.[10] Under Maryland law, no individual may marry within the state without a license issued by the clerk for the county in which the marriage is performed.[11] If a clerk finds "a legal reason why the applicants should not be married," he or she must withhold the license unless ordered by the court to issue it.[12] In this case, the clerks denied the couples' license applications pursuant to Family Law Article, section 2-201,[13] which provides that "[o]nly a marriage between a man and a woman is valid in this State."[14]

Thus, on July 7, 2004, appellees filed a joint complaint for declaratory and injunctive relief, naming the various clerks as defendants.[15]

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7. *See infra* Part IV.B.

8. *See infra* Part IV.

9. Conaway v. Deane, 401 Md. 219, 238, 932 A.2d 571, 582 (2007). Additionally, a homosexual male who expressed a wish to apply for a marriage license in the future joined the couples as an appellee. *Id.*

10. *Id.* at 239, 932 A.2d at 582.

11. *Id.* at 238, 932 A.2d at 581–82 (citing MD. CODE ANN., FAM. LAW § 2-401(a) (West 2002)).

12. *Id.*, 932 A.2d at 582 (citing MD. CODE ANN., FAM. LAW § 2-405(e)).

13. MD. CODE ANN., FAM. LAW § 2-201.

14. *Id.*; *Conaway*, 401 Md. at 239, 932 A.2d at 582.

15. Deane v. Conaway, No. 24-C-04-005390, 2006 WL 148145, at *2 (Md. Cir. Ct. Jan. 20, 2006), *rev'd*, Conaway v. Deane, 401 Md. 219, 932 A.2d 571 (2007). The defendant clerks include Frank Conaway, Clerk of the Circuit Court for Baltimore City, and four additional county clerks. *Id.* After appellees filed their complaint, three parties filed motions to intervene as defendants. *Conaway*, 401 Md. at 241, 932 A.2d at 583. Robert P. Duckworth, Clerk of the Circuit Court for Anne Arundel County, filed the first motion to intervene, arguing that a decision in favor of the plaintiffs-appellees "w[ould] create uncertainty with" respect to his duties as clerk, and "would . . . subject [him] to [possible] civil and criminal [litigation]." Duckworth v. Deane, 393 Md. 524, 530–31, 903 A.2d 883, 887 (2006). Next, eight members of the Maryland General Assembly attempted to intervene, claiming "that invalidation of" the marriage statute "would be a judicial encroachment upon [their legislative] authority." *Id.* at 531–32, 903 A.2d at 887 (internal quotation marks omitted). Third, Toni Marie Davis, a resident of Baltimore City, filed a motion to intervene, claiming that "the homosexual lifestyle" was offensive to her religious beliefs in violation of her First Amendment right to practice her religion. *Id.* at 532–33, 903 A.2d at 888. The circuit court denied these motions and each intervener noted an appeal to the Court of Special Appeals. *Id.* at 533, 903 A.2d at 888. The Court of Appeals issued a writ of

The complaint alleged that Family Law Article, section 2-201 (1) unconstitutionally discriminated on the basis of gender in violation of Article 46 of the Maryland Declaration of Rights ("MDR"), also known as the Equal Rights Amendment ("ERA"); (2) unjustifiably discriminated on the basis of sexual orientation in violation of the equal protection provisions of Article 24 of the MDR; (3) constituted an "unjustified, disparate deprivation of plaintiffs' fundamental right to marry," thereby violating the equal protection component of Article 24; and (4) inhibited, in violation of the due process provisions of Article 24 of the MDR, same-sex couples' fundamental rights to marriage.[16]

The parties filed cross-motions for summary judgment.[17] The trial judge granted plaintiffs' motion and denied defendants' cross-motion, finding that exclusion of same-sex couples from marriage is a sex-based classification that violates Article 46 of the MDR.[18] The court noted that such a sex-based classification called for strict scrutiny under the ERA.[19] Ruling that section 2-201 was not "narrowly tailored to serve any compelling governmental interests," the court deemed the statute unconstitutional.[20]

The circuit court stayed enforcement of its ruling pending resolution of the expected appeal because of the possible consequences of its ruling on clerks' offices throughout Maryland.[21] The clerks promptly appealed to the Court of Special Appeals.[22] Before the Court of Special Appeals reviewed the case, the Court of Appeals issued a writ of certiorari on its own initiative to determine whether section 2-201 was constitutional.[23]

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certiorari before the intermediate court could decide the appeal and affirmed. *Id.* at 533, 545, 903 A.2d at 888, 895.

16. *Deane*, 2006 WL 148145, at *3.

17. *Id.* at *2.

18. *Id.* at *3, *9.

19. *Id.* at *3.

20. *Id.* The trial opinion noted that under strict scrutiny, courts will only uphold a classification if the government can show that the classification was "'suitably tailored to serve a compelling state interest.'" *Id.* at *6 (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985)). According to the Court of Appeals, the Circuit Court "expressly declined to address [the] Appellees' [Article 24] equal protection and substantive due process arguments." Conaway v. Deane, 401 Md. 219, 237–38, 932 A.2d 571, 581 (2007).

21. *Deane*, 2006 WL 148145, at *9.

22. *Conaway*, 401 Md. at 238, 932 A.2d at 581.

23. *Id.*

II. LEGAL BACKGROUND

Like the Equal Protection Clause of the Fourteenth Amendment, equal protection guarantees under the Maryland Constitution require courts to strictly scrutinize laws that distinguish "suspect" classes.[24] However, Maryland courts have consistently reserved the right to interpret Maryland's equal protection guarantees *differently* from the Supreme Court's understanding of the Equal Protection Clause where the former provision provides greater protection to individual liberties.[25] Maryland's "suspect class" definition differs from the Supreme Court's test for suspectness, leaving open the possibility that Maryland courts could discover *new* suspect classes under Maryland's own constitution, where the Fourteenth Amendment would find none.[26]

A. Maryland Courts Apply a Three-Tiered Analytical Framework of Scrutiny to Claims that Arise Under Article 24 of the Maryland Declaration of Rights and Examine Claims of Discrimination Against Suspect Classes under the Strictest of These Tiers

Incorporating parts of the Fourteenth Amendment's Due Process Clause,[27] Article 24 of the Maryland Declaration of Rights provides "[t]hat no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land."[28] Although Article 24 lacks an express equal protection clause similar to the Fourteenth Amendment, Maryland courts have established that Article 24 contains both due process and equal protection principles.[29]

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24. *See infra* Part II.A.

25. *See infra* Part II.B.

26. *See infra* Part II.C.

27. *See* U.S. CONST. amend. XIV, § 1 (prohibiting states from "depriv[ing] any person of life, liberty, or property, without due process of law").

28. MD. CONST. DECL. OF RTS. art. 24.

29. Specifically, Maryland courts have held that Article 24's due process provision embodies the spirit of equal protection. *See, e.g.*, Neifert v. Dep't of the Env't, 395 Md. 486, 504, 910 A.2d 1100, 1111 (2006) ("Although Article 24 does not contain an express equal protection clause, this Court has held that the concept of equal protection is embodied within the Article."); Attorney Gen. v. Waldron, 289 Md. 683, 704, 426 A.2d 929, 940–41 (1981) ("Although the Maryland Constitution contains no express equal protection clause, we deem it settled that this concept of equal treatment is embodied in the due process requirement of Article 24 of the Declaration of Rights."). For more Court of Appeals cases recognizing that equal protection is embodied in the due process requirement of Article 24, see Kane v. Bd. of Appeals of Prince George's County, 390 Md. 145, 171 n.17, 887 A.2d 1060, 1075 n.17 (2005); Frankel v. Bd. of Regents of the Univ. of Md. Sys., 361 Md. 298, 312–13, 761 A.2d 324, 332 (2000); Kirsch v. Prince George's County, 331 Md. 89, 96, 626

Maryland courts apply one of three levels of constitutional scrutiny when a party challenges legislation under either the due process or equal protection components of Article 24. First, courts may subject legislation to "strict scrutiny."[30] Under this standard, courts presume that the law at issue contravenes Article 24 absent a showing that the law is "'*necessary* to promote a *compelling* governmental interest.'"[31] A statute subject to this standard must also be "suitably tailored" to serve that interest.[32] The Court of Appeals of Maryland has noted that this standard is "'strict' in theory and fatal in fact," typically leading to the challenged statute's nullification.[33] To merit strict scrutiny, the court has explained, a claimant must show that either (1) the statute implicates Article 24's *due process* clause by infringing upon a "fundamental right" or (2) the law triggers Article 24's *equal protection* principles by distinguishing a "suspect class" of persons.[34] The court in *Attorney General v. Waldron* specified that "classifications based on race, national origin, and ancestry" are inherently suspect and subject to this standard.[35]

Alternatively, courts may apply "heightened scrutiny."[36] To survive this intermediate level of scrutiny, a statute must be "reasonable, not arbitrary," and must serve as "a fair and substantial" means to achieve the legislation's purpose.[37] Heightened scrutiny, although a less exacting standard than strict scrutiny, "does not tolerate random speculation concerning possible justification for a challenged enactment; rather, it pursues the actual purpose of a statute and seriously examines the means chosen to effectuate that purpose."[38] This level of scrutiny is triggered under equal protection principles when legisla-

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A.2d 372, 375 (1993); Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 616 n.4, 458 A.2d 758, 768 n.4 (1983). *See generally* 1 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES, Appendix 3 at 3-59 to 3-63 (4th ed. 2006) (listing state constitutional provisions that explicitly address equal rights).

30. *See, e.g.*, *Waldron*, 289 Md. at 705–06, 426 A.2d at 941 (defining "strict scrutiny" as the top tier of judicial review).

