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SINGLE-GENDER MARRIAGE: A RELIGIOUS PERSPECTIVE

by REV. RAYMOND C. O'BRIEN*

INTRODUCTION

Little has changed so rapidly and so pervasively as family law in the United States. The dynamism of this change is revolutionary. "Long-settled principles and practices regarding divorce, marital property, spousal support, and custody, to mention only a few instances, have been abandoned or substantially modified over the last few decades."¹ Not only has there also been a radical transformation of principles and practices, there has been a concomitant genesis of new phrases, properties, encroachments and relationships.² Beginning in the late sixties, the federalization³ of family relations steadily

* Professor of Law, The Catholic University of America and the Georgetown University Law Center. I wish to make clear that, as a Roman Catholic priest, I accept the Church's teachings and believe that single-gender marriage is morally wrong and ought never to be sanctioned by law. Natural law, I believe, makes this clear. At the same time, I recognize that there are many who do not share that belief, or even agree that natural law exists at all. Accordingly, the argument laid out in this Article is an attempt to demonstrate why religious perspectives in a democracy deserve accommodation, even by those who fundamentally disagree with them.

1. LESLIE J. HARRIS ET AL., *FAMILY LAW* xxxv (1996). See generally MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* (1989); June Carbone & Margaret Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 *TUL. L. REV.* 953 (1991); Lee E. Teitelbaum, *Family History and Family Law*, 1985 *WIS. L. REV.* 1135.

2. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 898 (1992) (holding that husband lacks power over wife to prevent or procure abortion); *Compassion in Dying v. Washington*, 79 F.3d 790, 838 (9th Cir. 1996), cert. granted sub nom. *Washington v. Glucksberg*, 117 S. Ct. 37, rev'd, 117 S. Ct. 2258 (1997) (holding Due Process Clause of federal Constitution protects competent terminally ill patient's right to die with assistance from physician); *McCabe v. Sharrett*, 12 F.3d 1558, 1562-63 (11th Cir. 1994) (explaining freedom of association and right to marry); *Johnson v. Calvert*, 851 P.2d 776, 777-78 (Cal. 1993) (addressing question raised in new reproductive technology: who is the "natural mother" of the child?); *In re Baby Boy Doe*, 632 N.E.2d 326, 326 (Ill. 1994) (finding "woman's competent choice to refuse medical treatment . . . must be honored" over best interest of her fetus); *Ferguson v. Ferguson*, 639 So.2d 921, 926 & n.3, 928, 934 (Miss. 1994) (recognizing homemaker services as contributions to acquiring property); *LeClair v. LeClair*, 624 A.2d 1350, 1352, 1358 (N.H. 1993) (requiring divorced father to pay portion of son's college expenses); *Hawk v. Hawk*, 855 S.W.2d 573, 575, 582 (Tenn. 1993) (denying child's grandparents visitation rights because their rights conflicted with parents' right to privacy); *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992) (discussing resolutions for "disposition of pre-embryos produced by in vitro fertilization," and providing that divorcing party who does not want "procreation" using the pre-embryos should prevail where other party may become parent using other "reasonable" means); William Hohengarten, Note, *Same-Sex Marriage and the Right of Privacy*, 103 *YALE L. J.* 1495 (1994).

3. While federalism can be defined as a system of state and national governmental interaction, whereby the national government concentrates on wealth redistribution and the states on physical and social infrastructure, federalism used here is intended to include the array of federal

encroached on the power of the states to regulate intimate domestic relations.⁴ Beginning in the nineties, the federal government shifted power back to the states through block grants and continuing judicial restraint by federal courts.⁵ Initiated through federal constitutional interpretation by federal courts, the pace for change was quick, individual liberty oriented, and surprising within the last three decades.⁶ But the federal judiciary has moved at a slower pace recently,⁷ prompting citizens to look to state courts and legislatures for individual liberty guarantees.

State judiciaries have been swept up into the maelstrom of change. Indeed, as the United States Supreme Court refused to find a fundamental right to commit sodomy within the confines of the Due Process Clause in Georgia,⁸ the state courts of Pennsylvania,⁹ New York,¹⁰ and Kentucky,¹¹ invalidated sodomy statutes similar to the one upheld by the Court a few

laws enacted by Congress or decided within federal courts. For a good description of federalism as state and national interaction, see STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800* (1993); PAUL E. PETERSON, *THE PRICE OF FEDERALISM* (1995).

4. Federal control was initiated through constitutional decisions made within federal courts. Eventually, federal statutes regularized various state practices such as child support collection, custody enforcement and prevention of child abuse, making domestic abuse a federal crime when perpetrators cross state lines, and denying state agencies the ability to prohibit foster or adoptive services solely because of race. See, e.g., Child Support Enforcement Act, 42 U.S.C. §§ 651-669 (1991 & Supp. 1997); Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101 (1991 & Supp. 1997); Family Violence Prevention and Services Act, 42 U.S.C. § 10401 (1991 & Supp. 1997); Safe Homes for Women Act of 1994, Pub. L. No. 103-322, § 40221, 108 Stat. 1796, 1926-31 (amended to 42 U.S.C. §§ 10416); Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, § 553, 108 Stat. 3518, 4056-57 (to be codified at 42 U.S.C. § 5115a); Parental Kidnapping and Prevention Act of 1980, 28 U.S.C. § 1738a (1988). For a balancing proposal, see Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073 (1994).

5. See, e.g., Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 1305 (1996); *Ankenbrandt v. Richards*, 504 U.S. 689, 703-04 (1992) (explaining that domestic relations exception to federal jurisdiction encompasses divorce, alimony and child custody).

6. Some of the most surprising decisions involve federal courts and individual liberty rights. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 382-83 (1978) (holding that state statute prohibiting marriage without important state interest is violation of Equal Protection Clause); *Roe v. Wade*, 410 U.S. 113, 154 (1973) (holding that right of personal privacy includes right to have abortion); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (explaining that single people must be treated equally with married people in distribution of contraceptives); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that equal protection forbids states from preventing interracial marriages); *Quill v. Vacco*, 80 F.3d 716, 731 (2d Cir.), cert. granted, 117 S. Ct. 36 (1996), rev'd, 117 S. Ct. 2293 (1997) (finding that laws prohibiting assisted suicide violate Equal Protection Clause).

7. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) (setting limits on congressional authority under Commerce Clause for first time since 1936). But see SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* (1993) (arguing that federalism and rejection of federal control often ignores benefits or losses within federal proposals).

8. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

9. See *Commonwealth v. Bonadio*, 415 A.2d 47, 51 (Pa. 1980) (invalidating statute because it lacked rational basis).

10. See *People v. Onofre*, 415 N.E.2d 936, 938-39 (N.Y. 1980) (invalidating statute regarding deviate sexual intercourse between unmarried persons under Fourteenth Amendment).

years earlier. Thus, whereas the Federal Constitution was the earliest harbinger of individual liberty and civil rights, the state constitutions have recently become far more likely purveyors of individual liberties and protections. Prompted in part by both federal and state judiciaries, public opinion has changed as well.¹² Change has come to what has for so long been considered so well understood, so instinctive, and so, to use a judicial word, fundamental. Although prompted at first by the federal judiciary, change now comes to family law most often through the state judiciary.¹³

Since the changes that identify with public perceptions of individual liberty have become commonplace, returning to a time when, for instance, adultery was a crime, seems remote.¹⁴ The abolition of fault in the obtaining of a divorce,¹⁵ plus the privacy protection afforded couples, single or married, as a result of *Griswold v. Connecticut*¹⁶ and *Eisenstadt v. Baird*,¹⁷ all contribute to and recognize the changes that have occurred in American society regarding sexual, marital and relationship norms previously thought to be fundamental to American culture.¹⁸ Indeed, these names were thought to be part of a natural law common to all human persons.

Why have the changes come about? There seems to be many reasons. Lawrence Friedman has one insight:

Anyone who thinks about conditions of modern life can quickly come up with explanations for the triumph of no-fault; too many, in fact. There is, to begin with, the so-called sexual revolution, which downplays traditional morality, takes away some of the aura that surrounded chastity, and champions a rich, full sex life. There is the cumulative effect of the divorce rate itself; the status is so common

11. See *Commonwealth v. Wasson*, 842 S.W.2d 487, 489 (Ky. 1992) (invalidating statute which violated state constitutional guarantees of privacy and equal protection).

12. See Joan Biskupic, *Once Unthinkable, Now Under Debate: Same-Sex Marriage Issue to Take Center Stage in Senate*, WASH. POST, Sept. 3, 1996, at A1 (concerning issue of same-sex marriage and Senate debate over Defense of Marriage Act).

13. Increasingly, legal commentators argue that family law is different from commercial activity and that a state should retain control over its own community identity. "[T]he normative character of family law is closely tied to a communitarian model of state authority under the federal constitution." Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1790 (1995). Furthermore, "[t]he states potentially offer a relatively more inclusionary, deliberative political life than the national government ever could." *Id.* at 1876.

14. *But see* D.C. CODE ANN. § 22-301 (1994 & Supp. 1997). The District of Columbia has amended its adultery statute to read:

Whoever commits adultery in the District shall, on conviction thereof be punished by a fine not exceeding \$500, or by imprisonment not exceeding 1 year, or both; and when the act is committed between a married person and a person who is unmarried both parties to such act shall be deemed guilty of adultery.

Id.

15. Recently, legislatures have enacted more stringent demands pertaining to no-fault divorce when children are involved. There have been statutory requirements of counseling as to the effects of divorce upon children before a couple may receive a no-fault divorce.

16. 381 U.S. 479 (1965).

17. 405 U.S. 438 (1972).

18. See generally Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519 (1993-1994).

that much of the stigma is gone. There is the role of women, and the new conception of marriage, early signs of which William O'Neill had discovered in the Progressive era. There is the new individualism, with its emphasis on personal choice.¹⁹

Professor Mary Ann Glendon also observes why changes in society are not unique to, and have become a part of, American culture. She writes:

Between 1969 and 1985 divorce law in nearly every Western country was profoundly altered. Among the most dramatic changes was the introduction of civil divorce in the predominantly Catholic countries of Italy and Spain, and its extension to Catholic marriages in Portugal. Other countries replaced or amended old strict divorce laws. . . . The chief common characteristics of all these changes were the recognition or expansion of nonfault grounds for divorce, and the acceptance or simplification of divorce by mutual consent.²⁰

But Professor Glendon is quick to note that the relation between law and behavior is uncertain and other factors are critical.²¹ What other factors can account for the dramatic shift in the law of family relations that seemed so secure a foundation for every moral discourse just four decades ago? Is it because we live in an information explosive age, where all the factors are in doubt and thus nothing is secure enough upon which to take hold? Professor Lynn D. Wardle of the J. Reuben Clark Law School, Brigham Young University, opines that: "Judges are the most library-dependent public officials in American government."²² Does the availability of so many possibilities initiate change?

Perhaps the law does not matter at all:²³ it operates only as a recognition, not an initiator, of a consensus already established. Perhaps the law of family relations, created from the cloth of a Judeo-Christian tradition, has shifted and societies now seek common agreement in the wake of a "now-gone consensus of the Christian nation."²⁴ Furthermore, seeking common agreement plagues secular society as much as its loss troubles those who think the rules of the Judeo-Christian tradition were just fine. For instance, no less a secular publication than *The New Yorker* magazine wrote in its

19. Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 667 (1984).

20. MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 66-67 (1987).

21. See Carol Weisbrod, *On the Expressive Functions of Family Law*, 22 U.C. DAVIS L. REV. 991, 1005, 1005 n.63 (1989) (discussing Professor Glendon's view on the impact of law).

22. Lynn D. Wardle, *Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 24.

23. See generally MAX RHEINSTEIN, MARRIAGE, STABILITY, DIVORCE, AND THE LAW 406 (1972) ("Experienced observers have long known what we have laboriously tried in this book to prove, namely, that a strict statute law of divorce is not an effective means to prevent or even to reduce the incidence of marriage breakdown."); Lee E. Teitelbaum, *Moral Discourse and Family Law*, 84 MICH. L. REV. 430 (1985). Richard Abel, *Law Books and Books About Law*, 26 STAN. L. REV. 175, 183 (1973) ("[L]egal professionals, with their strong and obvious commitment to the importance of law, are clearly the last people likely to accept its irrelevance. Instead of doing so, they will make that *irrelevance* the central problem.").

24. Weisbrod, *supra* note 21, at 1005.

Comment section of Antioch College's effort to draft a new code of sexual engagement between students. It was drafted by students, faculty and administrators at the college as an effort to prescribe the terms of sexual engagement between students. The magazine was intrigued with the quest for rules:

The notion of "rules" understandably puts people off, conjuring up as it does, images of lawyers in the bedroom, and so forth. But there have always been rules for sexual conduct—rules that not so long ago were far more restrictive than anything dreamed of at Antioch College. You didn't pick them up in the dean's office, or with your personnel packet. You picked them up by making your own hideous faux pas; and they were enforced by fear of the humiliation that accompanied failures to observe the sexual customs of your social class. These tacit codes have now pretty obviously broken down, so that nobody is entirely clear anymore about what's cool and what's ground for a lawsuit.²⁵

Why family law has changed so radically and so quickly is uncertain, only the fact that it has changed is certain. This Article will describe one of those changes, the litigation and legislation surrounding single-gender marriage, and then offer a religious perspective as to why the "marriage [between one man and one woman] exists for the mutual love and support of the spouses and for the procreation and education of children."²⁶ While many religious perspectives exist within pluralistic America, this Article will expressly rely upon the perspective of the Roman Catholic Church through the writings of Pope John Paul II, the Second Vatican Council, and the individual and joint statements of the American Catholic Bishops. Because the Roman Catholic Church is an international organization, statements from the Second Vatican Council and the Pope are particularly corroborative of human perceptions inspired by religious perspective. Obviously too, those other religious persons and denominations sharing in the expressed opinions pronounced by the Roman Catholic Church are represented in this perspective.

In addition to this Introduction and a Conclusion, this Article will offer a religious perspective which is a response to the legal arguments in favor of single-gender marriage. Three arguments will be made: first, that the religious perspective identified and associated with the Roman Catholic tradition offers a fundamental basis for family life that has been proven to be beneficial to society as a whole, and to the message of revelation consigned to Christians by Jesus Christ; second, inasmuch as the religious perspective is being contradicted by judicial interpretation rather than through legislative process, a tyranny of judicial activism has and is subverting a public policy

25. Comment *NEW YORKER*, Nov. 29, 1993, at 10.

26. *CATHOLIC STANDARD*, Sept. 5, 1996, at 12 (quoting Bishop Joseph L. Charron of Des Moines, Iowa, Chairman of the Committee on Marriage and Family of the National Conference of Catholic Bishops, and Bishop William S. Skylstad of Spokane, Washington, Chairman of the Committee on Domestic Policy of the United States Catholic Conference).

consensus; and third, an analysis of the Hawaiian decision *Baehr v. Lewin*,²⁷ which presently prompts the debate over single-gender marriage, offers a compelling state interest to restrict the definition of marriage to those persons of the opposite gender.

The Hawaii trial court's failure to find a compelling state interest on remand to support the ban on single-gender marriage has precipitated state efforts to provide a solution through a constitutional convention and legislation to provide reciprocal benefits to non-married partners.²⁸ When the constitutional convention is held and if the people of Hawaii vote to restrict the definition of marriage to opposite gender persons, the judicial intrusion into the definition of marriage based on the constitutional interpretation will cease for the time being. Nonetheless, the debate over single-gender marriage is only one facet of an ever-changing social structure in America. Is this change similar to that of the sixties and the racial inequities which prompted the civil rights movement, the change which prompted *Loving v. Virginia*? No, race and gender are distinctive in that even the most individual-liberty-oriented person would admit that there are physical and emotional possibilities and responsibilities associated with gender which have no counterpart in race. This uniqueness has found representation in history, customs and religious observance. Gender is not race; marriage is not integration. Former Secretary of Education, William J. Bennett, recently wrote:

Nor is this view arbitrary or idiosyncratic. It mirrors the accumulated wisdom of millennia and the teaching of every major religion. Among worldwide cultures, where there are so few common threads, it is not a coincidence that marriage is almost universally recognized as an act meant to unite a man and a woman.²⁹

Any dramatic definitional change in so fundamental an institution as marriage would foster the societal confusion³⁰ already experienced in *Roe v. Wade*,³¹ when the Supreme Court recognized a woman's right to an abortion, *Compassion in Dying v. State of Washington*,³² where the federal Ninth Circuit Court of Appeals recognized a due process right in terminally ill patients to assisted suicide, and *Quill v. Vacco*³³ where the federal Second Circuit Court of Appeals decided that laws prohibiting assisted suicide violated the Equal Protection Clause of the United States Constitution. The Supreme

27. 852 P.2d 44 (Haw. 1993). For the most recent opinion on the decision, see *Baehr v. Miike*, 910 P.2d 112 (Haw. 1996), affirming the trial court's decision to refuse intervenor status to The Church of Jesus Christ of Latter Day Saints.

28. See HAW. REV. STAT. ANN. § 572C-1 (Michie 1997).

29. William J. Bennett, . . . *But Not a Very Good Idea, Either*, WASH. POST, May 21, 1996, at A19.

30. See generally CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT (1996) (arguing that Supreme Court should proceed narrowly, and with easiest cases, thus allowing democratic process to flourish and simultaneously avoiding social upheaval).

31. 410 U.S. 113 (1973).

32. 79 F.3d 790 (9th Cir. 1996), cert. granted sub nom. *Washington v. Glucksberg*, 117 S. Ct. 37, rev'd, 117 S. Ct. 2258 (1997).

33. 80 F.3d 716 (2d Cir. 1996), rev'd, *Vacco v. Quill*, 117 S. Ct. 2293 (1997).

Court opinions in *Washington v. Glucksberg*³⁴ and *Quill v. Vacco*,³⁵ rejected the judicial activism of both federal circuits, recognizing instead the value in all sides voicing an opinion. The *Glucksberg* court wrote: "Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits that debate to continue, as it should in a democratic society."³⁶ The courts and the legislatures, as well as public opinion, continue to swirl not just in debate, appropriate to a free society, but suffer acts of public disturbance.

Appropriate to current debate, this Article argues that changes in fundamental public policy are best reserved to the elected legislative process in which religion can contribute to the public discussion. This is particularly true when the rights claimed within the judicial sector are rights which can be represented within the democratic process of elected representation.³⁷ Even Cass Sunstein, in his portentous essay, *Homosexuality and the Constitution*,³⁸ argues that legislatures, not courts, should be at the forefront of the profound shifts in social and legal policy that are necessary to create gay rights.³⁹ While a convincing argument can be made that persons of African-American ancestry were unable to compete within the legislative arena prior to judicial civil rights successes in the mid-sixties, it is difficult to say that gay and lesbian persons or any other persons arguing for single-gender marriage cannot enter into the legislative arena today.⁴⁰ And religion has a voice and a role

34. 119 S. Ct. 2258 (1997).

35. 117 S. Ct. 2293 (1997).

36. *Glucksberg*, 119 S. Ct. at 2275.

