COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Suffolk County

NO. SJC-08860

HILLARY GOODRIDGE, JULIE GOODRIDGE,
DAVID WILSON, ROBERT COMPTON,
MICHAEL HORGAN, EDWARD BALMELLI,
MAUREEN BRODOFF, ELLEN WADE,
GARY CHALMERS, RICHARD LINNELL,
HEIDI HORTON, GINA SMITH,
GLORIA BAILEY and LINDA DAVIES,

Plaintiffs-Appellants,

vs.

DEPARTMENT OF PUBLIC HEALTH and
HOWARD KOH, COMMISSIONER
OF THE DEPARTMENT OF PUBLIC HEALTH,

Defendants-Appellees.

On Appeal from a Judgment
from the Superior Court, Suffolk County

BRIEF *AMICUS CURIAE*
ON BEHALF OF PROFESSORS OF LAW
IN SUPPORT OF DEFENDANTS-APPELLEES

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Interest of the *Amici*

Amici curiae are professors of law at various law schools across the United States. Our names and brief biographies are set forth in the attached Appendix.[1] Our expertise lies in the areas of constitutional law, family law and public policy issues. We have authored numerous law review articles, books and book chapters specifically on the topics of marriage and same-sex "marriage," as well as on equal protection issues and constitutional law generally.

The present case raises critically important legal and social issues, the resolution of which will profoundly affect family law, constitutional law and future litigation and legislation, both in Massachusetts and nationally. This brief is submitted in the hope that our varied expertise will assist the Court's understanding of this significant area of law and public policy by offering an analysis of the equality and equal rights language of Article One of the Massachusetts Declaration of

[1] *Amici* speak as individuals, not as representative of our respective law schools.

Rights as that language relates to the institution of marriage in the Commonwealth.

SUMMARY OF ARGUMENT

The superior court held that the Commonwealth's marriage statutes, *see* Mass. Gen Laws Ann. ch. 207, sec. 1 *et seq*. (West 1998 & Supp. 2002), do not authorize marriages between persons of the same sex. In this brief, *amici curiae* address whether that holding violates either the specific equal rights language of Article One of the Declaration of Rights or the more general equality guarantee of the same article.

With respect to the equal rights amendment, *amici* submit that restricting marriage to opposite-sex couples is gender neutral and does not implicate the prohibition of sex-based classifications set forth in the text of the amendment (6-14). Moreover, such restriction is entirely consistent with the history of the amendment, which leaves no doubt that both the General Court that proposed the amendment and the People who ratified it expressly understood that the amendment would not sanction same-sex marriage (14-20). Furthermore, nothing in

the prohibition of same-sex marriage runs afoul of the purpose of the amendment, which was to eradicate discrimination in the law between men and women by ensuring that the law did not confer benefits or impose burdens on one sex, but not the other (20-24). Finally, the interpretation of equal rights provisions in other state constitutions confirms that limiting marriage to opposite-sex couples does not violate equal rights principles (25-37).

With respect to the general equality language of Article One, *amici* submit that this Court has no authority under Article One to recognize sexual orientation or other novel suspect (or quasi-suspect) classifications not specifically enumerated in the article (38-40). Moreover, even assuming that the Court did have such authority, plaintiffs and their *amici* have provided the Court with no principled basis on which to do so in this case. Apart from treating sex-based classifications as constitutionally suspect, this Court's jurisprudence under the equality language of Article One generally follows federal equal protection analysis. Under that analysis, neither homosexuality nor sexual

orientation is an impermissible basis for classification (40-44). Finally, in addition to the lack of precedent to support their position, plaintiffs have not shown that homosexuals satisfy any of the traditional indicia of suspect classes (44-48). Accordingly, both their equal rights and equality challenge to the superior court's interpretation of the marriage statutes should be rejected.

I. THE PUBLIC POLICY OF THE COMMONWEALTH TO RESTRICT MARRIAGE TO OPPOSITE-SEX COUPLES DOES NOT VIOLATE THE EQUAL RIGHTS AMENDMENT OF THE MASSACHUSETTS CONSTITUTION.

Part One, Article One, of the Massachusetts Constitution provides, in part, that "Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin." Mass. Const. part 1, art. 1 (West 1997). The equal rights amendment (the second sentence of article 1) was added in 1976.[2]

Amici submit that nothing in the text, history, purpose or interpretation of the equal rights

[2] *Amici* discuss the first sentence of Part One, Article One, in the following argument.

amendment requires Massachusetts to recognize same-sex marriage in violation of the longstanding public policy of the Commonwealth to sanction only opposite-sex marriage. For this Court to decide otherwise would run directly counter to the intent of the General Court that proposed the amendment and the People of the Commonwealth who ratified it. Moreover, such a decision would stand in stark contrast to the interpretation courts in other States have given to their own equal rights amendments.

The general principles for interpreting an amendment to the state constitution are not in dispute. A constitutional amendment should be "interpreted in the light of the conditions under which it . . . [was] framed, the end to which it was designed to accomplish, the benefits which it was expected to confer, and the evils which it was hoped to remedy." *Tax Comm'r v. Putnam*, 227 Mass. 522, 524 (1917). The words of an amendment "should be interpreted in 'a sense most obvious to the common understanding at the time of its adoption,' because it is proposed for public adoption and must be

understood by all entitled to vote." *Attorney General v. Methuen*, 236 Mass. 564, 573 (1921). In interpreting an amendment, this Court has frequently relied on the intent of those who drafted and proposed it for submission to the People--either the General Court or a constitutional convention. *See Mazzone v. Attorney General*, 432 Mass. 515, 526 (2000); *Cohen v. Attorney General*, 357 Mass. 564, 572-79 (1970).[3]

A right to same-sex marriage is not supported by the language of the equal rights amendment, the circumstances of its adoption, the reason for its proposal or its construction by this Court. Accordingly, plaintiffs' equal rights argument should be rejected.

Text Of The Amendment

The equal rights amendment provides, in

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[3] The Brief of *Amici Curiae* Professors of State Constitutional Law in Support of Appellants recognizes that text, history, purpose and interpretation, as well as the construction of parallel provisions in other state constitutions, are all relevant sources of enlightenment on the proper meaning of given constitutional language. *See* Br. at 2, 7. Nevertheless, their brief essentially ignores these sources.

pertinent part, that “Equality under the law shall not be denied or abridged because of sex, ...” Mass. Const. part 1, art. 1 (West 1997). The Massachusetts statutes restricting marriage to opposite-sex couples cannot be said to “deny” or “abridge” “equality under the law” “because of sex.” The statutes, in fact, are gender neutral. Both men and women may marry members of the opposite sex; neither may marry anyone of the same sex. There is no inequality.

In an attempt to show that facial neutrality is not enough to save the constitutionality of the Commonwealth’s marriage statutes as applied to same-sex couples, plaintiffs and certain of their supporting *amici* compare those statutes to the Virginia anti-miscegenation statutes declared unconstitutional on equal protection grounds in *Loving v. Virginia*, 388 U.S. 1 (1967). *See* Plaintiffs’ Br. at 49-51; Brief in Support of Appellants of *Amici Curiae* Urban League of Eastern Massachusetts, *et al.*, at 4, 12-13. Plaintiffs’ comparison to *Loving* is singularly unconvincing.

