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BAEHR v. LEWIN: HAWAII TAKES A TENTATIVE STEP TO LEGALIZE SAME-SEX MARRIAGE

Marty K. Courson*

> "From Hawaii, best known for surfing, suntanning, and hula dancing, comes news that could be the Pearl Harbor of social issues in the 1990s - gay marriage."[1]

I. INTRODUCTION

In *Baehr v. Lewin*,[2] the Supreme Court of Hawaii sparked a controversy that has potential nationwide implications. The court held that three same-sex couples were entitled to an evidentiary hearing to determine if the State can demonstrate that denying the couples the right to marry under the Hawaii Marriage Law[3] furthers compelling state interests.[4] If the State fails its burden, it can no longer refuse marriage licenses to couples merely on the basis that they are of the same sex.[5] Should this occur, gay marriages will become legal in Hawaii.[6]

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1. James P. Pinkerton, *A Conservative Argument for Gay Marriage, Forming Families Leads to Social Stability. Why Fight It?*, L.A. TIMES, June 3, 1993, at B7.

2. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), *motion for reconsideration or clarification granted in part*, 852 P.2d 74 (Haw. 1993).

3. HAW. REV. STAT. § 572-1 (1992) (hereinafter the "Hawaii Marriage Law").

4. *Baehr*, 852 P.2d at 68.

5. *Id.* at 57.

6. This presupposes that the political arena has not somehow defeated same-sex marriage in the meantime. With the prospect of these legalized couplings engendering considerable public controversy, polls have shown about 60 percent opposition to same-sex marriage. Robert Stouffer, *Another View of Same-Gender Marriage*, ISLAND LIFESTYLE, Jan. 1994, at 15, 17. Against this backdrop, *Baehr v. Lewin* is susceptible of being

II. FACTS AND PROCEDURAL HISTORY

In May of 1991, the plaintiffs[7] filed a complaint for injunctive and declaratory relief in the Circuit Court of the First Circuit, State of Hawaii, seeking: (1) a declaration that the Hawaii Marriage Law was unconstitutional insofar as it was construed and applied by the Department of Health (hereinafter "DOH")[8] in refusing to issue a marriage license on the sole basis that an applicant couple was of the same sex; and (2) preliminary and permanent injunctions prohibiting the future withholding of marriage licenses on that sole basis.[9]

The plaintiffs alleged that the DOH's interpretation and application of the Hawaii Marriage Law to deny same-sex couples access to marriage licenses violated the plaintiffs' rights to privacy, equal protection, and due process of law, all of which were guaranteed by the Hawaii Constitution.[10]

In July of 1991, the DOH filed a Motion for Judgment on the Pleadings and requested that the court dismiss the com-

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overturned by a State constitutional amendment. To that end, multiple bills have been introduced in the Hawaii Legislature that would amend the Hawaii Constitution to eliminate the possibility of same-sex marriage. *See, e.g.*, H.B. 3709, 17th Leg., Reg. Sess. (Haw. 1974) (proposing a constitutional amendment clarifying same-sex marriage as not constitutionally protected and defining marriage as a legal relationship solely between a male and a female).

However, another bill attempts to offer a constitutional compromise by establishing state-wide domestic partnership registration. *See* H.B. 3647, 17th Leg., Reg. Sess. (Haw. 1974). Under this arrangement couples, who do not qualify for marriage licenses or otherwise wish not to marry, would get formal recognition by the State and enjoy the same rights, benefits, responsibilities, and status of married people. *Id.* Coupled with a constitutional amendment that would outlaw same-sex marriage, this domestic-partnership arrangement is designed to placate both sides of the controversy.

7. The plaintiffs were three same-sex couples whose applications for marriage licenses were denied. *Baehr*, 852 P.2d at 49.

8. The DOH is the state authority that administers marriage licenses. HAW. REV. STAT. §§ 572-5 to 72-6 (1992). Defendant John C. Lewin was sued in his official capacity as its director. *Baehr*, 852 P.2d at 44. Throughout this note, the DOH and Lewin will both be referred to as the "DOH."

9. *Baehr*, 852 P.2d at 48-49.