37. See generally Mario M. Cuomo, *Some Thoughts on Judicial Independence*, 72 N.Y.U.L. REV. 298 (1997) (arguing for independent judiciary, one not so willing to become involved in political squabbles).

38. Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1 (1994); see also SUNSTEIN, *supra* note 30 (emphasizing need for practical considerations at every level of judicial and political decision making).

39. See, e.g., Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 46 (1997); Sunstein, *Homosexuality and the Constitution*, *supra* note 38.

40. Professor Wardle of Brigham Young University writes that there is an "apparent academic taboo against publicly voicing opposition to homosexual interests." See Wardle, *supra* note 22, at 7. In reference to single-gender marriage, he writes:

American law reviews have been publishing articles about same-sex marriage for more than twenty years. However, the legal literature on this topic has exploded during the past five or six years. Between January 1970 and December 1975, only eight pieces were published in American law reviews addressing same-sex marriage. By comparison, between January 1990 and December 1995, more than seventy-five articles, comments, or notes discussing same-sex marriage were published in law reviews and other legal periodicals in the United States

The record of recent law review publications has been dramatically one-sided in recent years. Between 1970 and 1975, the record was somewhat balanced; three of the eight law review publications about same-sex marriage (38%) criticized or opposed same-sex marriage. In contrast, between 1990 and June 1995, only one of seventy-two articles, notes, comments, or essays focusing primarily on same-sex marriage (only 1.4%) fully defended the heterosexuality requirement for marriage (though it did so on religious, rather than legal, grounds). Only two other law review pieces about same-sex marriage published during that period primarily criticized constitutional arguments for same-sex

to play within that arena too. It is a voice and a role which has worked within public policy for the betterment of children and families. Within this role has come the practice, the belief and the voice to say that marriage is unique, it is definitional in scope, and it is an institution that neither judicially nor legislatively should include single-gender couples.

I. A RELIGIOUS PERSPECTIVE

A. Historical Importance

Long before the Protestant Reformation of the Sixteenth Century, and a few hundred years after Christianity left the Palestine arena and entered the cities and the forests of Europe and Asia, the Christian church considered marriage important enough to society and religion to regulate.⁴¹ Peter Brown, Rollins Professor of History at Princeton University, writes in *The Rise of Western Christendom*, that:

In Francia and Germany, Boniface, [eighth century missionary in Germany], along with other representatives of a "correct" Christian order, had come face to face with local communities on the issue of marriage. They strove to apply canonical rules in the choice of marriage-partners derived, nominally, from Old Testament prohibitions on incest. These norms reflected, in reality, the marital strategies to which the inhabitants of the more populous, urbanized centers of the Mediterranean had long been accustomed. Boniface and the Frankish bishops refused to recognize marriages within a wide range of prohibited degrees.⁴²

The integration of religion into the secular world of marriage and indeed, any social activity, was a hallmark of the rise of Christianity. "Morality, philosophy and ritual were treated as being intimately connected: all were part of 'religion,' all were to be found in their true form in the Church."⁴³ This is very important and must be seen in relation to the separation of the secular and the religious so prevalent in modern-day society. Such

marriage, while at least as many others attacked marriage as an institution for same-sex, as well as heterosexual, couples. All of the other (sixty-nine) pieces advocated, supported, or were generally sympathetic to same-sex marriage.

Id.

41. Obviously, marriage is very important to civil society. See, e.g., *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (stating "[m]arriage, . . . create[s] the most important relation in life . . ." and is the foundation of family and society); *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (describing marriage as fundamental right); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (stating marriage is "noble"); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (stating "[m]arriage . . . [is] fundamental to the very existence and survival of the race"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (stating that "right to marry, establish a home and bring up children . . ." is central tenet to Due Process Clause).

42. PETER BROWN, *THE RISE OF WESTERN CHRISTENDOM* 268-69 (1996). For an analysis of the theology of sexual ethics proposed by Augustine of Hippo, (b. A.D. 354), a theology many think became decisive for all later teachings in the Christian West on issues of marriage, reproduction and sexuality, see St. Augustine, Bishop of Hippo, *St. Augustine on Marriage and Sexuality*, in 1 SELECTIONS FROM THE FATHERS OF THE CHURCH (Elizabeth Clark ed., 1996).

43. *Id.* at 32.

separation was foreign to the early church, and was rejected as a vestige of paganism. Indeed, in the Christian churches during the decades of growth following the fall of Rome, “[p]hilosophy was dependent upon revelation and morality was absorbed into *religion* . . . [b]oth commitment to truth and moral improvement were held to be binding on all believers, irrespective of their class and level of culture . . . [b]oth were inescapable consequences of having accepted the Law of God.”⁴⁴

Such commitment to integration of religion with secularity was not a denial of individual liberty, but rather a guarantee of status within a very democratic group.

Christianity emerged as an unusually democratic and potentially wide-reaching movement. It takes some leap of the modern imagination (saturated as it is by later centuries of Christian language) to understand the novelty of seeing every human being as subject to the same universal law of God and as equally capable of salvation through the triumphant or the studious conquest of sin, brought about through permanent and exclusive membership of a unique religious group.⁴⁵

Women were the earliest benefactors of the democratic status early Christianity provided. Rodney Stark, a professor of sociology and comparative religion at the University of Washington, wrote in *The Rise of Christianity*, that:

[T]he Christian woman enjoyed far greater marital security and equality than did her pagan neighbors. But there was another major marital aspect to the benefits women gained from being Christian. They were married at a substantially older age and had more choice about whom they married. Since . . . pagan women frequently were forced into prepubertal, consummated marriages, this was no small matter.⁴⁶

Acceptance of the status afforded by early Christianity also signaled acceptance of the role of the Church to define entry into marriage, the interaction between religion and individual liberty, and what is so sharply criticized today, the right of the Church to define what is appropriate to society's morals. Such a notion is captured in former vice president Walter F. Mondale's quote: “God doesn't belong in politics.”⁴⁷ But religion throughout history has always played a role in politics, indeed, it has seen itself as having a role within politics as offering a constant critique of the public fo-

44. *Id.*

45. *Id.* at 26.

46. RODNEY STARK, *THE RISE OF CHRISTIANITY* 105 (1996). Professor Robert W. Shaffern notes that pagan households varied widely, but Christianity “regularized the household through its precepts for marriage, childbearing, sexual mores and family responsibilities, thereby making the nuclear family normative.” See Robert W. Shaffern, *Christianity and the Rise of the Nuclear Family*, *AMERICA*, May 7, 1994, at 13.

47. Kevin P. Quinn, Book Review, *AMERICA*, Nov. 27, 1993, at 19 (reviewing STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993) [hereinafter *THE CULTURE OF DISBELIEF*]).

rum. This is a very important point. In our dash to preserve the freedom of religion in the First Amendment guarantee, we prevent the expression of any religion.

Such a notion that religion and politics should be separate is, of course, part of the United States Constitution as defined within the First Amendment: "Congress shall make no law respecting an establishment of religion."⁴⁸ Yet, the issue invading the application of the Establishment Clause is whether it should be read as a rejection of a religious perspective within politics, that religion is not allowed to play any role in political debate. Some think yes;⁴⁹ others think religious morality, theology and action can and should be brought to bear in any political dialogue.⁵⁰ Increasingly, the argument is made that religion has been denied its voice through the First Amendment, a voice that is needed to critique a secular culture with very distinctive characteristics.

For Stephen L. Carter, Professor of Law at Yale Law School and author of *The Culture of Disbelief*, the Establishment Clause should not be read as isolating the secular from the religious, "an approach that, perhaps inevitably, carries us down the road toward a new establishment, the establishment of religion as a hobby, trivial and unimportant for serious people, not to be mentioned in serious discourse."⁵¹ Such a notion, that religion is folly is dramatized in a description of a classroom scene from a law school in the Southwest:

I teach in a law school in which approximately 10% of the students are fundamentalists, many of whom tell me they are afraid to express their beliefs in class, because of their fears of peer disapproval. This disapproval is not the scorn of "politically correct" leftists, who are not exactly dominant among the student body at the University of Tulsa, but the clearly classist disdain of apolitical, economically privileged students toward members of religions identified as "hicky."⁵²

The issue facing the Establishment Clause today in secular American culture is, quite frankly, not whether it offers protection to religious perspectives. The Free Exercise Clause contained within the First Amendment does this. The real issue is whether there can be an accommodation of religion in the lives of so many Americans.⁵³ This accommodation is made particularly difficult because of the plurality of religions in America, and increasingly, the

48. U.S. CONST. amend. I; see also *THE CULTURE OF DISBELIEF*, *supra* note 47.

49. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* 1 (1971).

50. See, e.g., MICHAEL J. PERRY, *LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS* (1991); MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW* (1988).

51. *THE CULTURE OF DISBELIEF*, *supra* note 47, at 115. The fact that religion often relies upon revelation and not on common human experiences, is often the reason for intellectual intolerance. See, e.g., KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* 205-06 (1988).

52. Linda J. Lacey, *Mimicking the Words, But Missing the Message: The Misuse of Cultural Feminist Themes in Religion and Family Law Jurisprudence*, 35 B.C. L. REV. 1, 15-16 (1993).

53. See generally Thomas Morawetz, Book Review, WASH. POST, Oct. 3, 1993, at 8 (reviewing *THE CULTURE OF DISBELIEF*, *supra* note 47).

bias against religious perspective evidenced by the classroom scene just recounted. So too, when the courts, answering to no election referendum, are able to radically alter established definitions of such family structures as marriage, the courts deny religion a voice and thus protection under the Establishment Clause. Denial of a voice in fundamental public policy separates religion from public discourse and fosters the isolation which imparts a sense of folly to any religious perspective.

Unlike mainstream America, “[t]he legal culture that guards the public square still seems most comfortable thinking of religion as a hobby, something done in privacy, something that mature, public-spirited adults do not use as the basis for politics.”⁵⁴ Religion is dismissed as non-authoritative, either because its revelatory documents are irrelevant to the times, or because the religious tradition is a product of ignorance or an underinclusive natural law. Such an approach is evident in the majority opinion of *Baehr v. Lewin*,⁵⁵ the 1993 Hawaiian decision concerning single-gender marriage. There the court summarily dismisses any probative validity of restrictions on single-gender marriage as existent within religious traditions for centuries. The court decides in an instant that times have changed and all that has gone before is irrelevant. The Hawaii Supreme Court wrote, “we do not believe that trial judges are the ultimate authorities on the subject of Divine Will, and, as *Loving* amply demonstrates, constitutional law may mandate, like it or not, that customs change with an evolving social order.”⁵⁶

When the Hawaii Supreme Court decided that the ban against single-gender marriage would fall unless the trial court on remand could produce a compelling state interest, many persons, some certainly motivated by deeply felt religious concerns, reacted quickly. There certainly seemed to be, across a very broad range of society, and motivated in part out of religious principle, a resistance to the *Baehr* decision. For instance, the legislature in Hawaii acted instantaneously to make explicit the statutory ban on single-gender marriages,⁵⁷ and created a Commission on Sexual Orientation and the Law to examine the issue.⁵⁸ Likewise, at least twenty-two states have enacted statutes refusing to recognize single-gender marriage contracted in another

54. THE CULTURE OF DISBELIEF, *supra* note 47, at 54.

55. 852 P.2d 44 (Haw.), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993).

56. *Baehr*, 852 P.2d at 63. The court refers to *Loving v. Virginia*, 147 S.E.2d 78 (Va. Ct. App. 1966), in which the Supreme Court of the United States struck down state statutes which refused to allow Caucasian persons to marry persons of another race. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

57. See 1994 Haw. Sess. Laws 217 § 3 (codified as amended HAW. REV. STAT. §572-1) (defining marriage as between a man and a woman, which reads as follows: “Sec. 572-1. Requisites of a valid marriage contract. In order to make valid the marriage contract, *which shall be only between a man and a woman . . .*”) (emphasis supplied). Since enactment of the statute, both the Hawaii senate and house have called for a constitutional amendment to ban single-gender marriage. See *In Brief Hawaii*, L.A. TIMES, Feb. 7, 1997, at A23.

58. State of Hawaii, Act of June 22, 1994, No. 217, § 6, *reprinted in* 20 FAM. L. REP. 2013 (1994). This initial commission was disbanded and another appointed, see Hawaii S.B. 888, sec. 3, 18th Leg., 1995 sess. (signed by governor Mar. 28, 1995); this commission voted to allow single-gender marriage by 5:2.

state; nineteen states have legislation pending, and six states have voted against such legislation. In the three remaining states, either the legislature has not introduced legislation or the legislature is not in session.⁵⁹ The Georgia statute is illustrative:

(b) No marriage between persons of the same sex shall be recognized as entitled to the benefits of marriage. Any marriage entered into by persons of the same sex pursuant to a marriage license issued by another state or foreign jurisdiction or otherwise shall be void in this state. Any contractual rights granted by virtue of such license shall be unenforceable in the courts of this state and the courts of this state shall have no jurisdiction whatsoever under any circumstances to grant a divorce or separate maintenance with respect to such marriage or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such marriage.⁶⁰

Congress passed a similar statute, the Defense of Marriage Act, denying federal marriage benefits to persons entering single-gender marriage.⁶¹ And, as was true with judicial decisions regarding abortion and assisted suicide, debate has flourished,⁶² but unlike with abortion and assisted suicide, there has been no violence associated with the legislative process.

Debate and argument are appropriate, even in this country. But, as Professor Carter suggests, and history has ratified, religion has a role to play, and

59. See Lisa Keen, *Marriage Fight Takes Odd Turn*, WASH. BLADE, Apr. 18, 1997, at 1, 26.

60. GA. CODE ANN. § 19-3-3.1 (1996).

61. See Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended at 1 U.S.C.A. § 7; 28 U.S.C.A. § 1738(C) (West Supp. 1997)). The Act provides:

Sec. 2. POWERS RESERVED TO THE STATES. No State, territory, possession of the United States, or Indian Tribe, shall be required to give to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Sec. 3. DEFINITION OF MARRIAGE. In determining the meaning of any Act of Congress, or any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

Id.; see generally, Schmitt, *Panel Backs Bill Against Official Gay Marriages*, N.Y. TIMES, June 13, 1996, at A14.

62. See, e.g., Jennifer Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745 (1995); Richard F. Duncan, *Homosexual Marriage and the Myth of Tolerance: Is Cardinal O'Connor a "Homophobe"?*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 587 (1996); Martin D. Dupuis, *The Impact of Culture, Society, and History on the Legal Process: An Analysis of the Legal Status of Same-Sex Relationships in the United States and Denmark*, 9 IN. J.L. & FAM. 86 (1995); Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567 (1994); Thomas M. Keane, Note, *Aloha, Marriage? Constitutional and Choice of Law Arguments for Recognition of Same-Sex Marriages*, 47 STAN. L. REV. 499 (1995); Note, *In Sickness and In Health, in Hawaii and Where Else?: Conflict of Laws and Recognition of Same-Sex Marriages*, 109 HARV. L. REV. 2038 (1996); Note, *Marriage, Equal Protection, and the New Judicial Federalism: A View From the States*, 14 YALE L. & POL'Y REV. 237 (1996).

a balance between inculcation of religious perspective and fear of religious domination of politics must be achieved.⁶³ That balance is subverted by a judiciary acting beyond the scope of constitutional review.

If, as most Americans believe, there is a God external to the human mind, and if that God has tried to communicate with us, whether through revelation or some other path, then the human task is surely to discover the contents of that communication, not to surrender that possibility in return for the freedom to call one's own politics God.⁶⁴

There is a separate entity called God. Neither politicians nor courts may assume the role of purveyor of revelation: there must be an opportunity for religion to provide a voice. However, when deeply held religious beliefs are dismissed cavalierly it is all too often called separation of church and state; such a practice dismisses the role of religion and lessens the importance of debate and argument because it subsumes God within any political objective.⁶⁵ Those who have spoken of God for centuries deserve an opportunity to interact in something so important as the definition of marriage.

Professor Carter offers a specific example of the importance of religion, as a separate entity in any political debate, both as an external moral critic and an alternative source of values and meaning.⁶⁶ His example concerns civil rights and this is of particular importance to any debate over *Baehr* and single-gender marriage. More than any other judicial decision, *Baehr* relies upon the 1967 decision of *Loving v. Virginia*.⁶⁷ In that civil rights case, a "Negro" woman and white man were married in the District of Columbia and then returned to live in Virginia in violation of Virginia's miscegenation statute.⁶⁸ The couple was convicted of a law which banned interracial marriages, the trial judge basing his decision in part on the fact that:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.⁶⁹

At the time of the decision, sixteen states still banned interracial marriages and all of the courts of Virginia upheld the conviction of the couple, stating that the statutes were constitutional.⁷⁰ The couple then challenged

63. See Joan E. Schaffner, *The Essence of Marriage*, 66 GEO. WASH. L. REV. 195 (1997); Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. Rev. 967 (1997).

64. THE CULTURE OF DISBELIEF, *supra* note 47, at 73.

65. The United States Supreme Court recently heard arguments in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997). The issue was whether the 1993 Religious Freedom Restoration Act exceeds Congress' power under section 5 of the Fourteenth Amendment as a usurpation of state laws and wrongly shifts the church-state balance in favor of churches. See *id.* at 2160.

66. See THE CULTURE OF DISBELIEF, *supra* note 47, at 273.

67. 388 U.S. 1 (1967).

68. See *id.* at 2-3.

69. *Id.* at 3 (quoting trial judge from Circuit Court of Caroline County, Virginia).

70. See *id.* at 6.

the statute as a denial of equal protection and due process of laws before the United States Supreme Court.⁷¹ The Court quickly overturned the statutes, holding that there was no legitimate overriding purpose [of the statutes] independent of invidious discrimination.⁷² The civil rights of the couple were protected through equal protection and due process of laws, rights now found within American society as a whole. Times had changed.

The decision in Hawaii relies heavily on this change in societal norms. The opinion in *Baehr* begins with the definition of civil rights as synonymous with civil liberties,⁷³ and recites instances when the Hawaii Supreme Court has protected the civil liberties of state citizens, especially against gender bias. It is because the state officials refuse to provide the applicants with a license to marry on the basis of their sex, "that gives rise to the question whether the applicant couples have been denied the equal protection of the laws"⁷⁴ Thus, as in *Loving*, *Baehr* is about the civil rights of litigants. However, while the Hawaii Supreme Court arrogantly dismisses the religious dicta of the Virginia trial court, the United States Supreme Court never addresses the religious dicta of the trial judge recounted in *Loving*. It does not need to do so. The historical lesson of the civil rights movement is there for the record; this is the mid-sixties. The court's opinion rejects White Supremacy, deplors racial classifications, and dignifies the orderly pursuit of happiness. These are common elements within the civil-rights movement of the sixties. And no one can contest the fact that the civil-rights movement was inspired and in point of fact, led, by a man with religious perspective, Martin Luther King. Indeed, religious hymns, church basements and marching clergy are the hallmarks of the mid-sixties civil rights movement in America.