First, the statutes challenged in *Loving* did not

prohibit all interracial marriages, but only marriages between “white persons” and “non-white persons.” *Loving*, 388 U.S. at 11 & n.11. Interracial marriages between “non-whites,” *e.g.*, blacks and Asians, were not banned, nor, for that matter, were marriages between “white persons” and “American Indians.” Thus, the “symmetry” of treatment in the Virginia anti-miscegenation statutes struck down in *Loving*, which plaintiffs argue is analogous to the uniform treatment of same-sex marriages in Massachusetts (no such marriages are allowed), Plaintiffs’ Br. at 50, was more apparent than real. The statutory treatment of interracial marriages was actually asymmetrical, *i.e.*, some interracial marriages were allowed while others were prohibited.

Second, in *Loving*, the Court found that “[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.” 388 U.S. at 11. Noting that “Virginia prohibits only interracial marriages involving white persons,” the Court determined that “the racial classifications must

stand on their own justification, as measures designed to maintain White Supremacy." *Id.* That "justification," the Court concluded, was patently inadequate: "We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Id.* at 11-12.

Unlike the history of the anti-miscegenation statutes at issue in *Loving*, which clearly stigmatized blacks as inferior to whites, neither plaintiffs nor their *amici* identify anything in the history of the laws limiting marriage to opposite-sex couples suggesting that they were "intended to promote any hostility between the sexes, preserve any unequal treatment as between men and women, or perpetuate any societal or cultural bias with regard to gender." *Lawrence v. State*, 41 S.W.3d 349, 357 (Tex. App. 2001, *pet. ref'd*) (*en banc*) (rejecting multifaceted state and federal constitutional challenge to state criminal statute prohibiting

homosexual, but not heterosexual, sodomy), *cert. granted*, Docket 02-102, Dec. 2, 2002. *See also Singer v. Hara*, 522 P.2d 1187, 1190-92 (Wash. Ct. App. 1974) (upholding statutes restricting marriage to opposite-sex couples and finding *Loving* inapplicable).

Third, this Court has implicitly rejected plaintiffs' effort to extend the rationale of *Loving* to sex discrimination claims. After *Brown v. Board of Education*, 347 U.S. 483 (1954), the "separate but equal" doctrine may no longer be invoked to justify a classification based upon race. The same cannot be said of classifications based upon sex.

In *Opinion of the Justices*, 374 Mass. 836 (1977), this Court expressed the opinion that a proposed bill prohibiting women from participating with men on football and wrestling teams would constitute impermissible sex discrimination. *Id.* at 840-42. "A prohibition of all females from voluntary participation in a particular sport under every possible circumstance serves no compelling State interest." *Id.* at 842. Significantly, the court "decline[d] to express a view whether it would

be permissible under [the equal rights amendment] if equal facilities were available for men and women in a particular sport which was available separately to each sex." *Id.* And in *Attorney General v. Massachusetts Interscholastic Athletic Ass'n, Inc.*, 378 Mass. 342 (1979), this Court held that an athletic association rule, which provided that no boy could play on a girl's team, although a girl could play on a boy's team if that sport was not offered for girls, violated the equal rights amendment. Nevertheless, the court minimized the impact of its decision stating: "It can be expected that the present decision will make little practical difference in the traditional conduct of interscholastic athletic competition, for that will proceed in the great majority of instances on a basis of 'separate but equal' teams whose validity is assumed here." *Id.* at 363. The court's assumption that "separate but equal" access does not violate the state equal rights amendment suggests that the *Loving* analogy simply does not apply to sex discrimination claims.[4] *See also O'Connor v. Board*

[4] That assumption is not peculiar to Massachusetts law.

of Education of School District No. 23, 645 F.2d 578, 582 (7th Cir. 1981) (in dissolving a preliminary injunction directing a school board to permit a junior high school girl to try out for the boys' sixth grade basketball team, the Seventh Circuit court commented that it was "highly unlikely" that the plaintiff could demonstrate that the school board's policy of "separate but equal" sports programs for boys and girls violated the equal

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At least two state reviewing courts have held or implied that ordinances prohibiting employees of massage parlors from giving massages to persons of the opposite sex do not violate state equal rights guarantees. *See Laspino v. Rizzo*, 398 A.2d 1069, 1073 (Pa. Commw. Ct. 1979) (holding that the lower court had erred in entering summary judgment in favor of the plaintiff to strike down a "facially neutral ordinance" under the state equal rights amendment); *Redwood Gym v. Salt Lake County Comm'n*, 624 P.2d 1138, 1147 (Utah 1981) (noting that "[m]en and women are afforded an equal right to practice as licensed masseurs, or to patronize massage parlors"); *but see Wheeler v. City of Rockford*, 387 N.E.2d 358, 359 (Ill. App. Ct. 1979) (reaching a contrary result under the Illinois equal rights provision). The New Mexico Supreme Court rejected an equal rights amendment challenge to a state university rule barring visitation to persons of the opposite sex in university residence hall bedrooms. *Futrell v. Ahrens*, 540 P.2d 214, 218 (N.M. 1975). And the Virginia Constitution, which forbids "discrimina-tion upon the basis of . . . sex," expressly provides that "the mere separation of the sexes shall not be considered discrimination." Va. Const. art. I, sec. 11 (2001).

rights provision of the Illinois Constitution).

Finally, contrary to plaintiffs' argument (Plaintiffs' Br. at 50), the *Loving* analogy is inapt on purely logical grounds. The statutes struck down in *Loving* prohibited marriages between members of *different* races, not between members of the *same* race. The equivalent, in the area of sex, of an anti-miscegenation statute would *not* be a statute prohibiting *same*-sex marriages, but one prohibiting *opposite*-sex marriages, an absurdity which no State has ever contemplated.[5] The equivalent, in the area of race, of a statute prohibiting same-sex marriage, would be a statute that prohibited marriage between members of the *same* race. Laws banning marriages between members of the same race would be unconstitutional, not because they would "segregate the races and perpetuate the notion that blacks are inferior to whites," *Lawrence v. State*, 41 S.W.3d at 357, indeed, quite the contrary, but because

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[5] Plaintiffs' reliance on *Loving* is unintentionally ironic. Plaintiffs ask this Court to give legal status to *segregation* of the sexes in an area of the law--marriage--where *integration* of the sexes has been the universal norm. The relief plaintiffs request, if granted, would actually undermine the purposes of the equal rights amendment.

there could be no possible rational basis for such laws. Laws against same-sex marriage, on the hand, are supported by a multitude of reasons. "Conventional marriage laws reasonably advance many legitimate governmental interests," among which may be included safeguarding public morality, encouraging childbirth within marriage, promoting the undeniable advantages of dual-gender parenting, not placing society's "stamp of approval" on homosexual relationships and avoiding a slippery scope of intended and unintended consequences of recognizing same-sex marriages. Richard F. Duncan, *The Narrow and Shallow Bite of* Romer *And the Eminent Rationality of Dual-Gender Marriage: A (Partial) Response to Professor Koppelman*, 6 WM. & MARY BILL OF RIGHTS J. 147, 158-165 (1997).[6]

This Court has not yet decided whether a gender-neutral law may be challenged under the state equal rights amendment on the basis of disparate impact alone, without any evidence of discriminatory

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[6] *Amici* generally rely on the Brief of the Attorney General and other supporting *amici* for a more detailed analysis of the rational bases for the prohibition of same-sex marriage.

intent. *See Buchanan v. Director of the Division of Employment Security*, 393 Mass. 329, 335 (1984).[7] Nevertheless, it has held that "[a] showing of . . .

