



2009

Comments: Civil Unions under the Maryland Era: How the Illusion of Equality Is an Equal Rights Avoidance

Michele Reichlin

University of Baltimore School of Law

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/ublr>



Part of the [Law and Gender Commons](#)

Recommended Citation

Reichlin, Michele (2009) "Comments: Civil Unions under the Maryland Era: How the Illusion of Equality Is an Equal Rights Avoidance," *University of Baltimore Law Review*: Vol. 38: Iss. 2, Article 4.

Available at: <http://scholarworks.law.ubalt.edu/ublr/vol38/iss2/4>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Review by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

CIVIL UNIONS UNDER THE MARYLAND ERA: HOW THE ILLUSION OF EQUALITY IS AN EQUAL RIGHTS AVOIDANCE

I. INTRODUCTION

Activism to gain nationwide legal recognition and protection of new civil rights often begins on the state level, as America's system of federalism means that individual states may provide more civil rights to their citizens than do other states or the federal government.¹ In the 1970s, women's rights activists sought to add an Equal Rights Amendment (ERA) to the federal Constitution in order to provide stronger constitutional protections against sex discrimination.² While there was not enough support nationwide to pass the amendment,³ fourteen states, including Maryland in 1972,⁴ added ERAs to their state constitutions in the 1970s and 1980s.⁵

Today, the movement to create a new civil right to same-sex marriage has begun on the state level, and plaintiffs in several states have sought to use these ERAs to argue that statutory bans on same-sex marriage are unconstitutional sex discrimination.⁶ This

-
1. See *Arizona v. Evans*, 514 U.S. 1, 8 (1995); see also William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) ("The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed."). *But cf.* Paul Finkelman, *Federalism: The Double-Edged Sword of Liberty and Oppression*, in AWAKENING FROM THE DREAM: CIVIL RIGHTS UNDER SIEGE AND THE NEW STRUGGLE FOR EQUAL JUSTICE 3, 3 (Denise C. Morgan et al. eds., 2006) (discussing the idea of federalism as having "progressive potential," and finding that while it does allow states to "experiment with new ideas and policies that could enhance human freedom," history has shown that the Supreme Court will often undermine this potential through its reading of the Constitution).
 2. See JANET K. BOLES, *THE POLITICS OF THE EQUAL RIGHTS AMENDMENT I* (1979) ("The basic principle on which the amendment rests is that gender should not be a factor in determining the legal rights of either men or women.").
 3. Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201, 1202 & n.7 (2005).
 4. MD. CONST., Declaration of Rights, art. 46 ("Equality of rights under the law shall not be abridged or denied because of sex.").
 5. Wharton, *supra* note 3, at 1201 & n.1.
 6. See Deborah A. Widiss et al., *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461, 461 n.1 (2007).

argument has been largely unsuccessful,⁷ and, for better or worse, the majority of the states that are changing their laws to recognize new rights for same-sex partners have largely taken to the idea that civil unions are an adequate substitute for same-sex marriage.⁸ Civil unions, created in Vermont in 2000,⁹ grant same-sex couples the rights and benefits of marriage under state law.¹⁰ While many gay rights activists find this alternative akin to “separate-but-equal,”¹¹ others have found that it may be a necessary step on the path to achieving full marriage rights for gays and lesbians.¹²

Maryland is one of the latest states to weigh in on the same-sex marriage issue. In *Conaway v. Deane*,¹³ the Court of Appeals of Maryland found that a Maryland statute¹⁴ denying the right to

-
7. *Id.* at 461–62. While this argument has been advanced in eleven states, only one state, Hawaii, has thus far found that bans on same-sex marriage constitute sex discrimination. *Id.*
 8. See NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE 97 (2008). Six states provide same-sex couples with a different status similar to marriage. *Id.* Vermont, New Jersey, Connecticut, and New Hampshire call this status a civil union, while California and Oregon call it a domestic partnership. *Id.* at 94. In addition, Hawaii, Maine, Washington, and the District of Columbia provide limited legal benefits to same-sex couples. *Id.* Massachusetts was the only state to allow same-sex marriage until May 15, 2008, when the Supreme Court of California held that same-sex marriage was a constitutional right under the state constitution. *The Guys Next Door*, ECONOMIST, May 24, 2008, at 43, 43. While the court’s decision in California is too new to predict its ultimate outcome, the same-sex marriage laws in California may be even more expansive than those in Massachusetts, as California plans to marry couples from other states. *Id.*
 9. See POLIKOFF, *supra* note 8, at 92; see also *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999) (mandating that the legislature provide same-sex couples with the same statutory benefits and protections afforded heterosexual couples, but allowing the legislature to create “a parallel ‘domestic partnership’ system or some equivalent statutory alternative”).
 10. See Sean Cahill, *The Symbolic Centrality of Gay Marriage in the 2004 Presidential Election*, in THE FUTURE OF GAY RIGHTS IN AMERICA 47, 62 (H.N. Hirsch ed., 2005) (“[Civil unions] offer no federal protections and are not portable to other states . . .”).
 11. See, e.g., MICHAEL MELLO, LEGALIZING GAY MARRIAGE 142 (2004) (likening Vermont’s civil unions statute to the separate-but-equal Jim Crow laws).
 12. See, e.g., Greg Johnson, *Civil Union, a Reappraisal*, 30 VT. L. REV. 891, 894 (2006). In arguing that civil unions are a viable alternative to marriage, and that they can “provide immediate relief while the battle for same-sex marriage continues,” Johnson contends that civil unions provide “all the rights, benefits, and responsibilities of marriage . . . [and treat] same-sex couples as if they were married in every respect, from inception to dissolution, withholding only the word ‘marriage’ itself.” *Id.* at 891, 894.
 13. 401 Md. 219, 932 A.2d 571 (2007).
 14. MD. CODE ANN., FAM. LAW § 2-201 (LexisNexis 2006) (“Only a marriage between a man and a woman is valid in this State.”).

marriage to same-sex couples does not discriminate on the basis of sex in violation of Maryland's ERA.¹⁵ In so ruling, the court found that the Maryland legislature, rather than the judicial system, has the authority to grant Maryland residents the right to same-sex marriage or civil unions.¹⁶ Implied in the court's holding is the premise that civil unions do not violate the ERA and are a constitutional alternative to same-sex marriage.¹⁷

Since the Maryland judicial system absolved itself of any responsibility in recognizing a right to same-sex marriage, the decision of whether to overturn the statute is now left with the legislators, many of whom do not want to vote for same-sex marriage if it may jeopardize their chances of re-election.¹⁸ As some lawmakers fear that public opinion is largely against same-sex marriage,¹⁹ they are taking to the idea of civil unions as a less controversial substitute.²⁰ Indeed, public opinion in Maryland is more in favor of civil unions.²¹ A recent *Washington Post* poll found that 57% of Maryland residents supported civil unions, while only 39% opposed them.²² Forty-four percent of Maryland residents were in favor of same-sex marriage, while 51% were opposed.²³ This poll shows increasing public support for providing same-sex couples with the rights and benefits of marriage, where four years ago, only 44% of Marylanders were in favor of civil unions.²⁴

This Comment will begin by explaining the key differences in how the *Conaway* majority and dissenting judges interpreted the ERA and

15. *Conaway*, 401 Md. at 325, 932 A.2d at 635.

16. *Id.* (“[O]ur opinion should by no means be read to imply that the General Assembly may not grant and recognize for homosexual persons civil unions or the right to marry a person of the same sex.”).

17. *See id.*

18. *See* Alan Brody, *Same-Sex Marriage Will Be Battle for Democrats*, THE GAZETTE (Md.), Dec. 14, 2007, at A1.

19. *Id.* (“For a law like that to move forward, there needs to be a strong body of public opinion, and I don’t think it’s there yet in a state of moderate temperament like Maryland.” (quoting Maryland Senate President Thomas V. Mike Miller, Jr.)).

20. *See* Lisa Rein, *Bills Pursued to Gain Rights Piece by Piece*, WASH. POST, Jan. 6, 2008, at C12 (“Gov. Martin O’Malley (D), who has kept a low profile on the matter, supports civil unions . . . but not same-sex marriage.”).