10. *Id.* at 50; HAW. CONST. art. I, § 6 (1978) ("The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right."); HAW. CONST. art. I, § 5 (1978) ("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.").

plaint for failure to state a claim upon which relief could be granted.[11] In October of 1991, the circuit court granted the DOH's motion and found that the DOH was entitled to judgment as a matter of law.[12] The court then dismissed the plaintiffs' complaint with prejudice.[13]

However, the Hawaii Supreme Court vacated and remanded the circuit court order.[14] In a plurality opinion,[15] the supreme court held that the circuit court made improper factual findings[16] beyond the scope of a judgment on the pleadings.[17] Addi-

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11. *Baehr*, 852 P.2d at 51. The following arguments were made by the DOH regarding the plaintiffs' failure to state a claim:

> (1) the state's marriage laws "contemplate marriage as a union between a man and a woman"; (2) because the only legally recognized right to marry "is the right to enter a heterosexual marriage, [the] plaintiffs do not have a cognizable right, fundamental or otherwise, to enter into state-licensed homosexual marriages"; (3) the state's marriage laws do not "burden, penalize, infringe, or interfere in any way with the [plaintiffs'] private relationships"; (4) the state is under no obligation "to take affirmative steps to provide homosexual unions with its official approval"; (5) the state's marriage laws "protect and foster and may help to perpetuate the basic family unit, regarded as vital to society, that provides status and a nurturing environment to children born to married persons" and, in addition, "constitute a statement of the moral values of the community in a manner that is not burdensome to [the] plaintiffs"; (6) assuming the plaintiffs are homosexuals (a fact not pleaded in the plaintiffs' complaint), they "are neither a suspect nor a quasi-suspect class and do not require heightened judicial solicitude"; and (7) even if heightened judicial solicitude is warranted, the state's marriage laws "are so removed from penalizing, burdening, harming, or otherwise interfering with [the] plaintiffs and their relationships and perform such a critical function in society that they must be sustained."

Id. at 51-52 (quoting the supporting memoranda for the DOH's Motion for Judgment on the Pleadings) (footnotes omitted).

12. Baehr v. Lewin, No. 91-1394-05, slip op. at 6 (Haw. Cir. Ct. Oct. 1, 1991).

13. *Id.*

14. *Baehr*, 852 P.2d at 68.

15. Three opinions were filed. The prevailing plurality opinion was written by Justice Levinson and was joined by Chief Justice Moon. *Id.* at 48. James Burns, an Intermediate Court of Appeals Chief Judge, sitting on the court as a substitute justice, concurred with the plurality. *Id.* at 68. Walter M. Heen, another Intermediate Court of Appeals Judge sitting on the panel, filed a dissenting opinion. *Id.* at 70. Judge Heen's dissent would have been joined by another judge; however, the other judge's temporary assignment to the court expired prior to the filing of the opinion. *Id.* at 48.

16. *Id.* at 53-54. The supreme court noted that:

> [Without] any evidentiary record before it, the circuit court's . . . order granting [the DOH's] motion for judgment on the

tionally, the supreme court held that:

> [O]n the state of the bare record before us . . . the circuit court erred when it concluded, as a matter of law, that: (1) homosexuals[18] do not constitute a "suspect class" for purposes of equal protection analysis under . . . the Hawaii Constitution; (2) the classification created by [the Hawaii Marriage Law] is not subject to "strict scrutiny," but must satisfy only the "rational relationship" test; and (3) [the Hawaii Marriage Law] satisfies the rational relationship test because the legislature "obviously designed [it] to promote the general welfare interests of the community by sanctioning traditional man-woman

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> pleadings contained a variety of findings of fact. For example, the circuit court "found" that: (1) [the Hawaii Marriage Law] "does not infringe upon a person's individuality or lifestyle decisions, *and none of the plaintiffs has provided testimony to the contrary*"; (2) [the Hawaii Marriage Law] "does not . . . restrict [or] burden . . . the exercise of the right to engage in a homosexual lifestyle"; (3) Hawaii has exhibited a "history of tolerance for all peoples and their cultures"; (4) "*the plaintiffs have failed to show* that they have been ostracized or oppressed in Hawaii and have opted instead to rely on a general statement of historic problems encountered by homosexuals which may not be relevant to Hawaii"; (5) "homosexuals in Hawaii have not been relegated to a position of 'political powerlessness.' . . . *[T]here is no evidence* that homosexuals and the homosexual legislative agenda have failed to gain legislative support in Hawaii"; (6) *the "[p]laintiffs have failed to show* that homosexuals constitute a suspect class for equal protection analysis under . . . the Hawaii State Constitution"; (7) "the issue of whether homosexuality constitutes an immutable trait has generated much dispute in the relevant scientific community"; and (8) [the Hawaii Marriage Law] "is obviously designed to promote the general welfare interests of the community by sanctioning traditional man-woman family units and procreation."