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[7] Reviewing courts in other States have consistently held that a law that is gender neutral on its face is *not* subject to constitutional challenge under a state equal rights provision solely on the basis of proof that the law in question has a disparate impact upon the members of one sex. To establish even a *prima facie* violation of a state equal rights amendment, the party challenging a gender-neutral law must show that the law was enacted with an *intent* to discriminate and not merely with the *knowledge* that some disparity would result. *See Wendt v. Wendt*, 757 A.2d 1225, 1243-45 (Conn. App. Ct. 2000) (unequal division of marital property in divorce proceedings; *People v. Adams*, 597 N.E.2d 574, 585 (Ill. 1992) (mandatory HIV testing of prostitutes); *State v. Spina*, 982 P.2d 421, 437 (Mont. 1999) ("the invidious quality of a law claimed to be discriminatory must ultimately be traced to an impermissibly discriminatory purpose"); *Crabtree v. Montana State Library*, 665 P.2d 231 (Mont. 1983) (veterans preferences in public employment); *Buck v. Commonwealth of Pennsylvania, Dep't of Public Welfare*, 566 A.2d 1269, 1273 (Pa. Commw. Ct. 1989) (party challenging facially neutral rule on the ground that its effects upon a class of women were dispropor-tionately adverse was required to show that the rule was adopted because of, not in spite of, its adverse effects upon an identifiable group); *Lawrence v. State*, 41 S.W.2d 349, 359 (Tex. App. 2001, *pet. ref'd*) (*en banc*) (sodomy statute that applies only to homosexual acts), *cert. granted*, Dec. 2, 2002, Docket 02-102; *Arnold v. Dep't of Retirement Systems*, 875 P.2d 665, 670-71 (Wash. Ct. App. 1994) (prohibiting divorced spouses of law enforcement officers and firefighters from obtaining retirement benefits). The analysis in these cases is consistent with federal equal protection doctrine. *See Personnel Administrator of*

disparity [in "impact on, or treatment of, women" or men] is a pre-requisite to scrutiny by this court of the constitutionality of the statute as applied . . . ." *Id.* (emphasis supplied). The operation of the Massachusetts statutes restricting marriage to opposite-sex couples, however, does not result in any "disparity" between men and women. Accordingly, those statutes are not subject to challenge on the grounds of their "disparate impact," even assuming that such a challenge could be mounted under the state equal rights amendment without evidence of discriminatory intent.

History Of The Amendment

What effect a general constitutional provision was intended to have upon a specific legal issue is often shrouded in darkness. The constitutional text itself may be unilluminating and the record of its proposal and ratification may shed little or no light on the subject. Fortunately, that is not the case with the impact of the Massachusetts equal rights amendment on the question of same-sex

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Massachusetts v. Feeney, 442 U.S. 256 (1979).

marriage.

Under a resolution adopted in 1975 and revived and continued in 1976, the General Court established a special commission, consisting of three senators, five representatives and three members appointed by the Governor, "to study the effect of the ratification of the proposed amendments to the Constitution of the Commonwealth of Massachusetts and the Constitution of the United States prohibiting discrimination on account of sex upon the laws, business communities and public in the Commonwealth." Special Study Commission on the Equal Rights Amendment, First Interim Report, Senate Report No. 1689 at i (October 19, 1976). Because the state equal rights amendment was scheduled to appear on the ballot on November 2, 1976, and the federal equal rights amendment, if ratified, would not have taken effect until two years from the date of ratification, "the Commission focused its initial inquiry upon the state amendment." Senate Report No. 1689 at 1. In discussing areas of the law that would *not* be affected by the equal rights amendment, the Commission stated:

> An equal rights amendment will have no

> effect upon the allowance or denial of homosexual marriages. The equal rights amendment is not concerned with the relationship of two persons of the same sex; it only addresses those laws or public-related actions which treat persons of the opposite sexes differently.

Senate Report No. 1689 at 21.[8] In support of this statement, the Commission noted that the "Washington Court of Appeals has already stated that the equal rights amendment to its state constitution did not afford a basis for validating homosexual marriage," citing *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974), and that the Colorado Attorney General had issued an opinion that "the state equal rights amendment did not validate homosexual marriage," citing a Colorado Attorney General Opinion of April 24, 1975. Senate Report No. 1689 at 21. The Commission also noted that "[t]here are no cases which have used a state equal rights amendment to either validate or require the allowance of homosexual marriage." *Id.* at 22. Consistent with its express disavowal of same-sex marriage, the Commission's detailed analysis of the impact the

[8] According to the Interim Report, the Final Report was intended to address those issues which were "not covered in the interim report." *Id.* at 2.

proposed equal rights amendment would have upon domestic relations law (*see* Senate Report No. 1689 at 30-61) made no mention of same-sex marriage.

Amici emphasize that the Special Study Commission's Interim Report was published on October 19, 1976, only two weeks before the People ratified the proposed equal rights amendment. The Commission's Interim Report reflects the intent of the General Court that proposed the equal rights amendment, an intent that is fairly attributable to the People who approved the amendment.[9] That intent, clear and unmistakable in its exclusion of "homosexual marriages" from the scope of the state equal rights amendment, precludes the judiciary from recognizing same-sex marriages under the amendment.[10] As the

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[9] The Interim Report was "designed to increase public understanding of the issues relating to the equal rights amendment." Senate Report No. 1689 at 2.

[10] Plaintiffs, understandably concerned about the weight this Court may give the Interim Report, attempt to minimize its significance, *see* Plaintiffs' Br. at 53-54, but their effort to "wish away" the Interim Report is not persuasive. This Court has relied upon the reports of special commissions established by the General Court in interpreting other provisions of the state constitution. *See, e.g., Connors v. City of Boston*, 430 Mass. 31, 38 & n.16 (1999) (mayor exceeded his home rule authority in extending group health benefits to registered

Washington Court of Appeals said in its opinion rejecting the claim that the Washington equal rights amendment mandated recognition of same-sex marriage, "To accept [plaintiffs'] contention that the ERA must be interpreted to prohibit statutes which refuse to permit same-sex marriages would be to subvert the purpose for which the ERA was enacted by expanding its scope beyond that which was undoubtedly intended by the majority of the citizens of this state who voted for the amendment." *Singer v. Hara*, 522 P.2d 1187, 1194 (Wash. Ct. App. 1974).[11]

On October 20, 1976, one day after the Special Study Commission's Interim Report was released, the *Boston Globe* endorsed the equal rights amendment. In an editorial responding to various objections to the amendment, including the claim that it would

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domestic partners).

[11] By way of contrast, the Hawaii Supreme Court noted that the history of Hawaii's equal rights amendment disclosed an intention "that a proscription against discrimination based on sexual orientation be subsumed within the clause's prohibition against discrimination based on sex." *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999) (unpublished order entered Dec. 11, 1999, at 2 n.1). No such intention, much less an intent to sanction same-sex marriages, appears in the history of the Massachusetts equal rights amendment.