21. John Wagner & Jon Cohen, *Marylanders Lean Left on Gay Marriage, Death Penalty*, WASH. POST, Oct. 26, 2007, at B1.

22. *Id.* In comparison, a national poll found that 45% of Americans supported civil unions, while 48% opposed them. *Id.*

23. *Id.*

24. *Id.*

applied it to same-sex marriage.²⁵ Part III will look at how other courts have interpreted their state constitutions to allow civil unions in lieu of same-sex marriage. It will also examine the possible consequences of allowing civil unions rather than same-sex marriage in Maryland.²⁶ Finally, Part IV will argue that the *Conaway* majority incorrectly interpreted the applicability of the ERA to same-sex marriage. It will further explain why there is no constitutional basis to create a separate civil union status for same-sex couples.²⁷

II. SAME-SEX MARRIAGE UNDER THE ERA

In the 1970s, debates over the proposed federal ERA concerned the possibility that the amendment could potentially require same-sex marriage,²⁸ and ERA opponents used the public's uneasiness with this possibility to sway public opinion against the amendment.²⁹ While some ERA supporters acknowledged the ERA could be used to eliminate the different-sex requirement for marriage, others thought it better to downplay this argument.³⁰

There are two parts to the argument that restricting marriage to opposite-sex couples is sex discrimination.³¹ The first part, which has been emphasized most often in marriage equality cases,³² is that bans on same-sex marriage discriminate on their face "by restricting an individual's right to marry his or her chosen spouse purely on the basis of gender."³³ The second part is a sex stereotype argument, which asserts that denying same-sex couples the right to marry "relies upon and perpetuates a system under which men and women occupy

25. See *infra* Part II.A.1–2.

26. See *infra* Part III.B.2.

27. See *infra* Part IV.B.

28. Widiss et al., *supra* note 6, at 465–66. Phyllis Schlafly, a leading opponent of the ERA, was concerned that the ERA could mandate same-sex marriage because "[i]t is precisely 'on account of sex' that a state now denies a marriage license to a man and a man, or to a woman and a woman." *Id.* at 466 (quoting PHYLLIS SCHLAFLY, *THE POWER OF THE POSITIVE WOMAN* 90 (1977)).

29. *Id.* at 463 ("[T]he amendment's opponents consciously used public discomfort with the concept of marriage by same-sex couples to undermine support for constitutional guarantees of sex equality.").

30. *Id.* at 466–67. While there were ERA proponents in Washington State who, "well aware of the volatility of the issue, went to lengths to disclaim the possibility that ratification of the ERA would require permitting same-sex couples to marry," there were other ERA advocates who argued that a benefit of the ERA was that it would require same-sex marriage. *Id.*

31. *Id.* at 468.

32. *Id.* at 469 ("Many litigants have chosen to emphasize the facial sex discrimination argument, shying away from more controversial subordination themes.").

33. *Id.*

different marriage and family roles: men must ‘act like husbands’ and women must ‘act like wives.’”³⁴ This argument seeks to promote liberty interests by “prohibiting government enforcement of sex roles that limit the freedom of individual women and men to depart from traditional gender roles in choosing their own life paths.”³⁵

Most plaintiffs in same-sex marriage cases have tended to either separate the two arguments or rely only on the facial sex discrimination argument,³⁶ and the courts have largely rejected the sex discrimination argument on the ground that same-sex marriage bans apply equally to men and women.³⁷ In contrast, the dissenters in these cases have often intertwined both the facial discrimination and sex stereotype parts of the argument in finding that ERAs protect same-sex marriage.³⁸ In *Conaway*, the Court of Appeals of Maryland disagreed with the sex discrimination argument.³⁹

A. *Conaway v. Deane*

Upon the plaintiffs’ lawsuit alleging that Maryland Code, Family Law Article, section 2-201 (Family Law § 2-201) unconstitutionally bans same-sex couples from marriage,⁴⁰ the Circuit Court for Baltimore City declared that the statute discriminated facially on the basis of sex, in violation of the ERA.⁴¹ The court held that “the exclusion of same-sex couples from marriage constitutes a sex-based classification, lacking a constitutionally sufficient justification.”⁴² The circuit court stayed enforcement of the ruling pending the resolution of the case upon appeal, and the case went directly to the

34. *Id.* (“The sex stereotype argument may be understood as vindicating anti-subordination values, on the view that sex stereotypes implicated by the marriage statute are harmful because they perpetuate a patriarchal view of marriage and family that presumes a breadwinner, head-of-household husband/father and a caretaker, subordinate wife/mother.”).

35. *Id.*

36. *Id.* at 470.

37. *Id.* at 472 (noting that while majorities have generally used this argument to uphold same-sex marriage bans, they have generally dismissed the sex stereotype argument separately or have not even addressed it).

38. *See id.* at 477.

39. *Conaway v. Deane*, 401 Md. 219, 325, 932 A.2d 571, 635 (2007).

40. *Id.* at 240–41, 932 A.2d at 583. The plaintiffs included nine same-sex couples who were denied marriage licenses and one homosexual male who wished to eventually apply for a marriage license. *Id.* at 238–39, 932 A.2d at 582.

41. *Id.* at 237, 932 A.2d at 581.

42. *Id.* at 242, 932 A.2d at 584.

Court of Appeals of Maryland.⁴³ The plaintiffs' four count complaint alleged that Family Law § 2-201 was sex discrimination in violation of the ERA and discrimination in violation of the equal protection and due process guarantees of Article 24 of the Maryland Declaration of Rights.⁴⁴

1. Majority's View on the Applicability of the ERA to Family Law § 2-201

The plaintiffs argued that Family Law § 2-201 violates the ERA because it "draws an impermissible classification on the basis of sex" as it "makes sex a factor in the enjoyment and the determination of one's right to marry."⁴⁵ In rejecting this argument, the court began by looking at the legislative intent of the ERA, and found "that the intended scope of [the ERA] was to prevent discrimination between men and women as classes."⁴⁶ The court then looked to Maryland precedent interpreting the ERA, and found that these cases indicated the ERA's "primary 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."⁴⁷

a. *Benefit/burden analysis*

*Burning Tree Club, Inc. v. Bainum (Burning Tree I)*⁴⁸ was the first case relied upon by the majority,⁴⁹ and was also the primary cause of contention between the majority and the dissent's interpretation of the case law construing the ERA.⁵⁰ *Burning Tree I* concerned the constitutionality, on ERA grounds, of a Maryland statute that afforded tax deferments to private country clubs that agreed to preserve their open spaces.⁵¹ The statute included an antidiscrimination provision which said that clubs could not qualify for the tax benefit if they practiced any form of discrimination, unless

43. *Id.*

44. *Id.* at 240–41, 932 A.2d at 583.

45. *Id.* at 244–45, 932 A.2d at 585–86.

46. *Id.* at 246–48, 932 A.2d at 587. Because the court was unable to find any formal legislative documents indicating the legislature's intent, it used extrinsic sources such as a post-amendment study, newspaper accounts, and the legislative history of the proposed federal ERA. *Id.* at 247–254, 932 A.2d at 587–591.

47. *Id.* at 254, 932 A.2d at 591.

48. 305 Md. 53, 501 A.2d 817 (1985).

49. *Conaway*, 401 Md. at 254, 932 A.2d at 591.

50. *Id.* at 356–57, 932 A.2d at 654–55 (Battaglia, J., dissenting).