31. *Id.* at 706, 426 A.2d at 941 (quoting Dunn v. Blumstein, 405 U.S. 330, 342 (1972)).

32. Murphy v. Edmonds, 325 Md. 342, 356, 601 A.2d 102, 109 (1992).

33. *Waldron*, 289 Md. at 707–08, 426 A.2d at 942 (quoting Gerald Gunther, *The Supreme Court 1971 Term: Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

34. *See Waldron*, 289 Md. at 705–06, 426 A.2d at 941 (describing the type of statute that is subject to strict scrutiny review).

35. *Id.* at 706, 426 A.2d at 941–42 (citations omitted).

36. *See, e.g.*, Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 641, 458 A.2d 758, 781 (1983) (describing heightened scrutiny as a tier of judicial review that is less exacting than strict scrutiny).

37. *Id.* at 642, 458 A.2d at 782.

38. *Id.* Like strict scrutiny, intermediate scrutiny can apply under either Article 24 due process principles or Article 24 equal protection principles. *See Waldron*, 289 Md. at 711,

tion involves "sensitive, although not necessarily suspect criteria of classification."[39] Classifications subject to heightened scrutiny under Article 24 have historically included legislative distinctions based on gender,[40] illegitimacy,[41] and "classification[s] between children of legal residents and children of illegal aliens with regard to a free public education."[42]

"Rational basis" review is the lowest level of scrutiny under Maryland's framework.[43] Under this standard, the court will presume a statute's constitutionality under Article 24 unless the party challenging the statute can show that the law is "clearly arbitrary."[44] Courts applying rational basis review defer largely to the legislature, and rarely strike down laws as unconstitutional.[45]

B. Maryland Courts Have Stressed the Independence of State Equal Protection Analysis by Acknowledging the Possibility of Different Outcomes Under the Equal Protection Clause of the Fourteenth Amendment

Maryland equal protection cases have long celebrated Article 24's independence from the Equal Protection Clause of the Fourteenth Amendment.[46] Courts have treated the two provisions as distinct even

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426 A.2d at 944 (explaining that heightened scrutiny is applicable in either of two cases, which "parallel the two groupings that trigger application of the strict scrutiny test").

39. *Hornbeck*, 295 Md. at 641, 458 A.2d at 781 (internal quotation marks omitted) (quoting *Waldron*, 289 Md. at 711, 426 A.2d at 944). Although this Note will focus solely on *equal protection* principles, it is worth noting that a party can trigger intermediate review using *due process* principles by showing that the statute affects "important" personal interests or significantly interferes with liberty or denies "a benefit vital to the individual." *Waldron*, 289 Md. at 711, 426 A.2d at 944.

40. Murphy v. Edmonds, 325 Md. 342, 357, 601 A.2d 102, 109 (1992) (citing Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723 (1982); Craig v. Boren, 429 U.S. 190 (1976); Reed v. Reed, 404 U.S. 71 (1971)).

41. *Id.* (citing Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Levy v. Louisiana, 391 U.S. 68 (1968)).

42. *Id.* (citing Plyler v. Doe, 457 U.S. 202, 217–18, 224 (1982)). In *Waldron*, the court also reviewed "a classification under which certain persons were denied the right to practice for compensation" under heightened scrutiny. *See id.* (noting *Waldron* as applying a heightened standard of review). Although the *Waldron* court itself professed to use only rational basis review, *see Waldron*, 289 Md. at 717, 426 A.2d at 948, later cases deemed the *Waldron* standard of review to be heightened. *See, e.g.*, *Murphy*, 325 Md. at 357, 601 A.2d at 109 (classifying *Waldron* as a case decided under a heightened standard of review).

43. *See Waldron*, 289 Md. at 706–07, 426 A.2d at 942 (explaining that courts use rational basis when "neither a suspect class nor a fundamental right or interest is implicated").

44. *Murphy*, 325 Md. at 356, 601 A.2d at 108.

45. *See* Hargrove v. Bd. of Trustees of Md. Ret. Sys., 310 Md. 406, 428, 529 A.2d 1372, 1383 (1987) (explaining that legislation receiving rational basis review "almost invariably" survive constitutional challenges).

46. *See infra* notes 47–83 and accompanying text.

when, in a specific case, the outcome would be the same under both provisions, by acknowledging the possibility that the two provisions could yield different conclusions in the future.[47] Collectively, cases analyzing Article 24 indicate that (1) Article 24 is independent and can provide *greater* protection of individual rights than the Fourteenth Amendment,[48] and (2) analysis under Article 24 is alone sufficient to prove a violation of equal protection and courts need not assess equal protection under the Fourteenth Amendment at all when legislation clearly violates Maryland's equal protection guarantees.[49]

In *Attorney General v. Waldron*,[50] the first landmark Article 24 equal protection case in Maryland, the Court of Appeals used heightened scrutiny to strike down legislation prohibiting a retired judge who had received a pension from practicing law.[51] Although the *Waldron* court decided that in this specific case analysis under federal and state equal protection guarantees would have the same result,[52] the court stressed that Maryland courts can examine Article 24 equal protection separately from equal protection under the U.S. Constitution. First, the court noted, although Article 24 does not include equal protection language, equal protection principles are "embodied in [Article 24's] due process requirement."[53] The court explained that, likely because the words do not appear in the text of Article 24, Maryland courts have applied equal protection "in like manner and to the same extent as the Fourteenth Amendment of the Federal Constitution."[54] The *Waldron* court repeatedly and ardently emphasized, however, that "the equal protection guaranties of Article 24 and the [F]ourteenth [A]mendment are independent" and "capable of divergent effect."[55] The court noted that, while Supreme Court opinions interpreting the Fourteenth Amendment are controlling with respect to state analysis of the Fourteenth Amendment, those cases are merely persuasive in

47. *See infra* notes 52–59, 62–64, 71 and accompanying text.

48. *See infra* notes 58–59 and accompanying text.

49. *See infra* notes 78–83 and accompanying text.

50. 289 Md. 683, 426 A.2d 929 (1981).

51. *Id.* at 684–87, 717, 728–29, 426 A.2d at 931–32, 948, 954. Having determined that the statute "neither impact[ed] upon rights recognized as 'fundamental' nor classifie[d] along lines determined to be 'suspect,'" the court refused to apply strict scrutiny to strike the statute down. *Id.* at 716–17, 426 A.2d at 947–48. However, in practice, the court also declined to apply mere rational basis review because, although the statute did not quite infringe on fundamental rights, it did affect "vital personal interests" and, as such, the court determined that it ought not "reach out and speculate as to the existence of possible justifications for the challenged enactment." *Id.* at 717, 426 A.2d at 948.

52. *Id.* at 714, 426 A.2d at 946.

53. *Id.* at 704, 426 A.2d at 940–41.

54. *Id.*, 426 A.2d at 941.

55. *Id.* at 705, 426 A.2d at 941.

assessing equal protection under Article 24.[56] Further, the court pointed out that "a violation of one [equal protection provision] is not necessarily a violation of the other."[57] Importantly, the *Waldron* court also noted that a state court could exceed federal protection of individual liberties by declaring unconstitutional a statute that might have passed federal constitutional scrutiny.[58] Indeed, the court continued, "a discriminatory classification may be an unconstitutional breach of the equal protection doctrine under . . . Article 24 alone."[59]

Subsequent Maryland courts interpreting equal protection under Article 24 have similarly reserved the right to reach different conclusions under the two constitutions. For example, in *Hornbeck v. Somerset County Board of Education*,[60] the Court of Appeals used rational basis scrutiny to uphold Maryland's system of public school finance.[61] The *Hornbeck* court restated the *Waldron* principle that the federal and state equal protection provisions "are independent."[62] Then, despite concluding that the two equal protection guarantees would yield the same result, the *Hornbeck* court analyzed the provisions separately, dividing its analysis into "Federal Equal Protection"[63] and "State Equal Protection."[64]

Almost a decade after *Hornbeck*, the Court of Appeals heard another landmark Article 24 equal protection case, *Murphy v. Edmonds*.[65] In *Murphy*, the court used rational basis review to declare a statutory cap on non-economic damages for personal injuries constitutional under Article 24.[66] The *Murphy* court considered the plaintiff's equal protection claim "in light of cases applying the Equal Protection Clause of the Fourteenth Amendment as well as cases applying Article 24."[67] Although the *Murphy* court deemed federal case law under the Fourteenth Amendment persuasive and stated that Maryland's equal protection principles apply "in like manner and to the same extent" as

56. *Id.*

57. *Id.* at 714, 426 A.2d at 946.

58. *Id.* at 714–15 n.20, 426 A.2d at 946 n.20.

59. *Id.* at 715, 426 A.2d at 947.

60. 295 Md. 597, 458 A.2d 758 (1983).

61. *Id.* at 653, 656, 458 A.2d at 788, 789.

62. *Id.* at 640, 458 A.2d at 781.

63. *See id.* at 642–45, 458 A.2d at 782–84 (pointing to federal precedent on equal protection under the U.S. Constitution to explain why the public school system does not violate federal equal protection).

64. *See id.* at 645–53, 458 A.2d at 784–88 (explaining why the school system should not be strictly scrutinized under Article 24).

65. 325 Md. 342, 601 A.2d 102 (1992).

66. *Id.* at 367, 370, 601 A.2d at 114, 116.