"legitimize marriage between people of the same sex," the *Globe* said, "In reality, the proposed amendment would require none of these things." *Boston Globe*, Wednesday, Oct. 20, 1976, p. 22.[12] After noting the changes that the equal rights amendment would make to the state constitution, the *Globe* commented, "It is inappropriate for the constitution to be read as if its protections extended only to males in a society that has rejected most legal and customary double standards formerly applied to men and women." *Id.* That the public was informed by the leading newspaper in the Commonwealth that the equal rights amendment would not "legitimize marriage between people of the same sex" is obviously relevant in evaluating the public's understanding of the amendment's intended effect.

Four days later, the *Boston Sunday Globe* carried a lengthy article on the likely impact of the

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[12] In the interpretation of a constitutional amendment, it is what its *proponents* have said in its support, not what its *opponents* may have said in an effort to defeat it (*see* Plaintiffs' Br. at 55 n.38, Addendum at A-5), that is relevant. *See Mazzone v. Attorney General*, 432 Mass. 515, 527-28 (2000) (interpreting Mass. Const. amend. 48 (West 1997)).

amendment, if approved. Referring to the Special Study Commission's Interim Report, the article noted that the report "recommended changing a number of other laws in the area of domestic relations if the ERA is approved [in addition to support obligations], but the proposed changes are not significant." *Boston Sunday Globe*, Oct. 24, 1976, "ERA fate has national import," pp. 29, 41. Needless to say, the public would have regarded an intent to require or allow same-sex marriages as a "significant" change in domestic relations law.

One week later, the *Boston Sunday Globe* carried another article on the equal rights amendment and other propositions appearing on the ballot. "Supporters of Question 1, the equal rights amendment, back the proposal because it would mandate revision of state laws that favor men over women." *Boston Sunday Globe*, Oct. 31, 1976, "On Bay State ballot, questions are the big attraction," pp. 25, 39. In an editorial review of its previous recommendations on the pending referenda, the *Globe*, on November 1, 1976, urged a "Yes" vote on what it described as the "Women's Equal Rights Amendment to

the state constitution, barring discrimination on account of sex, race, color, creed or national origin." *Boston Globe*, Monday, Nov. 1, 1976, p. 26. The *Globe's* explanation, consistent with the Special Study Commis-sion's Interim Report, that the equal rights amendment was intended to eliminate inequities in the law between men and women, not to sanction same-sex marriage, is of particular relevance in determining the public's understanding of the purpose and effect of the amendment.

Purpose Of The Amendment

In addition to the text and history of the equal rights amendment, this Court's case law confirms the Special Study Commission's Interim Report's conclusion that the purpose of the amendment was to "address[] those laws . . . which treat persons of the opposite sexes differently." For example, in *Attorney General v. Massachusetts Interscholastic Athletic Ass'n, Inc.*, 378 Mass. 342 (1979), cited above, this Court, speaking of state equal rights amendments generally, observed that such provisions were aimed at eliminating all forms of

discrimination *between* the sexes:

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

Id. at 352.

Courts in other States with equal rights amendments are in accord. Thus, the Pennsylvania Supreme Court has held that the purpose of the state equal rights amendment "was to end discriminatory treatment on account of sex," *Commonwealth v. Butler*, 328 A.2d 851, 855 (Pa. 1974), and to ensure that "men and women . . . have equal status . . . ." *Hopkins v. Blanco*, 320 A.2d 139, 140 (Pa. 1974). Accordingly, under the amendment, the law "[may] not impose different benefits or different burdens upon the members of a society based on the fact that they may be man or woman." *Henderson v. Henderson*, 327 A.2d 60, 62 (Pa. 1974). Of course, laws limiting marriage to opposite-sex couples do not "impose

different benefits or different burdens" upon men and women.

The New Mexico Supreme Court has held that the state equal rights amendment was intended to provide "a legal remedy for the invidious consequences of the gender-based discrimination that prevailed under the common law and civil law traditions that preceded it." *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 853 (N.M. 1998). The "gender-based discrimination" to which the court referred was historical discrimination against women. *Id.* at 852-55. *See also People v. Ellis*, 311 N.E.2d 98, 100 (Ill. 1974) ("purpose of the amendment was to guarantee rights for females equal to those of males"); *Marchioro v. Chaney*, 582 P.2d 487, 491 (Wash. 1978) (thrust of state equal rights amendment was "to end special treatment for or discrimination against either sex"), *aff'd,* 442 U.S. 191 (1979).

Speaking of state equal rights amendments generally, the Maryland Court of Appeals noted that "[t]he cases concerning equal rights amendments share a common thread; they generally invalidate

governmental action which imposes a burden on one sex but not the other, or grants a benefit to one but not the other." *Burning Tree Club, Inc. v. Bainum*, 501 A.2d 812, 822 (Md. 1985) (plurality opinion). Laws restricting marriage to opposite-sex couples, however, do not "impose[] a burden on one sex but not the other, or grant[] a benefit to one but not the other." Such laws treat men and women equally.

Given the purpose of state equal rights amendments, to ensure that men and women are treated equally under the law, it is not surprising that virtually all of the cases construing such amendments have concerned challenges to state statutes, administrative regulations, municipal ordinances, judicial rules and common law doctrines that have been alleged to confer benefits or impose burdens on one sex, but not the other, and not laws or policies that confer the same benefits or impose the same burdens on both sexes. *See* Paul Benjamin Linton, *State Equal Rights Amendments: Making A Difference Or Making A Statement?*, 70 TEMPLE L. REV. 907 (1997). Laws restricting marriage to opposite-

sex couples, however, do not confer different benefits or impose different burdens upon the sexes and are not subject to challenge under those amendments.

Interpretation Of The Amendment

This Court has not yet decided whether, contrary to the understanding of the General Court, as expressed in its Interim Report, the state equal rights amendment applies to the relationship between members of the same sex, or only between members of the opposite sexes. Nevertheless, its decision in *Macauley v. Massachusetts Comm'n Against Discrimination*, 379 Mass. 279 (1979), is instructive. In *Macauley*, the court considered whether language in the Commonwealth's anti-discrimination statute making it an "unlawful practice" for an employer to discriminate "because of . . . sex," Mass. Gen. Laws Ann. ch. 151B, sec. 4(1) (West 1982), applied to "discrimination against homosexuals . . . , in the absence of any discrimination between men and women." 379 Mass. at

281. Although, "[a]s a matter of literal meaning, discrimination against homosexuals could be treated as a species of discrimination because of sex," *id.*, this Court refused to so interpret the statute:

> But we do not think that we are free to supply our own reading of the statutory language or our own view of what the policy should be. We know that the widespread design of sex discrimination in recent years has focused on discrimination between men and women. The uniform interpretation of statutes prohibiting discrimination in employment because of sex has limited the statutes to discrimination between men and women. Discrimination based on sexual preference has been excluded.

Id. (citations omitted).[13]

By a parity of reasoning, the equal rights amend-ment should not be interpreted to apply to homosexuality or sexual preference, either, regardless of this Court's view of the public policy restricting marriage to opposite-sex couples. As the cases cited above indicate, the equal rights amendment was adopted, here as elsewhere, as a remedy for "discrimination between men and women." Moreover, the Special Study Commission's Interim Report on the intent and import of the equal rights

[13] Plaintiffs do not cite *Macauley* in their brief.

amendment made clear that it would not mandate recognition of what it called "homosexual marriages." Senate Report No. 1689 at 21.