Thus, *Loving* was certainly within the mainstream of American social consciousness and it is indisputable that religion was very much involved with that struggle. Professor Carter, an African-American, notes: "The movement's public appeals were openly and frankly religious, and many of the nation's political leaders joined in these appeals, and even echoed them in supporting legislation."⁷⁵ It should be of no surprise that religion had a decisive role to play in the Supreme Court's protection of the civil rights of the *Loving* couple. Certainly religion did not bring about the judicial victory, but as Professor Carter states so often: "The religions, for all their arrogance and sinfulness, can often provide approaches to the consideration of ultimate questions that a world yet steeped in materialistic ideologies desperately requires."⁷⁶ And yes, "it is true that powerful religious voices were raised in support of racial oppression as well. But . . . no religion *always* challenges the state's imposed meanings, and few do it very often . . . and it is more likely

71. *See id.* at 2.

72. *See id.* at 10-12.

73. *See Baehr*, 852 P.2d at 60.

74. *Id.* at 60.

75. THE CULTURE OF DISBELIEF, *supra* note 47, at 227.

76. *Id.* at 273.

than other competing sources of authority to turn up alternative meanings precisely because of religions' focus on the ultimate."⁷⁷

Baehr is different from *Loving*. The Hawaii decision does not operate within the mainstream of social consciousness, nor does it benefit from a religious movement which brought the religious fervor, oratory and political nonviolence of Dr. Martin Luther King. The Hawaii decision's quick dismissal of Divine Will is radically different from what can be said of civil rights promoted by *Loving*. There is thus a crucial difference between the civil rights struggle of *Loving* and the gender inequality of *Baehr*. For *Baehr* to rely upon *Loving* as a means to avoid *Singer v. Hara*⁷⁸ and the definition of marriage as a "union of one man and one woman[.]" is too great a leap. *Loving* could change the definition of marriage to include two people of different races because the social consciousness of America, to include religion, was present, ready, and advocating change.⁷⁹ For the court in *Baehr* to hold that the definition of marriage can now be changed to include persons of single gender, overlooks the obvious, neither the social conscious nor the support of religion is present, ready, and advocating change.

Religion is important to people, both to people who believe in its precepts, and to people who are served by its schools, hospitals, shelters and other social action ministries. It is also important because it supplies a meaning to countless social issues based on revelation and history. So too, it is important as an external moral critic, and as a source of values and meaning. It also offers a tradition, a history, a process tempered by history. It is impossible to ignore the fact that "[c]ontemporary American legal policies concerning the family are rooted in historic patriarchal structures and reflect notions of normality and morality developed centuries ago in the ecclesiastic as well as the common law courts."⁸⁰ A system and a community, a sense of what is right and wrong and a spill-over of religion into secular society, are facts of life.⁸¹ This nexus is not to be surrendered easily, nor should it be; it

77. *Id.* at 272-73.

78. 522 P.2d 1187, 1191, *rev. denied*, 84 Wash. 2d 1008 (1974).

79. The Ninth Circuit Court of Appeals found that a state ban on assisted suicide violated a liberty interest guaranteed by the Due Process Clause, the court noted that changed social attitudes incorporated into the Constitution's equal protection guarantees made *Loving* possible, for certainly marriage between persons of different races would have been condemned at the time the Constitution was adopted. See *Compassion in Dying v. Washington*, 79 F.3d 790, 806, *cert. granted sub nom. Washington v. Glucksberg*, 117 S. Ct. 37 (1997); see also *Loving*, 388 U.S. at 1.

80. Martha Albertson Fineman, *Our Sacred Institution: The Ideal of the Family in American Law and Society*, 1993 UTAH L. REV. 387, 389. For an example of the inclusion of biblical concepts within family structure, see Herbert W. Titus, *Defining Marriage and the Family*, 3 WM. & MARY BILL RTS. J. 327 (1994). But see Lacey, *supra* note 52, at 2 ("An increased emphasis on pluralism and secularism has virtually removed religious language from dialogue about legal issues.")

81. Sometimes, the most religious of symbols can be absorbed into the secular culture and lose the unique religious meaning intended. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 686 (1984) (allowing city's inclusion of nativity scene in its annual Christmas display, finding that city's inclusion of creche was secular, showing origins of holiday). But see American Civil Liber-

provides a moral check on society. "People to whom religion truly matters, people who believe they have found the answers to the ultimate questions, or are very close to finding them, will often respond to incentives other than those that motivate more secularized citizens."⁸² Because of this, the opinions of religiously motivated people are significant, and while not always free from bias, they "attack the sterility of liberal thought and its emphasis on autonomy."⁸³ Their accommodation and how this is best accomplished is the issue.

No matter the outcome of *Baehr*, the compelling state reason required by the court should include a religious perspective. That religious perspective offered by the Roman Catholic Church is both national and international, subjective and objective, historical and on-going. What follows is a synopsis of that perspective with an attentiveness to its applicability to finding a compelling state interest in defining marriage as a union of mixed gender.

B. Pope John Paul II

Pope John Paul II is no stranger to the theme of family life. In his *Letter to Families for the International Year of the Family*,⁸⁴ he writes that "[t]he family originates in a marital communion described by the Second Vatican Council as a 'covenant,' in which man and woman 'give themselves to each other and accept each other.'"⁸⁵ This family "arises whenever there comes into being the conjugal covenant of marriage, which opens the spouses to a lasting communion of love and life, and it is brought to completion in a full and specific way with the procreation of children."⁸⁶ Consistently, he draws upon the words of the Book of Genesis, the start of the Hebrew scriptures, and creates the basis for the definition of marriage as the union of one man and one woman. Attentive to the physical difference as proper to marriage, he writes:

In marriage man and woman are so firmly united as to become—to use the words of the Book of Genesis—"one flesh" (Gn. 2:24).

ties *Union of New Jersey v. Schundler*, 104 F.3d 1435, 1450-51 (3d Cir.), cert. denied, 117 S. Ct. 2434 (1997) (finding that city's display of creche and menorah in front of city hall was not rendered secular by festooning it with four-foot plastic figures of Santa Claus and Frosty the Snowman).

82. THE CULTURE OF DISBELIEF, *supra* note 47, at 275-76.

83. Lacey, *supra* note 52, at 7; see also David M. Smolin, *Regulating Religious and Cultural Conflict in Postmodern America: A Response to Professor Perry*, 76 IOWA L. REV. 1067 (1991); John W. Whitehead, *Civil Disobedience and Operation Rescue: A Historical and Theoretical Analysis*, 48 WASH. & LEE L. REV. 77 (1991); John Whitehead & John Conland, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications*, 10 TEX. TECH. L. REV. 1 (1978).

84. John Paul II, *Letter to Families for the International Year of the Family*, ORIGINS, Mar. 3, 1994, at 638 [hereinafter John Paul II, *Letters to Families*].

85. *Id.* at 641 (quoting John Paul II, *Gaudium et spes*, in VATICAN COUNCIL II: THE CONCILIAL AND POST CONCILIAL DOCUMENTS 903 (Austin Flannery ed., 1975) [hereinafter John Paul II, *Gaudium et spes*]).

86. John Paul II, *Letters to Families*, *supra* note 84, at 641.

Male and female in their physical constitution, the two human subjects, even though physically different, share equally in the capacity to live “in truth and love.” This capacity, characteristic of the human being as person, has at the same time both a spiritual and bodily dimension. It is also through the body that man and woman are predisposed to form a communion of persons in marriage. When they are united by the conjugal covenant in such a way as to become “one flesh” (Gn. 2:24), their union ought to take place “in truth and love,” and thus express the maturity proper to persons created in the image and likeness of God.⁸⁷

Surely the physical characteristics of man and woman and the biological act of begetting are intrinsically important to the definition of family, the communion of marriage, and the interaction between God and humankind. It is possible to see in this theology the fact that all persons, “including those born with sicknesses or disabilities,”⁸⁸ even “absolutely everyone, including the chronically ill and the disabled”⁸⁹ as being a part of the genealogy of God’s family of persons. The authentic exercise of begetting within the context of family must, perforce, take place between a man and a woman united within a communion generated by the covenant of marriage.⁹⁰

Covenant is an essential ingredient of marriage and thus family. “Marriage, which undergirds the institution of the family is constituted by the covenant whereby ‘a man and a woman establish between themselves a partnership of their whole life,’ and which ‘of its own very nature is ordered to the well-being of the spouses and to the procreation and upbringing of children’”⁹¹ And then of particular importance, the Pope writes: “Only such a union can be recognized and ratified as a ‘marriage’ in society. Other interpersonal unions which do not fulfill the above conditions cannot be recognized, despite certain growing trends which represent a serious threat to the future of the family and of society itself.”⁹²

The Pope thus draws upon the icon of man and woman destined from the first book of revelation as partners in procreation, mutual commitment, and an ordered pair for procreation and rearing of children. The fact that a man and woman would be unable to have children does not separate their conjugal covenant from the icon of Genesis and the specific definition of married life ordered by God. Since a single-gender couple would be unable to form such a union, single-gender unions are beyond the definition of marriage.

The Pope continually refers to the “great mystery of God.”⁹³

87. *Id.* at 642.

88. *Id.*

89. *Id.* at 643.

90. *See id.*

91. *Id.* at 651 (quoting Catechism of the Catholic Church, 1601; Code of Canon Law, Canon 1055.1).

92. *Id.*

93. *Id.* at 653.

This mystery "is most immediately revealed as the bride of Christ in the domestic church and its experience of love: conjugal love, paternal and maternal love, fraternal love, the love of a community of persons and of generations."⁹⁴ Because conjugal love must be expressed within the capacity of a man and woman forming a covenant in the image of Adam and Eve, any sexual union of persons not conforming to this definition are outside the grasp of the great mystery of God. This definition has been a historical reality.

Robert W. Shaffern, a historian of medieval Christianity, writes of the changes brought about by Christianity:

Sexual mores changed along with the evangelization of Europe. St. Paul held men and women to chastity before marriage, and fidelity afterward. Although the Christian Middle Ages were by no means puritanical, the more bizarre sexual practices of the pagan era diminished. The diverse households of pagan Rome, Ireland and Germany meant that many people had multiple sexual partners. The economy and society of the Roman Empire was built upon the backs of chattel slaves, whose bodies were often made to serve the sexual fancies of their masters. Pagan attitudes towards deviance were ambivalent. Incestuous marriages were common among those eager to maintain family properties. Homosexuality and pederasty had few critics in imperial Rome. Christianity, in contrast, insisted that the only licit sexual relationships were between husband and wife who intended to have children.⁹⁵

Responding in part to the changing family structure and to the concomitant sexual attitude, the Pope writes: "How far removed are some modern ideas from the profound understanding of masculinity and femininity found in divine revelation."⁹⁶ By this statement, he of course incorporates modern views of sexuality outside of the context of sacramental marriage. Sexuality outside of the spiritual great mystery of God leads to a separation of spirit and body, and this leads to:

[A] growing tendency to consider the human body, not in accordance with the categories of its specific likeness to God, but rather on the basis of its similarity to all the other bodies present in the world of nature, bodies which man uses as raw material in his efforts to produce goods for consumption.⁹⁷

Conjugal love is of a divine nature, it allows men and women to partake in God's mystery, it means far more than sexual activity. The Pope concludes:

The deep-seated roots of the great mystery, the sacrament of love and life which began with creation and redemption and which has Christ the bridegroom as its ultimate surety, have been lost in the

94. *Id.* at 654.

95. Robert W. Shaffern, *Christianity and the Rise of the Nuclear Family*, AMERICA, May 13, 1994, at 13, 14.

96. John Paul II, *Letters to Families*, *supra* note 84, at 655.

97. *Id.*

modern way of looking at things. The great mystery is threatened in us and all around us.⁹⁸

His conclusion confirms the unique status of mixed gender marriage.

While the letter written to families in 1994 contains many of the elements particular to a Christian understanding of family, the previous year, 1993, Pope John Paul II published an encyclical, *Veritatis Splendor*,⁹⁹ which sought to emphasize the benefits associated with the interaction between God and the human condition. He laments the loss of God and the splendor of knowing the interaction between human beings and God—the loss of soul. In his encyclical, the Pope sought to answer the obscure riddles which, as in the past, profoundly disturb the human heart:

What is man? What is the meaning and purpose of our life? What is good and what is sin? What origin and purpose do suffering have? What is the way to attain true happiness? What are death, judgement and retribution after death? Last, what is that final, unutterable mystery which embraces our lives and from which we take our origin and toward which we tend?¹⁰⁰

The theme is very similar to that of the great mystery defined earlier. That is, the necessity of Christ as the model, the unity of body and soul, the fact that all actions must reflect those of God as revealed in the natural law. This all comes together in the following passage:

At this point the true meaning of the natural law can be understood: It refers to man's proper and primordial nature, the "nature of the human person," which is the person himself in the unity of soul and body, in the unity of his spiritual and biological inclinations and of all the other specific characteristics necessary for the pursuit of his end. "The natural moral law expresses and lays down the purposes, rights and duties which are based upon the bodily and spiritual nature of the human person. Therefore this law cannot be thought of as simply a set of norms on the biological level; rather it must be defined as the rational order whereby man is called by the Creator to direct and regulate his life and actions and in particular to make use of his own body."¹⁰¹

Thus, freedom and nature must be bound together; each is intimately linked to the other.

Faith is a decision involving one's whole existence. It is an encounter, a dialogue, a communion of love and of life between the believer and Jesus Christ It entails an act of trusting

98. *Id.*

99. John Paul II, *Veritatis Splendor*, ORIGINS, Oct. 14, 1993, at 297 [hereinafter John Paul II, *Veritatis Splendor*].

100. *Id.* at 307 (quoting *Declaration on the Relationship of the Church to the Non-Christian Religions [Nostra Aetate]*, in VATICAN COUNCIL II: THE CONCILIAR AND POST CONCILIAR DOCUMENTS 1 (Austin Flannery ed., 1975)).

101. *Id.* at 313 (quoting from Congregation for the Doctrine of the Faith, *Donum Vitae, Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation*, Feb. 22, 1987, Intro. at 3 reprinted in AAS 80, 74 (1988)). Cf. Paul VI, *Humanae Vitae*, July 25, 1968, at 10 reprinted in AAS 60, 487-88 (1968).

abandonment to Christ, which enables us to live as he lived . . . in profound love of God and of our brothers and sisters.¹⁰²

But this dialogue has parameters, love has context, and the believer and Jesus Christ has a nexus. This parameter, context and nexus is found within scriptural models and these cannot be altered to conform to changing norms of gender. The Pope consistently asserts that the established scriptural norms offer the unique and consummate definition of marriage.

While the two papal documents briefly analyzed, neither capture all of the writings of John Paul II, nor exhaustively discuss all of the precepts which could be made applicable to single-gender marriage, the Pope did speak specifically to the issue on February 20, 1994. While speaking to a gathering of persons in St. Peter's Square, the Pope said that the European Parliament's resolution that homosexuals should enjoy the same rights regarding marriage and the adoption of children seeks to legitimize a moral disorder.¹⁰³ The Pope was very specific in denouncing all forms of discrimination against homosexuals, but said that the action by the European Parliament served to give legal approval to homosexual activity, specifically, marriage. Such a balance, between respect of the homosexual person, but condemnation of the activity, is found in *Veritatis Splendor*, the previously noted encyclical. There, the Pope writes:

The church is in no way the author or the arbiter of this norm. In obedience to the truth which is Christ, whose image is reflected in the nature and dignity of the human person, the church interprets the moral norm and proposes it to all people without concealing its demands of radicalness and perfection.¹⁰⁴

Thus, not only because all sexual activity outside of marriage is beyond the moral norm, but also because marriage between persons of a single gender is beyond the definition of marriage, is single-gender marriage prohibited.

C. *Second Vatican Council*

The Second Vatican Council ended on December 8, 1965. When it began in 1962, having been called by Pope John XXIII, it was the largest gathering of bishops in the Church's history. It was also the most diverse gathering, assembling 2900 pastors, including approximately 100 who were black, and those present represented every continent in the world.¹⁰⁵ At the Council many documents were approved and some paid particular attention to family, marriage and the relationship of the Gospel.

102. *Id.* at 323.

103. See Trevor Huggins, *Pope Slams "Morally Unacceptable" Euro Vote for Homosexuality*, AGENCE FRANCE PRESSE, Feb. 20, 1994, at 3. See generally PETER TATCHELL, *EUROPE IN THE PINK: LESBIAN AND GAY EQUALITY IN THE NEW EUROPE* (1992); John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049 (1994); Paul Vlaardingerbroek, *Marriage, Divorce, and Living Arrangements in the Netherlands*, 29 FAM. L.Q. 635 (1995) (discussing the subject of homosexuality and living arrangements in Europe).

104. John Paul II, *Veritatis Splendor*, *supra* note 99, at 325.

105. See VATICAN II REVISITED: BY THOSE WHO WERE THERE 342 (Alberic Stacpoole OSB ed., 1986).

In a document mentioned often by Pope John Paul II and many American political leaders, the Pastoral Constitution on the Church in the Modern World [*Gaudium et spes*], promulgated at the Council, it is written that, “[t]he family is the foundation of society. In it the various generations come together and help one another to grow wiser and to harmonize personal rights with the other requirements of social life.”¹⁰⁶ While general, the Council continues to objectify specific practices which it views as destructive of family life: “[the] happy picture of the dignity of [married] partnerships is not reflected everywhere, but is overshadowed by polygamy, the plague of divorce, so-called free love, and similar blemishes; furthermore, married love is too often dishonored by selfishness, hedonism, and unlawful contraceptive practices.”¹⁰⁷ The document thus establishes a link with the nature of conjugal love and its characterization within scripture and the destructive tendencies within couples and society when it departs from this model. The implication is that conjugal love offers a connection with the soul of men and women with God, and when this connection is violated through the practices named, disharmony with both God and with each other results.

The Council documents define marriage in such a way that it is linked expressly with divine law and derives particular responsibilities and benefits because of this. The definition provided is quite important:

The intimate partnership of life and the love which constitutes the married state has been established by the creator and endowed by him with its own proper laws: it is rooted in the contract of its partners, that is, in their irrevocable personal consent. It is an institution confirmed by the divine law and receiving its stability, even in the eyes of society, from the human act by which the partners mutually surrender themselves to each other; for the good of the partners, of the children, and of society this sacred bond no longer depends on human decision alone. For God himself is author of marriage and has endowed it with various benefits and with various ends in view: all these have a very important bearing on the continuation of the human race, on the personal development and eternal destiny of every member of the family, on the dignity, stability, peace, and prosperity of the family and of the whole human race.¹⁰⁸

This definition of marriage, involving as it does, the unique involvement of God, the mutual consent of two persons of the opposite sex, and responsibilities and benefits traditional to the married state, was normative within statutory and judicial understandings until *Baehr v. Lewin*.¹⁰⁹ For instance, in rejecting a petition by two men—a single-gender union—which would have required the clerk of the Superior Court of the District of Columbia to issue them a marriage license, the Superior Court of the District of Columbia

106. John Paul II, *Gadium et spes*, *supra* note 85, at 956.

107. *Id.* at 949.