67. *Id.* at 355, 601 A.2d at 108.

the Fourteenth Amendment, it again acknowledged the well-settled principle that the federal and state equal protection provisions are "obviously independent and capable of divergent application."[68]

One year later, the Court of Appeals in *Kirsch v. Prince George's County*[69] similarly applied rational basis review to strike down a zoning ordinance that differentiated between permissible residential tenant classes based on tenants' occupations.[70] The *Kirsch* court again treated equal protection under the two constitutions as distinct, assessing the zoning ordinance under both the Fourteenth Amendment *and* Article 24.[71] And again, the court deferred to the well-established notion that "the two provisions are independent of one another, and a violation of one is not necessarily a violation of the other."[72]

The next year, in *Verzi v. Baltimore County*,[73] the Court of Appeals yet again struck down legislation under rational basis review.[74] This time, the court deemed unconstitutional a Baltimore County requirement that licensed tow operators maintain places of business in the county in order to be eligible to receive police calls to tow disabled vehicles.[75] The court stressed that Supreme Court decisions interpreting the federal equal protection clause are persuasive, but not controlling, authority for its interpretation of Article 24.[76] To underscore the

68. *Id.* at 354–55, 601 A.2d at 108.

69. 331 Md. 89, 626 A.2d 372 (1993).

70. *Id.* at 104, 107–08, 626 A.2d at 379, 381.

71. *Id.* at 91, 626 A.2d at 373.

72. *Id.* at 97, 626 A.2d at 376.

73. 333 Md. 411, 635 A.2d 967 (1994).

74. *See id.* at 425, 635 A.2d at 974 (identifying the rational basis test as the proper standard of review to determine the constitutionality of a county ordinance at issue in the case).

75. *Id.* at 413, 427, 932 A.2d at 967–68, 975.

76. *Id.* at 417, 932 A.2d at 970; *see also* Neifert v. Dep't of the Env't, 395 Md. 486, 504–05, 910 A.2d 1100, 1111 (2006) ("United States Supreme Court cases applying the Equal Protection Clause of the Fourteenth Amendment are binding on this Court when applying that clause and are persuasive when applying Article 24 of the Declaration of Rights."); Ehrlich v. Perez, 394 Md. 691, 715, 718–19, 908 A.2d 1220, 1234, 1236–37 (2006) (explaining that Article 24 and the Fourteenth Amendment are "capable of divergent application," and that Supreme Court interpretations of the latter Constitution are "persuasive" before discussing alienage as an "inherently suspect" classification); Frankel v. Bd. of Regents of the Univ. of Md. Sys., 361 Md. 298, 312–13, 761 A.2d 324, 331–32 (2000) (stating, before using rational basis review to strike down a tuition policy discriminating against certain in-state residents, that "while United States Supreme Court cases applying the Equal Protection clause of the Fourteenth Amendment are, of course, binding upon us in the application of that federal constitutional provision, and are regarded as persuasive in the application of Article 24 of the Declaration of Rights, nevertheless the federal and state guarantees of equal protection are obviously independent and capable of divergent application" (internal quotation marks omitted) (quoting Md. Aggregates Ass'n v. State, 337 Md. 658, 671 n.8, 655 A.2d 886, 893 n.8 (1995))).

court's right to interpret Article 24 independently, the court stated that it frequently treated the equal protection guarantees of Article 24 and the U.S. Constitution's as "complementary but independent," and commented that "'a discriminatory classification may be an unconstitutional breach of the equal protection doctrine under the authority of Article 24 alone.'"[77]

More recently, in *Frankel v. Board of Regents of the University of Maryland System*,[78] the Court of Appeals maintained the stance that courts could analyze Article 24 equal protection independently of the Fourteenth Amendment, and further clarified that such an analysis is alone sufficient to establish an equal protection violation.[79] Here, the court employed rational basis review to deem unconstitutional a university's policy precluding in-state tuition status for students whose primary monetary support came from an out-of-state source.[80] First, the *Frankel* court followed its predecessors in acknowledging Article 24's general independence from the Fourteenth Amendment with respect to equal protection.[81] Next, in assessing whether the university's policy was constitutional, the *Frankel* court treated the two equal protection provisions as distinct—even though the plaintiff brought equal protection claims under *both* the U.S. Constitution and Article 24, the court concluded that it was not necessary to even touch upon the plaintiff's Fourteenth Amendment equal protection claims because the university's policy clearly violated Article 24.[82] Accordingly, the court clarified:

> By underscoring the independence of Article 24 of the Declaration of Rights, we do not suggest that the result in this case would be any different if the sole issue were whether the Policy violated the Equal Protection Clause of the Fourteenth Amendment. We simply are making it clear that our

77. *Verzi*, 333 Md. at 417, 635 A.2d at 970 (quoting Attorney Gen. v. Waldron, 289 Md. 683, 715, 426 A.2d 929, 947 (1981)).

78. 361 Md. 298, 761 A.2d 324.

79. *See id.* at 312–13 & n.3, 761 A.2d at 331–32 & n.3 (recognizing Article 24's general independence from the Fourteenth Amendment and assessing the policy's constitutionality under Article 24 alone, even though plaintiffs brought equal protection claims under both constitutions).

80. *Id.* at 314–15, 761 A.2d at 332–33.

81. *See id.* at 313, 761 A.2d at 332 ("[W]hile United States Supreme Court cases applying the Equal Protection Clause of the Fourteenth Amendment are, of course, binding upon us in the application of that federal constitutional provision, and are regarded as persuasive in the application of Article 24 . . . the federal and state guarantees of equal protection are obviously independent and capable of divergent application." (citations and internal quotation marks omitted)).

82. *Id.* at 312, 761 A.2d at 331.

decision is based exclusively upon Article 24 and is in no way dependent upon the federal constitutional provision.[83]

C. *Maryland Courts Consider Only Two of the Four Indicia of Suspectness that the Supreme Court Examines to Decide Whether a Class is Suspect*

The Supreme Court of the United States examines four indicia of suspectness to determine whether a group is suspect under the Fourteenth Amendment.[84] By contrast, Maryland courts consider only two of the four federal factors to decide whether a group constitutes a suspect class under Article 24.[85]

The Supreme Court articulated its first test for evaluating the suspectness of a class for equal protection purposes in *United States v. Carolene Products Co.*[86] In the oft-cited footnote four, the Court explained that "prejudice against *discrete and insular minorities* may be a special condition," suggesting that classifications drawn along those lines should be "subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."[87]

Since *Carolene Products*, the Supreme Court has examined four major indicia of "discrete and insular minorities" for purposes of applying strict scrutiny. First, the Court considers whether a class has suffered a history of purposeful unequal treatment or discrimination.[88] Next, the Court may look at whether the group's unique characteristics bear any relation to the group's ability to contribute to society.[89] A third factor that the Court may consider is whether the

83. *Id.* at 313 n.3, 761 A.2d at 332 n.3.

84. *See infra* notes 86–100 and accompanying text.

85. *See infra* notes 101–105 and accompanying text.

86. 304 U.S. 144 (1938).

87. *Id.* at 152 n.4 (emphasis added).

88. *See, e.g.*, Lyng v. Castillo, 477 U.S. 635, 638 (1986) (refusing to confer suspect classification to "[c]lose relatives" after finding that the class has not been subjected to a history of purposeful unequal treatment); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (holding that uniformed police officers over the age of fifty have not historically been subjected to discrimination and are not a suspect class); Frontiero v. Richardson, 411 U.S. 677, 684, 688 (1973) (plurality opinion) (concluding that "classifications based upon [gender] are inherently suspect, and [subject] to strict judicial scrutiny," in part because women have suffered a history of discrimination); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S 1, 28 (1973) (holding that wealth is not a suspect classification after determining that the plaintiff's class has not been "subjected to . . . a history of purposeful unequal treatment").

89. *E.g.*, *Murgia*, 427 U.S. at 313 (refusing to consider age a suspect class because, among other reasons, the "aged" have not been "subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities"); *Frontiero*, 411 U.S.

group has endured political powerlessness.[90] Last, the Court occasionally looks at whether the groups' defining traits are immutable.[91] The Supreme Court applies these factors in a flexible manner, rather than requiring each to be fulfilled.[92] In other words, the Court has never applied the factors as if they formed a conjunctive elements test[93] and sometimes chooses not to discuss every factor.[94] Normally, courts balance the totality of these factors to decide whether a classification should receive strict scrutiny under the federal Equal Protection Clause.[95]

Courts balancing the factors typically afford the second two factors—political powerlessness and immutability—less weight than the others.[96] Those factors are mere "supplements" to suspect class analysis.[97] By contrast "the first two factors—history of intentional discrimination and relationship of classifying characteristic to a person's ability to contribute—have always been present when heightened scrutiny has been applied."[98] Because those first two factors are so critical to suspect class analysis, they "could be considered as prerequisites to concluding a group is a suspect or quasi-suspect class."[99] In-

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at 686 (analogizing gender to recognized suspect criteria because "the sex characteristic frequently bears no relation to ability to perform or contribute to society").

90. *E.g.*, *Murgia*, 427 U.S. at 313 (explaining that a suspect class can include a group "'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process'" (quoting *Rodriguez*, 411 U.S. at 28)).

91. *E.g.*, *id.*; *Frontiero*, 411 U.S. at 686.

92. *See* Varnum v. Brien, 763 N.W. 2d 862, 888 (Iowa 2009) (noting the "flexible manner in which the Supreme Court has applied the four factors in the past").

93. *Id.*

94. *See id.* at 889 n.16 (noting various Supreme Court cases in which some indicia of suspectness were considered and not others).

95. *See* Thomas W. Simon, *Suspect Class Democracy: A Social Theory*, 45 U. MIAMI L. REV. 107, 155 (1990) ("The individual factors . . . do not provide a precise formula for clearly determining if and when a social group qualifies as a suspect class. Instead, the factors, along with the mitigating concerns, interrelate. The case or narrative for suspect class status must be constructed from the sum of these factors.").