Id. at 53-54 (quoting Baehr v. Lewin, No. 91-1394-05, slip op. (Haw. Cir. Ct. Oct. 1, 1991)) (alterations in both original and quoted material) (footnote omitted).

17. *Baehr*, 852 P.2d at 54. A motion for judgment on the pleadings must be based solely on the content of the pleadings. *Id.* at 53.

18. Interestingly, the *Baehr* court noted that the DOH, by virtue of its Motion for Judgment on the Pleadings, was the party which put the question of homosexuality at issue. *Baehr*, 852 P.2d at 52 n.12. The court observed that parties to "a union between a man and a woman" may or may not be homosexuals and, conversely, parties to a same-sex marriage could be either homosexuals or heterosexuals. *Id.* at 52 n.11. It appears that to the *Baehr* court, a person's sexual orientation is theoretically distinct from the fact that he or she chooses to marry a man or a woman.

family units and procreation."[19]

After an exhaustive analysis, the supreme court found that the denial of marriage to same-sex couples did indeed implicate strict scrutiny equal protection analysis under the Hawaii Constitution.[20] Describing the circuit court's order as "run[ning] aground on the shoals of the Hawaii Constitution's Equal Protection Clause,"[21] the court determined that unresolved factual questions precluded an entry of judgment, as a matter of law, in favor of the DOH[22] and, therefore, remanded the case to the circuit court.[23]

On remand, in accordance with a strict scrutiny standard, the DOH will have the burden of demonstrating that the Hawaii Marriage Law furthers a compelling state interest and is narrowly drawn to avoid unnecessary abridgments of constitutional rights.[24]

III. COURT'S ANALYSIS

A. THE RIGHT TO PRIVACY DOES NOT INCLUDE A FUNDAMENTAL RIGHT TO SAME-SEX MARRIAGE

Initially, the *Baehr* court noted that the right to privacy

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19. *Id.* (quoting Baehr v. Lewin, No. 91-1394-05, slip op. (Haw. Cir. Ct. Oct. 1, 1991)) (alterations in both original and quoted material) (footnote omitted).

20. *Id.* at 67. In Hawaii, suspect categories are subject to a strict scrutiny standard and distinctions based on suspect categories are presumed to be unconstitutional unless the state can show compelling state interests which justify the offending classification. Nelson v. Miwa, 546 P.2d 1005, 1008 n.4 (Haw. 1976).

21. *Baehr*, 852 P.2d at 54. The court's decision rests on Hawaii's Equal Protection Clause which is more elaborate than the United States counterpart. Under the United States Constitution, no state may "deny . . . any person . . . equal protection of the laws," U.S. CONST. amend. XIV, § 1, while the Hawaii counterpart provides that "[n]o person shall be . . . denied the equal protection of the laws, nor [their] civil rights . . . because of race, religion, *sex* or ancestry." HAW. CONST. art. I, § 5 (1978) (emphasis added); *see Baehr*, 852 P.2d at 59-60.

22. *Baehr*, 852 P.2d at 54-55.

23. *Id.* at 68.

24. *Id.* During the subsequent DOH motion for the court to reconsider or clarify its opinion, the court reiterated its instructions for remand. Motion for Reconsideration or Clarification, *granted in part*, 852 P.2d 74 (Haw. 1993). The original plurality decision was effectively converted into an outright majority when Justice Nakayama took her seat on the five-member Hawaii Supreme Court and joined with Chief Justice Moon and Justice Levinson in the decision on the motion. *Id.*; *see* Robert Stouffer, *Another View of Same-Gender Marriage*, ISLAND LIFESTYLE, Jan. 1994, at 15, 15-17.

under the Hawaii Constitution is treated as a fundamental right for purposes of constitutional analysis.[25] The Hawaii Constitution expressly provides that the right to privacy may not be infringed unless a compelling state interest is demonstrated.[26] Additionally, "the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause."[27] Therefore, the *Baehr* court needed to determine whether the fundamental right to privacy under the Hawaii Constitution included protection of marriages by same-sex couples.