51. *Burning Tree I*, 305 Md. at 56, 501 A.2d at 818.

the club was operated with the primary purpose of serving members of a particular sex.⁵² A majority of the court held that the primary purpose provision violated the ERA.⁵³

There were three main issues before the court in *Burning Tree I*,⁵⁴ and the court's holdings were divided between three separate opinions.⁵⁵ Judge Rodowsky's concurrence joined Judge Murphy's opinion and Judge Eldridge's opinion on different issues.⁵⁶ While Judge Rodowsky agreed with Judge Murphy's opinion that the primary purpose provision was not severable from the sex discrimination prohibition, he agreed with Judge Eldridge's opinion that the primary purpose provision violated the ERA.⁵⁷

In using only Judge Murphy's opinion, the *Conaway* majority concluded that *Burning Tree I* stood for the proposition that the ERA prohibited sex-based classifications "in the allocation of benefits, burdens, rights and responsibilities *as between men and women*."⁵⁸ The court concluded that the proper ERA analysis is whether governmental action "imposes a burden on one sex but not the other, or grants a benefit to one but not the other."⁵⁹ This benefit/burden analysis was primarily gleaned from Judge Murphy's interpretation of case law from both Maryland and other jurisdictions that applied the ERA to various statutes.⁶⁰ The *Conaway* majority also included similar ERA interpretations given by courts in Washington, New York, and Vermont.⁶¹

b. Men and women as classes, not individuals

Using this analysis in *Conaway*, the majority found that Family Law § 2-201 was only subject to rational basis review because it does "not separate men and women into discrete classes for the purpose of granting to one class of persons benefits at the expense of the other

52. *Id.* at 57, 501 A.2d at 819 (citing MD. ANN. CODE art. 81, § 19(e)(4)(i) (repealed 1996)).

53. *Id.* at 84, 501 A.2d at 832.

54. *Id.* at 90, 501 A.2d at 836 (Eldridge, J., concurring in part and dissenting in part).

55. *Id.* at 55, 85, 88, 501 A.2d at 818, 833, 835.

56. *See id.* at 85, 501 A.2d at 833 (Rodowsky, J., concurring).

57. *See id.*

58. *Conaway*, 401 Md. at 255–56, 932 A.2d at 592 (quoting *Burning Tree I*, 305 Md. at 64, 501 A.2d at 823 (emphasis added)).

59. *Id.* at 260, 932 A.2d at 596 (quoting *Burning Tree I*, 305 Md. at 70, 501 A.2d at 825).

60. *See Burning Tree I*, 305 Md. at 65–70, 501 A.2d at 823–25.

61. *Conaway*, 401 Md. at 265–67, 932 A.2d at 598–99.

class.”⁶² Since men and women are both prohibited equally from marrying someone of the same sex, there is no sex discrimination.⁶³

In coming to this conclusion, the court also rejected the plaintiffs’ reliance on *Loving v. Virginia*,⁶⁴ which they used to argue that the court should examine how the statute affects each individual seeking to marry rather than whether the statute treats one sex differently from the other.⁶⁵ In *Loving*, the U.S. Supreme Court wrote on the importance of the freedom to marry,⁶⁶ and found unconstitutional a Virginia statute prohibiting marriage between Caucasians and non-Caucasians.⁶⁷ Despite the statute’s equal application to all races, the Court found a discriminatory purpose behind the statute.⁶⁸ In rejecting the plaintiffs’ *Loving* argument, the *Conaway* majority found that the *Loving* court held the miscegenation statute unconstitutional because its discriminatory purpose was to “sustain White Supremacy and to subordinate African-Americans and other non-Caucasians as a class.”⁶⁹ Since Family Law § 2-201 was not intended to have a discriminatory effect on either men or women as a class, and was not based on a discriminatory view of gender roles, the court held that *Loving* was an inapplicable analogy.⁷⁰

2. Dissent’s View on Applicability of the ERA to Family Law § 2-201

Judge Battaglia’s dissenting opinion, which was joined by Judge Bell,⁷¹ found that Family Law § 2-201 implicated the ERA and was

62. *Id.* at 264, 932 A.2d at 598. Rational basis review is the minimal level of scrutiny that a court will apply to a claim that a law violates the right to equal protection or due process. ERWIN CHEREMINSKY, *CONSTITUTIONAL LAW* 815 (2d ed. 2005). Under this test, “the government’s action only has to . . . be shown to be rationally related to a legitimate government purpose.” *Id.* Heightened scrutiny, or strict scrutiny, is the highest level of scrutiny a court may apply, and requires that “the government’s action [is] necessary to achieve a compelling purpose.” *Id.*

63. *Conaway*, 401 Md. at 264, 932 A.2d at 598.

64. 388 U.S. 1 (1967).

65. *Conaway*, 401 Md. at 267, 932 A.2d at 599.

66. *Loving*, 388 U.S. at 12 (“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. . . . Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.”).

67. *Id.* at 2.

68. *Id.* at 11 (“There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.”).

69. *Conaway*, 410 Md. at 269, 932 A.2d at 601.

70. *Id.* at 270, 932 A.2d at 601–02.

71. *Id.* at 421, 932 A.2d at 693 (Battaglia, J., dissenting).

therefore subject to strict scrutiny, rather than rational basis, review.⁷² The dissent stated that the proper analysis was whether a statute drew gender classifications on its face, not whether a statute benefited or burdened one sex.⁷³ In making this finding, the dissent, relying primarily on the same Maryland case law as the majority, found a largely different ERA construction within these cases.⁷⁴ In addition, the dissent concluded these cases collectively indicated that “the ERA is intended to address the rights of individuals, not the rights of ‘men and women *as classes*.’”⁷⁵

a. Sex-based classification analysis

The *Conaway* dissent’s main issue with the majority’s use of *Burning Tree I* was that the court used Judge Murphy’s opinion to interpret the ERA.⁷⁶ In his own opinion, Judge Murphy wrote, “[a] majority of the judges of the Court do not fully share the analysis set forth in this opinion and hold that the primary purpose provision is unconstitutional under the [ERA] for the various reasons set forth in the concurring and dissenting opinions.”⁷⁷ Despite this, the *Conaway* majority’s discussion of *Burning Tree I*’s holding on the primary purpose provision quoted solely from and acknowledged only Judge Murphy’s opinion.⁷⁸

Instead, the dissent relied upon Judge Eldridge’s majority opinion,⁷⁹ which rejected the benefit/burden analysis, explaining that “[w]hile it is true that many of our prior cases have involved

72. See *id.* at 358, 932 A.2d at 655 (Battaglia, J., dissenting).

73. *Id.* at 357–58, 932 A.2d at 655.

74. *Id.* at 399, 932 A.2d at 680.

Our cases stand for the proposition that all state action that draws sex-based distinctions, regardless of whether such action ‘directly impos[es] a burden or confer[s] a benefit entirely upon either males or females,’ implicates the ERA and must be subjected to strict scrutiny. . . . Until today, this Court has never shied away from that standard when applying the ERA.

Id. (alterations in original) (citation omitted).

75. *Id.* at 403, 932 A.2d at 682 (Bell, C.J., dissenting) (quoting majority opinion).

76. *Id.* at 356–57, 932 A.2d at 654–55 (stating that the majority erroneously relied on Judge Murphy’s opinion because it did not reflect the majority of the court’s view).

77. *Burning Tree I*, 305 Md. at 80, 501 A.2d at 830. Judge Eldridge, after noting that Judge Murphy’s opinion was not the opinion of the court, warned that if it “were in the future to be adopted by a majority of this Court, the effectiveness of the [ERA] to the Maryland [c]onstitution would be substantially impaired.” *Id.* at 88, 501 A.2d at 835 (Eldridge, J., concurring in part and dissenting in part).