96. In particular, the Supreme Courts of Iowa and Connecticut stressed this discrepancy in their recent opinions upholding gay marriage. *See infra* notes 97–100. On April 3, 2009, the Supreme Court of Iowa struck down the state's statutory ban on marriage after deeming homosexuals a quasi-suspect class. *Varnum*, 763 N.W.2d, at 896, 906. Several months prior to the Iowa decision, the Connecticut Supreme Court similarly considered homosexuals a quasi-suspect class to invalidate the state's ban on gay marriage under heightened scrutiny. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 431–32, 482 (Conn. 2008).

97. *Varnum*, 763 N.W.2d, at 889.

98. *Id.*

99. *Id.* at 889. *See also Kerrigan*, 957 A.2d at 426 (considering the first two indicia of suspectness "required" and the latter two merely "other considerations").

deed, the Supreme Court has placed "far greater weight—indeed . . . dispositive weight" on those first two factors.[100]

To determine whether a group constitutes a suspect class under Article 24, Maryland courts analyze only the two factors the Supreme Court considers the most important. In two landmark equal protection cases, the Court of Appeals of Maryland defined suspect classification under Article 24. First, in *Waldron*, the court concluded that a suspect class includes people who have either (1) experienced a history of purposeful unequal treatment or (2) "'been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.'"[101] The *Waldron* court attributed this two-factor test to *Massachusetts Board of Retirement v. Murgia*,[102] a case that had additionally considered "political powerlessness" in determining suspectness.[103] The *Waldron* court, however, did not include this element.

The court in *Hornbeck* reiterated this simple two-part test, defining a "suspect class" as "a category of people who have experienced a history of purposeful unequal treatment or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."[104] By the time the Maryland Court of Appeals reiterated this test in *Hornbeck*, the Supreme Court had already articulated all four indicia of suspectness.[105] Nevertheless, the *Hornbeck* court incorporated only two of the federal indicia into its definition.

III. THE COURT'S REASONING

In *Conaway v. Deane*,[106] the Court of Appeals of Maryland reversed the judgment of the Baltimore City Circuit Court and upheld the constitutionality of Family Law Article, section 2-201, which prohibits same-sex marriage.[107] Writing for the majority, Judge Harrell determined that the statute (1) "[did] not draw an impermissible sex-based distinction" in violation of the ERA, also known as Article 46 of

100. *Id.*

101. Attorney Gen. v. Waldron, 289 Md. 683, 706, 426 A.2d 929, 941 (1981) (quoting Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976)).

102. *See id.* (using language from *Murgia* to articulate the two-factor test for identifying a suspect class).

103. *See supra* note 90 and accompanying text.

104. Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 641, 458 A.2d 758, 781 (1983).

105. *See supra* notes 88–91 and accompanying text (describing the indicia of suspectness set forth in Supreme Court cases prior to 1992, when *Hornbeck* was decided).

106. 401 Md. 219, 932 A.2d 571 (2007).

107. *Id.* at 237–39, 932 A.2d at 581–82.

the MDR;[108] (2) was not subject to strict scrutiny under the equal protection provisions of Article 24 of the MDR because "sexual orientation [wa]s neither a suspect nor quasi-suspect" classification;[109] and (3) was not subject to strict scrutiny under the due process provisions of Article 24 of the MDR because same-sex couples do not have a fundamental right to marry.[110] Thus, the majority concluded that section 2-201 was not subject to strict scrutiny and was instead reviewable under the less stringent rational basis standard, under which it was constitutional.[111]

A. The Majority Concluded that a Statutory Ban on Same-Sex Marriage Did Not Draw a Gender-Based Distinction

The *Conaway* majority first denied appellees' claim that Family Law Article, section 2-201 violated the ERA and was thus subject to strict scrutiny.[112] First, Judge Harrell explained, the legislative history of the ERA suggested that the General Assembly "intended [it] to combat discrimination between men and women as classes," not between individuals of a different "*sexual orientation*."[113] Although the court acknowledged that the General Assembly's purpose for the ERA was not formally documented, the majority bolstered its argument with relevant "extrinsic sources."[114] Second, Judge Harrell continued, Maryland precedent showed that the ERA was not designed to protect individuals' sexual orientations, but to prevent discrimination between the sexes as classes.[115] Therefore, the majority concluded, un-

108. *Id.* at 246, 932 A.2d at 586.
109. *Id.* at 277, 932 A.2d at 606.
110. *Id.* at 315, 932 A.2d at 629.
111. *Id.*
112. *Id.* at 246, 932 A.2d at 586.
113. *Id.*, 932 A.2d at 586–87.
114. *Id.* at 248, 932 A.2d at 587–88. Initially, the majority pointed to the stated purposes of a commission designed by Governor Marvin Mandel to study the amendment's post-implementation effects. *See id.* at 249, 932 A.2d at 588. One such purpose, the majority found, "was to examine Maryland laws that, while not facially discriminatory, drew [gender-based] classifications . . . in their application." *Id.* Next, the majority identified newspaper accounts that viewed the newly passed amendment as assuring equal rights for the sexes as classes. *See id.* at 249–50, 932 A.2d at 588–89. Moreover, "[b]ecause the 1972 General Assembly considered in tandem the proposed federal and Maryland amendments," the majority pointed to quotes from the legislative history of the federal initiative that suggested that the amendment sought to prevent discrimination between sexes as classes. *See id.* at 250–54, 932 A.2d at 589–91 (quoting statements from congressional committee hearings and floor debates).
115. *See id.* at 254–65, 932 A.2d at 591–98 (citing early ERA cases in which courts suggest that the ERA's purpose was "to remedy the long history of subordination of women in this country, and to place men and women on equal ground as pertains to the enjoyment of basic legal rights under the law").

less a law classifies men or women "to the exclusion of an entire subsection of similarly situated members of the opposite sex," the ERA does not extend protection and rational basis applies, absent some other application of heightened scrutiny.[116] Third, the majority cited to precedent in other jurisdictions that also suggested that the ERA only prohibits discrimination between the sexes as classes.[117] The majority focused on *Singer v. Hara*,[118] which held that the contention that Washington's ERA protects same-sex marriages subverted the purpose of its ERA "by expanding its scope beyond that which was undoubtedly intended by the majority of the citizens of this state who voted for the amendment."[119] In fact, the *Conaway* majority noted, most state courts have followed *Rand v. Rand* in disposing of equal rights challenges.[120] Ultimately, the majority concluded that section 2-201 did not trigger strict scrutiny under the ERA because it did not treat men and women as separate classes for the benefit of one and not the other, but rather "prohibit[ed] equally both men and women from the same conduct."[121]

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116. *Id.* at 260, 264, 932 A.2d at 595, 597–98.

117. *See id.* at 265–67, 932 A.2d at 598–99 ("'Cases from other state jurisdictions interpreting the breadth and meaning of their equal rights amendments are instructive in ascertaining the reach of Maryland's [ERA].'" (quoting Rand v. Rand, 280 Md. 508, 512, 374 A.2d 900, 903 (1977))).

118. 522 P.2d 1187 (Wash. App. 1774).

119. *Id.* at 1194.

120. *Conaway*, 401 Md. at 265–66, 932 A.2d at 599.

121. *Id.* at 264, 932 A.2d at 598. Throughout the case, the court referred to the idea that § 2-201 should not be analyzed under strict scrutiny because it does not discriminate between the two sexes as classes, but equally bars both sexes from the same conduct, as the "equal application theory." *See, e.g.*, *id.* at 266–67, 932 A.2d at 599 (referring to the argument that marriage laws are facially neutral because the laws prohibit men and women equally from marrying a person of the same sex, and noting the appellees counter argument to such an "equal application theory"). In an important footnote, the majority first clarified that this theory is *distinct* from the "separate but equal" approach that a plurality of the court had previously rejected in *Burning Tree Club, Inc. v. Bainum* (*Burning Tree I*), 305 Md. 53, 501 A.2d 817 (1985). *Conaway*, 401 Md. at 260–61 n.26, 932 A.2d at 595 n.26. That case concerned a statute that (1) conditioned tax benefits to country clubs on the clubs' agreement not to discriminate based on sex, but (2) exempted clubs whose "primary purpose [was] to serve . . . members of a particular sex." *Burning Tree I*, 305 Md. at 56–57, 501 A.2d at 818–19 (plurality opinion). Ultimately, only a plurality of the court formed to invalidate the "primary purpose" provision; however, a majority of judges in *Burning Tree I* rejected the "separate but equal" argument that the provision was sex-neutral and thus did not violate the ERA because, although *gender-neutral by its language*, the provision was discriminatory in its *effect*. *See id.* at 90–92, 501 A.2d at 835–36 (Eldridge, J., concurring in part, dissenting in part) (dismissing the "separate but equal" argument and concluding that the antidiscrimination provision violated the ERA); *id.* at 87, 501 A.2d at 834 (Rodowsky, J., concurring) (same). The *Conaway* majority explained that while the plurality in *Burning Tree I* deemed the statute violative of the ERA because it allowed, "albeit in gender-neutral terms, the exclusion of the entire opposite sex by a uniform-gender club," Family

B. The Majority Found that a Statutory Ban on Same-Sex Marriage Did Not Impact a Suspect or Quasi-Suspect Class

The majority decided that sexual orientation was not a suspect or quasi-suspect classification, and on that basis rejected the argument that the equal protection principles embedded in Article 24 required the court to strictly scrutinize section 2-201.[122] Notably, the majority conceded in two short sentences that there is a history of purposeful unequal treatment of gay and lesbian persons, and that such persons are "subject to unique disabilities not truly indicative of their abilities to contribute to meaningfully to society."[123] Nonetheless, the majority agreed with most federal and state courts[124] that homosexual persons are not members of suspect or quasi-suspect classifications on two grounds: (1) evidence that homosexuality is an immutable character-

Law Article, § 2-201 "in no way single[d] out an entire group of persons based on sex." *Conaway*, 401 Md. at 263–64 n.26, 932 A.2d at 597 n.26. The majority thus concluded that, contrary to an argument made by Judge Battaglia in her dissenting opinion, "the 'equal application theory' [was] not inconsistent with the plurality [opinion] in *Burning Tree I*." *Id.* at 264 n.26, 932 A.2d at 597 n.26.