Same-Sex Marriage Under Other State Equal Rights Amendments

With the exception of the Hawaii Supreme Court, *see Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (plurality opinion), whose decision was later overturned by an amendment to the state constitution, *see* Haw. Const. art. I, sec. 23 (Michie Supp. 2001), no state reviewing court has held that laws restricting marriage to opposite-sex couples are subject to a heightened standard of review.[14] And no state reviewing court, including the Hawaii Supreme Court, has held that statutes restricting marriage to opposite-sex couples violate equal rights principles. Indeed, the constitutions, constitutional history and interpretive case law in

[14] A noted constitutional scholar, Bernard Schwartz, has described *Baehr* as "an affront to both law and language that well deserves its place on the list of worst decisions." Bernard Schwartz, A BOOK OF LEGAL LISTS at 182 (Oxford University Press 1997). "The *Baehr* decision is so contrary to both established law and common sense that one is almost speechless before this patent reductio ad absurdum of equal-protection jurisprudence." *Id.* at 183.

States with equal rights amendments uniformly *reject* judicially mandated recognition of same-sex marriage. *See generally* Paul Benjamin Linton, *Same-Sex "Marriage" Under State Equal Rights Amendments*, 46 ST. LOUIS U. LAW J. 909 (Fall 2002).

Alaska and Hawaii have amended their constitutions to forbid same-sex marriage, *see* Alaska Const. art. I, sec. 25 (Michie 2000), or to acknowledge the legislature's authority "to reserve marriage to opposite-sex couples." Haw. Const. art. I, sec. 23 (Michie Supp. 2001). In proposing to add the phrase, "female and male alike," to the language of the Florida "Basic Rights" provision, Fla. Const. art. I, sec. 2 (West Supp. 2002), which was ratified on November 3, 1998, the Florida Constitution Revision Commission explained that it intended "to affirm explicitly that all natural persons, female and male alike, are equal before the law." Commentary, Fla. Const. art. I, sec, 2 (West Supp. 2002). The Commission, however, cautioned that "[t]he proposal as adopted [for submission to the electorate] is not intended, and should not be construed, to confer any right to same-sex marriages in

this state." *Id.* The language was drafted "to assure that the proposal would not be deemed in any way to countenance same-sex marriages." *Id.*

Reviewing courts in Colorado and Pennsylvania have held that it is for the state legislature, not the courts, to decide whether to allow same-sex marriage. *See Ross v. Denver Dep't of Health & Hospitals*, 883 P.2d 516, 520 (Colo. Ct. App. 1994); *In re Adoption of C.C.G.*, 762 A.2d 724, 728 (Pa. Super. Ct. 2000), *rev'd on other grounds*, 803 A.2d 1195 (Pa. 2002); *In re Adoption of R.B.F*, 762 A.2d 739, 743 (Pa. Super. Ct. 2000), *rev'd on other grounds*, 803 A.2d 1195 (Pa. 2002).[15] *See also Jennings v. Jennings*, 315 A.2d 816, 820 n.7 (Md. Ct. Spec. App. 1974) ("Maryland does not recognize a marriage between persons of the same sex").

In Montana, the state supreme court struck down its sodomy statute as applied to noncommercial, homosexual conduct between consenting adults in

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[15] In the latter pair of cases, the Pennsylvania Supreme Court noted that "the Commonwealth only recognizes marriages 'between one man and one woman.'" *In re Adoption of R.B.F.*, 803 A.2d at 1199, citing 23 Pa. Cons. Stat. Ann. sec. 1704 (West 2001).

private on privacy grounds, refusing to base its decision on the state equal rights provision, Mont. Const. art. II, sec. 4 (2000). *See Gryczan v. State*, 942 P.2d 112, 115, 120-26 (Mont. 1997). The opinion suggests an unwillingness to view homosexuals as a suspect or quasi-suspect class under the state equal rights guarantee and manifests a disinclination to mandate same-sex marriage.

In *In re Opinion of the Justices*, 530 A.2d 21 (N.H. 1987), the New Hampshire Supreme Court found no state or federal constitutional impediment to a proposed bill that would prohibit homosexuals from adopting children or being licensed as adult members of foster families.[16] In its analysis of the state equal protection issue, the court stated that "no suspect class is involved, nor is heightened scrutiny . . . appropriate." *Id.* at 26. The court determined that the proper test under the state constitution was the rational relationship test and found that the proposed legislation was "rationally

[16] The court, however, found that a provision in the bill prohibiting homosexuals from operating child care agencies would not pass constitutional muster. *See Opinion of the Justices*, 530 A.2d at 25-26.

related to a legitimate governmental purpose [*i.e.*, to avoid homosexual influence on the child's developing sexual identity] insofar as it applies to adoption and foster care." *Id.*[17]

The New Hampshire Supreme Court's opinion in *In re Opinion of the Justices* strongly suggests that the State's prohibition of same-sex marriage, *see* N.H. Rev. Stat. Ann. sections 457.1, 457.2 (1992), does not violate the equal rights guarantee contained in Part 1, Article 2, of the state constitution. N.H. Const. part 1, art. 2 (1988). The court's refusal to treat classifications based on homosexuality as suspect or even deserving of intermediate scrutiny indicates that an asserted claim to homosexual marriage would be resolved on the rational basis standard of review. Under that standard, the prohibition of same-sex marriage easily passes constitutional muster.

In *Lawrence v. State*, 41 S.W.3d 349 (Tex. App. 2001, *pet. ref'd*) (*en banc*), *cert. granted*, Dec. 2,

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[17] The validity of this concern has been confirmed. *See* Judith Stacey and Timothy Biblarz, *(How) Does The Sexual Orientation of Parents Matter?,* 66 AMERICAN SOCIOLOGICAL REVIEW 159 (Spring 2001).

2002, Docket No. 02-102, the Texas Court of Appeals rejected a multifaceted attack on the constitutionality of the state sodomy statute, Tex. Penal Code Ann. sec. 21.06(a) (West 1994), which applies only to homosexual acts. Particularly relevant to the issue of same-sex marriage was the court's discussion of the defendants' argument that the sodomy statute discriminates on account of sex in violation of the state equal rights amendment, Tex. Const, art I, sec. 3a (West 1997), because it prohibits only homosexual, and not also heterosexual, deviate sexual conduct. *Lawrence*, 41 S.W.3d at 357. The State defended the statute on the ground that it applies equally to men and women, *i.e.*, "two men engaged in homosexual conduct face the same sanctions as two women." *Id.* The defendants replied that a similar rationale was expressly rejected in *Loving v. Virginia*, 388 U.S. 1 (1967). *Lawrence*, 41 S.W.3d at 357. The court of appeals rejected the *Loving* analogy:

> [W]hile the purpose of Virginia's miscegenation statute was to segregate the races and perpetuate the notion that blacks are inferior to whites, no such sinister motive can be ascribed to the criminalization of homosexual conduct. In other words, we

> find nothing in the history of Section 21.06 to suggest that it was intended to promote any hostility between the sexes, preserve any unequal treatment as between men and women, or perpetuate any societal or cultural bias with regard to gender. Thus, we find [defendants'] reliance on *Loving* unpersuasive.

Id. at 357-58.