108. *Id.* at 950.

109. 852 P.2d 44 (1993).

relied upon the historical definition of marriage.¹¹⁰ Quoting from the opinion of the District of Columbia Court of Appeals, the court wrote:

[A]ll definitional sources for “marriage”—the legislative history of the Marriage and Divorce Act, D.C.Law 1-107, 1977 D.C.Stat. 114; the various references to gender in relevant provisions of the District of Columbia Code; the common law of the District of Columbia; decisions of appellate courts in other states; references to marriage in the Bible; and dictionary definitions of “marriage”—show that marriage inherently requires one male and one female participant.¹¹¹

While concurring with the decision to deny the petition of the two men to be issued a marriage license,¹¹² Associate Judge Ferren acknowledged in a separate opinion the crucial definitional role relating to marriage:

[A]lthough the [E]qual [P]rotection [C]lause may not permit the state to discriminate against homosexuals in some areas, such as employment, any constitutional concern evaporates when marriage becomes the issue simply because marriage is different: It is conceptually limited by its traditional definition to opposite-sex couples—a limitation that inherently, therefore, cannot reflect discrimination against homosexual couples in fact or purpose.¹¹³

Many of the definitional elements embraced by the papal documents are found within the Second Vatican Council documents. For instance, the elements of commitment and sexuality, and then marriage as a divine covenant between Christ and the church, are reflected in the following. First, as to commitment and sexuality:

Married love is an eminently human love because it is an affection between two persons rooted in the will and it embraces the good of the whole person; it can enrich the sentiments of the spirit and their physical expression with a unique dignity and ennoble them as the special elements and signs of the friendship proper to marriage.¹¹⁴

110. See *Dean v. District of Columbia*, 653 A.2d 307 (D.C. App. 1995). For a discussion of the statutory definition, see *id.* at 312-15. The Hawaii Supreme Court held that reliance upon the definition of marriage as a union of one man and one woman to bar same-sex marriage, was “circular and unpersuasive.” *Baehr*, 852 P.2d at 61.

111. *Dean*, 653 A.2d at 309-10.

112. See *id.* The concurring opinion by Judge Ferren would be used extensively in the conclusions of law of the Circuit Court of Hawaii when it held, on remand, that the state had failed to sustain its burden to overcome the presumption that the Hawaii statute denying persons of single gender the right to marry is unconstitutional by demonstrating or proving that the statute furthers compelling state interests. See *Baehr v. Miiike*, CIV. No. 91-1394, 1996 WL 694235 at *20, 21 (Haw. Cir. Ct. Dec. 3, 1996); see also *infra* text accompanying notes 281-82.

113. *Dean*, 653 A.2d at 360 (Ferren, J., concurring). Relying on the analysis of *Baehr* and its use of *Loving* to conclude that the definition of marriage has changed, see *Baehr*, 852 P.2d at 61, 70, and that a trial is required to determine if same-sex couples comprise a “suspect” class, Judge Ferren would remand the case for trial on the equal protection issue. See *Dean*, 653 A.2d at 309. Likewise, *Baehr* decided that the state statute violated the Equal Protection Clause of the Hawaii state constitution. See *Baehr*, 852 P.2d at 60.

114. John Paul II, *Gaudium et spes*, *supra* note 85, at 952.

So too, sexuality within marriage is proper and a reflection of the love of God.

Married love is uniquely expressed and perfected by the exercise of the acts proper to marriage. Hence the acts in marriage by which the intimate and chaste union of the spouses takes place are noble and honorable; the truly human performance of these acts fosters the self-giving they signify and enriches the spouses in joy and gratitude.¹¹⁵

Second, marriage is a sign of the divine covenant between Christ and the church.

The Christian family, which springs from marriage as a reflection of the loving covenant uniting Christ with the Church, and as a participation in that covenant, will manifest to all men the Savior's living presence in the world, and the genuine nature of the Church. This the family will do by the mutual love of the spouses, by their generous fruitfulness, their solidarity and faithfulness, and by the loving way in which all members of the family work together.¹¹⁶

The elements defining marriage contained within the Council documents, as well as those within the papal writings, are enjoined on the bishops for transmission, not just to the members of the Roman Catholic Church. The Council makes clear the bishops have a responsibility to "maintain close relations with the society in which [the Church] lives [T]he bishops should make it their special care to approach men and to initiate and promote dialogue with them."¹¹⁷ Then,

[I]et them explain also how high a value, according to the doctrine of the Church, should be placed on the human person, on his liberty and bodily life; how highly we should value the family, its unity and stability, the procreation and education of children, human society with its laws and professions, its labor and leisure, its arts and technical inventions, its poverty and abundance.¹¹⁸

Within the United States, the National Conference of Catholic Bishops and the United States Catholic Conference assist in the teaching and interaction responsibilities of the bishops.¹¹⁹ They have commented specifically and generally on the issue of single-gender marriage.

D. American Catholic Bishops

On July 24, 1996, the American Catholic bishops reiterated the definition of marriage in a statement opposing the legalization of marriage be-

115. *Id.*

116. *Id.* at 951-52.

117. *Vatican II, Christus Dominus*, in VATICAN COUNCIL II: THE CONCILIAL AND POST CONCILIAL DOCUMENTS 570 (Austin Flannery ed., 1975).

118. *Id.*

119. A specific example of the teaching responsibility of the bishops in connection with families is the pamphlet published by the Bishops Committee on Marriage and Family. See NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *FAMILIES AT THE CENTER: A HANDBOOK FOR PARISH MINISTRY WITH A FAMILY PERSPECTIVE* 1 (1990).

tween persons of the same sex. They wrote "that marriage is a faithful, exclusive and lifelong union between one man and one woman joined as husband and wife in an intimate partnership of life and love. This union was established by God with its own proper laws."¹²⁰ Because of this definitional obstacle to single-gender unions, the opposition of the bishops to single-gender marriage, "is not an instance of unjust discrimination or animosity towards homosexual persons."¹²¹ Indeed, the American bishops, as does every major court decision to date, admonishes against discrimination against homosexuals.¹²² For instance: "[T]he Catholic Church teaches emphatically that individuals and society must respect the basic human dignity of all persons, including those with a homosexual orientation. Homosexual persons have a right to and deserve our respect, compassion, understanding and defense against bigotry, attacks and abuse."¹²³

The bishops who wrote that statement sponsor a vast network of social agencies throughout the United States. This is of particular importance when seeking to justify a role of the bishops in contributing to any social policy, particularly in this regard, a change in the definition of marriage. The American Catholic Church has been particularly involved in the "well-being of society" through its extensive and pervasive social agencies. Only recently, the American Catholic bishops voiced strong and consistent opposition to both enactment by Congress and signing by President Clinton of welfare legislation which ended cash assistance for many children born out of wedlock.¹²⁴

120. *Marriage in the Church: "Between One Man and One Woman,"* CATHOLIC STANDARD, Sept. 5, 1996, at 12 [hereinafter *Marriage in the Church*] (quoting from text of the *Statement on Same-Sex Marriage* jointly issued by Bishop Joseph L. Charron of Des Moines, Iowa, chairman of the Committee on Marriage and Family of the National Conference of Catholic Bishops, and Bishop William S. Skylstad of Spokane, Washington, chairman of the Committee on Domestic Policy of the United States Catholic Conference).

121. *Id.* The definitional aspect of marriage is a crucial factor in rejecting concerns that denial of the status of marriage to homosexual persons is discriminatory. Indeed, the Hawaii decision in *Baehr v. Lewin* even states that "'homosexual' and 'same-sex' marriages are not synonymous . . . Parties to a same-sex marriage could theoretically be either homosexuals or heterosexuals." See *Baehr*, 852 P.2d at 52 n.11.

122. See generally, *Dean v. District of Columbia*, 653 A.2d 307 (D.C. App. 1995) (Ferren, J., concurring) (giving excellent synopsis of current decisions and articles).

123. *Marriage in the Church*, *supra* note 120.

124. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 1305 (1996). See generally Faye Fiore & Jeffrey L. Rabin, *U.S. Welfare Revision Could Be Costly to L.A. Assistance: Denying Aid to Legal Immigrants Might Add \$300 Million to County Burden. Clinton May Veto Measure*, L.A. TIMES, July 22, 1996, at A1; Mark Gladstone, *Panel Begins to Assess Impact of Welfare Changes*, L.A. TIMES, Aug. 15, 1996, at A3; David Gonzalez, *Bishops Assail Rule Hostile to Immigrants*, N.Y. TIMES, Nov. 18, 1994, at A21; Jane Gross, *For Many on Welfare, Obstacles to Jobs Abound Transition: Lack of Basic Skills, English Proficiency and—as ONE Working Mother Puts It—'Life Training' Are Just A Few of the Barriers*, L.A. TIMES, Aug. 4, 1996, at B1; Dana Milbank, *Children's Defense Fund and Its Lauded Leader Lose Clout as Social Policy Shifts to the States*, WALL ST. J., May 28, 1996, at A28; Robert Pear, *Catholic Bishops Challenge Pieces of Welfare Bill*, N.Y. TIMES, Mar. 19, 1995, at A1; Peter Steinfelds, *Beliefs*, N.Y. TIMES, Jan. 9, 1993, at A9.

The bishops also opposed restricting benefits for legal immigrants.¹²⁵ And they have been consistent in this approach¹²⁶ even though President Clinton recently signed the legislation allowing the states, through block grants, to sharply reduce financial assistance to mothers, their children, and legal immigrants.¹²⁷

It is important to see the connection the bishops envision between the definition of family and the concern they have over the social difficulties facing American society. They are serving as moral critics of a society which differs from what the Pope has envisioned as the necessary connection between the body and the soul as a reflection of God. They write about the particular danger of wealth:

More studies are needed to probe the possible connections between affluence and family and marital breakdowns. The constant seeking for self-gratification and the exaggerated individualism of our age, spurred on by false values often seen in advertising and on television, contribute to the lack of firm commitment in marriage and to destructive notions of responsibility and personal growth.¹²⁸

They also write of the general breakdown of social structure and its effect upon the family:

A breakdown of family life often brings with it hardship and poverty. Divorce, failure to provide support to mothers and children, abandonment of children, pregnancies out of wedlock, all contribute to the amount of poverty among us. Though these breakdowns of marriage and the family are more visible among the poor, they do not affect only that one segment of our society. In fact, one could argue that many of these breakdowns come from the false values found among the more affluent-values which ultimately pervade the whole of society.¹²⁹

Both of these examples, the particular dilemma of wealth and the technology it spawns and the general breakdown of social structure, appear within the bishops approach to pregnancy by teenagers, a devastating problem in America. The final report of the National Commission on Children, *Beyond Rhetoric*,¹³⁰ has a bleak picture of many American children:

125. See, e.g., Charles Wheeler & Josh Bernstein, *Welfare Bill Impacts Immigrants the Hardest*, Press Release, CATH. LEGAL IMMIGR. NETWORK, INC., Aug. 1996.

126. See, e.g., Rev. J. Bryan Hehir, *Testimony on Welfare Reform*, in UNITED STATES CATHOLIC CONFERENCE, 5 PASTORAL LETTERS OF THE UNITED STATES CATHOLIC BISHOPS 493 (Hugh J. Nolan ed., 1987); *Excerpts From the Bishops*, N.Y. TIMES, Mar. 19, 1995, at 26; Gonzalez, *supra* note 124, at A21; Pear, *supra* note 124, at A1.

127. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 1305 (1996).

128. National Conference of Catholic Bishops, *Economic Justice for All: Pastoral Letter on Catholic Social Teaching and the U.S. Economy*, in 5 PASTORAL LETTERS OF THE UNITED STATES CATHOLIC BISHOPS 486 (Hugh J. Nolan ed., 1989).

129. *Id.*

130. FINAL REPORT OF THE NATIONAL COMMISSION ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES (1991) [hereinafter BEYOND RHETORIC]. The National Commission on Children was established by Public Law 100-203 to serve as a forum on behalf of the children of the nation. It is a bipartisan body whose members were

Today, one in four children in the United States is raised by just one parent, usually a divorced or unmarried mother. Many grow up without the consistent presence of a father in their lives. One of every five children lives in a family without minimally decent income. Many of these families are desperately poor, with incomes less than half of the federal poverty level. Each year, half a million babies are born to teenage girls ill prepared to assume the responsibilities of parenthood. Most of these mothers are unmarried, many have not completed their education, and few have prospects for an economically secure future.¹³¹

The report further states that “[i]n 1960 only 5 percent of all births in the United States were to unmarried mothers; in 1988 more than 25 percent were. Today, more than a million babies each year are born to unmarried women.”¹³² Ultimately,

[t]he proportion of teenage births that occur outside of marriage has increased steadily since the early 1970s [T]hey are more likely than girls who delay childbearing to be poor and dependent on welfare The cycle of poverty and hopelessness thus continues from one generation to the next: children of unmarried teenage mothers are four times as likely as children in other families to be poor, and they are likely to remain poor for a long time.¹³³

The report concludes that “[a]mong children living with only their mothers, sustained poverty for seven or more years is common; among children living with both parents, it is rare.”¹³⁴

The bishops’ approach to this problem is first and foremost to call for sustained economic support for children; by reducing support for pregnant women and mothers, the new federal welfare legislation diminishes this support.¹³⁵ The irony is that while many Americans would support the bishops’ stance of continuing financial assistance to unmarried mothers and their children, the support lessens when the bishops criticize school-based programs for providing contraceptives to unmarried teenagers. There is a connection, however, between the bishops’ opposition to the distribution of condoms and the bishops’ reliance on the definition of family as a committed, mutually supportive, non-individualistic, divinely created institution.

The bishops, because of the definition of family, conclude that condom distribution programs contribute to the rejection of the values the definition of marriage promotes. The bishops write:

appointed by the President, the President pro tempore of the U.S. Senate, and the Speaker of the U.S. House of Representatives. The Commission is required to submit a final report to the President; to the Committee on Finance and the Committee on Labor and Human Resources of the Senate; and to the Committees on Ways and Means, Education and Labor, and Energy and Commerce of the House of Representatives. *See id.*

131. *Id.* at 4.

132. *Id.* at 19.

133. *Id.* at 33-34.

134. *Id.* at 83.

135. *See generally* Ellen L. Bassuk et al., *Single Mothers and Welfare*, SCIENTIFIC AMERICAN, Oct. 1996, at 60.

A school-based program for providing contraceptives to unmarried teenagers fails to respect teenagers themselves because it takes a promiscuous lifestyle for granted and resorts to the deception that premarital sexual activity is without adverse consequences so long as pregnancy is avoided. This message makes light of the serious medical, emotional, moral, and spiritual consequences of premature sexual experimentation. Teenagers are taught to deal with their sexuality by suppressing their fertility with drugs and devices, instead of learning the self-control needed to live in harmony with the precious gift of sexuality and its power to create new life. The adverse consequences may include impairment of the ability later in life to form a lasting and satisfying commitment in marriage.¹³⁶

Obviously, for the American Catholic bishops, the definition of family—its inculcation of mutual surrender of the two parties in a covenant relationship for the good of themselves and for their children, the personal establishment by the Creator and confirmed in divine law—incorporates the sense of responsibility which the bishops think is needed in society today. For instance, they write: “We know that we [as a society] are called on to be members of a new covenant of love. We have to move from our devotion to independence, to a commitment to human solidarity. That challenge must find its realization in the kind of community we build among us.”¹³⁷ And the way in which that community is formed—responsibility—begins at an early age, and it begins through programs and people who emphasize mutual commitment.

The issue is one of how to define what is best for society, a definition of family which is immutably drawn from sacred texts and practices of many generations of religious adherents, a definition which incorporates mutual responsibility and abjures individual liberty without human solidarity. The conflict arises between American bishops and many within secular society over individual elements of this issue. For instance: Why should the definition of family drawn from sacred texts and incorporated by others impact my life? Why should mutual responsibility be forced upon me, and to what end? Is not individual liberty an American ideal, creative and self fulfilling? These questions form the critical tension within family law in American society, a society with many religiously affiliated adherents, a society both liberated and trapped within the cultural advertisement maze of freedom versus responsibility.

The conflict is seen within the dialogue between Bernard Cardinal Law, Archbishop of very Catholic Boston, and the mayor of the city, Thomas M. Menino. Cardinal Law urged the mayor to veto the bill approved by the City Council which would provide health benefits to the partners of gay and les-

136. National Conference of Catholic Bishops, *Statement on School-Based Clinics*, in 5 PASTORAL LETTERS OF THE UNITED STATES CATHOLIC BISHOPS 601 (Hugh J. Nolan ed., 1989); see also PONTIFICAL COUNCIL FOR THE FAMILY, THE TRUTH AND MEANING OF HUMAN SEXUALITY: GUIDELINES FOR EDUCATION WITHIN THE FAMILY (1996).

137. 5 PASTORAL LETTERS OF THE UNITED STATES CATHOLIC BISHOPS, *supra* note 136, at 492.

bian city workers.¹³⁸ The Cardinal issued a two page statement supporting special societal benefits to married persons because, "society has a special interest in the protection, care and upbringing of children."¹³⁹ Further, because "marriage remains the principal, the best, framework for the nurture, education, and socialization of children, the state has a special interest in marriage."¹⁴⁰ For the Cardinal, the definition of marriage, as including the elements previously noted, provides the divinely established and mutually covenanted arrangement in which children should be raised. No other arrangement, no matter how functional, can meet this definition. Thus, it should not be sanctioned by the state which should restrict official sanction to those relationships defined in accordance with this standard.

Thomas Keane, one of the Boston city councilors who sponsored the proposal, voiced his opinion that the involvement by church officials is "a wholly inappropriate mixing of religion and state. This is not a religious issue. This is an issue about civil government."¹⁴¹ Such a comment by Mr. Keane is common whenever religion offers a different value perspective. It fails to incorporate an understanding of religion's role in society, the fact that religion has a right to impart its view of what is best for society.

More recently, Archbishop William Levada, Archbishop of San Francisco, had to confront the domestic partnership law which went into effect in San Francisco in 1991. "Under the law, the city allows couples who have registered as domestic partners with the city to have visitation rights in hospitals and if they are city employees, to participate in shared health plans and to take bereavement leave when a domestic partner dies."¹⁴² Three thousand couples have registered as domestic partners since the law was enacted in 1991.¹⁴³ Most recently, the city began requiring all who contract with the city to provide the same spousal benefits to domestic partners as it provides to the married spouses of its employees.¹⁴⁴ Approximately 40% of the budget of Catholic Charities, about \$5.6 million, comes from the city of San Francisco. In return, Catholic Charities provides programs to house and feed the homeless, poor families, and people with the HIV infection and AIDS and

138. See Andrea Estes, *Law Lobbies Mayor to Nix Gay Measure*, BOSTON HERALD, Mar. 16, 1996, at A1. Other jurisdictions also face challenges from religious leaders over the issue of benefits which would incorporate relationships outside of the definition of marriage. See, e.g., Bob Harvey, *Senate Bill On Gays Could Force Federal Action*, THE OTTAWA CITIZEN, Apr. 13, 1996, Citylife at 1 (resisting effort to redefine marriage by Canadian Roman Catholic bishops); Stephanie Salter, Editorial, *Gay Marriage? Same Sex or Not, Let's Honor Love Commitment*, ORLANDO SENTINEL, Apr. 14, 1996 (quoting Archbishop William Levada, Catholic Archbishop of San Francisco, saying that gay and lesbian marriage contradicts nature and creation).