78. See *Conaway*, 401 Md. at 260–64, 932 A.2d at 595–98.

79. See *id.* at 356–58, 932 A.2d at 654–55 (Battaglia, J., dissenting).

government action directly imposing a burden or conferring a benefit entirely upon either males or females, we have never held that the [ERA] is narrowly limited to such situations.”⁸⁰ Judge Eldridge also advocated a broad interpretation of the ERA,⁸¹ and stated that sex-based classifications were subject to the same scrutiny as racial classifications.⁸²

The dissent then examined Maryland case law which applied *Burning Tree I*'s ERA analysis, and found that these cases adopted Judge Eldridge's ERA analysis rather than Judge Murphy's analysis.⁸³ Of particular importance to the dissent was *State v. Burning Tree Club, Inc. (Burning Tree II)*,⁸⁴ which dealt with a periodic discrimination provision enacted after the primary purpose provision at issue in *Burning Tree I* was declared unconstitutional.⁸⁵ The *Burning Tree II* court interpreted *Burning Tree I* as holding that any “enactment of legislation which on its face draws classifications based on sex is state action sufficient to invoke the [ERA].”⁸⁶ Further, *Burning Tree II* held that once these sex-based classifications were drawn, the court must apply strict scrutiny under the ERA, not rational basis.⁸⁷

b. Men and women as individuals, not classes

The *Conaway* dissent also disagreed with the majority's assertion that the ERA was meant to protect the rights of men and women as classes, finding instead that the ERA was meant to protect “the individual whose rights are infringed by the sex-based classification.”⁸⁸ In *Giffin v. Crane*,⁸⁹ the Court of Appeals of

80. *Burning Tree I*, 305 Md. at 95, 501 A.2d at 838 (Eldridge, J., concurring in part and dissenting in part) (noting the court's position that sex-based classifications are suspect under the ERA, and are therefore subject to stricter scrutiny (citing Md. State Bd. of Barber Exam'rs v. Kuhn, 270 Md. 496, 506–07, 312 A.2d 216, 222 (1973)) and noting Judge Murphy's statement that the ERA's language unambiguously requires equality of rights and sex cannot be a factor (citing *Rand v. Rand*, 280 Md. 508, 512, 374 A.2d 900, 903 (1977))).

81. *Id.*

82. *Id.* at 98, 501 A.2d at 840. However, Judge Eldridge did believe that some sex-based classifications could be justified under strict scrutiny because of “inherent differences between the sexes.” *Id.*

83. *See Conaway*, 401 Md. at 381–88, 932 A.2d at 669–74 (Battaglia, J., dissenting).

84. 315 Md. 254, 554 A.2d 366 (1989).

85. *Id.* at 259–63, 554 A.2d at 369–71.

86. *Id.* at 293, 554 A.2d at 386.

87. *Id.* at 293–96, 554 A.2d at 386–87.

88. *Conaway*, 401 Md. at 402, 932 A.2d at 682 (Battaglia, J., dissenting).

89. 351 Md. 133, 716 A.2d 1029 (1998).

Maryland held that a parent's sex was an impermissible factor in the granting of child custody.⁹⁰ The *Giffin* court stated that:

[T]he equality between the sexes demanded by the Maryland [ERA] focuses on "rights" of individuals "under the law," which encompasses all forms of privileges, immunities, benefits and responsibilities of citizens. As to these, the Maryland [ERA] absolutely forbids the determination of such "rights," as may be accorded by law, solely on the basis of one's sex, i.e., sex is an impermissible factor in making any such determination.⁹¹

The *Conaway* majority focused on the phrase "between the sexes" in the first sentence of the above-quoted passage, but left out the second sentence in its analysis.⁹² The dissent believed that the omission of the second sentence was a deliberate misconstruction of the passage,⁹³ and argued that this passage, along with other case law construing the ERA, meant that "the ERA [was] intended to address the rights of individuals."⁹⁴

The dissent also rejected the majority's *Loving* argument, and instead found *Loving* applicable to Family Law § 2-201.⁹⁵ The majority found that *Loving* was inapplicable because Family Law § 2-201 did not have a discriminatory purpose.⁹⁶ However, the dissent argued that the *Loving* court "reached its holding independently of the issue of discriminatory intent . . . 'find[ing] the racial classifications . . . repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the "integrity" of all races.'"⁹⁷ Further, the dissent argued that the

90. *See id.* at 155, 716 A.2d at 1040.

91. *Id.* at 149, 716 A.2d at 1037 (citation omitted).

92. *Conaway*, 401 Md. at 258, 932 A.2d at 595.

93. *Id.* at 403, 932 A.2d at 682 (Battaglia, J., dissenting) ("The majority in the present case deliberately misconstrues the passage quoted above through selective quotation, conveniently omitting the second sentence, to support its narrowly constrained view of the ERA as somehow permitting separate but 'equal' in matters of sex discrimination.").

94. *Id.*

95. *Id.* at 408–09, 932 A.2d at 685–86.

96. *Id.* at 270, 932 A.2d at 602.

97. *Id.* at 408, 932 A.2d at 685 (Battaglia, J., dissenting) (quoting *Loving v. Virginia*, 388 U.S. 1, 11 n.11 (1967)).

underlying intent of Family Law § 2-201 was irrelevant because the statute drew sex-based classifications on its face.⁹⁸

III. CIVIL UNIONS

While finding a rational basis for Maryland's ban on same-sex marriage, the Court of Appeals of Maryland held that it would nevertheless be constitutional for the legislature to allow same-sex marriage or civil unions.⁹⁹ The court found a rational basis within the state's interests in "fostering procreation and encouraging the traditional family structure in which children are born."¹⁰⁰ The court explained that, while these interests were reasonably related to the exclusion of same-sex couples from marriage, the legislature could choose other means of pursuing these interests.¹⁰¹ Because this holding creates the possibility that the legislature may enact civil unions instead of same-sex marriage,¹⁰² it is necessary to examine their constitutionality and consequences.¹⁰³ This Part will first look at Vermont's and New Jersey's legal rationales for civil unions. As Judge Raker's concurrence in *Conaway* advocated civil unions,¹⁰⁴ this Part will then use that opinion as the starting point for a discussion of the constitutionality and consequences of civil unions in Maryland.

A. Court Ordered Civil Unions

Two high courts, those in Vermont¹⁰⁵ and New Jersey,¹⁰⁶ have separated the right to marry from the rights of marriage.¹⁰⁷ Both courts ruled that while same-sex couples can be banned from marriage, they still must be able to receive the rights and benefits of marriage.¹⁰⁸ In *Baker v. State*,¹⁰⁹ the Supreme Court of Vermont allowed the legislature to create civil unions after the court held that

98. *Id.* at 408–09, 932 A.2d at 685–86 (“[I]t is well-settled that the question of discriminatory intent does not arise unless the threshold question of facial neutrality is answered in the affirmative.”).

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

100. *Id.*

101. *Id.*

102. *See id.*

103. *See infra* Part III.B.

104. *See Conaway*, 401 Md. at 326–27, 932 A.2d at 635–36 (Raker, J., concurring in part and dissenting in part).

105. *Baker v. State*, 744 A.2d 864 (Vt. 1999).

106. *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

107. *Lewis*, 908 A.2d at 221; *Baker*, 744 A.2d at 867.

108. *Lewis*, 908 A.2d at 200; *Baker*, 744 A.2d at 867.

109. 744 A.2d 864.

the Vermont Constitution's Common Benefits Clause required the state to provide same-sex couples with the same statutory benefits and protections afforded opposite-sex couples.¹¹⁰ In so holding, the court explained that the legislature could choose to include same-sex couples "within the marriage laws themselves or a parallel 'domestic partnership' system or some equivalent statutory alternative."¹¹¹ The court came to this conclusion after characterizing the plaintiffs' claim as primarily seeking the statutory protections of marriage rather than the actual right to marriage.¹¹²

The plaintiffs in *Baker* unsuccessfully argued that the ban on same-sex marriage was sex discrimination, and the court applied rational basis review.¹¹³ The court found that heightened scrutiny was unwarranted because the marriage laws were facially neutral and did not "single out men or women as a class for disparate treatment."¹¹⁴ The court did not believe that the laws had a discriminatory purpose, as there was no evidence "that the authors of the marriage laws excluded same-sex couples [from marriage] because of incorrect and discriminatory assumptions about gender roles or anxiety about gender-role confusion."¹¹⁵ The court therefore did not find sex discrimination a "useful analytic framework for determining plaintiffs' rights under the Common Benefits Clause."¹¹⁶

In *Lewis v. Harris*,¹¹⁷ the Supreme Court of New Jersey held that the New Jersey Constitution's equal protection requirement meant that same-sex couples must receive the rights of marriage.¹¹⁸ The court followed the *Baker* court's lead in recharacterizing the plaintiffs' claims, refusing to take an "all-or-nothing approach" and instead separating the plaintiffs' equal protection claim into two rights: the right to marry and the rights of marriage.¹¹⁹ Similar to Vermont, the court gave the legislature the option of allowing

110. *Id.* at 867. The court noted that its holding was based only on the Common Benefits Clause, not the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. *Id.* at 870. It found that the Common Benefits Clause was intended to provide "equal access to public benefits and protections for the community as a whole." *Id.* at 876.