Then, the *Conaway* majority rejected the same-sex couples' assertion that, instead of applying an "equal application theory," the court should have examined how the statute affects each person seeking to marry *individually*. *Id.* at 267, 270, 932 A.2d at 599, 602. The couples relied on *Loving v. Virginia*, 388 U.S. 1 (1967), the landmark Supreme Court case in which the Court held that a Virginia miscegenation statute violated the Fourteenth Amendment, even though the statute "'punish[ed] equally both the white and the Negro participants in an interracial marriage.'" *Conaway*, 401 Md. at 267, 932 A.2d at 599–600 (alteration in original) (quoting *Loving*, 388 U.S. at 8). The majority rebuffed this analogy, arguing that, while the "underlying purpose [of the *Loving* statute] was to sustain White Supremacy," in violation of the core purposes of the Fourteenth Amendment, Family Law Article, § 2-201 could not violate the core purposes of the ERA because it did not "differentiate between men and women as classes." *Id.* at 269–70, 932 A.2d at 601–02.

122. *Conaway*, 401 Md. at 277, 932 A.2d at 605–06.

123. *Id.* at 282, 932 A.2d at 609. The majority later conceded again that "[i]t is clear that homosexual persons, at least in terms of contemporary history, have been a disfavored group in both public and private spheres of our society." *Id.* at 285, 932 A.2d at 610. But the majority quickly dismissed this argument because, "in light of the other indicia" of suspectness, a mere "history of unequal treatment does not require [the court to] deem" homosexuals a suspect class. *Id.*, 932 A.2d at 610–11. The majority professed "instead [to] view the circumstances as a whole in order to determine whether sexual orientation constitutes a protected classification." *Id.* at 285–86, 932 A.2d at 611.

124. *See id.* at 280–81, 932 A.2d at 607–08 (listing cases in other jurisdictions refusing to recognize sexual orientation as a suspect or quasi-suspect class).

istic is inconclusive;[125] and (2) homosexual persons are not "politically powerless [enough to] constitute a suspect class."[126]

C. The Majority Determined that the Statutory Ban on Same-Sex Marriage Did Not Burden a Fundamental Right

Reasoning that same-sex couples lack the fundamental right to marry, the majority determined that the due process provisions of Article 24 similarly did not require the court to assess section 2-201 under strict scrutiny.[127] First, the majority insisted that the right at issue was not a general right to marry, but more specifically the right of *same-sex couples* to marry.[128] In support of this assertion, the majority deemed inapplicable the precedent on which appellees relied to assert that the proper inquiry was whether the right *itself* had been historically enjoyed rather than *who* had enjoyed it.[129] Moreover, the majority argued that Maryland has always reserved the right to regulate who can and cannot marry within the State.[130]

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125. *Id.* at 291, 932 A.2d at 614. Curiously, the majority focused on this immutability factor despite the fact that no party addressed it in its brief. *See id.* at 292 n.57, 932 A.2d at 615 n.57. Moreover, the majority never "form[ed] any sort of merits-driven conclusion" on the matter—instead, the majority simply found that "there does not appear to be a consensus yet among 'experts'" on the topic. *Id.* at 293 n.57, 932 A.2d at 615–16 n.57.

126. *Id.* at 282, 932 A.2d at 609. The majority reasoned that evolution in Maryland's statutes, regulations, and judicial decisions show that gay and lesbian persons are not "politically powerless," but rather exercise increasing political power. *See id.* at 286–90, 932 A.2d at 611–13 (describing relatively recent Maryland laws that afford various protections against discrimination to homosexuals in areas including public accommodation, employment, housing, education, and child-custody); *see also id.* at 288–89, 932 A.2d at 612–13 (outlining briefly two relatively recent United States Supreme Court cases that protect homosexuals from various forms of discrimination without deeming them a suspect class).

127. *Id.* at 294, 315, 932 A.2d at 616, 629.

128. *See id.* at 298–99, 932 A.2d at 619 (finding that the right to marry issue "is framed more properly in terms of whether the right to choose *same-sex* marriage is fundamental" (emphasis added)).

129. *Id.* at 300, 932 A.2d at 619. Particularly, the majority attacked appellees' reliance on *Loving v. Virginia*. *See id.*, 932 A.2d at 619–20. Appellees argued that *Loving* stood for the proposition that, despite the long history of prohibition against interracial marriages, the Constitution guaranteed the right to marry to different-race couples just as it did for single-race couples, thereby suggesting that the proper inquiry is whether the right *itself* had been historically enjoyed rather than *who* had enjoyed it. *Id.* The majority rejected the *Loving* analogy because the *Loving* Court had reasoned that marriage is "'fundamental to our very existence and survival,'" thereby suggesting that the *Loving* Court only contemplated unions between men and women. *See id.* at 300, 932 A.2d at 620 (emphasis omitted) (quoting Loving v. Virginia, 388 U.S. 1, 12 (1967)).

130. *See id.* at 305, 932 A.2d at 622–23 (stating that the fundamental right to marry in Maryland is not absolute). The *Conaway* majority pointed out that Maryland law has always regulated who may marry based on characteristics such as age, consanguinity, and mental competence. *See id.* at 305–06, 932 A.2d at 622–23 (listing features that may justify the basis of a State denial of a couple's right to marry).

Next, despite recognizing that Article 24's due process concepts are flexible and that the legal rights of homosexual persons are expanding,[131] the *Conaway* majority refused to deem same-sex marriage a fundamental right because (1) Maryland has traditionally expressly limited marriage to those unions between members of the opposite sex;[132] (2) "nearly every other state in" the U.S. has placed comparable limits on marriage;[133] and (3) the Supreme Court has declined to deem same-sex marriage a fundamental right.[134]

D. The Majority Thus Applied Rational Basis Review and Found Maryland's Statutory Ban on Same-Sex Marriage to be Constitutional

After determining that the statutory ban on same-sex marriage did "not discriminate on the basis of sex," implicate a suspect or quasi-suspect class, or abridge a fundamental right to marriage, the court concluded that "rational basis review is the correct standard of constitutional review."[135] The majority deemed the State's alleged interest in preserving the traditional, opposite-sex institution of marriage to promote procreation legitimate and agreed that section 2-201 was a sufficient means to that end.[136] In other words, the majority determined that a sufficient link existed between opposite-sex marriage and procreation because the traditional nuclear family[137] is the "environment most conducive to the stable propagation and continuance of the human race."[138] In so concluding, the majority dismissed the same-sex couples' argument that section 2-201 was not rationally re-

131. *See id.* at 308–09, 932 A.2d at 624–25 (characterizing the flexibility of due process under Article 24 as "well-established," and observing that the legal landscape in Maryland "no doubt" is moving towards providing gay, lesbian, and bisexual persons more rights).

132. *See id.* at 312, 932 A.2d at 627 (claiming that "[e]ven a quick glance at the laws of Maryland indicate that this State has long regarded marriage as a union between a man and a woman," and listing several Family Laws that suggest that the General Assembly approved only of heterosexual marriage).

133. *Id.* at 312–13, 932 A.2d at 627–28 ("With the exception of Massachusetts, virtually every court to have considered the issue has held that same-sex marriage is not constitutionally protected as fundamental . . . .").

134. *Id.* at 314, 932 A.2d at 628.

135. *Id.* at 315, 932 A.2d at 629.

136. *Id.* at 317–18, 932 A.2d at 630. The State additionally argued it had an interest in maintaining its police power over the social institution of marriage, but the majority did not address this argument. *See id.* at 323 n.70, 932 A.2d 634 n.70 (declining to address the State's police powers argument because the State's interest in fostering procreation was sufficient to sustain the same-sex marriage prohibition).

137. The majority noted that a traditional "nuclear" family generally consists of "a mother, father, and children born to them during the marriage." *Id.* at 320, 932 A.2d at 632.

138. *Id.* at 317, 932 A.2d at 630.

lated to the State's interest in fostering procreation as the statute was (1) "overinclusive because children may be born *into* same-sex relationships through alternative methods of conception, including surrogacy, artificial insemination, in vitro fertilization, and adoption;" (2) "under-inclusive . . . because not all opposite-sex couples choose to bear children," and, in fact, some cannot do so because of infertility; and (3) insufficiently linked to procreation because allowing same-sex couples to marry would not discourage opposite-sex couples from bearing children.[139] The majority conceded that the couples' arguments were "quite convincing[ ],"[140] and even cited statistics to support the couples' argument that there is a societal "trend towards the gradual erosion of the traditional nuclear family."[141] Nevertheless, the majority concluded that because, under rational basis, a statute "need not be drawn with mathematical exactitude, and may contain imperfections that result in some degree of inequality," the mere *possibility* of procreation inherent in opposite-sex marriage supplied a sufficiently rational, if imperfect, link between opposite-sex marriage and procreation.[142] Thus, using rational basis review, the majority concluded that Maryland's interest in fostering procreation was strong enough to render section 2-201 constitutional.[143]

E. Three Judges Dissented, Arguing Either that the Same-Sex Marriage Ban Was Unconstitutional or that the Court Should Have Remanded the Case for Review Under a Higher Standard of Scrutiny

Judge Raker dissented in part and concurred in part with the majority.[144] Despite agreeing with the majority's selection of rational basis scrutiny,[145] Judge Raker parted with the majority in her belief that, even under rational basis review, section 2-201 was unconstitutional because it deprived "committed same-sex couples" of benefits available to opposite-sex couples in violation of the equal protection guarantee of Article 24.[146] Judge Raker argued that the State's alleged

139. *Id.* at 319, 932 A.2d at 631.