139. Salter, *supra* note 138.

140. *Id.*

141. Estes, *supra* note 138, at A1.

142. Michael Maloney, *Domestic Partners—How It's Done in S.F.*, S.F. CHRON., Mar. 26, 1996, at A1.

143. See David Tuler, *S.F. to Marry 150 Gay Couples*, S.F. CHRON., Mar. 23, 1996 at A1.

144. See Don Lattin, *S.F. Archbishop Insists He's "Not Anti-Gay;" He Seeks Compromise on Catholic Charities Contract*, S.F. CHRON., Feb. 4, 1997, at A13.

also job training and mental health counseling.¹⁴⁵ The issue for the church and thus the archbishop, was whether the city could force the church to extend health care benefits to persons not married and living in relationships which the church regards as sinful.¹⁴⁶

The archbishop wrote to the mayor of the city asking for an exemption from the new law and arguing that forcing Catholic Charities to adopt the policy of the domestic partnership arrangement would violate the church's religious and ethical teachings.¹⁴⁷ The mayor responded that "[i]t was wrong for the church to interject its views into a governmental matter."¹⁴⁸ Leslie Katz, a city supervisor, argued that Catholic Charities should comply with the law: "Catholic Charities has the status of a nonprofit charity, not a religious entity They have to choose one or the other. They can't have it both ways."¹⁴⁹ Later, the mayor said that "when it contracts to carry out social service functions for the city, Catholic Charities is not functioning as a religious institution but as a nonprofit corporation that must obey the same law that applies to everyone else."¹⁵⁰

As in Boston, there is a conflict between what the church sees as best for society and what elected officials see as best. In the case of San Francisco, the archbishop and the mayor eventually agreed to a plan that would allow Catholic Charities to contract with the city and still avoid a purposeful recognition of domestic partnerships.¹⁵¹ The city and the Archdiocese of San Francisco agreed to the following language: "[a]n employee may designate a legally domiciled member of the employee's household as being eligible for spousal equivalent benefits."¹⁵² Such language shifted attention from a possible sexual partner to any legally domiciled member of the household, including such persons as a child or a mother or brother. Of course this would

145. *See id.*

146. The issue of individual religious conscience contradicting an exacted state statute was the subject of a recent California Supreme Court decision. *See Smith v. Fair Employment and Hous. Comm'n*, 913 P.2d 909 (1996), *cert. denied*, 117 S. Ct. 2531 (1997). A landlord, a member of the Bidwell Presbyterian Church, refused to rent an apartment she owned to an unmarried couple and the city found her in violation of the statute which prohibited discrimination based on marital status. When the landlord sought to justify her refusal on the basis of her firmly held religious beliefs, the court did not exempt her from the ordinance because the right of free exercise does not relieve an individual from complying with a valid and neutral law of general applicability. *See id.* at 918.

147. *See* Edward Epstein, *Domestic Partners Law Showing Up in Contracts; Some S.F. Vendors Quietly Signing Deals*, S.F. CHRON., Jan. 30, 1997, at A13.

148. *Id.*

149. Don Lattin, *S.F. Clash Over Partners Law; Prelate Seeks Exemption for Catholic Charities*, S.F. CHRON., Jan. 28, 1997, at A1.

150. Edward Epstein, *Mayor Firm on Partners Law; Brown Rejects Prelate's Authority on Secular Matters*, S.F. CHRON., Jan. 29, 1997, at A12.

151. *See generally* Torri Minton, *S.F. Archbishop Agrees to Discuss Partners Policy*, S.F. CHRON., Feb. 7, 1997, at A21; Editorial, *Room to Compromise on Domestic Partners*, S.F. CHRON., Apr. 11, 1997, at A24.

152. Minton, *supra* note 151.

not exclude a member of the same or opposite sex with whom there was a sexual relationship.¹⁵³

Both domestic partnership disputes, in Boston and San Francisco, are illustrative of the conflict between a church with views on how the family and society should function and a secular society, reluctant or hostile, to accepting any advice. Worse, the religious perspective suffers the perception, previously described, of being formed in ignorance or simply a private matter with no consequences to the secular process. This is evident in the comments of the mayors of both Boston and San Francisco and local administrators serving the city. This impasse creates a dysfunctional environment.

The extent of this dysfunction is seen within the already cited *Beyond Rhetoric*, reports containing myriad statistics and little rhetoric.¹⁵⁴ But also, the United States Catholic Conference, an official organization of the Catholic bishops, has published *Putting Children and Families First: A Challenge for Our Church, Nation, and World*. This publication lists the reality of life in the United States for many—millions—of children:

An estimated 5.5 million U.S. children under twelve are hungry; another 6 million are underfed.

The rate of teenage suicide has tripled in thirty years.

More than 2.5 million children suffer physical, emotional, or sexual abuse or neglect in one year in the United States.

More teenage boys die of gunshot wounds than from all natural causes combined.

More than 8 million children are in families without health insurance.¹⁵⁵

It is logical to think that some of the problems listed above exist within families meeting the definition of marriage espoused by the bishops and other religious denominations; there is a struggle for the ideal. Nonetheless, *Beyond Rhetoric* and other studies suggest that the vast number of children at risk today are from homes where they are born out of wedlock, separated from a parent because of divorce, or the family structure has little or no respect for "teaching values and creating the ethical context that is fundamental to our society and our democracy."¹⁵⁶ Again, it is not that a religious perspective guarantees freedom from responsibility, it is that the religious

153. See Don Lattin, *Sunday Interview*, S.F. CHRON., Feb. 23, 1997, at 3Z1.

154. BEYOND RHETORIC, *supra* note 130.

155. UNITED STATES CATHOLIC CONFERENCE, *PUTTING CHILDREN AND FAMILIES FIRST* 2 (1991).

156. BEYOND RHETORIC, *supra* note 130, at 360.

The family has primary responsibility for teaching values and creating the ethical context that is fundamental to our society and our democracy. Children learn to love others by being loved. They learn to respect and value the rights of others by being respected and valued themselves. They learn to trust when they have unwavering support from parents and the other adults closest to them. The capacity for understanding and valuing the feelings of others is present in every child, and it flowers when children are encouraged to emphasize with others From the time they are very young, children learn responsibility and commitment, freedom and dissent in small, managea-

perspective offers a historical direction based in history which is both possible and proven.

Religious perspective may be a dissident and discordant voice in the marketplace of ideas. It may be operating from a value structure predicated on religious tenets recognized by only a few in a religiously pluralistic society or it may be viewed as folly, religion may stumble and even fail. But religion is there in the midst of it all. This is a crucial point. The religious perspective is not important because religion itself says it is important. A religious perspective is important because it has been around for a very long time: it is rooted in revelation. In the case of the Roman Catholic Church, it is a tradition about to enter its third millennium. Second, religion is important because it has entered and remains within the fray of American social life; religion is a player. The American Catholic Church is perhaps the largest private organization in the United States in the dispensation of service to the very people society has marginalized. Third, religious perspective is important because it invokes an international character, advocating positions and programs responsive to all humankind.

Therefore, the contribution of a religious perspective to family matters, particularly any change in the definition of marriage, is consequential. The ability of the courts to dismiss a Virginia trial judge and religious perspective so quickly in *Baehr v. Lewin*¹⁵⁷ is more a result of the culture of disbelief than the irrelevance of the perspective.

II. JUDICIAL ACTIVISM

What should be the role of a court, of a judge, of the judicial process? The Hawaii Supreme Court required a compelling state interest to support the definition of marriage as one between persons of mixed gender.¹⁵⁸ This is an important question. This question has had great importance over rights and responsibilities concerning minorities such as African-Americans, gay and lesbian persons, women seeking abortions, and those seeking assisted suicide. Long before any legislative liberties were accorded, these named minorities, the courts—in the beginning, federal courts—discovered these liberties in the Bill of Rights of the United States Constitution.¹⁵⁹ Stated simply,

ble steps. Experiences within the family provides them with the moral and ethical framework for their lives as adults.

Id. at 360-61.

157. 852 P.2d 44, 63 (Haw. 1993) (“With all due respect to the Virginia courts of a bygone era, we do not believe that trial judges are the ultimate authorities on the subject of Divine Will, and, as *Loving* amply demonstrates, constitutional law may mandate, like it or not, that customs change with an evolving social order.”).

158. *See id.* at 68.

159. *See, e.g.,* *Romer v. Evans*, 116 S.Ct. 1620, 1629 (1996) (upholding legislative, executive and judicial action to protect homosexuals from discrimination as guarantee of equal protection); *Roe v. Wade*, 410 U.S. 113, 154 (1973) (holding right of woman to abortion is right of personal privacy found within penumbra of Constitution); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (allowing interracial marriages because of equal protection and due process guarantees); *Compassion in Dying v. Washington*, 79 F.3d 790, 839 (9th Cir. 1996), *cert. granted sub nom.*

judges adapted the Bill of Rights to changing societies and developed from objective rights an applicability which applied to changing subjective situations. Because state or federal statutes were affected, laws came into being with aid of the legislative process, and sometimes laws were simply abandoned. This practice by judges is often called judicial activism.

The late Justice William Brennan, who served on the Supreme Court from 1956 until his retirement in 1990, is seen by many as a proponent of judicial activism. For Brennan "[t]he Constitution was designed to place fundamental rights 'beyond the reach of temporary political majorities.'"¹⁶⁰ Throughout his tenure on the Court, Justice Brennan's judicial philosophy was captured in the constantly used phrase "dignity of every person."¹⁶¹ When confronted by a government of these temporary political majorities, "the meaning of the Constitution must change as society changes. Judges speak for a community that is diverse and disputatious, and they must step in to prevent majorities, permanent or temporary, from trampling on the rights of minorities."¹⁶²

The opposite of this approach could be called the American form of positivism, which would give "judges an independent but limited role in reviewing laws, constrained by precedent and the constitutional text."¹⁶³ Chief Justice Rehnquist is, along with other justices on the Court, aligned more with the positivistic approach to decision making. The Chief Justice "has voted more consistently to uphold governmental actions, legislative and executive. And none [of the justices] has voted more consistently against the claims of dissenters and minorities. His 'deference' principle stands in stark contrast to the 'dignity' value of Justice Brennan."¹⁶⁴

Incorporated into the legal process, which affects the balance between judicial activism and judicial positivism, is the inclusion of the concept of "strict scrutiny" explained first in *United States v. Carolene Products Company*.¹⁶⁵ Following the Great Depression and just before the Second World War, the decision had marked importance because a footnote, written more as an aside, provided increased judicial intervention in non-economic affairs. The opinion read as follows:

Washington v. Glucksberg, 117 S. Ct. 37, *rev'd*, 117 S. Ct. 2258 (1997) (holding that laws prohibiting assisted suicide violate Due Process Clause); Quill v. Vacco, 80 F.3d 716, 731 (2d Cir. 1996), *rev'd*, 117 S. Ct. 2293 (1997) (holding that laws prohibiting assisted suicide violate Equal Protection Clause).

160. PETER IRONS, BRENNAN VS. REHNQUIST: THE BATTLE FOR THE CONSTITUTION 37 (1994) [hereinafter BRENNAN VS. REHNQUIST].

161. *Id.* at 38. Brennan uses the word "dignity" in more than 30 opinions. See *id.* at xi.

162. *Id.* at 39.

163. *Id.* at 62.

164. *Id.* at 64.

165. 304 U.S. 144 (1938). For a critique, see Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985); Lea Brilmayer, *Carolene, Conflicts, and the Fate of the "Inside-Outsider,"* 134 U. PA. L. REV. 1291 (1986); Laurence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L. J. 1063 (1980). For a comprehensive theory of judicial review, see J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

[L]egislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, [may] be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment [S]imilar considerations [may] enter into the review of statutes directed at particular religious . . . national . . . or racial minorities . . . [and] prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.¹⁶⁶

These words inaugurated strict scrutiny, an approach “most powerfully employed for the examination of political outcomes challenged as injurious to those groups in society which have occupied, as a consequence of widespread, insistent prejudice against them, the position of perennial losers in the political struggle.”¹⁶⁷ Some were identified individually, such as racial, religious and national minorities; some were openly defined, such as the discrete and insular minorities broadly identified in *Carolene*. Nonetheless, all share “a close and complex relationship with notions of fundamental rights.”¹⁶⁸ The notions of “suspect classifications” and “conclusive presumptions” have a commonality with the issue of “fundamental,” such as the right to bodily integrity or the right to be heard in one’s own defense,¹⁶⁹ and the practical effect was to turn the “presumption of constitutionality” against laws affecting such groups.¹⁷⁰ Thus, a compelling state interest was required when laws denied fundamental rights to any person or created a suspect class for any minority group.¹⁷¹

These judicial notions of suspect class, fundamental rights, and compelling state interest are not contained within the “positive” language of the United States Constitution. Their use by the courts creates a tension between those persons seeking to uphold the positive language of the Bill of Rights and those persons seeking to provide a functional approach to what the language was intended to mean. The tension is exasperated by the Supreme Court’s lack of candor as to when heightened scrutiny and especially, intermediate scrutiny, is to be used.¹⁷² Indeed, in *Employment Division, Department of Human Resources v. Smith*,¹⁷³ the Court held that the

166. 304 U.S. at 152-53 n.4 (citations omitted).

167. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1453-54 (2d ed. 1988). The argument is made that gay and lesbian persons have significant political clout within America. See, e.g., *Romer v. Evans*, 116 S. Ct. 1620, 1637 (1996) (Scalia, J., dissenting) (“It is nothing short of preposterous to call ‘politically unpopular’ a group which enjoys enormous influence in America media and politics, and which . . . though composing no more than 4% of the population had the support of 46% of the voters . . .”).

168. TRIBE, *supra* note 167, at 1454.

169. *Id.* at 1590.

170. BRENNAN VS. REHNQUIST, *supra* note 160, at 76.

171. See *id.* at 77.

172. See TRIBE, *supra* note 167, at 1610-25.

173. 494 U.S. 872 (1990).

compelling state interest test was inapplicable to free exercise (religious) challenges to criminal prohibitions.¹⁷⁴ The tension and the resulting congressional action in the form of the Religious Freedom Restoration Act, is a typical example of the conflict between those who wish to retain the original words of the Constitution as an objective, positive rule of law, and those who wish to fashion the words to accommodate changing situations.¹⁷⁵ It should come as no surprise that the majority opinion in *Smith* was written by Associate Justice Antonin Scalia, noted for his "positive" interpretation of the Constitution.

Recently, Justice Scalia wrote an essay about his belief in a philosophy of interpretation best described as "textualism." He elaborates:

Textualism should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into dispute. I am not a strict constructionist, and no one ought to be—though better that, I suppose, than a nontextualist. A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.¹⁷⁶

How textualism best preserves democracy and thus avoids the temptation of non-elected judges to create rights and realities when none exist in the text, is illustrated in an example provided by Justice Scalia. The example concerns women voting rights and is analogous to the gender issues presently being litigated in *Baehr*. Justice Scalia writes:

Seventy-five years ago, we believed firmly enough in a rock-solid, unchanging Constitution that we felt it necessary to adopt the Nineteenth Amendment to give women the [right to] vote. The battle was not fought in the courts, and few thought it could be, despite the constitutional guarantees of Equal Protection of the Laws; that provision did not, when it was adopted, and hence did not in 1920, guarantee equal access to the ballot but permitted distinctions on the basis of not only age but of property and of sex. Who can doubt that if the issue had been deferred until today, the Constitution would be (formally) unamended, and the courts would be the chosen instrumentality of change? The American people have been converted to belief in The Living Constitution, a "morphing" document that means, from age to age, what it ought to mean. And with that conversion has inevitably come the new phenomenon of selecting and confirming federal judges, at all levels, on the basis of their

174. See *Smith*, 494 U.S. at 889-90. See generally Raymond C. O'Brien & Michael T. Flannery, *The Pending Gauntlet to Free Exercise: Mandating That Clergy Report Child Abuse*, 25 LOYOLA L.A. L. REV. 1 (1991).

175. Religious Freedom Restoration Act § 2, 42 U.S.C. 2000bb-2000bb-4 (1993). The Act, which requires government to demonstrate that law substantially burdening free exercise of religion is the least restrictive means available to further compelling state interest, is a valid exercise of Congress' power under Section 5 of Fourteenth Amendment. See *Sasnett v. Sullivan*, 91 F.3d 1018, 1022 (7th Cir. 1996) *vacated*, 117 S. Ct. 2502 (1997).

176. Antonin Scalia, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23 (1997).

views regarding a whole series of proposals for constitutional evolution. If the courts are free to write the Constitution anew, they will, by God, write it the way the majority wants; the appointment and confirmation process will see to that. This, of course, is the end of the Bill of Rights, whose meaning will be committed to the very body it was meant to protect against: the majority. By trying to make the Constitution do everything that needs doing from age to age, we have caused it to do nothing at all.¹⁷⁷

Single-gender marriage and the Hawaii decision of *Baehr v. Lewin* are heirs to the tension resulting from suspect classification, discrete and insular minorities, fundamental rights and levels of scrutiny. For instance, when the plaintiffs filed their petition in the Hawaii circuit court, they proclaimed “their homosexuality and [asserted] a fundamental constitutional right to sexual orientation [Plaintiffs] reiterated their position that the DOH’s refusal to issue marriage licenses to the applicant couples violated their rights to privacy, equal protection of the laws, and due process of law under article I, section 5 and 6 of the Hawaii Constitution.”¹⁷⁸ While the Hawaii Supreme Court dismissed the relevance of homosexuality as to the issue presented and concentrated instead on state regulation of same-sex couples, the following quote from the court’s decision is illustrative of the use of judicially-created paradigms:

[T]he issue [of homosexuality] is not material to the equal protection analysis set forth Its resolution is unnecessary to our ruling that [the statute], both on its face as applied, denies same-sex couples access to the marital status and its concomitant rights and benefits. Its resolution is also unnecessary to our conclusion that it is the state’s regulation of access to the marital status, on the basis of applicants’ sex, that gives rise to the question whether the applicant couples have been denied the equal protection of the laws in violation of article I, section 5 of the Hawaii Constitution And, in particular, it is immaterial to the exercise of “strict scrutiny” review, . . . inasmuch as we are unable to perceive any conceivable relevance of the issue to the ultimate conclusion of law—which, in the absence of further evidentiary proceedings, we cannot reach at this time—regarding whether [the statute] furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgments of constitutional rights.¹⁷⁹

The Hawaii Supreme Court, as a state court, would continue to incorporate the words and phrases which have been traditionally associated with ju-

177. *Id.* at 47.