111. *Id.* at 867.

112. *Id.* at 886.

113. *See id.* at 880 n.13.

114. *Id.*

115. *Id.*

116. *Id.*

117. 908 A.2d 196 (N.J. 2006).

118. *Id.* at 200.

119. *Id.* at 206.

same-sex marriage or civil unions.¹²⁰ The court refused “to alter the long accepted definition of marriage,” and believed the proper arena for such a dramatic social change was through the democratically elected members of the legislature.¹²¹ As the court’s holding was on equal protection grounds, it did not address the plaintiffs’ sex discrimination argument.¹²²

B. The Constitutionality and Consequences of Enacting Civil Unions in Maryland

While civil unions may seem, at first glance, preferable to the current statutory scheme as it relates to same-sex couples, they have many negative attributes that must be considered.¹²³ Because the pros and cons of civil unions have been well-documented,¹²⁴ this section will only touch on these general arguments within the larger discussion. A more relevant analysis will be Judge Raker’s concurrence in *Conaway*, which provided a legal rationale for civil unions in Maryland.¹²⁵ Because Judge Raker agreed with the Supreme Court of New Jersey’s legal analysis, and focused on New Jersey’s civil union statute as a model for Maryland to follow,¹²⁶ this section will look specifically at the effects of New Jersey’s civil union laws.

120. *Id.* at 221. The court also implicitly rejected the separate but equal argument against civil unions: “[W]e will not speculate that identical schemes called by different names would create a distinction that would offend [the equal protection guarantee]. We will not presume that a difference in name alone is of constitutional magnitude.” *See id.* at 222.

121. *Id.* at 223.

122. Widiss et al., *supra* note 6, at 474 (citing *Lewis*, 908 A.2d 196).

123. *See infra* Part III.B.2 (outlining the negative consequences of civil unions).

124. *See generally* EVAN GERSTMANN, SAME-SEX MARRIAGE AND THE CONSTITUTION 198–202 (2d ed. 2008) (criticizing civil unions as a denial of full citizenship); Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont’s Civil Unions Law, Same-Sex Marriage, and Separate but (Un)Equal*, 25 VT. L. REV. 113, 123–146 (2000) (comparing civil unions laws with race and sex discrimination); Joseph F. Emmerth, *Civil Unions in Illinois: A Cautious Gaze into a Possible Future*, 20 DCBA BRIEF: THE JOURNAL OF THE DUPAGE COUNTY BAR ASSOCIATION, Nov.-Dec. 2007, at 14–20 (outlining the pros and cons of passing a civil unions act in Illinois); Johnson, *supra* note 12, at 902–08 (arguing in favor of civil unions and other alternatives to marriage).

125. *See Conaway v. Deane*, 401 Md. 219, 326, 932 A.2d 571, 635–36 (2007) (Raker, J., concurring in part and dissenting in part).

126. *See id.* at 326–27, 932 A.2d at 635–36.

1. Judge Raker's Argument for Civil Unions

a. *Constitutional basis*

Judge Raker argued that “[u]nder the equal protection guarantee of Article 24 of the Maryland Declaration of Rights, the State must provide committed same-sex couples, on equal terms, the same rights, benefits, and responsibilities enjoyed by married heterosexual couples.”¹²⁷ She agreed with the Supreme Court of New Jersey that the rights of marriage should be separated from the right to marry.¹²⁸ In making her argument for civil unions, Judge Raker agreed with the *Conaway* majority that Family Law § 2-201 was only subject to rational basis review,¹²⁹ but disagreed that it met this standard.¹³⁰ The majority held that the state’s interest in promoting procreation and child rearing was rationally furthered by only granting the full rights of marriage to opposite-sex couples.¹³¹ Judge Raker found it “striking . . . that the State’s proffered interest—providing a stable environment for procreation and child rearing—is actually compromised by denying same-sex families the benefits and rights that flow from marriage.”¹³² This was because any child of same-sex parents was denied numerous rights that were received by similarly situated children of married opposite-sex parents.¹³³ Judge Raker further argued that the state was arbitrary in its assignment of some rights, but not all, to same-sex couples.¹³⁴

127. *Id.* at 352, 932 A.2d at 651.

128. *Id.* at 326, 932 A.2d at 636.

129. *Id.* at 329, 932 A.2d at 638. Judge Raker argued that rational basis was the proper standard because Family Law § 2-201 did not “discriminate on the basis of sex, burden significantly a fundamental right, or otherwise draw a classification based on suspect or quasi-suspect criteria.” *Id.* at 328–29, 932 A.2d at 637–38.

130. *Id.* at 352, 932 A.2d at 651. Judge Raker found that rational basis review was not met because of the denial to same-sex couples of the rights and benefits of marriage, not because of the denial of the right to marriage. *Id.* at 351–52, 932 A.2d at 651.

131. *Id.* at 317–18, 932 A.2d at 630–31 (majority opinion) (“[The] ‘inextricable link’ between marriage and procreation reasonably could support the definition of marriage as between a man and a woman only, because it is that relationship that is capable of producing biological offspring of both members (advances in reproductive technologies notwithstanding).”).

132. *Id.* at 349, 932 A.2d at 650 (Raker, J., concurring in part and dissenting in part).

133. *Id.* at 350, 932 A.2d at 650. As an example, Judge Raker believed there was “no rational basis for requiring a group life insurance policy to cover a spouse and dependent children in a heterosexual family, when children of same-sex couples would benefit just as much from life insurance.” *Id.*

134. *Id.* at 349, 932 A.2d at 650.

b. *Civil unions as a remedy*

Upon finding that the means employed by the state did not meet its interest in promoting the family, Judge Raker discussed the magnitude of the injustice currently imposed upon same-sex couples, especially those with children.¹³⁵ A civil union statute providing same-sex couples with the rights and benefits of marriage would offer these couples hundreds of statutory rights that they are currently denied.¹³⁶ Judge Raker elaborated:

It is clear that there are significant differences in the benefits provided to married couples and same-sex couples in the areas of taxation, business regulation, secured commercial transactions, spousal privilege and other procedural matters, education, estates and trusts, family law, decision-making regarding spousal health care, insurance, labor and employment, child care and child rearing, pensions, and the responsibilities attendant to spousal funeral arrangements.¹³⁷

Some of these rights are especially important for children of same-sex couples, an issue with which Judge Raker was particularly concerned.¹³⁸ Judge Raker's analysis makes clear that civil unions have some positive aspects, such as affording hundreds of Maryland children rights that they are currently denied solely because of their parents' sexual orientation.¹³⁹ Despite this, civil unions are unconstitutional under the ERA, and the next section will explain how marriage is the only truly equal way of providing legal rights to same-sex couples.

135. *Id.* at 350, 932 A.2d at 650.

136. *See id.* at 343, 932 A.2d at 646 (“[Plaintiffs] have directed us to over 425 statutory protections that are afforded to married couples and, as a result, to their children under state law, protections that [plaintiffs] are denied.”); *see also* Gregory Care, Comment, *Something Old, Something New, Something Borrowed, Something Long Overdue: The Evolution of a “Sexual Orientation-Blind” Legal System in Maryland and the Recognition of Same-Sex Marriage*, 35 U. BALT. L. REV. 73 app. at 103–32 (2005) (describing 339 statutory benefits and obligations granted to married couples and their children but denied to same-sex couples and their children).

137. *Conaway*, 401 Md. at 345–46, 932 A.2d at 648 (Raker, J. concurring in part and dissenting in part).

138. *Id.* at 346, 932 A.2d at 648 (“Significantly, the inequities directed to individuals in same-sex couples have an impact on their children. [These c]hildren . . . are treated differently—because their care providers are denied certain benefits and rights—despite comparable needs to children of married couples.”).