Emphasizing that as the "ultimate judicial tribunal" in Hawaii its authority to interpret and enforce the State's Constitution was final and unreviewable,[28] the *Baehr* court noted that it could give broader privacy protection under the Hawaii Constitution than was possible under the United States Constitution.[29] Nevertheless, the *Baehr* court determined that it was constrained by the privacy jurisprudence of the U.S. Supreme Court in defining the limits of Hawaii's right to privacy.[30] Thus, follow-

25. *Baehr*, 852 P.2d at 55. During the Hawaii Constitutional Convention of 1978, the framers articulated:

> By amending the Constitution to include a separate and distinct privacy right, it is the intent of your Committee to insure that privacy is treated as a fundamental right for purposes of constitutional analysis. . . . It is a right that, though unstated in the federal Constitution, emanates from the penumbra of several guarantees of the Bill of Rights. . . . [T]here has been some confusion as to the source of the right and the importance of it. . . . By inserting clear and specific language regarding this right into the Constitution, your Committee intends to alleviate any possible confusion over the source of the right and the existence of it.

Id. (quoting Comm. Whole Rep. No. 15, 1 Proceedings, at 1024).

26. HAW. CONST. art. I, § 6 (1978); *see supra* note 10.

27. *Baehr*, 852 P.2d at 55 (quoting Zablocki v. Redhail, 434 U.S. 374 (1978)). The court admitted that the U.S. Supreme Court was "obviously contemplating unions between men and women when it ruled that the right to marry was fundamental." *Id.* at 56.

28. *Id.* at 57 (citing State v. Kam, 748 P.2d 372, 377 (Haw. 1988)).

29. *Id.* at 57; *see also* cases cited *infra* note 96.

30. *Baehr*, 852 P.2d at 57. The Hawaii Supreme Court had previously held that the privacy right found in the Hawaii Constitution was similar to the federal right of privacy. State v. Mueller, 671 P.2d 1351, 1360 (Haw. 1983). The *Mueller* court was guided in this determination by the proceedings of Hawaii's constitutional framers who described the right of privacy as being similar to the right as discussed in such United States Supreme Court cases as Griswold v. Connecticut, 381 U.S. 479 (1965), Eisenstadt v. Baird, 405 U.S. 438 (1972), and Roe v. Wade, 410 U.S. 113 (1973). *See Mueller*, 671 P.2d at 1357-58

ing federal jurisprudence, the court declined to extend the fundamental right to marry to same-sex couples, stating that:

> [W]e do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither do we believe that a right to same-sex marriage is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed.[31]

Accordingly, the court held that the right to privacy did not provide the applicant couples with a fundamental constitutional right to same-sex marriage.[32]

B. Equal Protection Under the Hawaii Constitution Is Implicated When the State Uses Its Sovereign Power to Discriminate on the Basis of Sex

Although the *Baehr* court rejected the right to privacy claim, it gave favorable consideration to the plaintiffs' equal protection claim.[33] As a threshold matter, the court noted that "[t]he power to regulate marriage is a sovereign function reserved exclusively to the respective states."[34] This sovereign power is a monopoly which had been codified by statute for over a hundred years.[35] Further, "by its plain language, the Hawaii

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(citing Comm. Whole Rep. No. 15, 1 Proceedings, at 1024).

31. *Baehr*, 852 P.2d at 57. The court's holding on this point echoed the now familiar refrain from U.S. Supreme Court jurisprudence on fundamental rights and privacy. For example, in *Griswold*, the Supreme Court observed that judges, "determining which rights are fundamental," must 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 as fundamental," *Griswold*, 381 U.S. at 493 (Goldberg, J., concurring) (quoted in *Baehr*, 852 P.2d at 57); and in *Palko v. Connecticut*, the Supreme Court propositioned that only rights implicit in the concept of ordered liberty can be deemed fundamental. Palko v. Connecticut, 302 U.S. 319, 325 (1937) (cited in *Baehr*, 852 P.2d at 57 n.16).