178. *Baehr v. Lewin*, 852 P.2d 44, 52 (Haw. 1993). Note that the Hawaii Supreme Court finds it “irrelevant, for purposes of the constitutional analysis germane to this case, whether homosexuality constitutes ‘an immutable trait’ because it is immaterial whether the plaintiffs, or any of them, are homosexuals.” See *id.* at 54 n. 14. For a discussion of immutability and sexual orientation, see CHANDLER BURR, *A SEPARATE CREATION: THE SEARCH FOR THE BIOLOGICAL ORIGINS OF SEXUAL ORIENTATION* (1996); SIMON LEVAY, *QUEER SCIENCE: THE USE AND ABUSE OF RESEARCH INTO HOMOSEXUALITY* (1996).

179. *Baehr*, 852 P.2d at 53 n.14.

dicial activism in the federal courts.¹⁸⁰ For example, the court stated that the right of privacy is recognized expressly in the Hawaii Constitution, and that it shall not be infringed without a showing of a compelling state interest and it is to be treated as a fundamental right.¹⁸¹ And “[i]t would make little sense to recognize a right of privacy with respect to other matters of life and not with respect to the decision to enter the relationship that is the foundation of the family in society.”¹⁸² “Therefore, the precise question facing this court is whether we will extend the present boundaries of the fundamental right of marriage to include same-sex couples, or, put another way, whether we will hold that same-sex couples possess a fundamental right to marry.”¹⁸³

While the court concluded that “the applicant couples do not have a fundamental constitutional right to same-sex marriage arising out of the right to privacy or otherwise . . . ,”¹⁸⁴ the court did find that the applicant couple was denied equal protection under the Hawaii State Constitution.¹⁸⁵ “It is the state’s regulation of access to the status of married persons, on the basis of the applicant’s sex, that gives rise to the question whether the applicant couples have been denied the equal protection of the laws”¹⁸⁶ The court held that the couples were denied equal protection of the law as a result of sex-based classification. Furthermore, “sex-based classifications are subject, as a per se matter, to some form of ‘heightened’ scrutiny, be it ‘strict’ or ‘intermediate,’ rather than the mere ‘rational basis’ analysis.”¹⁸⁷ Most crucial to the holding, the court wrote:

[W]e hold that, sex is a “suspect category” for purposes of equal protection analysis under . . . [the Hawaii State Constitution] . . . and that [the state statute] is . . . subject to the “strict scrutiny” test. It therefore follows, and we so hold, that [the statute] is presumed to be unconstitutional . . . unless [the state] . . . can show that (a) the statute’s sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgements of the applicant couples’ constitutional rights.¹⁸⁸

180. The court rejected the notion that it was engaging in judicial activism, implying instead that it was simply interpreting the Hawaii State Constitution. *See id.* at 68 (“In effect, we are being accused of engaging in judicial legislation. We are not.”).

181. *See id.* at 55.

182. *Id.* at 56.

183. *Id.* at 56-57.

184. *Id.* at 57.

185. *See id.* at 59.

186. *Id.* at 60.

187. *Id.* at 65. For a recent example of judicial application of fundamental right to marry principles, see *Shahar v. Bowers*, 836 F. Supp. 859 (N.D. Ga. 1993). In this Georgia case, a lesbian woman sued the state attorney general after he withdrew his offer of employment after it was alleged he discovered her single-gender marriage. She petitioned the court for redress arguing that his dismissal of her violated her fundamental right to marry. *See id.* An Eleventh Circuit Court of Appeals panel reversed the trial court and remanded the case for a strict scrutiny review and this was vacated by the full circuit and set for an en banc hearing. *See Shahar v. Bowers*, 78 F.3d 499, 500 (11th Cir. 1996).

188. *Baehr*, 852 P.2d at 67.

Because of this particular holding, the case was remanded to the trial court to allow the state to comply with the court's demand that it provide both a compelling state interest and demonstrate that the statute is narrowly drawn.¹⁸⁹

Almost from the start, arguments were made concerning the judicial activism of the Hawaii Supreme Court. Critics argued that the court, through the use of words such as fundamental right, strict scrutiny, compelling state interest and suspect classification, was legislating or judicially acting within an arena reserved for duly elected officials.¹⁹⁰ The court responded to this criticism by stating that its decision was based on its ability to interpret the state constitution. "The result we reach today is in complete harmony with the *Loving* court's observation that any state's powers to regulate marriage are subject to the constraints imposed by the constitutional right to equal protection of the laws."¹⁹¹ Then adding as an aside the court explained, "[i]f the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned."¹⁹²

While few would deny a court's ability to interpret the Constitution in accordance with the power reserved within the often-quoted decision of *Marbury v. Madison*,¹⁹³ more would complain of the court's use of judicially-created classifications to reject validly enacted state legislation. Indeed, some would describe such activity as an imposition by an elite class upon the rest,¹⁹⁴ and furthermore, deem any consideration of sex-based classifications, as "no business of the courts" as opposed to the political branches.¹⁹⁵ The bottom line is that religion must be accommodated within American life and through judicial interpretation by a few, as opposed to legislative decision-making by many.¹⁹⁶

189. See *id.* at 68. Thomas P. Gill, Chairperson of the State Commission on Sexual Orientation and the Law, stated that "the opposition [to single-gender marriage] can't come up with a compelling state interest other than Leviticus 18." David A. Dunlap, *Panel in Hawaii Recommends Legalizing Same-Sex Marriage*, N.Y. TIMES, Dec. 11, 1995, at A18.

190. See, e.g., *Baehr*, 852 P.2d at 70-74 (Heen, J., dissenting).

191. *Id.* at 68.

192. *Id.*

193. 5 U.S. 137 (1803). *Marbury v. Madison* was the first case where the Supreme Court asserted that a federal court has power to refuse to give effect to congressional legislation if it is inconsistent with the Court's interpretation of the Constitution. For an example of judicial responsibility, see *Compassion in Dying v. Washington*, 79 F.3d 790, 836 (9th Cir. 1996), cert. granted sub nom. *Washington v. Glucksberg*, 117 S. Ct. 37 (1996) ("Weighing and then balancing a constitutionally-protected interest against the state's countervailing interests, while bearing in mind the various consequences of the decision, is quintessentially a judicial role.").

194. See *Romer v. Evans*, 116 S.Ct. 1620, 1629 (1996) (Scalia, J., dissenting). "When the Court takes sides in the culture wars, it tends to be with the knights rather than with the . . . Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn." *Id.* at 1637.

195. *Id.* (referring to heterosexual monogamy as opposed to polygamous cohabitation).

196. See *Lynch v. Donnelly*, 465 U.S. 668 (1984) (holding that city of Pawtucket did not violate Establishment Clause by including crèche in its Christmas display); *Marsh v. Chambers*, 463 U.S. 783 (1983) (holding that Nebraska legislature's chaplaincy practice does not violate Establishment Clause); JOHN T. NOONAN, JR., *THE BELIEVER AND THE POWERS THAT ARE: CASES, HISTORY, AND OTHER DATA BEARING ON THE RELATION OF RELIGION AND GOVERN-*

The judicial controversy created over assisted suicide is another example of asserted judicial activism. *Compassion in Dying v. State of Washington*,¹⁹⁷ held that the provision of the Washington state statute which prohibited aiding another person to commit suicide violated the Due Process Clause as applied to terminally ill patients who wished to hasten their own death with medications prescribed by their physicians.¹⁹⁸ The court noted the similarity between assisted suicide and abortion cases by stating that “they present issues of . . . profound spiritual importance . . . because they so deeply affect [the] individual’s right to determine their own destiny”¹⁹⁹

Implying its ability to interpret and apply the Constitution to changing circumstances, the court noted, “[i]n all cases, our analysis of the applicability of the protections of the Constitution must be made in light of existing circumstances as well as our historic traditions.”²⁰⁰ Further, the court also noted that “[s]triving to assure itself and the public that announcing rights not readily identifiable in the Constitution’s text involves much more than the imposition of the Justices’ own choice of values on the states and the Federal Government”²⁰¹

The Ninth Circuit Court goes to considerable lengths to justify its ability to correctly interpret the times and to refrain from imposing its own value choices on others. For instance, the court begins its analysis with Greek and Roman times,²⁰² then early Christian and the traditional English experience,²⁰³ and finally the current social attitudes evidenced by polls and recent court decisions.²⁰⁴ The court also answers the criticism that it should leave decisions such as assisted suicide to the legislatures, by writing that it is doing just that, but one step better. The court is “permitting the individual to exercise the right to choose[,] . . . to take such decisions out of the hands of the government, both state and federal, and put them where they rightly belong, in the hands of the people.”²⁰⁵ But in the end, the court acknowledges, “[w]eighing and then balancing a constitutionally-protected interest against the state’s countervailing interests, while bearing in mind the various conse-

MENT (1987); Michael W. McConnell, *Accommodation in Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992); Michael W. McConnell, *Neutrality Under the Religious Clauses*, 81 NW. U. L. REV. 146 (1986); John T. Noonan, *The Constitution’s Protection of Individual Rights: The Real Role of the Religion Clauses*, 49 U. PITT. L. REV. 717 (1988).

197. 79 F.3d 790.

198. *See id.* at 793-94. The due process interest concerns the liberty interest a person has in determining the time and manner of one’s own death. Because the Washington state statute prohibits aid by another in the prescription of life-ending medication for use by terminally ill, competent adult patients who wish to hasten their deaths, the statute violates due process. The court does not address whether the statute then violates equal protection. *See id.* at 798.

199. *Id.* at 801.

200. *Id.* at 803.

201. *Id.* (quoting *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986)).

202. *See id.* at 806-07. *But see id.* at 845-47 (Beezer, J., dissenting).

203. *See id.* at 808-09.

204. *See id.* at 810-16.

205. *Id.* at 839.

quences of the decision, is quintessentially a judicial role.”²⁰⁶ At some point, “mindful of our constitutional obligations, including the limitations imposed on us by that document, we must rely on our judgement, guided by the facts and the law as we perceive them.”²⁰⁷ Clearly, the court is in control.

In a lengthy dissent, Circuit Judge Beezer contradicts the history and the dismissal by the majority of the state’s interest. He finds four rational purposes to the state statute: (1) preserving life, (2) protecting the interest of innocent third parties, (3) preventing suicide, and (4) the ethical integrity of the medical profession.²⁰⁸ For him these interests are dispositive, since, “[i]f the liberty interest is not fundamental, the statute is subjected only to the ‘unexacting’ inquiry of whether the statute rationally advances some legitimate governmental purpose.”²⁰⁹ For him the state statute is rational; it has met the test. Impliedly, by holding the statute unconstitutional, the court has raised the standard on its own to more than rationality. Indeed, the court is finding within the constitution a right to suicide. As Circuit Judge Fernandez writes in a separate dissent, this is not something for the courts to discover, it is for the people and their elected representatives to decide.²¹⁰ Circuit Judge Kleinfeld was more to the point:

Suicide has not been traditionally or historically protected as a right That a question is important does not imply that it is constitutional. The Founding Fathers did not establish the United States as a democratic republic so that elected officials would decide trivia, while all great questions would be decided by the judiciary People of varying views, including people with terrible illnesses and their relatives, physicians, and clergy, can, through democratic institutions, obtain enlightened compromises of the complex and conflicting considerations. They can do at least as well as we judges can, and nothing in the Constitution prevents them from making the law.²¹¹

Agreeing with the dissent and thus rejecting the Ninth Circuit’s discovery of a liberty interest to commit suicide within the Due Process Clause, Chief Justice Rehnquist wrote for the majority of the Supreme Court:

[W]e “ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended.” [Collins v. Harker Heights, 503 U.S. 115, 125 (1992)]. By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore “exercise the utmost care whenever we are asked to break new ground in this field,” *ibid.*, lest the liberty protected by the Due Process Clause be subtly trans-

206. *Id.* at 836.

207. *See id.* at 836.

208. *See id.* at 839 (Beezer, J., dissenting).

209. *Id.* at 855.

210. *See id.* at 857 (Fernandez, J., dissenting).

211. *Id.* at 858-59 (Kleinfeld, J., dissenting).

formed into the policy preferences of the members of this Court, [Moore v. East Cleveland, 431 U.S. 494, 502 (1977) (plurality opinion)].²¹²

This decision returned the debate over assisted suicide to the legislative process in the State of Washington.

The second example of asserted judicial activism is *Quill v. Vacco*.²¹³ On the other side of the country, in New York, the Second Circuit held that a state statute prohibiting assisted suicide violated the Equal Protection Clause of the United States Constitution. Nonetheless, the court did not find that there was a fundamental right to assisted suicide in the constitution, relying on the fact that the "Supreme Court has drawn a line, albeit a shaky one, on the expansion of fundamental rights that are without support in the text of the constitution."²¹⁴ As with *Compassion in Dying*, the Court reiterated historical precedent, discussed the basis of rational review, intermediate, and strict scrutiny, and concluded that the statutes lack any rational basis.²¹⁵

The denial of equal protection comes about in the following way:
[T]hose in the final stages of terminal illness who are on life-support systems are allowed to hasten their deaths by directing the removal of such systems; but those who are similarly situated, except for the previous attachment of life sustaining equipment, are not allowed to hasten death by self-administered prescribing drugs.²¹⁶

While a state could sustain the difference through a rational reason, the court concluded that the "state's interest lessens as the potential for life diminishes" and there were no state interests which met the criteria of rationality for the court.²¹⁷ Thus, the state statute was declared unconstitutional.

In a concurring opinion, the former dean of the Yale Law School, now Circuit Judge Calabresi, agreed that the statutes were unconstitutional, but thought the issue of whether they violated equal protection or due process should not be decided at this time. He wrote:

I contend that when a law is neither plainly unconstitutional (because in derogation of one of the express clauses or our fundamental charter or, for that matter, of the more general clauses, as these have been interpreted in our constitutional history and traditions), nor plainly constitutional, the courts ought not to decide the ultimate validity of that law without current and clearly expressed statements, by the people or by their elected officials, of the state interests involved.²¹⁸

Nonetheless, Circuit Judge Calabresi continued:

[W]hether under Equal Protection, or Due Process . . . the absence of a recent, affirmative, lucid and unmistakable statement of why a

212. *Washington v. Glucksberg*, 117 S. Ct. 2258, 2267-68 (1997).

213. 80 F.3d 716 (2d Cir. 1996), *rev'd*, *Vacco v. Quill*, 117 S. Ct. 2293 (1997).

214. *Id.* at 724.

215. *See id.* at 726-27.

216. *Id.* at 729.

217. *Id.* (citations omitted).

218. *Id.* at 738 (Calabresi, J., concurring).

state wishes to interfere with what has been held by the Supreme Court to be a significant individual right, dooms these statutes [N]o court need or ought to make ultimate and immensely difficult constitutional decisions unless it knows that the state's elected representatives and executives . . . assert through their actions (not their inactions) that they really want and are prepared to defend laws that are constitutionally suspect.²¹⁹

Again writing for the majority of the Supreme Court, Chief Justice Rehnquist rejected the Second Circuit's conclusion that New York state's prohibition of assisted suicide violated the Equal Protection Clause of the Fourteenth Amendment.²²⁰ Writing that there is no violation of equal protection, the Chief Justice noted that "the overwhelming majority of state legislatures have drawn a clear line between assisting suicide and withdrawing or permitting the refusal of unwanted lifesaving medical treatment by prohibiting the former and permitting the latter."²²¹ The debate was thus returned to the New York state legislature and withdrawn from judicial decisionmaking.

Judicial activism is not purposefully exclusionary; it is functionally exclusionary. That is, since the vast majority of judges are neither elected, nor subject to recall, the judiciary is not subject to the democratic process of politics and having to answer to a majority of the people at given times and places. Inasmuch as the courts, through decisions such as *Compassion in Dying v. State of Washington* and then *Vacco v. Quill*, departed from a deeply rooted principle of prolongation of life because life is decidedly important,²²² the courts deprived religious and other advocates in the political process of a voice through the legislative process. Religious accommodation is lacking. This can also be said of the privacy right of a woman to terminate her pregnancy as in *Roe v. Wade*,²²³ and the discovery of the right of privacy as in *Griswold v. Connecticut*,²²⁴ and the recent decision in the Hawaii State Supreme Court, *Baehr v. Lewin*.²²⁵ Each of these decisions has prompted

219. *Id.* at 741-42.

220. *See Vacco v. Quill*, 117 S. Ct 2293, 2296 (1997).

221. *Id.* at 2300 (citing *Glucksberg*, 117 S. Ct. at 2262-63, 2265-67).

222. *Id.*, at 2293, the concurring opinion of Justice Stevens, identifying the historical importance of human life:

History and tradition provide ample support for refusing to recognize an open-ended constitutional right to commit suicide. Much more than the State's paternalistic interest in protecting the individual from the irrevocable consequences of an ill-advised decision motivated by temporary concerns is at stake. There is truth in John Donne's observation that "No man is an island." The State has an interest in preserving and fostering the benefits that every human being may provide to the community—a community that thrives on the exchange of ideas, expressions of affection, shared memories and humorous incidents as well as on the material contributions that its members create and support. The value to others of a person's life is far too precious to allow the individual to claim a constitutional entitlement to complete autonomy in making a decision to end that life.

Id. at 2305 (Stevens, J., concurring).

223. 410 U.S. 113 (1973).

224. 381 U.S. 479 (1965).

225. 852 P.2d 44 (Haw. 1993).

intense political debate and often heated legislative reaction.²²⁶ In the cases of *Compassion in Dying v. State of Washington* and *Vacco v. Quill*, the Supreme Court of the United States was prompted to reverse the holdings, allowing the states to continue the debate without judicial interference. In her concurring opinion, Justice Sandra Day O'Connor wrote:

There is no reason to think the democratic process will not strike the proper balance between the interests of terminally ill, mentally competent individuals who would seek to end their suffering and the State's interest in protecting those who might seek to end life mistakenly or under pressure. As the Court recognizes, States are presently undertaking extensive and serious evaluation of physician-assisted suicide and other related issues.²²⁷

The fact that the court has devised levels of scrutiny to facilitate judicial activism only exacerbates the situation. If the right in question is so fundamental to individual liberty, and considered so restricted in comparison to other rights that the restriction is seen as a denial of equal protection, why has there not been a political call for change by the group so affected? This question is particularly pertinent when asked in the context of women, who form a majority of American voters, and even in the context of the elderly, who form a rapidly expanding and cohesive voting population in America. If at all, the practice of judicial establishment of levels of scrutiny finds reasonableness in the context of racial minorities who are discrete and insular minorities. This practice is understandable when seen in the racial context applied to the footnote in the Supreme Court's 1938 decision of *United States v. Carolene Products Company*.²²⁸

The Court's 1967 racial decision in *Loving v. Virginia*²²⁹ was within the parameters of *Carolene Products*. *Baehr* seeks to apply heightened scrutiny to single-gender unions (not homosexual unions). The court argued that they should find equal protection within suspect classification or quasi-suspect classification²³⁰ because "sex is a 'suspect category' for purposes of equal protection analysis under article I, section 5 of the Hawaii Constitution . . ." ²³¹ This is a judicial leap, made more palatable because it is confined to the Hawaii state constitution, but nonetheless, not within the intent of "dis-

226. See, e.g., Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended at 1 U.S.C.A. §7; 28 U.S.C.A. §1738(C) (West Supp. 1997)); Lisa M. Farabee, Note, *Marriage, Equal Protection, and New Judicial Federalism: A View From the States*, 14 YALE L. & POL'Y REV. 237 (1996); Keane, *supra* note 62. Candance L. Sage, Note, *Sister-State Recognition of Valid Same-Sex Marriages: BAEHR v. LEWIN—How Will It Play In Peoria?*, 28 IND. L. REV. 115 (1994).