139. *Id.* at 343, 345–46, 932 A.2d at 646, 648.

2. Consequences of Civil Unions

a. *Effects of New Jersey's civil union statute*

As Judge Raker's analysis largely relied upon New Jersey's approach to civil unions,¹⁴⁰ it is important to look not only at the Supreme Court of New Jersey's legal rationale for civil unions, but also at the effects of this statutory scheme. After the *Lewis* court mandated that the New Jersey legislature amend the statutory scheme to allow either same-sex marriage or civil unions,¹⁴¹ the legislature established civil unions and a Civil Union Review Commission, which was created to study the effects of the law.¹⁴² Judge Raker summarized the commission's duties as "studying the implementation of the law, evaluating the effect on same-sex couples, their children and other family members of being provided civil unions rather than marriage, and reporting its findings to the Legislature and Governor on a semi-annual basis."¹⁴³ The first report by the commission provides numerous reasons that the Maryland legislature should consider in deciding to bypass civil unions and instead recognize same-sex marriages.¹⁴⁴

The twelve-member commission, composed of government officials, lawyers, and ministers, held three public hearings in late 2007, during which they heard testimony from ninety-six people.¹⁴⁵ The testimony was overwhelmingly against civil unions as an adequate substitute for same-sex marriage.¹⁴⁶ The president of the New Jersey State Bar Association called civil unions "a failed experiment," explaining that the civil union statutory scheme "fail[ed] to afford same-sex couples the same rights and remedies provided to heterosexual married couples."¹⁴⁷

The testimony showed that same-sex couples faced especially unequal treatment from their employers.¹⁴⁸ Many employers failed to

140. *Id.* at 353–56, 932 A.2d at 652–54 (Raker, J., concurring in part and dissenting in part).

141. *Lewis v. Harris*, 908 A.2d 196, 221, 224 (N.J. 2006).

142. *See* N.J. STAT. ANN. § 37:1-28(e), Assembly Judiciary Committee's statement (West Supp. 2008).

143. *Conaway*, 401 Md. at 355, 932 A.2d at 653–54 (Raker, J., concurring in part and dissenting in part) (citing N.J. STAT. ANN. § 37:1–36 (West Supp. 2008)).

144. N.J. CIVIL UNION REVIEW COMM'N, FIRST INTERIM REPORT OF THE NEW JERSEY CIVIL UNION REVIEW COMMISSION (2008).

145. *Id.* at 1–2, 4.

146. *See id.* at 6–7, 9–17.

147. *Id.* at 4.

148. *Id.* at 6–7.

recognize civil unions because the employers were covered by the Federal Employment Retirement Income Security Act (ERISA), which meant that they were governed by federal law rather than state law.¹⁴⁹ Because the federal Defense of Marriage Act (DOMA) allowed employers the option of not offering equal benefits to civil union partners, many employers continued to discriminate against same-sex couples.¹⁵⁰ In contrast, the testimony showed that in Massachusetts, where the legislature enacted laws allowing same-sex marriage rather than civil unions, the vast majority of ERISA-covered employers extended benefits to same-sex couples.¹⁵¹ Furthermore, the testimony indicated that the issue was primarily one of semantics, as “numerous employers decline[d] to provide insurance and health benefits to civil union partners not because of an objection to the government recognition of same-sex couples, but because of the term used by statutes establishing government sanctioned, same-sex relationships.”¹⁵²

Another problem recognized in the report was that the general public did not understand civil unions, and thus civil union partners had to explain the meaning “repeatedly to employers, doctors, nurses, insurers, teachers, soccer coaches, [and] emergency room personnel.”¹⁵³ This was shown to be more than a “mere inconvenience,” as many witnesses were “denied access and decision-making authority to civil union partners, either initially or completely, because of a lack of understanding of the rights that flow from civil unions.”¹⁵⁴ Further, the testimony discussed specific problems civil unions presented for gay children, non-Caucasians, military families, and transgenders.¹⁵⁵

149. *Id.* at 6.

150. *Id.*

[I]n 1996 Congress passed [DOMA], which defined marriage in federal law as a ‘legal union between one man and one woman,’ thereby restricting federal benefits, such as Social Security survivor benefits, to heterosexual couples. The bills also told states they did not have to recognize same-sex marriages should another state legalize such marriages.

Cahill, *supra* note 10, at 55 (quoting Defense of Marriage Act of 1996, Pub. L. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738c (2006))).

151. N.J. CIVIL UNION REVIEW COMM’N, *supra* note 144, at 7-9.

152. *Id.* at 9.

153. *Id.* at 10 (describing civil unions as “a second-class status”).

154. *Id.* at 10-11.

155. *Id.* at 11-12, 15-17.

b. Potential similar problems in Maryland

As the previous section illustrates, civil unions do not provide truly equal protection to same-sex couples. There is no reason to believe that the responses of employers, government officials, school authorities, and hospital staff to civil union partnerships would be any different in Maryland, as even civil union couples in Vermont continue to face problems similar to those in New Jersey.¹⁵⁶ In addition to denying some Maryland residents equality under the law, civil unions would create unnecessary administrative and financial hardships on both public and private institutions because they would have to make changes, such as on administrative forms, to conform to the new law.¹⁵⁷ By simply bringing same-sex couples into the definition of marriage, there would be no need for these institutions to change forms or policies.¹⁵⁸

IV. CIVIL UNIONS ARE UNCONSTITUTIONAL UNDER THE ERA

Because of the *Conaway* majority's interpretation of the ERA, civil unions are currently a constitutional possibility under Maryland case law.¹⁵⁹ However, this Part argues that the *Conaway* majority misinterpreted both the meaning and intent of the ERA and subsequent case law construing it. Further, while courts in Vermont and New Jersey separated the right to marry from the rights of marriage, this court-created distinction cannot be made under the Maryland constitution.¹⁶⁰ Because the *Conaway* dissent's interpretation of the ERA was correct, and therefore strict scrutiny

156. See *id.* at 5 (discussing testimony that Vermont has established a commission to determine whether it should provide full marriage equality to same-sex couples, as civil union couples still face problems with the law, even though the civil unions law was enacted in 2000); Sarah Liebowitz, *Civil Limits in Vermont: Gay Couples Learn That Union Isn't the Same as Marriage*, CONCORD MONITOR, May 6, 2007, available at <http://www.concordmonitor.com/apps/pbcs.dll/article?AID=120070506/REPOSITORY/705060311/1002/NEWS02> ("In the seven years since Vermont became the first state to create civil unions, couples have uncovered countless ways in which same-sex unions differ from heterosexual marriage.").

157. See N.J. CIVIL UNION REVIEW COMM'N, *supra* note 144, at 13 ("Several witnesses spoke of the lack of a 'married/civil unioned' or 'civil unioned' option on government agency forms, leaving civil union couples in a quandary as to which box to check, 'married' or 'single.'").

158. See *id.*

159. See *Conaway v. Deane*, 401 Md. 219, 325, 932 A.2d 571, 635 (2007).

160. See *infra* Part IV.B.

must be applied to a civil union statute that denies the right to marriage to same-sex couples, civil unions are sex-based discrimination in violation of the Maryland ERA.¹⁶¹

A. *Why Conaway Misinterpreted the ERA*

The *Conaway* majority based its interpretation of the ERA on the ERA's legislative history, Maryland case law construing the ERA's meaning, and other jurisdictions' interpretations of their respective state ERAs.¹⁶² This section will expand on arguments from the *Conaway* dissent, which correctly criticized the majority's interpretation of case law construing the ERA. Since the dissent extensively covered the reasons why the majority misconstrued case law,¹⁶³ this section will only focus on the majority's analysis of the ERA's legislative history.