Noting that "[t]he mere allusion to gender is not a talisman of constitutional invalidity," *id.* at 359, the court of appeals held that "[i]f a statute does not impose burdens or [confer] benefits upon a particular gender, it does not subject individuals to unequal treatment." *Id.* Although sec. 21.06 "includes the word 'sex,' it does not elevate one gender over the other. Neither does it impose burdens on one gender not shared by the other." *Id.* Because the sodomy statute is "gender-neutral on its face," the court held that defendants had the burden "of showing that the statute has had an adverse effect upon one gender and that such disproportionate impact can be traced to a discriminatory purpose." *Id.* But defendants did not even claim, much less prove, that "Section 21.06 has had any disparate impact between men and women." *Id.*

> Rather, [defendants] complain only that the statute has had a disparate impact between homosexuals and heterosexuals. While we recognize [that] the statute may adversely affect the conduct of male and female homosexuals, this simply does not raise the specter of gender-based discrimination.

Id. Adverting to its earlier discussion of "sexual orientation," *id*. at 353-57, the court held that "[t]o the extent [that] the statute has a disproportionate impact on homosexual conduct, the statute is supported by a legitimate state interest [*i.e.*, "preserving public morals"]." *Id.* at 359.

Clearly, the Texas Court of Appeals decision in *Lawrence* supports the State's prohibition of same-sex marriage. Tex. Fam. Code Ann. sec. 2.001 (West 1998). If the State may criminalize homosexual conduct without implicating the state equal rights amendment, then its authority to limit marriage to one man and one woman is not constrained by that amendment, either. Even if such a statute were vulnerable to challenge in another State on other state grounds (*e.g.*, privacy), it would *not* be subject to challenge under an equal rights amendment.[18] Like the Texas statute making

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[18] *Amici* acknowledge that to avoid problems of vagueness,

homosexual sodomy a crime, the Massachusetts statues restricting marriage to opposite-sex couples are gender neutral on their face. Moreover, as

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this Court has construed the Commonwealth's comparable statutes, *see* Mass. Gen. Laws Ann. ch. 272, sections 34, 35 (West 2000), not to apply to non-commercial sexual acts performed between consenting adults in private. *See Gay & Lesbian Advocates v. Attorney General*, 436 Mass. 132, 133-34 (2002); *Commonwealth v. Balthazar*, 366 Mass. 298, 302 (1974). Contrary to plaintiffs' representations, however, *see* Plaintiffs' Br. at 33 n.19, 75-76, neither decision reached the substantive constitutionality of the challenged statutes. In *Balthazar*, the court expressly declined to decide "whether a statute which explicitly prohibits specific sexual conduct, even if consensual and private, would be constitutionally infirm." 366 Mass. at 302. Because of the stated policies of the Attorney General and two district attorneys not to enforce sections 34 and 35 in such circumstances, the court in *GLAD v. Attorney General* refused to address plaintiffs' claims that enforcement of the laws would violate "the rights to privacy, equality, free expression, and freedom from cruel or unusual punishment guaranteed by the Massachusetts Declaration of Rights." 436 Mass. at 133. *Amici* note that this Court has rejected a *federal* constitutional challenge to the statute prohibiting adultery, Mass. Gen. Laws Ann. ch, 272, sec. 14 (West 2000), even though the conduct in question occurred between consenting adults in private. *See Commonwealth v. Stowell*, 389 Mass. 171, 174 (1983) ("there is no fundamental personal privacy right implicit in the concept of ordered liberty barring the prosecution of consenting adults committing adultery in private"). Regardless of the constitutionality of sections 34 and 35 under other provisions of the Massachusetts Declaration of Rights, the analysis in *Lawrence* suggests that they do not violate the state equal rights amendment.

previously noted, plaintiffs point to nothing in the history of those statutes that suggests that the statutes were "intended to promote any hostility between the sexes, preserve any unequal treatment as between men and women, or perpetuate any societal or cultural bias with respect to gender." *Lawrence*, 41 S.W.3d at 358.

Finally, *amici* submit that *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974), is particularly persuasive on the question of whether a state equal rights amendment mandates recognition of same-sex marriage. In *Singer*, not cited or distinguished in plaintiffs' brief, the Washington Court of Appeals considered an appeal from a trial court order refusing to compel the county auditor to issue a marriage license to two males. After interpreting the marriage statutes not to allow same-sex marriage, the court turned to the plaintiffs' state and federal constitutional claims. The State argued that the prohibition of same-sex marriage did not violate the state equal rights amendment because the prohibition affects men and women equally--neither may marry members of the same sex. *Singer*, 522 P.2d

at 1190-91. The plaintiffs countered that the State's position could not be reconciled with the Supreme Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967), striking down Virginia's anti-miscegenation statutes. *Singer*, 522 P.2d at 1191. Like the Texas Court of Appeals in the *Lawrence*, the Washington Court of Appeals found *Loving* to be distinguishable because the laws struck down in that case "were founded on an impermissible racial classification . . . ." *Id.* The relationship described by the term marriage, however, has always been understood as "the legal union of one man and one woman." *Id.* Unlike the laws at issue in *Loving*, "There is no analogous sexual classification involved in the instant case because [plaintiffs] are not being denied entry into the marriage relationship because of their sex; rather, they are being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex." *Id.* at 1192.

Plaintiffs' claim of discrimination was not sup-

ported by the state equal rights amendment, whose "primary purpose" was "to overcome discriminatory legal treatment as between men and women 'on account of sex.'" *Id.* at 1194, quoting Wash. Const, art. XXXI, sec. 1 (West 1988). "To accept [plaintiffs'] contention that the ERA must be interpreted to prohibit statutes which refuse to permit same-sex marriages," the court cautioned, "would be to subvert the purpose for which the ERA was enacted by expanding its scope beyond that which was undoubtedly intended by the majority of the citizens of this state who voted for the amendment." *Id.* Rejecting this interpretation, the court stated:

> We are of the opinion that a common-sense reading of the language of the ERA indicates that an individual is afforded no protection under the ERA unless he or she first demonstrates that a right or responsibility has been denied solely because of that individual's sex. [Plaintiffs] are unable to make such a showing because the right or responsibility they seek does not exist. The ERA does not create any new rights or responsibilities, such as the conceivable right of persons of the same sex to marry one another; rather, it merely insures that existing rights and responsibilities, or such rights and responsibilities as may be created in the future, which previously might have been wholly or partially denied to one sex or to the other, will be equally available to members of either sex.

Id. The prohibition of same-sex marriage does not deny men or women a right available to members of the opposite sex, to wit, a right to "marry" someone of the same sex. *Id.* The court explained:

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

Id. at 1195.

The court of appeals also rejected plaintiffs' federal equal protection claim, finding that plaintiffs had not made out a case of sexual discrimination. *Id.* at 1195-97. "[Plaintiffs] were not denied a marriage license because of their sex; rather, they were denied a marriage license because of the nature of marriage itself." *Id.* at 1195. The court found no greater merit in plaintiffs' alternative federal claim, *i.e.*, that the marriage laws discriminate against them as homosexuals, agreeing with the State that "to define marriage to exclude homosexual or any other same-sex relationships is not to create an inherently suspect legislative classification requiring strict judicial scrutiny to determine a compelling state interest." *Id.* at 1196. The reservation of marriage to opposite sex couples easily satisfied the rational-basis standard of judicial review: "Although . . . married persons are not required to have children or even to engage in sexual relations, marriage is so clearly related to the public interest in affording a favorable environment for the growth of children

that we are unable to say that there is not a rational basis upon which the state may limit the protection of its marriage laws to the legal union of one man and one woman." *Id.* at 1197. The court concluded, "although the legislature may change the definition of marriage within constitutional limits, the constitution does not require the change sought by appellants." *Id.*

The Massachusetts marriage statutes which restrict marriage to opposite-sex couples, do not deny or abridge "equality under the law" because of "sex." Accordingly, they do not violate the equal rights amendment of the Massachusetts Constitution.