227. *Glucksberg*, 117 S. Ct. at 2303 (O'Connor, J., concurring) (citations omitted).

228. 504 U.S. 144, 152 n.4 (stating that Justice Stone provided insular and discrete minorities may warrant more searching judicial inquiry).

229. 388 U.S. 1 (1967).

230. See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Craig v. Boren*, 429 U.S. 190 (1976). The state must demonstrate that legislative use of "the classification reflects a reasoned judgment consistent with the ideal of equal protection . . ." See *Plyler v. Doe*, 457 U.S. 202, 217-18 (1982).

231. See *Baehr*, 852 P.2d at 67.

crete and insular minorities" if the basis is solely on gender. And if the basis is one of sexual orientation, the Supreme Court has not addressed the issue of whether or not homosexual couples constitute a suspect or a quasi-suspect classification.²³² At most, a federal district court in the southern district of Ohio has held that homosexuals and bisexuals comprise a quasi-suspect class of persons.²³³ Thus, the Hawaii court is dodging the obvious, that homosexuals are not within the ambit of *Carolene Products*, and utilization of gender equivalents stretches the limits of tolerance of judicial review.

III. THE DECISION: *BAEHR V. LEWIN*

The Hawaii decision should be seen in context. The area of family law has long been dominated by traditional American notions of what constitutes a family. These notions were primarily influenced by the historical and international tradition of Judeo-Christian practices. By requiring the state to show a compelling reason why persons of the same gender should not be allowed to marry, *Baehr* is a dramatic shift away from these traditional Judeo-Christian practices. Such shifts have been occurring at the local level for decades,²³⁴ with only minimal public reaction. Until *Baehr*, the public had largely perceived these changes as based on individual liberty, rather than on a comprehensive plan to replace the Judeo-Christian underpinnings of family law. However, the Hawaii decision captured the attention of the

232. See *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting) (asserting "discrimination against homosexuals or bisexuals based solely on their sexual preference raises significant constitutional questions under both prongs of our settled equal protection analysis"). But see *Watkins v. United States Army*, 875 F.2d 699, 724-28 (9th Cir. 1989) (en banc) (Norris, J., concurring) (stating homosexuals comprise suspect class); see also David K. Flaks, *Gay and Lesbian Families: Judicial Assumptions, Scientific Realities*, 3 WM. & MARY BILL RTS. J. 345 (Summer 1994); Harris M. Miller II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797 (July 1984); John F. Niblock, Comment, *Anti-Gay Initiatives: A Call for Heightened Judicial Scrutiny*, 41 UCLA L. REV. 153 (Oct. 1993); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (Apr. 1985); Stephen Zamansky, Note, *Colorado's Amendment 2 and Homosexuals' Right to Equal Protection of the Law*, 35 B.C. L. REV. 221 (Dec. 1993).

233. See *Equality Found. of Greater Cincinnati Inc. v. Cincinnati*, 860 F. Supp. 417, 436 (S.D. Ohio 1994), *rev'd and vacated*, 128 F.3d 289 (6th Cir. 1997).

234. See, e.g., *Braschi v. Stahl Associates Co.*, 543 N.E.2d 49, 54 (N.Y. 1989) (stating expanded definition of family can include two men living together for ten years where they share financial and emotional dependency). See generally MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* (1993) (shifting focus of marriage to economic partnership of two equal persons); Raymond C. O'Brien, *Domestic Partnership: Recognition and Responsibility*, 32 SAN DIEGO L. REV. 163, 175-219 (1995) (tracing past, present and future of domestic partnerships); Foreword, *Twenty-Five Years of Divorce Resolution*, 1994 UTAH L. REV. 1 (introducing articles written in conjunction with symposium tracing acceptance of no-fault divorce: *Twenty-Five Years of Divorce Revolution*).

media and the public because it was such a radical shift from what the prior decisions had correctly called "the definition of marriage."²³⁵

What then does the decision bring to the context of family law? First, remember that the Hawaii case of *Baehr* is not the first to concern single-gender unions.²³⁶ In the past the issue was dismissed as beyond the definition of marriage,²³⁷ not as an issue involving discrimination involving due process, equal protection or any state equal rights amendment. At its essence, "marriage" was seen as involving the possibility of procreation.²³⁸ Even without this possibility, the icon of sexual union between a man and a woman was established in history and practice as normative. This norm was beyond the capacity of two persons of the same gender and necessarily excluded them from the idea of marriage. Such an argument, based solely on the definition established by generations of people and sanctified by biblical and historical precedent, was both rational and dispositive in any legal challenge. Hawaii changed this rationale.²³⁹ *Baehr* has as its premise the proposition that times have changed and thus so has the possible definition of marriage.

The Hawaii court's argument that the definition of marriage has changed relies on the rationale of *Loving v. Virginia* and its conclusion, adopted by the Hawaii court that, "customs change with an evolving social order."²⁴⁰ The Hawaii court took the shift in racial categories as applied to marriage in the *Loving* decision, and held that the evolving social order now demanded strict scrutiny of any marriage restrictions involving race or gender.²⁴¹ This extension of *Loving* to couples of the same gender makes *Baehr* unique. The court rejected the argument of the state which "proposes that 'the right of persons of the same sex to marry one another does not exist because mar-

235. See generally William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993); William Hohengarten, Note, *Same-Sex Marriage and the Right of Privacy*, 103 YALE L.J. 1495 (1994).

236. See Peter G. Guthrie, Annotation, *Marriage Between Persons of the Same Sex*, 63 A.L.R.3d 1199, 1199 (1975) (summarizing state court decisions in New York, Minnesota, Washington, and Kentucky which held there is "no valid marital contract [between] persons of the same sex").

237. See *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

238. See, e.g., *Baehr*, 852 P.2d at 55; see also *Loving v. Virginia*, 388 U.S. 1, 12, (1967) (finding marriage is one of "[the] basic civil rights of man, fundamental to our very existence and survival"); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (finding "marriage and procreation are fundamental to the very existence and survival of the race").

239. See *Baehr*, 852 P.2d at 56 (recognizing that "[i]mplicit in the *Zablocki* court's link between the right to marry, on the one hand, and the fundamental rights of procreation, childbirth, abortion, and child rearing, on the other, is the assumption that the one is simply the logical predicate of the others."). But cf. *id.* at 58-59. However, the Hawaii court lists the rights and benefits arising out of marriage without reference to procreation and childbirth. See *id.* at 58 n.1.

240. See *id.* at 63.

241. See *id.* Opponents of the Hawaii decision argue that if single-gender marriage is allowed, the changing social order, with neither rule nor travail, will eventually allow for polygamy, incest and other social possibilities. See, e.g., Editorial, *Who's Boss?*, WALL ST. J., Dec. 20, 1996, at A16 (arguing that legislation from bench suggests new level of audacity).

riage, by definition and usage, means a special relationship between a man and a woman."²⁴² The Hawaii court found this argument to be "circular and unpersuasive."²⁴³ That is, the Hawaii court stated that, since any argument involving the possibility of single-gender marriage could be rejected because of the definition of marriage, no argument could be made for single-gender marriage. The Hawaii Supreme Court then demanded that the trial court determine if there is a compelling state interest which would justify preventing single-gender marriage.²⁴⁴

Second, the Hawaii Supreme Court was very careful to formulate the case in the context of gender, not sexual orientation. According to the court, "[h]omosexual' and 'same-sex' marriage are not synonymous Parties to 'a union between a man and a woman' may or may not be homosexuals. Parties to a same-sex marriage could theoretically be either homosexuals or heterosexuals."²⁴⁵ The court opined: "it is irrelevant, for purposes of the constitutional analysis germane to this case, whether homosexuality constitutes an 'immutable trait' because it is immaterial whether the plaintiffs . . . are homosexuals"²⁴⁶ The Court continued: "we disagree with Chief Judge Burns' position that 'questions whether heterosexuality, homosexuality, bisexuality, and asexuality are "biologically fated" are relevant questions of fact."²⁴⁷

The media has made the Hawaii decision into one affecting gay marriages and indeed, this was the posture of previous decisions.²⁴⁸ Since *Baehr*, both the state and the federal governments have passed legislation prohibiting recognition of single-gender marriage, and there is little doubt the legislation was passed in part because of concern over homosexuals being able to marry.²⁴⁹ Why is gender significant? Partly because by concentrating on gender rather than sexual orientation, the Hawaii decision avoids two previ-

242. See *Baehr*, 852 P.2d at 61.

243. See *id.*

244. See *id.* at 68. The trial began in September 1996. See generally Matsuoka, *And Now the Trial*, HONOLULU STAR BULL., May 14, 1996, at A1. It ended December 3, 1996. See generally, Susan Essoyan & Bettina Boxall, *Hawaii Ruling Lifts Ban on Marriage of Same-Sex Couples*, L.A. TIMES, Dec. 4, 1996, at A1; Carey Goldberg, *Hawaii Judge Ends Gay-Marriage Ban*, N.Y. TIMES, Dec. 4, 1996, at A1.

245. *Baehr*, 852 P.2d at 51 n.11. It was John C. Lewin, Director of the Department of Health of the State of Hawaii, who, by virtue of his motion for judgment on the pleading, had sought to place the question of homosexuality in issue. See *id.* at 51 n.12.

246. *Id.* at 54.

247. *Id.* at 53 n.14. The Hawaii Supreme Court dismissed the lower court's conclusions of law involving the question of homosexuality and sexual orientation as well. See *id.* at 53-54.

248. See, e.g., *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995). See generally HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* §2.8 (2d ed. 1988).

249. See Paul M. Barrett, *I Do/No You Don't: How Hawaii Became Ground Zero in Battle Over Gay Marriages*, WALL ST. J., June 17, 1996, at 1. President Clinton signed the Defense of Marriage Act in September 1996. See Defense of Marriage Act, Pub. L. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. §7; 28 U.S.C. §1738(C) (West Supp. 1997)). See generally Reske, *A Matter of Full Faith*, A.B.A. J., July 1996, at 32. Reske lists ten states which have passed specific legislation to prohibit recognition of single-gender marriage. See *id.* At the date

ous United States Supreme Court decisions. The first one, in 1986, *Bowers v. Hardwick*,²⁵⁰ asked "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in [consensual] sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time."²⁵¹ The court answered "no" to the question, but cases decided since 1986 by the court invited a host of other issues surrounding equal protection analysis and homosexual conduct, privacy protection and even due process rights.²⁵² The Hawaii court skirts the labyrinth of federal constitutional issues surrounding sexual orientation, by focusing instead on "gender" and questions of privacy and equal protection under the Hawaii state constitution.

The second Supreme Court decision the Hawaii court avoids is *Romer v. Evans*.²⁵³ Here, the Supreme Court held that when "Colorado voters adopted by statewide referendum 'Amendment 2' to the state constitution, [thereby] precluding all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on their 'homosexual, lesbian or bisexual orientation, conduct, practices or relationships,'" such amendment violated the Equal Protection Clause of the United States Constitution.²⁵⁴ Justice Kennedy held that "Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else."²⁵⁵ This Colorado cannot do. "A State cannot so deem a class of persons a stranger to its laws."²⁵⁶ The Hawaii court,

of publication of this article, at least 25 states have passed legislation prohibiting single-gender marriage and its recognition. See, e.g., GA. CODE ANN. § 19-3-3.1 (1996):

(a) It is declared to be the public policy of this state to recognize the union of man and woman. Marriages between persons of the same sex are prohibited in this state.

(b) No marriage between persons of the same sex shall be recognized as entitled to the benefits of marriage. Any marriage entered into by persons of the same sex pursuant to a marriage license issued by another state or foreign jurisdiction or otherwise shall be void in this state. Any contractual rights granted by virtue of such license shall be unenforceable in the courts of this state and the courts of this state shall have no jurisdiction whatsoever under any circumstances to grant a divorce or separate maintenance with respect to such marriage or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such marriage.

Id.

250. 478 U.S. 186 (1986).

251. *Id.* at 190.

252. See, e.g., *Shahar v. Bowers*, 70 F.3d 1218 (11th Cir. 1995), *vacated*, 78 F.3d 499 (11th Cir. 1996), *reh'g granted*, 114 F.3d 1097 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998); *High Tech. Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989); *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987).

253. 116 S. Ct. 1620 (1996).

254. *Id.* at 1621.

255. *Id.* at 1629.

256. *Id.* at 1629. The American Catholic bishops have voiced concern for homosexual persons and decried any discrimination directed against them. In a 1990 publication, *Human Sexuality: A Catholic Perspective For Education And Lifelong Learning*, the bishops wrote:

We call on all Christians and citizens of good will to confront their own fears about homosexuality and to curb the humor and discrimination that offend homosexual per-

by focusing on gender, rather than sexual orientation, avoids the strict interpretation of *Romer* as forbidding a "bare . . . desire to harm" homosexuals,²⁵⁷ and allows single-gender marriage to be isolated from the animus surrounding *Bowers*.²⁵⁸

Finally, a third point about *Baehr v. Lewin* is that it rests squarely on *Loving v. Virginia*. The 1967 Virginia decision invalidating state laws against racial intermarriage is particularly important because it describes marriage as "one of the vital personal rights essential to the orderly pursuit of happiness."²⁵⁹ Because marriage was an essential right, the Court sought a compelling purpose for the state statute, but finding none, it invalidated the law as violative of equal protection and repudiation of official acceptance of the obnoxious eugenic theory that intermarriage between blacks and whites pollutes the Aryan gene pool and threatens "White Supremacy."²⁶⁰

Even though *Loving* was decided by the United States Supreme Court and involved only the United States Constitution, the Hawaii court adopted this interpretation for the Hawaii State Constitution.²⁶¹ The Hawaii State Supreme Court admitted that in attempting to define privacy within its own constitution, the court was "'led back to' the landmark United States

sons. We understand that having a homosexual orientation brings with it enough anxiety, pain, and issues related to self-acceptance without society adding additional prejudicial treatment.

HUMAN SEXUALITY: A CATHOLIC PERSPECTIVE FOR EDUCATION AND LIFELONG LEARNING 55 (1990). The Vatican's Sacred Congregation for the Doctrine of the Faith, wrote in its 1988 *Letter to the World's Bishops on the Pastoral Care of Homosexual Persons*, that:

It is deplorable that homosexual persons have been and are the object of violent malice in speech or in action. Such treatment deserves condemnation from the Church's pastors wherever it occurs. It reveals a kind of disregard for others which endangers the fundamental principles of a healthy society. The intrinsic dignity of each person must always be respected in word, in action and in law.

Letter to the World's Bishops on the Pastoral Care of Homosexual Persons 10 (1988). See generally United States Catholic Conference, *AWAY OUR CHILDREN: A PASTORAL MESSAGE TO PARENTS OF HOMOSEXUAL CHILDREN* (1997).

257. *Romer*, 116 S. Ct. at 1628.

258. But see *Shahar v. Bowers*, 70 F.3d 1218 (11th Cir. 1995), where, a year before *Romer*, the Eleventh Circuit remanded to the district court for it to determine under a strict scrutiny standard whether the intimate association between a woman and a second woman whom she planned to marry in a Jewish religious ceremony was protected by the First Amendment.

259. *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Other Supreme Court decisions apply a heightened level of scrutiny to state legislation which burdens an individual's right to marry. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 382-83 (1978) (support obligation of parent); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 269 (1974) (right to travel); *Shapiro v. Thompson*, 394 U.S. 618, 642 (1969) (residency requirements for welfare recipients); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (right to procreate).

260. *Loving*, 388 U.S. at 11.

261. See *Baehr*, 852 P.2d at 50 (citing HAW. CONST. art. I, § 5, § 6 (1978)). Specifically, Art. I, § 5: "No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." And also Art. I, § 6: "The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest."

Supreme Court cases”²⁶² And in doing so, the court admitted it would need to find a “new fundamental right”²⁶³ if it were to find constitutional protection for same-sex couples, and it would have to look, “not to ‘personal and private notions’, but to the . . . ‘traditions and [collective] conscience of our people’ to determine whether a principle is so rooted [there] . . . as to be ranked . . . fundamental.”²⁶⁴ The court could not find that applicants for single-gender marriage have a fundamental right arising out of privacy or otherwise.²⁶⁵ It is interesting for analysis that while *Loving* firmly rested on the fundamental marriage right of the two opposite gender persons, the Hawaii Supreme Court relied completely on *Loving*, yet concluded it finds no fundamental right to marry for single-gender couples. Failing to find this fundamental right, but still relying on *Loving*, the Hawaii court utilized an equal protection analysis and applied it to the issue of single-gender marriage to arrive at its conclusion.

The Hawaii Supreme Court devoted a considerable portion of the decision to the facts in *Loving*. It described the slavery, the reliance by the trial judge on what Divine Providence intended, and the decision by Chief Justice Earl Warren to invalidate the state statute because it discriminates solely on the basis of race, a denial of equal protection. The reliance upon *Loving* is evident in the fact that even the dissent in *Baehr* was dismissed by the majority as having been rejected previously in *Loving*.²⁶⁶ The Hawaii court goes one step further. Failing to confine itself to the fact that *Loving* was a case about racial discrimination, the Hawaii court focused instead on broader equal protection of the laws. It stated, “as a rule our initial inquiry has been whether the legislation in question should be subjected to ‘strict scrutiny’ or to a ‘rational basis’ test.”²⁶⁷ Even though the court had not dealt with sex-based classifications previously,²⁶⁸ it had held that “sex-based classifications are subject, as a per se matter, to some form of ‘heightened’ scrutiny, be it ‘strict’ or ‘intermediate,’ rather than mere ‘rational basis’ analysis.”²⁶⁹ The Hawaii Supreme Court thus opened the way to heightened scrutiny, although it could not arrive at this level of review through denial of a fundamental right.

The Hawaii Supreme Court required the highest level of scrutiny to sustain the state statute—strict scrutiny—and this was the reason why the trial court was directed to find a compelling state interest to justify it.²⁷⁰ That is,

262. *Baehr*, 852 P.2d at 57.

263. *Id.*

264. *Id.*

265. *See id.*

266. *See id.* at 68.

267. *Id.* at 63.

268. *See id.* at 64. The court did note a preference for finding a compelling state interest as a result of its holding in *Holdman v. Olim*, 581 P.2d 1164, 1167 (1978). *See also Baehr*, 852 P.2d at 67.

269. *Baehr*, 852 P.2d at 65.