1. Meaning and Intent of the ERA

The *Conaway* majority found that the ERA's "primary purpose . . . was to eliminate discrimination as between men and women as a class."¹⁶⁴ Because the majority could not find any formal legislative history on the ERA, in order to determine the legislature's intent, they used extrinsic sources such as a post-amendment study, newspaper articles, and the legislative history of the proposed federal ERA.¹⁶⁵ The *Conaway* dissent was also unable to provide any legislative history on the Maryland ERA, but criticized the majority for "attempt[ing] to parse the meaning of the ERA from contemporaneous newspaper articles . . . [when] we [in prior cases]

161. *See Conaway*, 401 Md. at 399–409, 932 A.2d at 680–86 (Battaglia, J., dissenting). The dissent applied strict scrutiny, and stated that the case should be remanded for a fuller hearing on whether the state could meet its "unrebutted contention regarding the broad societal interest in retaining traditional marriage." *Id.* at 420, 932 A.2d at 693 (construing MD. CODE ANN., FAM. LAW § 2-201 (LexisNexis 2008)). While the dissent did not finalize "an ultimate opinion on whether the [s]tate could meet its burden," it provided several reasons why, when considered with the reasons given in this Comment, it would be an almost impossible challenge for the state to meet its burden on remand. *Id.*

162. *See id.* at 246–67, 932 A.2d at 587–99.

163. *See Conaway*, 401 Md. at 358–76, 381–88, 932 A.2d at 655–65, 669–74. As discussed earlier in this Comment, the *Conaway* majority primarily relied upon a minority opinion in *Burning Tree I* for its view that the ERA is implicated only when a statute benefits or burdens a sex. *See supra* Part II.A.2.a.

164. *Conaway*, 401 Md. at 250, 932 A.2d at 589.

165. *Id.* at 246–54, 932 A.2d at 587–91.

have questioned the legitimacy of so doing.”¹⁶⁶ Instead, the dissent argued that case law interpreting the ERA immediately following its passage was a better source of its meaning.¹⁶⁷

The majority pointed out that the legislative history of the proposed federal ERA contained a statement, by one of its supporters, that the ERA would not require same-sex marriage.¹⁶⁸ However, the majority failed to mention that many ERA opponents and proponents explicitly stated that the ERA *would require* same-sex marriage.¹⁶⁹ One senator did not vote for the federal ERA because he was “convinced to a moral certainty that [under the ERA] the U.S. Supreme Court would have to say that homosexuals could marry.”¹⁷⁰ The possibility that the federal ERA would require same-sex marriage was also used by some conservatives as a tool to lower support for the ERA.¹⁷¹ In fact, one conservative’s opposition movement “explicitly tied the possibility of marriage for same-sex couples to ‘degradat[ion]’ of women’s homemaker role and traditional gender roles within families.”¹⁷² This also demonstrates that the denial of marriage to same-sex couples is tied to traditional gender roles and sex discrimination.

The conflicting statements from both sides of the issue indicate that the federal ERA’s applicability to same-sex marriage was never settled in the 1970s, and is not clearly on the *Conaway* majority’s side.¹⁷³ Either way, “statements from thirty years ago regarding a constitutional amendment that was never enacted have no weight in determining whether different-sex marriage requirements violate modern sex discrimination standards.”¹⁷⁴ The ERA rests on the

166. *See id.* at 368 n.14, 932 A.2d at 661 n.14 (Battaglia, J., dissenting) (“To appreciate the weakness of reliance on newspaper articles, consider the fact that an analysis of the interpretative methodology of this Court over the period from 1987 to 1994 revealed only one case out of sixty-six where this Court even mentioned newspaper accounts in the context of statutory interpretation.”).

167. *See id.* at 367–68, 932 A.2d at 661 (Battaglia, J., dissenting).

168. *Id.* at 253–54, 932 A.2d at 591 (majority opinion).

169. *See* Widiss et al., *supra* note 6, at 466–68; *see also supra* notes 29–31 and accompanying text.

170. Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1394 n.209 (2006).

171. *See id.* at 1389; *see also supra* note 30 and accompanying text.

172. Widiss et al., *supra* note 6, at 466 (alteration in original).

173. *See id.*

174. *Id.* at 467 n.28. The Supreme Court held that male-on-male sexual harassment is actionable under Title VII, although it

was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go

“basic principle . . . that gender should not be a factor in determining the legal rights of either men or women.”¹⁷⁵ The *Conaway* majority mischaracterized the ERA’s intent by leaving out the history that indicated it could be used to require same-sex marriage.¹⁷⁶ The reality is that, in the 1970s, there were many different views on the applicability of the ERA to same-sex marriage.¹⁷⁷ While the full meaning and intent of the ERA are somewhat unclear, both sides of the debate are in agreement that the amendment was meant to break down stereotypical gender roles.¹⁷⁸ Bans on same-sex marriage are therefore sex discrimination because they involve sex stereotyping.¹⁷⁹ Because bans on same-sex marriage are sex discrimination, they invoke the ERA, and are therefore subject to strict scrutiny.¹⁸⁰

B. *Constitutionality of Civil Unions in Other States Compared to Constitutionality of Civil Unions in Maryland*

Under our system of federalism, individual states may provide more state constitutional rights to their citizens than do other states or the federal government.¹⁸¹ In making comparisons between Maryland’s own constitutional imperatives and those of states that have enacted civil unions, it is first critical to note that, unlike Maryland, neither Vermont nor New Jersey has an ERA.¹⁸² Further,

beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.

Oncala v. Sundowner Offshore Servs., 523 U.S. 75, 79 (1998).

175. BOLES, *supra* note 2, at 1.

176. See *Conaway v. Deane*, 401 Md. 219, 424, 932 A.2d 571, 695 (2007) (Bell, C.J., dissenting) (citing *Hernandez v. Robles*, 855 N.E.2d 1, 23 (N.Y. 2006) (Kaye, J., dissenting)).

177. See Siegel, *supra* note 170, at 1401–02 (“In sum, it is painfully plain that, throughout the 1970s and into the 1980s, opponents of the ERA had enormous leverage over the ways that proponents of the ERA expressed and litigated the meaning of discrimination ‘on account of sex.’”).

178. See, e.g., *Conaway*, 401 Md. at 252, 932 A.2d at 590 (discussing the intended scope of the federal ERA, and quoting a pro-ERA Senator’s remark that discussed the ways in which the “tradition and law have worked together to relegate women to an inferior status in our society”); Widiss, *supra* note 6, at 465–68.

179. See *supra* notes 35–36 and accompanying text.

180. See *Conaway*, 401 Md. at 409, 932 A.2d at 686 (Battaglia, J., dissenting).

181. See *supra* note 1 and accompanying text.

182. See Wharton, *supra* note 3, at 1201 n.1. In contrast, Connecticut and New Hampshire, two other states that have enacted civil union statutes, do have ERAs. *Id.* However, these statutes were enacted by legislatures on their own, without court mandates. POLIKOFF, *supra* note 8, at 94. This Comment argues that the *Conaway* majority’s interpretation of the ERA was incorrect, and that civil unions are unconstitutional

the Supreme Court of Vermont did not address any of the plaintiffs' constitutional arguments other than the one based on the Common Benefits Clause,¹⁸³ whereas Maryland's constitution does not have a similar clause.¹⁸⁴ A legal rationale for civil unions in Maryland, which uses as a guide one of these state's judicial rationales,¹⁸⁵ must take into consideration the different constitutional imperatives under the Maryland constitution.

In contrast, Maryland's constitutional imperatives are more similar to those of Massachusetts and Hawaii, states which both have ERAs.¹⁸⁶ Massachusetts is not only the one state in the country that has enacted same-sex marriage, but it has also held that civil unions are an unconstitutional alternative to same-sex marriage.¹⁸⁷ While the Supreme Judicial Court of Massachusetts decided its same-sex marriage case, *Goodridge v. Department of Public Health*,¹⁸⁸ on grounds other than sex discrimination, it did "refer favorably to sex discrimination arguments."¹⁸⁹ The court rejected the idea that the institution of marriage should be tied "to the 'optimal' mother and father setting for child rearing."¹⁹⁰ Instead, the court stated that "[a]n abundance of legislative enactments and decisions . . . negate any such stereotypical premises."¹⁹¹ While same-sex marriage ultimately was not enacted in Hawaii, in *Baehr v. Lewin*,¹⁹² the Hawaii Supreme Court invoked the state constitution's ERA in holding that a state

under the Maryland ERA. It is, therefore, difficult to compare Maryland's constitutional imperatives with those of Connecticut and New Hampshire, since their high courts did not address the constitutionality of the civil union statutes on ERA grounds.