II. THE PUBLIC POLICY OF THE COMMONWEALTH TO RESTRICT MARRIAGE TO OPPOSITE-SEX COUPLES DOES NOT VIOLATE THE EQUALITY GUARANTEE OF THE MASSACHUSETTS CONSTITUTION.

The first sentence of Part One, Article One, of the Massachusetts Constitution provides:

> All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness.

Mass. Const. part 1, art. 1 (West 1997).

Plaintiffs' argument that the statutes restricting marriage to opposite-sex couples violates the state equal rights amendment (the second sentence of Part One, Article One) has no basis in the language of the amendment, the history of its adoption, its purpose or its interpretation by this Court. Their related argument (*see* Plaintiffs' Br. at 48 n.30, 61-79), that such statutes should be subjected to heightened scrutiny under the general equality language of Part One, Article One (the first sentence) fares no better. Even assuming that laws limiting marriage to opposite-sex couples classify on the basis of sexual orientation,[19] heightened scrutiny is not mandated or appropriate.

In adopting the second sentence of Part One, Article One, the People determined what classifications shall be subject to strict scrutiny under the state constitution--sex, race, creed, color and national origin. That enumeration is both "definitive," *Commonwealth v. Soares*, 377 Mass. 461,

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[19] That assumption is debatable. The distinction in the law is between opposite-sex couples and same-sex couples, not between heterosexuals and homosexuals.

488-89 (1979), and exclusive, *Powers v. Wilkinson*, 399 Mass. 650, 657 n.11 (1987) (under the equal rights amendment, "suspect classifications are *only* those of 'sex, race, color, creed or national origin'") (emphasis supplied). This Court does not have the authority and has refused to expand the categories of suspect classes beyond those specified in the Constitution itself, to wit, sex, race, color, creed or national origin. *See Attorney General v. Desilets*, 418 Mass. 316, 327 (1994) (marital status); *Powers v. Wilkinson*, 399 Mass. at 657 n. 11 (illegitimacy).[20] Classifications based on

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[20] Nothing in *Doe v. Comm'r of Transitional Assistance*, 439 Mass. 521 (2002), cited by plaintiffs (Plaintiffs' Br. at 63), is to the contrary. In *Doe*, this Court merely observed that "[i]n matters concerning aliens, the Massachusetts Declaration of Rights has been interpreted to provide a right to the equal protection of the laws, coextensive with the Federal right." 437 Mass. at 525, citing *Frost v. Comm'r of Corporations and Taxation*, 363 Mass. 235, 238 & n.3 (1973). This interpretation does not authorize the Court to recognize, as a matter of state constitutional law, new "suspect classifications" not enumerated in Part One, Article One, of the Massachusetts Constitution. *Frost* relied upon an entirely different article of the Declaration of Rights (art. 10), as did the case it cited, *Opinion of the Justices*, 357 Mass. 827, 830 (1970). For the reasons set forth in the Brief of the Attorney General, nothing in Part One, Article 10, mandates the relief requested by plaintiffs.

factors other than those specifically enumerated in the second sentence of Part One, Article One, are reviewed under the rational basis standard (unless a higher standard is required by the federal constitution). *See Murphy v. Dep't of Corrections*, 429 Mass. 736, 739-40 (1999).[21] For the reasons set forth in the previous argument and developed in more depth in the Attorney General's brief, *amici* submit that the statutes restricting marriage to opposite-sex couples easily satisfy that standard.

Even if this Court were authorized to recognize new suspect (or quasi-suspect) classifications, plaintiffs have provided the Court with no principled basis for doing so in this case. Apart from treating sex-based classifications as constitutionally suspect, *Commonwealth v. King*, 374 Mass. 5, 21 (1977), this Court's jurisprudence under the "equality" language of Part One, Article One, of the Massachusetts Constitution generally follows

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[21] There is no basis in the *state* constitution to apply intermediate scrutiny to "quasi-suspect" classifications. Intermediate scrutiny is a *federal* standard applicable to classifications based on gender or illegitimacy. The statutes challenged here do not discriminate on the basis of gender or illegitimacy.

federal equal protection analysis. *See Dickerson v. Attorney General*, 396 Mass. 740, 743 (1985) ("[f]or the purpose of equal protection analysis, our standard of review under the cognate provisions of the Massachusetts Declaration of Rights is the same as under the Fourteenth Amendment to the Federal Constitution"); *Commonwealth v. Franklin Fruit Co., Inc.*, 388 Mass. 228, 235 (1983) (*same*). "Absent a showing that a statute burdens a suspect group or fundamental interest, it will be upheld as long as it is rationally related to the furtherance of a legitimate State interest." *Dickerson*, 396 Mass. at 743. "A classification will be considered rationally related to a legitimate state purpose 'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Chebacco Liquor Mart, Inc. v. Alcoholic Beverages Control Comm'n*, 429 Mass. 721, 723 (1999), citing *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 313 (1993).

The reservation of marriage to opposite-sex couples does not discriminate against either men or women and, therefore, does not implicate the state

equal rights amendment. And restricting marriage to opposite-sex couples does not "burden[] a suspect group," *i.e.*, persons who want to marry others of the same sex. *Dickerson*, 396 Mass. at 743.[22]

In *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), the Minnesota Supreme Court rejected a broad based federal constitutional challenge to a statute which, as interpreted by the trial court and the state supreme court, did not permit the issuance of marriage licenses to same-sex couples. The United States Supreme Court thereafter dismissed the appellants' appeal for want of a substantial federal question. *See Baker v. Nelson*, 409 U.S. 810 (1972). Until the Supreme Court decides otherwise, the Court's dismissal of the appeal in *Baker* for want of a substantial federal question constitutes a *holding* that the constitutional challenge was considered by the Supreme Court and was rejected as insubstantial. *See Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975). The dismissal of the appeal in *Baker* is an adjudication on the merits of the federal constitu-

[22] *Amici* generally adopt the Attorney General's analysis of plaintiffs' "fundamental interest" argument.

tional claims raised, including due process and equal protection, which lower courts are bound to follow. *Hicks*.