270. *See id.* at 65. In reaching this determination, the Hawaii court assumed the conclusion of a case decided in the United States Supreme Court where a married woman and her husband

because equal protection analysis under the Hawaii constitution afforded "some form of 'heightened' scrutiny,"²⁷¹ plus the presence of the Equal Rights Amendment in the Hawaii State Constitution, both allowed for sex to be a suspect category for equal protection analysis.²⁷² The result was that the trial court was told to find a compelling state interest to justify the gender distinction. The direction of the Hawaii Supreme Court was clear:

[W]e so hold, that [the statute] is presumed unconstitutional . . . unless Lewin, as an agent of the State of Hawaii, can show that (a) the statute's sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgments of the applicant couples' constitutional rights.²⁷³

The Hawaii Supreme Court's remand initiated a trial at the lowest level of the state, *Baehr v. Miike*.²⁷⁴ Other events unfolded: within the three years following the decision, the legislature adopted language for incorporation into the state constitution which expressly banned single-gender marriage and created a commission to study the controversial issue.²⁷⁵ In December 1995, the Commission on Sexual Orientation and the Law recommended 5-2 that single-gender marriage be permitted in the state.²⁷⁶ A proposal to allow a state-wide referendum to vote on a state constitutional amendment banning single-gender marriages was declared invalid on March 24, 1997.²⁷⁷ Such a referendum, if it were to be included as part of the November 1997 elections, would have allowed the people of the state to vote for a constitu-

filed suit against the Secretary of Defense seeking declaratory and injunctive relief against enforcement of federal statutes governing quarters allowances and medical benefits for members of the uniformed services. The statute provided that spouses of male members were treated differently from spouses of female members, thus precipitating the issue of gender discrimination. The court found that there was gender discrimination, and some of the justices thought that strict scrutiny should be applied. See *Baehr*, 852 P.2d at 66-67 (quoting *Frontiero v. Richardson*, 411 U.S. 677 (1973)).

271. *Baehr*, 852 P.2d at 64.

272. See *id.*

273. *Id.* at 67.

274. CIV. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). On December 3, 1996, Hawaii Circuit Court Judge Kevin S.C. Chang found that the state had failed to provide a compelling state interest to deny single-gender couples a license to marry. Specifically, the court rejected the state's argument that allowing same-sex marriages would have a negative impact on development of children because it is in the child's best interest to be brought up by a mother and a father. The court stayed its ruling pending the state's appeal to the Hawaii Supreme Court.

275. See 1994 Haw. Sess. Laws 217 §3 (codified as amended HAW. REV. STAT. §572-1), which reads, "Requisites of valid marriage contract. In order to make valid the marriage contract, which shall be only between a man and a woman, it shall be necessary . . ." (emphasis supplied).

276. See generally David W. Dunlap, *Panel in Hawaii Recommends Legalizing Same-Sex Marriage*, N.Y. TIMES, Dec. 11, 1995, at A18.

277. See *Hawaii State AFL-CIO v. Yoshina*, 935 P.2d 89 (1997) (holding that November 5, 1996 general election ballot on whether or not to convene constitutional convention did not receive a favorable majority of the total ballots cast. Thus, because there were blank ballots and over votes, the 163,869 persons who voted for the constitutional convention were less than half of the 369,357 total ballots cast); see also *Hawaii Probes Results of Constitutional Convention Question*, CAP. MRKTS. RPTS., Nov. 7, 1996, at 3.

tional amendment which could affect single-gender marriage in the state. A state constitutional ban on same-sex unions would make null and void any judicial opinion. The invalidity of the November 1996 referendum petition was particularly troublesome to those seeking to end the litigation and restore opposite gender marriage as the sole definition of marriage.

The failure of the state effort to place the referendum on the ballot was precipitous for another reason: it occurred three months after the lower court in Hawaii ruled that it could find no compelling interest of the State of Hawaii to justify refusal of its officers to grant marriage licenses to same-sex couples.²⁷⁸ At trial, the State offered the following interests to justify its refusal to issue a marriage license to same-sex couples:

- (1) That the State has a compelling interest in protecting the health and welfare of children and other persons. Specifically, the State has a compelling interest to promote the optimal development of children as, all things being equal, it is best for a child that it be raised in a single home by its parents, or at least by a married male and female;
- (2) That the State has a compelling interest in fostering procreation within a marital setting;
- (3) That the State has a compelling interest in securing or assuring recognition of Hawaii marriages in other jurisdictions;
- (4) That the State has a compelling interest in protecting the State's public fisc from the reasonably foreseeable effects of State approval of same-sex marriage in the laws of Hawaii;
- (5) That the State has a compelling state interest in protecting civil liberties, including the reasonably foreseeable effects of State approval of same-sex marriages, on its citizens.²⁷⁹

On December 3, 1996, Circuit Court Judge Kevin S.C. Chang rejected the arguments of the State and ruled that the State of Hawaii had thus failed to demonstrate any compelling reasons to prohibit same-sex persons from being married.²⁸⁰ Relying in significant part upon the concurring opinion of Judge Ferren's opinion concurring in part and dissenting in part in *Dean v. District of Columbia*,²⁸¹ Judge Chang concluded:

[The State] has failed to present sufficient credible evidence which demonstrates that the public interest in the well-being of children and families, or the optimal development of children would be adversely affected by same-sex marriage. Nor has [the state] demonstrated how same-sex marriage would adversely affect the public fisc, the state interest in assuring recognition of Hawaii marriages in other states, the institution of traditional marriage, or any other important public or government interest.²⁸²

278. See *Baehr*, CIV. No. 91-1394, 1996 WL 694235.

279. *Id.* at *3.

280. See *id.* at *46-47.

281. 653 A.2d 307, 355-56 (D.C. App. 1995) (Ferren, J., concurring in part and dissenting in part).

282. *Baehr*, CIV. No. 91-1394, 1996 WL 694235, at *21.

The failed argument of the State of Hawaii seeking to arrive at a compelling state interest in the context of equal protection analysis, should have introduced into consideration the following issues: (1) the limits of equal protection in the discovery of new constitutional rights; (2) the level of judicial inquiry as exceeding this type of equal protection analysis; (3) reliance upon *Loving* was more a product of wishful thinking than judicial precedent—*Loving*, a case of racial discrimination with a distinctive social, legal and historical basis (an American civil war was fought in large part concerning this issue) is not the case of single-gender marriage, a notion that has not reached the stage of even domestic partnership in most American jurisdictions; (4) *Loving* involved a distinct fundamental right to marry which *Baehr* expressly admits cannot be found within the context of same-sex marriage; and (5) there is a vibrant social fabric, reliant in large part on the religious underpinnings of generations which has been deprived of a voice in such a radical transformation of societal precedent by a minority of jurists as to “legislating from the bench.”²⁸³

The legislature, the people, the jurists and the plaintiffs themselves await a decision of the Supreme Court of Hawaii. If that court upholds the finding by Judge Chang that the state has failed to meet its burden to produce compelling state interests, then single-gender marriage will become a reality in Hawaii. This creates an interesting situation. That is, for at least a time, it will be possible for single-gender persons to enter into marriage in Hawaii. Although the marriages will be valid there, it remains to be seen whether they will be valid in other states. The Federal Defense of Marriage Act²⁸⁴ is one effort to prevent recognition. But legal commentators are marshalling arguments in favor of state recognition of these single-gender marriages.

Larry Kramer, a Professor of Law at New York University Law School, offers one argument.²⁸⁵ He writes that states, when asked to recognize marriages celebrated in other states, rely upon the traditional public policy approach: valid where celebrated, valid everywhere unless contrary to strong state public policy. Such an approach was acceptable when recognizing an act which had no judicial approbation, unlike a divorce which requires judicial action. Professor Kramer rejects this public policy exception as unconstitutional: “The Full Faith and Credit Clause prohibits states from selectively discriminating in choice of law based on judgments about the desirability or

283. Editorial, *Who's Boss?*, *supra* note 241.

284. Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended at 1 U.S.C.A. §7; 28 U.S.C.A. § 1378(C) (West Supp. 1997)).

285. See Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997); see also Barbara J. Cox, *Same-Sex Marriage and Choice of Law: If We Marry in Hawaii Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033; Deborah M. Henson, *Will Same-Sex Marriages be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States' Choice of Law Regarding Status and Incidents of Homosexual Marriages Following Hawaii's Baehr v. Lewin*, 32 U. LOUISVILLE J. FAM. L. 551 (1993-1994); Monrad G. Paulsen & Michael I. Sovern, “Public Policy” in the *Conflict of Laws*, 56 COLUM. L. REV. 969 (1956).

obnoxiousness of other state's policies."²⁸⁶ Thus, a sister state may not deny recognition of a marriage celebrated in another state on public policy grounds. Furthermore, Congress may not authorize them to do so through the Defense of Marriage Act.²⁸⁷

Mark Strasser, agrees with Professor Kramer in principle, but adds a distinction.²⁸⁸ He writes:

The Full Faith and Credit Clause is intended to promote a variety of purposes which include unifying the nation, reducing wasteful litigation, and increasing the predictability and certainty of judgements. While the choice of law rules generally give much discretion to courts, they give much less discretion in the context of the recognition of marriages than in other contexts, because of the importance of the right at issue and the importance of respecting settled expectations. Choice of law in the context of recognizing marriages celebrated in another state seems best understood as incorporating both full faith and credit and choice of law jurisprudence.²⁸⁹

The distinction and the conclusion implies that "if the state does not have an evasion statute and has not declared the marriage void, courts cannot in good faith hold that the state will not recognize the union."²⁹⁰

The debate over recognition will mount and there will certainly be sufficient cases to test the constitutional waters should there be a period in Hawaii when single-gender marriage is available and valid. To prevent this possibility, the Hawaii legislature has passed a resolution calling for a constitutional convention to be held in early 1998. While this is not certain, polls in Hawaii suggest that when the people in Hawaii are asked to ratify a constitutional amendment banning single-gender marriage, they will do so. Nonetheless, in the meantime, as a means to provide benefits to homosexual couples who do not wish to enter into marriage with a person of the opposite sex, the Hawaii legislature offered a unique benefit package. The package, similar to a domestic partnership program but far more extensive, offers to couples composed of two individuals who are legally prohibited from marrying under state law many of the benefits of married couples. The legislation became effective July 1, 1997. It establishes "Reciprocal Beneficiaries."²⁹¹ The purpose of the legislation is explanatory:

Section 2. Findings. The legislature finds that the people of Hawaii choose to preserve the tradition of marriage as a unique social institution based upon the committed union of one man and one

286. Kramer, *supra* note 285, at 1967.

287. *See id.* at 2008.

288. *See generally* MARK STRASSER, LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION 1 (1997).

289. Mark Strasser, *Judicial Good Faith and the Baehr Essentials: Giving Credit Where It's Due*, 28 RUTGERS L.J. 313, 365 (1997).

290. *Id.* at 365-66.

291. *See* HAW. REV. STAT. ANN. § 572C-1 (Michie 1997). Response to the new benefits has not been enthusiastic. Even though 5,000 people obtained applications, only 296 couples actually signed up. *See Hawaii's Domestic Partnership Law A Bust*, WASH. POST, Dec. 25, 1997, at A14.

woman. The legislature further finds that because of its unique status, marriage provides access to a multiplicity of rights and benefits throughout our laws that are contingent upon that status. As such, marriage should be subject to restrictions such as prohibiting respective parties to a valid marriage contract from standing in relation to each other, i.e. brother and sisters of the half as well as to the whole blood, uncle and niece, aunt and nephew. However, the legislature concurrently acknowledges that there are many individuals who have significant personal, emotional, and economic relationships with another individual yet are prohibited by such restrictions from marrying. For example, two individuals who are related to one another, such as a widowed mother and her unmarried son, or two individuals who are of the same gender. Therefore, the legislature believes that certain rights and benefits presently available only to married couples would be made available to couples comprised of two individuals who are legally prohibited from marrying one another.²⁹²

After defining what is required to enter into the described "committed relationship," the statute then seeks to include benefits similar to those enjoyed by married couples, including among others: hospital visitation, inclusion within medical insurance coverage, election against a valid last will and testament, availability of tenancy by the entirety, survivorship under intestate succession and the benefit of augmented estate practices.²⁹³ The intent is to provide benefits to persons unable to marry, but still retain the unique status of marriage as that between a man and a woman.

Even though the reciprocal beneficiaries statute is currently in effect in Hawaii, there still is no constitutional amendment banning single-gender unions. Thus there is the conflict between the judicially created right to marry of *Baehr v. Miike* and the legislative enactment of reciprocal beneficiaries. Single-gender marriage may still occur. Whether there is subsequent recognition of these marriages in other states is problematic because of the apparent and traditional inapplicability of the Full Faith and Credit Clause to marriage.²⁹⁴ But, as has been discussed earlier, this is now the subject of debate. There is also the reality of the fervor on both sides of the issue to continue litigation no matter what the outcome,²⁹⁵ and the pressing desire on the part of everyone in Hawaii to resolve the matter as quickly as possible.

292. HAW. REV. STAT. ANN. § 572C-2 (Michie 1997).

293. See *id.*

294. See, e.g., Robert L. Cordell II, *Same-Sex Marriage: The Fundamental Right of Marriage and an Examination of Conflict of Laws and the Full Faith and Credit Clause*, 26 COLUM. HUM. RTS. L. REV. 247 (1994); Lisa M. Farabee, *Marriage, Equal Protection, and New Judicial Federalism: A View From the States*, 14 YALE L. & POL'Y REV. 237, 237-38 (1996) (arguing state courts should recognize same sex marriage in an age of "judicial federalism"); Note, *In Sickness and In Health, In Hawaii and Where Else?: Conflict of Laws and Recognition of Same-Sex Marriages*, 109 HARV. L. REV. 2038, 2038 and n.4 (1996) (arguing valid same-sex marriages should be recognized as valid in all states as part of common law).

295. See, e.g., Cox, *supra* note 285; Mark Strasser, *Domestic Relations Jurisprudence and the Great, Slumbering Baehr: On Definitional Preclusion, Equal Protection, and Fundamental Interests*, 64 FORDHAM L. REV. 921 (1995); Evan Wolfson, *Crossing the Threshold: Equal Rights for*

All parties involved—and America itself—must be asking how marriage could be the subject of such a debate. Such a legal predicament gives new meaning to all the perniciousness of “shotgun.”

CONCLUSION

The 1993 decision of *Baehr v. Lewin* is significant in part because it is a continuation of changes within the religiously organized and inspired underpinnings of American family law. These changes have been decades in the making. Nonetheless, unlike changes in state statutes, for instance, regarding the nature of marriage between persons of opposite gender, the facilitation of divorce, and the permissive ability of unmarried cohabitants to maintain legal and social objectivity, the issue of single-gender marriage has captured the imagination and both the praise and anger of many Americans. The anger comes because—again as a product of lengthy changes—religious perspective has been shunted aside when religion seeks to provide a sense of history, a sense of natural law, and a sense of critique of American society. The irrelevancy of religion has become a hallmark of portions of American society. The comments and underlying assumptions of the justices in Hawaii,²⁹⁶ the mayors of San Francisco and Boston,²⁹⁷ and the observations of Professor Carter provide examples.²⁹⁸ Judicial activism facilitates rejection of religion by depriving religion of a voice in any political process rejecting or sustaining something so fundamental as the definition of marriage. Religious people are angry because their voices are deemed irrelevant.

It is not that any particular religion seeks to force a totalitarian view upon the rest of American society. It is that religion: (1) has a world view forged by society, tradition, and in some cases a magisterium; (2) has a right to present this world view consistent with the free exercise provisions of the Constitution; (3) is willing to allow that world view to be examined objectively and critically; (4) that world view has, does, and will continue to serve the social programs which religion thinks are necessitated by the rejection of this world view; and (5) that the service to these social programs is marked by extreme generosity. Whenever America seeks to quash religious critique as the means by which to preserve separation of church and state, America abrogates both the mission and the protection of religion embodied in the First Amendment.

Judicial activism, especially that demonstrated in *Baehr v. Lewin*, deprives religion of a voice, a critique, an interaction with the legislative process. When the court, any court, announces a change in deeply held customs, it acts as a super-legislature, providing oligarchy in lieu of democracy. The sudden rush to pass legislation prohibiting any consequences from the Ha-

Lesbians and Gay Men and the Intra-Community Critique, 21 N.Y.U. REV. L. & SOC. CHANGE 567 (1994).

296. See discussion *supra* Part III.

297. See *supra* text accompanying notes 138-153.

298. See *supra* text accompanying notes 51-54, 63-66, and 75-77.

waii decision demonstrates the insular opinion in Hawaii,²⁹⁹ the nature of what is fundamental, and a sure contrast between judicial activism and legislative enactment. The racial climate of *Loving v. Virginia* was different. The time was the mid-sixties, civil rights and change had come to America, there was a democratic and a social climate, and certainly a judicial climate, which represented equal protection and an attempt to eradicate discrimination. It can certainly be factually demonstrated that religion was there at the front throughout the era of civil rights change; indeed, religious hymns formed the battle cry.³⁰⁰ This is not the case with single-gender marriage and thus, absolutely, the courts have no basis whatsoever to justify recognition of single-gender marriage.

The Roman Catholic Church, especially in the documents of the Second Vatican Council, the writings of Pope John Paul II and the statements of the American bishops,³⁰¹ present a religious perspective which defines marriage within the context of biblical texts dated thousands of years. These texts define marriage as a union between a man and a woman and, whether able to have children or not, their union is normative for the marital state, one which cannot accommodate the shift to secular notions of gender. For this reason, a reason based upon religious perspective, neither state legislatures nor state courts should allow for single-gender marriage. Additionally, neither legislatures nor state courts should expand the definition of marriage to accommodate single gender. This is so, in part, because of the compelling interest demonstrated in the society of Hawaii. At this point in the public debate, it is evident that the people of Hawaii do not regard single-gender marriage as a part of their collective conscience. The compelling state interest is to preserve a public policy originating in a pluralistic society, but adamant in maintaining a definition of marriage as a union between a man and a woman. The fact that this represents the icon of a Judeo-Christian heritage is both religious and secular. But of paramount importance, it is a compelling public policy in Hawaii. This is reflected in the dramatic and vociferous opposition mounted to retain the traditional definition of marriage and to suppress the judicial activism of a few who have decide that "times have changed."³⁰²

The religious perspective offered in opposition to single-gender marriage is not based in bigotry; indeed, if one takes the Hawaii decision at face value, this is not an issue involving sexual orientation, particularly gay and lesbian persons. Instead, the religious perspective offered is one of definition, not a definition formed in secret or without social practice for generations, nor without a rational basis for society as a whole. Indeed, the religious perspective offers a definition of marriage—and marriage alone—as one formed from the practice of men and women from Adam and Eve through every other cultural recounting of creation, and practiced today at every moment of every day. Religion's definition of marriage is both compelling and manifest

299. See *supra* text accompanying notes 57-61.

300. See *supra* discussion pp. 441-44.

301. See *supra* Part II.B-D.

302. See *supra* text accompanying notes 236-39.

and prohibitive of single-gender solemnization. Neither the court nor the legislatures should do otherwise.