183. See *Baker v. State*, 744 A.2d 864, 870 n.2 (Vt. 1999).

184. *But cf. Conaway*, 401 Md. at 327–28, 932 A.2d at 636–37 (Raker, J., concurring in part and dissenting in part). Judge Raker found that while the Vermont decision was based on the Common Benefits Clause of the Vermont Constitution, the court-ordered remedy of civil unions would be adequate under the Maryland constitution. *Id.* However, she failed to provide a constitutional basis for this conclusion, explaining only that Vermont's remedy made "eminent sense." *Id.*

185. See *supra* Part III.A. (discussing New Jersey's and Vermont's legal rationales for civil unions).

186. See Wharton, *supra* note 3.

187. See *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 572 (Mass. 2004) (holding that the legislature's proposed civil union bill violated the state constitution's equal protection and due process requirements).

188. 798 N.E.2d 941 (Mass. 2003).

189. See Widiss et al., *supra* note 6, at 474 n.60.

190. See *Goodridge*, 798 N.E.2d at 965 n.28.

191. *Id.*

192. 852 P.2d 44 (Haw. 1993).

statute restricting marriage to opposite-sex couples was subject to strict scrutiny because it was sex discrimination.¹⁹³

In comparing Maryland's constitutional imperatives with those of Vermont and New Jersey, it is particularly useful to look at New Jersey's legal rationale for civil unions, as Judge Raker used this reasoning to advocate civil unions in her opinion in *Conaway*.¹⁹⁴ While Judge Raker used New Jersey's legal analysis as a rationale for civil unions in Maryland, the Supreme Court of New Jersey never offered a reason for separating the right of marriage from the right to marry.¹⁹⁵ The opinion simply stated that the rights were separate ones, without offering any reason as to why they should be separated.¹⁹⁶ It seems that

[b]ecause the court offer[ed] no valid basis for this distinction under equal protection reasoning other than deference to the legislative branch, which it already held [was] insufficient to deny same-sex couples the rights and benefits in the first place, there is ample room to speculate that political factors, such as fear of public reaction, influenced the court.¹⁹⁷

Since there is no constitutional justification for separating these rights, the General Assembly should not, solely because of political factors, avoid a bill which offers same-sex couples true marriage equality. Maryland's constitutional imperatives may not be compromised by political fear.

It is further significant that in offering the legislature the option of enacting civil unions over same-sex marriage, the Supreme Court of New Jersey stated that it would not "speculate that identical schemes called by different names would create a distinction that would offend [the state's equal protection clause]. We will not presume that

193. See *id.* at 67. Following this decision, Hawaii voters approved a constitutional amendment allowing the legislature to restrict marriage to a man and a woman. See POLIKOFF, *supra* note 8, at 91. The legislature gave same-sex couples the option of becoming "reciprocal beneficiaries," which provides them with "some of the rights and responsibilities afforded married couples, including health-related provisions, property rights, inheritance rights, and taxation." *Id.* at 92.

194. See *supra* Part III.B.1.

195. See Lisa Newstrom, *The Horizon of Rights: Lessons from South Africa for the Post-Goodridge Analysis of Same-Sex Marriage*, 40 CORNELL INT'L L.J. 781, 802 (2007) (criticizing the Supreme Court of New Jersey's decision to offer same-sex couples the rights and benefits of marriage, but without the name "marriage" itself).

196. *Id.*

197. *Id.*

a difference in name alone is of constitutional magnitude.”¹⁹⁸ The results of the first Civil Union Review Commission indicate that a “difference in name alone” is an inadequate description of the discrimination and unequal treatment faced by same-sex couples in civil unions.¹⁹⁹ These results shatter the illusion that civil unions are equal to marriage in all respects but name.²⁰⁰

Similar to the Supreme Court of New Jersey, the Court of Appeals of Maryland failed to provide a constitutional basis to separate the rights of marriage from the right to marry.²⁰¹ Since there is no constitutional basis or justification to separate these rights, and since the Civil Union Review Commission has so far demonstrated that civil unions are not truly equal to marriage,²⁰² New Jersey’s constitutional analysis should not be followed in Maryland.

Maryland should instead follow Massachusetts’s lead and provide same-sex couples with the right to civil marriage.²⁰³ The Supreme Judicial Court of Massachusetts opined that “the governmental aim of [marriage] is to encourage stable adult relationships for the good of the individual and of the community, especially its children.”²⁰⁴ Maryland’s laws should also provide for the good of all families in the community. Judge Raker’s opinion is certainly well-intentioned, as it advocates civil unions as a means of providing children of same-sex couples with rights that they are currently denied only because of their parents’ sexual orientation.²⁰⁵ However, in creating civil unions, a message is conveyed to these children that they are different.²⁰⁶ After the Massachusetts legislature sought to enact a civil union bill, the Supreme Judicial Court of Massachusetts pointed out that “[i]f . . . the proponents of the [civil union] bill believe that no message is conveyed by eschewing the word ‘marriage’ and replacing it with ‘civil union’ for same-sex ‘spouses,’ we doubt that the attempt to circumvent the court’s decision in *Goodridge* would be

198. *Lewis v. Harris*, 908 A.2d 196, 221–22 (N.J. 2006).

199. *See supra* Part III.B.2.a.

200. *See id.*

201. *See Conaway v. Deane*, 401 Md. 219, 326, 932 A.2d 571, 635–36 (2007) (Raker, J., concurring in part and dissenting in part). Judge Raker simply stated that the New Jersey court distinguished between the two rights, and that she would analyze the issue the same way. *Id.* No constitutional basis or justification for separating these rights was offered. *See id.*

202. *See supra* Part III.B.2.a.

203. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969–70 (Mass. 2003).

204. *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 569 (2004).

205. *See supra* Part III.B.1.b.

206. N.J. CIVIL UNION REVIEW COMM’N, *supra* note 144, at 11–12.

so purposeful.”²⁰⁷ The General Assembly should follow the lead of Massachusetts and enact civil marriage because of both the constitutional imperatives of the ERA and the important public policy of encouraging the stability of all families in the community.²⁰⁸

V. CONCLUSION

Maryland is on the brink of becoming the next state to embrace full marriage equality for all people, regardless of sexual orientation. The General Assembly should enact a civil marriage bill rather than a civil union bill because civil unions are unconstitutional sex discrimination.²⁰⁹ In holding that Family Law § 2-201 was not sex discrimination under the ERA,²¹⁰ the *Conaway* court misinterpreted the ERA’s meaning and purpose.²¹¹ Maryland cannot continue to subscribe to a marriage system which is based on traditional and stereotypical gender roles.²¹² Further, Maryland should not expand the flaws in our currently unconstitutional marriage system, and relegate certain couples to the second-class status of civil unions. Civil unions are not only unconstitutional, but they will also cause the state unnecessary financial and administrative hardships that could be easily avoided by providing same-sex couples with the right to civil marriage.²¹³ The ERA demands that the General Assembly enact a civil marriage bill that does not discriminate on the basis of sex.²¹⁴ The General Assembly should not subscribe to the illusory belief that the difference between civil unions and marriage is only one of semantics, thereby avoiding a bill that provides full marriage equality to all Maryland residents.

Michele Reichlin

207. *In re Opinions of the Justices*, 802 N.E.2d at 570 (“For no rational reason the marriage laws . . . discriminate against a defined class; no amount of tinkering with language will eradicate that stain It would deny to same-sex ‘spouses’ only a status that is specially recognized in society and has significant social and other advantages.”).

208. *See supra* Part IV.B.

209. *See supra* Part IV.

210. *See supra* Part II.A.1.

211. *See supra* Part IV.A.

212. *See supra* notes 32–36 and accompanying text.

213. *See supra* Part III.B.2.

214. *See supra* Part IV.A.