Entirely apart from the disposition in *Baker*, neither the United States Supreme Court nor this Court has held that sexual orientation is a suspect (or even a quasi-suspect) basis for classification.[23] With the exception of one panel decision of the Ninth Circuit Court of Appeals that was later withdrawn, *see Watkins v. United States Army*, 847 F.2d 1329, 1349 (9th Cir. 1988), *withdrawn*, 875 F.2d 699, 711 (9th Cir. 1989), *cert. denied*, 498 U.S. 957 (1990), no federal court of appeals has ever applied heightened scrutiny when considering equal protection claims in the context of sexual orientation. Nine of the thirteen federal courts of

[23] The argument of certain *amici* in support of appellants, that sexual orientation classifications merit strict scrutiny under federal equal protection principles, *see* Brief in Support of Appellants of *Amici Curiae* Urban League of Eastern Massachusetts, *et al.*, at 18-41, cannot be reconciled with Supreme Court precedent that classifications based on sex itself merit only heightened, not strict, scrutiny. *See Craig v. Boren*, 429 U.S. 190, 197 (1976). And, as *amici* have shown in their previous argument, the prohibition of same-sex marriage does not constitute discrimination on account of sex.

appeals have held that homosexuals do not constitute a suspect or a quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes,[24] and a tenth court of appeals has strongly intimated the same. *See Shahar v. Bowers*, 114 F.3d 1097, 1099 n.2 (11th Cir. 1997) (*en banc*) ("Given the culture and traditions of the Nation, considerable doubt exists that plaintiff [a woman] has a constitutionally protected federal right to be 'married' to another woman"), *cert. denied*, 522 U.S. 1049 (1998). Plaintiffs cite no

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[24] *See Thomasson v. Perry*, 80 F.3d 915, 927-28 (4th Cir. 1996) (*en banc*), *cert. denied*, 519 U.S. 948 (1996); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (*en banc*), *cert. denied*, 478 U.S. 1022 (1986); *Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati*, 128 F.3d 289, 292-93 & nn.1-2 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 & n.8 (7th cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Richenberg v. Perry*, 97 F.3d 256, 260 & n.5 (8th Cir. 1996), *cert. denied*, 522 U.S. 807 (1997); *Holmes v. California National Guard*, 124 F.3d 1126, 1132 (9th Cir. 1997), *cert. denied*, 525 U.S. 1067 (1999); *Philips v. Perry*, 106 F.3d 1420, 1425 (9th Cir. 1997); *High Tech Gays v. Defense Industrial Services Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *Rich v. Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984); *Steffan v. Perry,* 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (*en banc*), ; *Padula v. Webster*, 822 F.2d 97, 103-04 (D.C. Cir. 1987); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990).

contrary holdings from any federal court of review or any state court interpreting state constitutional language comparable to Part 1, Article 1, of the Massachusetts Constitution.[25]

Apart from the lack of precedent supporting their position, plaintiffs have not shown that homosexuals satisfy any of the "traditional indicia of suspect-ness." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973). First, despite their rhetoric of "victimization,"

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[25] Certain of plaintiffs' *amici* attempt to dismiss the significance of these authorities by observing that "all but one of those cases arose in the context of military and security clearance policies" where "special deference must be given to government judgments regarding military operations and military security." Brief in Support of Appellants of *Amici Curiae* Urban League of Eastern Massachusetts, *et al.*, at 22 n.38. This observation ignores the fact that the government's interests in these cases did not influence the selection of the appropriate standard of review (strict scrutiny, intermediate scrutiny or relaxed scrutiny), but only whether the appropriate standard (rational basis) had been met. Thus, they remain relevant authorities for the proposition that homosexuality (or sexual orientation) is not an impermissible basis for classification. Moreover, two of the cases cited above, *Baker v. Wade* and *Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati*, did not involve an area of sensitive government or national defense employment.

see Plaintiffs' Br. at 66-70,[26] plaintiffs have not shown that homosexuals have experienced a "history of purposeful unequal treatment," *San Antonio Independent School District*, 411 U.S. at 28, by the People or the government of the Commonwealth of Massachusetts.

Second, plaintiffs (and their supporting *amici*) have not shown that, in being denied marriage licenses, homosexuals have been "subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976). *See* Plaintiffs' Br. at 70-72; Brief in Support of Appellants of *Amici Curiae* Urban League of Eastern Massachusetts, *et al.*, at 30-32. With respect to the statutes restricting marriage to opposite-sex couples, it is self-evident that *no* same-sex couples can procreate by themselves or provide dual gender parenting for children, two of the legitimate purposes for which the institution of marriage exists. Limiting

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[26] *See also* Brief in Support of Appellants of *Amici Curiae Urban* League of Eastern Massachusetts, *et*

marriage to opposite-sex couples, thus, is not based on "stereotyped characteristics" unrelated to the abilities of homosexuals.

Third, plaintiffs have not shown that homosexuals have been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School District v. Rodriguez*, 411 U.S. at 28. *See* Plaintiffs' Br. at 72-74. *See also* Brief in Support of Appellants of *Amici Curiae* Urban League of Eastern Massachusetts, *et al.*, at 33-39. The record of their political prowess suggests quite the contrary.

The basic state civil rights statute makes it an "unlawful practice" to discriminate on the basis of "sexual orientation" in, among other areas, employment and membership in labor unions, rental or sale of real estate, advertising, granting of mortgage loans, issuance of surety contracts and furnishing credit or services. Mass. Gen Laws Ann. ch. 151B, sec. 4 (West Supp. 2002). Under

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al., at 25-30.

Massachusetts law, discrimination on account of "sexual orientation" in places of public accommodation is a crime. Mass. Gen. Laws Ann. ch. 272, sections 92A, 98 (West 2000). Other statutes forbid sexual orientation discrimination in school placement and charter schools, Mass. Gen. Laws Ann. ch. 76, sec. 5 (1996), ch. 71, sec. 89(l) (West Supp. 2001), homeowner's insurance, Mass. Gen. Laws Ann. ch. 175, sec. 4C 1998), and the Youth Conservation and Service Corps, Mass. Gen. Laws Ann. ch. 78A, sec. 6(h) (1996). More-over, a crime motivated by bias against a person's "sexual orientation" is defined as a "hate crime." Mass. Gen. Laws Ann. ch. 22C, sec. 32 (West 2002). *See also* Mass. Gen. Laws Ann. ch. 265, sec. 39 (West 2000) (intimidation based on "sexual orientation"). This record of legislative accomplishments is evidence of political power, not political powerlessness. *See City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 445 (1985) (a "politically powerless" group means a group that has "no ability to attract the attention of the lawmakers").

"Homosexuality, as a definitive trait, differs fundamentally from those defining any of the recognized suspect or quasi-suspect classes" because it is "primarily behavioral in nature." *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989). *See also High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) ("homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes"). Plaintiffs do not contend that homosexuality is an immutable characteristic like race, sex, national ancestry or ethnic origin, nor do they argue that it has a legal status like alienage or illegitimacy. Because it is "primarily behavioral in nature," homosexuality lacks common elements with those classifications which are based on immutable, observable or legal characteristics. For that reason, it should not be treated as a suspect or quasi-suspect basis for classification.

The Massachusetts marriage statutes restricting

marriage to opposite-sex couples do not infringe upon a fundamental right of same-sex couples to marry, nor do they discriminate on the basis of a suspect or quasi-suspect classification. They are rationally related to legitimate governmental purposes and should be upheld.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request this Honorable Court to affirm the judgment of the superior court.

Respectfully submitted,

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Certificate of Service

I, Paul Benjamin Linton, an attorney for *Amici Curiae,* American Professors of Law, hereby certify that on December 19, 2002, I served the foregoing Brief *Amicus Curiae* by causing two copies to be mailed, first class postage prepaid, to counsel for the plaintiffs, Mary L. Bonauto, Jennifer L. Levi, Gary D. Buseck, Bennett H. Klein, Karen L. Loewy, GAY & LESBIAN ADVOCATES & DEFENDERS, 294 Washington Street, Suite 301, Boston, Massachusetts 02108-4608, and counsel for the defendants, Judith S. Yogman, Assistant Attorney General, and Anthony E. Penski, Assistant Attorney General, One Ashburton Place, Boston, Massachusetts 02108-1698.

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