140. *Id.*; *see also id.* at 320, 932 A.2d at 632 (finding "some merit to [the couples'] arguments").

141. *Id.* at 320, 932 A.2d 632; *see id.* at 321–22, 932 A.2d 632–33 (citing statistics from the U.S. Census Bureau about the composition of households across the country).

142. *Id.* at 322, 932 A.2d at 633.

143. *Id.* at 325, 932 A.2d at 635.

144. *Id.* at 326, 932 A.2d at 635.

145. *Id.* at 329, 932 A.2d at 638 (Raker, J., concurring in part and dissenting in part).

146. *Id.* at 326–27, 932 A.2d at 636. Importantly, Judge Raker's opinion does not focus on whether banning same-sex marriage is constitutional, but rather on whether depriving same-sex couples of the benefits and privileges that accompany marriage is constitutional.

interest in providing for the offspring that may result from heterosexual intimacy, an interest that the State claimed was preserved by section 2-201, was wholly irrational.[147] She explained that "Maryland's equal protection jurisprudence requires that a legislative distinction *reasonably* relate to the achievement of a legitimate State interest,"[148] and that, in this case, there was not a sufficient link between the State's alleged interest in procreation and section 2-201.[149]

The legislature, Judge Raker proposed, should "either amend the marriage statutes to include same-sex couples or create a parallel statutory structure" to provide them with the same rights afforded opposite-sex couples.[150] Chief Judge Bell concurred with Judge Raker's opinion to the extent that it mandated such rights for same-sex couples, but disagreed with Judge Raker's belief that the court should examine section 2-201 under rational basis review.[151]

Chief Judge Bell filed a dissenting opinion,[152] reasoning that section 2-201 merited strict scrutiny for three reasons. First, Chief Judge Bell agreed with Judge Battaglia's dissenting argument that section 2-201 created a sex-based classification.[153] Second, he asserted that "[h]omosexuals meet the constitutional definition of a suspect class, that is, a group whose defining characteristic is so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy."[154] Chief Judge Bell explained that "the majority dismisse[d] an undisputed but extensive history of pervasive prejudice and discrimination targeted at homosexuals" to conclude improperly "that (1) homosexuals have enough political power to effect the eventual establishment, by statute, of marriage or civil unions for same-sex couples; and (2) this political power precludes their characterization as a sus-

Id. at 326, 932 A.2d at 635–36 (commenting that "entitlement to the rights of marriage and the right to marry are distinct issues").

147. *See id.* at 349, 932 A.2d at 650 (arguing that a same-sex marriage ban is not a rational means by which to realize the State's alleged interest in preserving procreation and child rearing).

148. *Id.* at 348–49, 932 A.2d at 649.

149. *Id.* at 349, 932 A.2d at 650. More specifically, Judge Raker adopted the same-sex couples' argument that, among other flaws, § 2-201 is both over-inclusive (because children can be born into same-sex relationships), and under-inclusive (because not all opposite-sex couples have children). *Id.* at 347, 932 A.2d at 648.

150. *Id.* at 327, 932 A.2d at 636.

151. *Id.* at 356, 932 A.2d at 654.

152. *Id.* at 421, 932 A.2d at 693 (Bell, C.J., dissenting).

153. *Id.* at 421 & n.1, 932 A.2d at 693 & n.1.

154. *Id.* at 421 n.1, 932 A.2d at 693 n.1 (alteration in original) (internal quotation marks omitted) (quoting Hernandez v. Robles, 855 N.E.2d 1, 27 (2006) (Kaye, C.J., dissenting)).

pect class."[155] The Chief Judge argued that the majority's denial that homosexuals are a politically powerless class was unfounded and, in any event, political power did not preclude their characterization as a suspect class.[156] Third, Chief Judge Bell contended that section 2-201 hindered the fundamental right to marriage, disagreeing with the majority that the case required the court to determine whether same-sex marriage was a fundamental right, and stating instead that the fundamental right to marriage *in general* was the "real issue in this case."[157]

In addition, Chief Judge Bell argued that, even under rational basis review, section 2-201 was unconstitutional.[158] He rejected the majority's argument that limiting marriage to heterosexual couples is reasonably related to the State's interest in fostering procreation, reasoning that "'the *exclusion* of gay men and lesbians from marriage in no way furthers this interest. There are enough marriage licenses to go around for everyone.'"[159]

Judge Battaglia, joined by Chief Judge Bell,[160] filed a lengthy dissenting opinion arguing that section 2-201 created a sex-based classification that implicated the ERA.[161] First, Judge Battaglia noted that government action implicating the ERA is subject to strict scrutiny.[162] Section 2-201, she argued, must therefore be strictly scrutinized.[163] However, concluding that the State's alleged interest in "retaining traditional marriage present[ed] an issue of triable fact," Judge Bat-

155. *Id.* at 422, 932 A.2d at 694.

156. *Id.* at 422–23, 932 A.2d at 694.

157. *Id.* at 425, 932 A.2d at 695–96.

158. *Id.* at 427, 932 A.2d at 697.

159. *Id.* at 428, 932 A.2d at 697 (quoting Hernandez v. Robles, 855 N.E.2d 1, 30 (2006)). Chief Judge Bell also rejected the majority's argument that the mere "'*possibility* of procreation'" creates a sufficiently reasonable link between § 2-201 and the State's interest in fostering procreation. *Id.* at 428–29, 932 A.2d at 698.

160. *Id.* at 356, 932 A.2d at 654 (Battaglia, J., dissenting).

161. *Id.* at 356–57, 932 A.2d at 654. Specifically, Judge Battaglia argued that the majority improperly rebuffed the same-sex couples' gender discrimination argument using the "equal application" theory. *Id.*, 932 A.2d at 654–55. This theory, in Judge Battaglia's view, was analogous to the discredited "separate but equal" approach that erroneously exempted statutes that *equally* benefit or burden the sexes from strict scrutiny. *Id. But see supra* note 121 (explaining the majority's argument that this description mischaracterizes the "equal application theory"). Judge Battaglia then described in great detail Maryland and other state cases rejecting the argument that laws benefiting or burdening the sexes equally are exempt from strict scrutiny. *See id.* at 358, 932 A.2d at 655–71.

162. *See id.* at 399, 932 A.2d at 680 (maintaining that any law that "draws sex-based distinctions," regardless of whether the law imposes a burden or confers a benefit entirely upon either males or females, implicates the ERA and is subject to strict scrutiny).

163. *Id.* at 419, 932 A.2d at 692.

taglia would have remanded the case to the circuit court for a full evidentiary hearing.[164]

IV. ANALYSIS

In *Conaway v. Deane*, the Court of Appeals of Maryland employed rational basis review to hold constitutional a statute prohibiting same-sex marriage in Maryland.[165] The *Conaway* majority declined to strictly scrutinize the statute, in part because it concluded that sexual orientation did not establish suspect class status for equal protection purposes.[166] In finding no suspect status, the majority pointed to the Supreme Court's four "indicia of suspect or quasi-suspect classes"—history of purposeful unequal treatment; group characteristics that bear no relation to its members' abilities to contribute to society; political powerlessness; and immutability.[167] Prior to *Conaway*, however, Maryland courts had included only the first two indicia in their test for suspect classification.[168]

The *Conaway* court's alteration of Maryland's unique equal protection analysis had two unfortunate results.[169] First, via an unjustified departure from settled Maryland precedent, the *Conaway* majority deprived same-sex couples of deserved suspect classification.[170] Second, the *Conaway* court similarly dispossessed future Maryland groups seeking suspect classification of the potentially greater equal protection historically available under Maryland's own constitution by prospectively adopting federal suspect class analysis and locking Maryland courts into step with an increasingly conservative Supreme Court.[171] Instead, the court should have preserved Maryland's independent equal protection jurisprudence by applying, or at least giving proper weight to, Maryland's own suspect class definition.

164. *Id.* at 420, 932 A.2d at 693.

165. *See supra* Part III.

166. *See supra* Part III.B. While the *Conaway* court also examined the Maryland same-sex marriage ban under gender discrimination and fundamental rights, this Note focuses on the court's equal protection analysis.

167. *Conaway*, 401 Md. at 277–78, 932 A.2d at 606 (majority opinion) (outlining these factors to determine whether a statute merits "a more exacting constitutional analysis").

168. *See supra* Part II.C.

169. *See infra* Part IV.A–B.

170. *See infra* Part IV.A.

171. *See infra* Part IV.B.

A. To Deny Homosexuals Suspect Classification, the Conaway *Court Ignored Settled Maryland Precedent by Engaging in "Unreflective Adoption" of Supreme Court Indicia of Suspectness and Giving Undue Weight to Those Federal Factors in Applying its Suspect Class Test*

When it grafted new federal analysis onto its prior suspect class definition, the *Conaway* court engaged in "unreflective adoptionism," an approach that scholars have coined to define state courts' application of "federal analysis to a state clause without acknowledging the possibility of a different outcome, or considering arguments in favor of such a different, or more protective, outcome."[172] While adopting federal analysis for application to state law is not per se unjustifiable, such "adoptionism" is appropriate only where state courts use federal analysis after first thoroughly and independently evaluating the relevant state law.[173]

In *Conaway*, the court's unreflective adoptionism allowed it to overlook Maryland's two-part suspect class definition that would have provided same-sex couples greater equal protection than the hybrid test.[174] Rather than acknowledging the outcome under Maryland's more protective test, however, the court engaged in unreflective adoption by merely stressing that "Article 24 is construed at least to the same extent as the Fourteenth Amendment,"[175] and then conflating the two-part test with federal analysis without explaining or justifying its incorporation of the two additional federal factors.[176]

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172. Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1505 (2005).

173. *Id.* at 1506 (quoting Barry Latzer, *The New Judicial Federalism and Criminal Justice: Two Problems and a Response*, 22 RUTGERS L.J. 863, 864 (1991)). This superior method of incorporation is known as "reflective adoption." *Id.* Under the "reflective adoption" approach, state courts acknowledge the possibility of different state and federal outcomes, considering the arguments on a *case-by-case* basis, and "on balance, decid[e] to apply federal analysis to the state provision." *Id.*

174. Indeed, the majority conceded that homosexuals possessed both characteristics of suspectness under the Maryland definition. *See* Conaway v. Deane, 401 Md. 219, 282, 932 A.2d 571, 609 (2007) (stating in a heading that "there is a history of purposeful unequal treatment of gay and lesbian persons, and homosexual persons are subject to unique disabilities not truly indicative of their abilities to contribute to society," but quickly deemphasizing the concession by refusing to "hold that gay and lesbian persons are so politically powerless that they constitute a suspect class").

175. *Id.* at 279, 932 A.2d at 607.

176. *See id.* (explaining only that the court "find[s] useful in [its] analysis those additional criteria used by the Supreme Court in assessing claims of a new suspect or quasi-suspect classification"). The *Conaway* court's "unreflective adoption" of these federal factors contrasts with the suspect class analyses in *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008), a recent Connecticut Supreme Court opinion upholding same-sex marriage. The *Kerrigan* court discussed for the first time the same four Supreme Court factors

Unreflective adoption was particularly inappropriate in *Conaway*. Prior to *Conaway*, the Court of Appeals of Maryland treated Article 24 separately from the Fourteenth Amendment to preserve the court's right to deviate from less protective Supreme Court decisions in the future.[177] The court constantly reserved this right, even when its decision would be the *same* under either constitution.[178] In *Conaway*, for the first time, the outcome would have been *different* under the two suspect class definitions.[179] For the first time, the court had an opportunity to provide greater equal protection under Article 24 than the Fourteenth Amendment, and the court declined to take it, failing even to reflect on the more protective outcome possible under the State's own definition.

The *Conaway* court further disregarded Maryland's historical approach to equal protection in its *application* of the newly adopted Supreme Court indicia of suspectness by giving undue weight to those new factors.[180] In two short sentences, the majority dismissed with troubling ease its concession that homosexuals (1) have "been the object of social prejudice" and (2) possess definitive characteristics "not truly indicative of their abilities to contribute meaningfully to society,"[181] the only two indicia of suspectness that the Maryland Court of Appeals had previously included in its suspect class definition.[182] With those sentences, which were relegated to the introduction of a subsection denying homosexuals' political powerlessness,[183] the majority quickly brushed aside the latter element—ability to contribute to society—and failed to mention it again. The majority addressed the former element several paragraphs later, when it again conceded in passing that "[i]t is clear that homosexual persons, at least in terms of contemporary history, have been a disfavored group."[184] Inexplicably, however, the majority concluded that "in light of the *other* indicia"

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that the *Conaway* court considered. *See Kerrigan*, 957 A.2d at 425–26. Unlike the *Conaway* court, however, the *Kerrigan* court justified its adoption of these factors by explaining that it had *never previously articulated* "the specific criteria to be considered in determining whether recognition as a quasi-suspect class is warranted." *Id.* The Maryland Court of Appeals lacked a comparable explanation.

177. *See supra* Part II.B.

178. *See supra* Part II.B.

179. *See infra* notes 181–191 and accompanying text (contrasting the majority's concession that same-sex couples possess the characteristics of suspect class under Maryland's traditional approach with the majority's denial of suspect class status based on new federal elements of suspectness).

180. *See infra* notes 181–200 and accompanying text.

181. *Conaway*, 401 Md. at 282, 932 A.2d at 609.

182. *See supra* Part II.C.

183. *Conaway*, 401 Md. at 282, 932 A.2d at 609.

184. *Id.* at 285, 932 A.2d at 610.

of suspectness, "a history of unequal treatment does not require [the court to] deem suspect a classification based on sexual orientation."[185] Ironically, after affording virtually no weight to these two important elements,[186] the majority professed instead to "view the circumstances as a whole" to decide whether same-sex couples merit suspect classification.[187]

The majority plainly did not consider "the circumstances as a whole." Instead, after swiftly dismissing the two Maryland elements of suspectness, the majority divided its entire analysis into two parts: one denying that homosexuals are politically powerless,[188] and the other claiming that homosexuality may not be an immutable trait.[189] When the majority first laid out its test for suspectness, it claimed that those two "additional criteria," would be "useful" in its analysis.[190] In application, however, the factors were dispositive, not merely "useful" to the majority's suspect class decision—the majority denied that homosexuals constituted a suspect class under Article 24 based solely on the arguments that homosexuality might not be immutable, and that homosexuals suffer insufficient political powerlessness to deserve heightened legal protection.[191]

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185. *Id.*, 932 A.2d at 610–11 (emphasis added).

186. *See id.* at 422, 932 A.2d at 694 (Bell, C.J., dissenting) (arguing that the majority dismissed too swiftly "an undisputed but extensive history of pervasive prejudice and discrimination targeted at homosexuals").

187. *Id.* at 285–86, 932 A.2d at 611 (majority opinion).

188. *See id.* at 282–90, 932 A.2d at 609–14 (pointing to Maryland statutes, regulations, and judicial decisions protecting homosexuals against discrimination in areas like public accommodation, employment, housing, education, and child custody to deny the group's lack of political powerlessness).

189. *See id.* at 291–94, 932 A.2d at 614–16 (rejecting the argument that homosexuality is an immutable trait because there is no generally accepted scientific conclusion to that effect).

190. *Id.* at 278–79, 932 A.2d at 606–07.

191. *See supra* Part III.B. Affording the new indicia of suspectness such weight was also inapt because the majority's arguments that homosexuals failed to meet those indicia were substantively feeble. First, with respect to political powerlessness, Chief Judge Bell stressed that the majority's argument that homosexuals have enough political power to preclude their characterization as a suspect class was unfounded. *See Conaway*, 401 Md. at 422, 932 A.2d at 694 (Bell, C.J., dissenting) (finding as evidence of Maryland homosexuals' lack of political power that "Maryland has not adopted, and it may safely be said, is not on the verge of adopting, a comprehensive statewide domestic partnership scheme for same-sex couples that approximates the institution of civil marriage"). With regard to the immutability factor, even the majority did not argue that homosexuality is not an immutable trait. *See id.* at 293 n.57, 932 A.2d at 615–16 n.57 (majority opinion). Rather, based on the court's own research into scientific studies about the immutability of homosexuality, *see id.* at 292–93 n.57, 932 A.2d 615–16 n.57, the majority determined that the conclusions of studies conflict and therefore declined "to recognize sexual orientation as an immutable trait and therefore a suspect or quasi-suspect classification." *Id.* at 294, 932 A.2d at 616.

Affording exclusive weight to the political power and immutability factors was inappropriate for two reasons. First, in so doing, the court erroneously treated the four indicia as required elements. Normally, courts balance the totality of the factors in a flexible manner to determine suspect classification.[192] But the *Conaway* court inaccurately applied a conjunctive test when it denied same-sex couples suspect status based solely on its belief that homosexuality may not be immutable and is not linked with political powerlessness, without even considering the other factors.[193] The Supreme Court of Iowa, in recently upholding same-sex marriage, denounced just such a flawed application of the factors. The Iowa court flatly rejected the argument that if the immutability and political powerlessness "elements" are not satisfied the suspect class argument must fail.[194] Any effort to treat the factors as essential elements, it explained, "overlooks the flexible manner in which the Supreme Court has applied the four factors in the past."[195]

Second, the court's exclusive consideration of the second two factors—immutability and political power—was especially inappropriate because, as Maryland and several other state courts have suggested, those factors are the least crucial to suspect class analysis.[196] Prior to *Conaway*, the Maryland Court of Appeals had repeatedly declined to include those very indicia in its suspect class definition.[197] Tellingly, neither party even raised the issue of immutability in its brief; still, the court unexpectedly elected to consider that factor on its own.[198] In their recent affirmations of same-sex marriage, the highest courts of

192. *See supra* Part II.C.

193. *See supra* notes 181–191 and accompanying text.

194. *See* Varnum v. Brien, 763 N.W.2d 862, 888–89 (Iowa 2009) (commenting that "immutability of the characteristics and political powerlessness of the group . . . supplement the analysis as a means to discern whether a need for heightened scrutiny exists," and are not "essential elements").

195. *Id.* at 888.

196. *See id.* at 889 (noting that these two factors are merely a "supplement" to suspect class analysis).

197. *See supra* Part II.C. Indeed, the *Waldron* court quoted *Massachusetts Board of Retirement v. Murgia* to define a suspect class as "a category of people who have 'experienced a history of purposeful unequal treatment or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.'" Attorney Gen. v. Waldron, 289 Md. 683, 706, 426 A.2d 929, 941–42 (1981) (internal quotation marks omitted) (quoting Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976)). Notably, the *Murgia* Court did include "political powerlessness" in its definition. *See Murgia*, 427 U.S. at 313 (defining suspect class). But the *Waldron* court decidedly did not include that part of the *Murgia* definition. *Waldron*, 289 Md. at 706, 426 A2d at 941–42.

198. *See Conaway*, 401 Md. at 292 n.57, 932 A.2d at 615 n.57 (addressing the question of immutability despite the fact that neither party mentioned it in its brief, in part because the issue is the subject of recent studies and debate).

both Connecticut and Iowa agreed that the first two factors—history of discrimination and ability to contribute to society—are far more crucial than the other two.[199] Those courts argued that the first two factors merit more weight because they are frequently dispositive, while the second factors, immutability and political power, are mere "supplements" to suspect class analysis.[200]

By inexplicably granting undue weight to immutability and political powerlessness, the very two indicia that prior courts specifically chose not to include in Article 24's suspect class definition,[201] the *Conaway* majority deprived Maryland's homosexual community of the suspect status it deserves under Article 24.

B. The Conaway *Court Similarly Deprived Future Maryland Groups Seeking Suspect Classification of the Potentially Greater Equal Protection Historically Available Under Maryland's Constitution by Prospectively Adopting the Supreme Court's Suspect Class Test*

Not only did the *Conaway* court's adoption of the federal suspect class test deny the Maryland homosexual community its deserved suspect classification—it also may have denied to future Maryland groups seeking suspect classification the possibility of the greater protection historically available under Article 24.[202] This wholesale adoption of federal analysis could lock Maryland courts into step with an increasingly conservative Supreme Court, leaving Maryland much less in control of its own equal protection jurisprudence.[203]

Prior to *Conaway*, Maryland courts analyzing equal protection distinguished Article 24 from the Fourteenth Amendment, preserving Article 24's ability to provide greater protections of individual liberties.[204] In fact, the *Waldron* court "left open the possibility that Article 24 . . . may *require* a result at variance with the Supreme Court's application of the Fourteenth Amendment's [E]qual [P]rotection

199. *See Varnum*, 763 N.W.2d at 888–89, 896, 906 (striking down as unconstitutional Iowa's ban on same-sex marriage and deeming the history of discrimination and ability to contribute to society as the only two factors that "have always been present when heightened scrutiny has been applied"); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 426, 431–32, 482 (Conn. 2008) (invalidating Connecticut's legislative ban on same-sex marriage as unconstitutional and commenting that the first two indicia of suspectness are "required," while the latter two are merely "other considerations").

200. *See supra* notes 96–100, 199 and accompanying text.

201. *See supra* Part II.C.

202. *See infra* notes 204–215 and accompanying text.

203. *See infra* notes 208–219 and accompanying text.

204. *See supra* Part II.B.

[C]lause."[205] Maryland courts in the wake of *Waldron* preserved that possibility of greater protection until *Conaway*.[206] With respect to suspect classification in particular, despite "reluctance on the part of the Maryland court to expand the number of interests and suspect classes triggering review greater than 'rational basis,'" prior to *Conaway*, "it ha[d] not precluded the possibility of such action in the future."[207]

Conaway may have thwarted that possibility by applying a more stringent Supreme Court test in lieu of the two-factor test for suspectness that Maryland courts had used since *Waldron*,[208] thereby engaging in "prospective lockstepping" with Supreme Court analysis.[209] State courts engage in a form of "prospective lockstepping" when they adopt a Supreme Court "test, formula, or mode of reasoning" used to interpret the federal Constitution.[210] This implies that the state court will continue to apply the federal test in the future,[211] operating as a "precommitment device" or "irrebuttable presumption" that the state court must decide future cases "the same way the United States Supreme Court has decided, or would decide, the same issue under the federal constitution."[212] Thus, by adopting this new federal test, the *Conaway* court likely closed the window that *Waldron* had left open to the possibility of expanding equal protection to find new suspect classes where the Supreme Court would not have done so.

Conaway's lockstepping approach to equal protection is particularly likely to deny future Maryland groups suspect classification because the Supreme Court, since the 1980's, has been increasingly inclined to "curtail the recognition of new rights or liberties and to even rescind some that were previously granted."[213] With respect to

205. MICHAEL CARLTON TOLLEY, STATE CONSTITUTIONALISM IN MARYLAND 6–7 (1992) (emphasis added).

206. *See supra* Part II.B.

207. TOLLEY, *supra* note 205, at 77.

208. *See supra* Part III.B.

209. This unfortunate approach occurs where state courts adopt "'apparently in *perpetuity*, all existing or future United States Supreme Court interpretations of a federal constitutional provision as the governing interpretation of the parallel state constitutional provision.'" Williams, *supra* note 172, at 1499 (emphasis added) (quoting Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1161 (1985)).

210. *Id.* at 1514.

211. *See id.* ("[I]t operates as an announced approach of ongoing, or prospective, deference to federal constitutional doctrine.").

212. *Id.* at 1523.

213. JEFFREY M. SHAMAN, EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW XVI (2008); *see also id.* at XI ("[T]he Supreme Court of the United States has become increasingly conservative and antipathetic, if not hostile, to the recognition of individual rights.").

suspect classification in particular, since the Supreme Court's classification of illegitimate children as quasi-suspect, it has adamantly refused to recognize any new suspect or semi-suspect classifications.[214] This halted possible expansion of protection under the Equal Protection Clause of the Fourteenth Amendment.[215]

The frozen state of federal equal protection highlights the inopportuneness of *Conaway*'s lockstepping techniques. Indeed, scholars have noted that "prospective lockstepping" is especially troubling "where the United States Supreme Court 'underenforce[s]' certain federal constitutional norms, such as the Equal Protection Clause."[216] In such cases, state courts are especially justified in diverging from the Supreme Court's interpretation of the Federal Constitution.[217] In fact, many state courts have begun to afford more protection of equality than the Supreme Court by focusing their attention on the equality provisions in their own constitutions in a movement known as the "New Judicial Federalism."[218] Unfortunately, in the midst of this great revolution, the *Conaway* court, it seems, has rendered Maryland more dependent upon federal interpretation of equal protection under the Fourteenth Amendment than ever before.[219]

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214. *Id.* at 11 (noting that when the Supreme Court classified illegitimate children as quasi-suspect, "[c]lassifications based on race, national origin, or alienage were suspect; classifications based on gender or against non-marital children were semi-suspect; and there the list ended").

215. *Id.* at 11–12.

216. Williams, *supra* note 172, at 1501 (alteration in original).

217. *Id.* Moreover, scholars have concluded that where areas of constitutional law are unsettled, states must have the option of providing greater liberties than the federal Constitution might. *See, e.g.*, TOLLEY, *supra* note 205, at 77–78 ("If the federal Constitution does not protect the asserted right . . . or federal law is unsettled . . . then the Maryland court turns to its state constitution and often has found the authority to expand the right in question."). The *Conaway* court mentioned that classification of homosexuals for equal protection purposes is unsettled, pointing out that "[a]lthough the Supreme Court has characterized repeatedly as suspect classes distinctions based on race, alienage, and national origin, the Court has not addressed expressly whether sexual orientation is considered suspect, thereby implicating strict or heightened scrutiny." Conaway v. Deane, 401 Md. 219, 279, 932 A.2d 571, 607 (2007) (footnotes omitted).

218. *See* SHAMAN, *supra* note 213, at XVI–XVII, 17. Professor Shaman explains that "[a]t least twenty-one states have ruled that their state equality guarantees afford greater protection than the [Fourteenth Amendment]," and that some states have maintained the basic two to three-tier structure for determining the appropriate standard of scrutiny, but have "increased the scope of one or another of the upper tiers by recognizing various classifications or rights calling for heightened scrutiny that are not recognized as such in the federal system." *Id.* at 17. For example, Professor Shaman points out, "[a] number of states . . . have upgraded gender classifications from intermediate to strict scrutiny." *Id.*

219. *See supra* notes 204–215 and accompanying text. As Professor Shaman points out, it is important to note that new federalism is not an exclusively judicial phenomenon. SHAMAN, *supra* note 213, at XXII. Through state constitutional amendments, some state legislatures have "expressly creat[ed] new individual rights that have no counterpart in the

V. CONCLUSION

The *Conaway* court's adoption and application of Supreme Court suspect class analysis ignored Maryland precedent, dismissed Article 24's long-celebrated independence from federal jurisprudence, and prevented future Maryland courts from affording stronger equal protection guarantees than would the increasingly conservative Supreme Court.[220] In the late 1970's, Justice Brennan proclaimed that "state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution" for state protections "often extend[ ] beyond those required by the Supreme Court's interpretation of federal law."[221] Without "the independent protective force of state law," he continued, "the full realization of our liberties cannot be guaranteed."[222] Maryland courts have long recognized this notion that the U.S. Constitution is a floor, not a ceiling, when it comes to guaranteeing individual rights—Maryland's own constitution can afford its citizens more, but not less, protection than the U.S. Constitution.[223] Instead of unreflectively replacing well-established Maryland equal protection jurisprudence with less-protective federal analysis, the *Conaway* majority should have preserved the state constitution's ability to protect Maryland citizens more fully by applying Maryland's own suspect class definition or at least giving sufficient weight to the two indicia that comprise it, to deem homosexuals a suspect class, thereby subjecting the statutory prohibition on same-sex marriage to the strict scrutiny it merits.

Federal Constitution." *Id.* Maryland, for example, adopted its ERA to prevent discrimination based on sex after the attempt to add an ERA to the Federal Constitution failed. *See Conaway*, 401 Md. at 246–47 & n.15, 932 A.2d at 587 & n.15 (explaining the legislative history of the ERA).

220. *See supra* Part IV.

221. William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

222. *Id.*

223. *See, e.g.*, Dorsey v. State, 56 Md. App. 54, 60, 466 A.2d 546, 549 (1983) (recognizing that "while states may not circumscribe federal constitutional rights, they may grant greater rights under their own constitutions, provided those greater rights do not impinge upon federal constitutional rights"); *see also supra* Part II.B.