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

33. *Id.*

34. *Id.* at 58.

35. *Id.* The court noted that:

> So zealously has this court guarded the state's role as the ex-

Constitution prohibits state-sanctioned discrimination against any person in the exercise of his or her civil rights on the basis of sex."[36]

When the state, through its marriage monopoly, denies marital status to a same-sex couple, it deprives them of the "multiplicity of rights and benefits reserved exclusively to that particular relation."[37] The Hawaii Marriage Law implicitly restricts the marriage relation to a male and a female.[38] However, the constitutionality of such a restriction was not to be determined simply

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> clusive progenitor of the marital partnership that it declared, over seventy years ago, that 'common law' marriages—i.e., 'marital' unions existing in the absence of a state-issued license and not performed by a person or society possessing governmental authority to solemnize marriages—would no longer be recognized in the Territory of Hawaii.

Id. (citing Parke v. Parke, 25 Haw. 397, 404-05 (1920)).

36. *Baehr*, 852 P.2d at 60; *see* HAW. CONST. art. I, § 5 (1978); *supra* note 10.

37. *Id.* at 59. Among the rights and benefits identified by the court were: state income tax advantages, public assistance advantages, community property rights, inheritance rights, award of child custody and support payments in divorce proceedings, the right to spousal support, the right to enter into premarital agreements, the right to change of name, the right to file a nonsupport action, post-divorce rights relating to support and property division, the benefit of the spousal privilege and confidential marital communications, real property benefits and exemptions, and the right to bring a wrongful death action. *Id. See also* Brooke Oliver, Note, *Contracting for Cohabitation: Adapting the California Statutory Marital Contract to Life Partnership Agreements Between Lesbian, Gay or Unmarried Heterosexual Couples*, 23 GOLDEN GATE U. L. REV. 899, 900 (1993) (identifying over 450 California statutes that involve the rights, duties and privileges pertaining to marriage that together comprise the California civil marital contract).

38. *Baehr*, 852 P.2d at 60. The requisites of a valid marriage contract are enumerated in the Hawaii Marriage Law as follows:

> In order to make valid the marriage contract, it shall be necessary that:
>
> (1) The respective parties do not stand in relation to each other of ancestor and descendant of any degree whatsoever, *brother* and *sister* of the half as well as to the whole blood, *uncle* and *niece, aunt* and *nephew*, whether the relationship is legitimate or illegitimate;
>
> . . . .
>
> (3) The *man* does not at the time have any lawful *wife* living and that the *woman* does not at the time have any lawful *husband* living;
>
> . . . .
>
> (7) The marriage ceremony be performed in the State by a person or society with a valid license to solemnize marriages and the *man* and the *woman* to be married and the person performing the marriage ceremony be all physically present at the same place and time for the marriage ceremony.

HAW. REV. STAT. § 572-1 (1985) (emphasis added).

because the legislature contemplated unions between a man and woman when it enacted the Hawaii Marriage Law.[39] The court noted that constitutional violations are not sanitized by legislative action.[40]

However, the DOH argued that no sex-based discrimination had taken place.[41] The main thrust of the DOH's argument was that persons of the same sex had no right to marry one another because the definition and customary use of the word "marriage" includes only the special relationship between a man and a woman.[42] Very simply, two members of the same sex could not marry because the definition of marriage did not include that configuration as a possibility. Thus, no impermissible discrimination implicating equal protection had taken place because of the plaintiffs' innate biologic inability as couples to achieve married status.[43]

The *Baehr* court distinguished two of the cases relied on by the DOH to support its premise, *Baker v. Nelson*[44] and *De Santo v. Barnsley*,[45] describing them as "demonstrably inapposite to the appellant couples' claim."[46] The *Baker* court had observed that dictionaries defined marriage as a union between persons of the opposite sex.[47] Additionally, same-sex marriages were, not surprisingly, outside of the intent of the "original draftsmen" of the Minnesota marriage statutes which had existed since the "territorial days."[48] After observing this, the *Baker* court held, with regard to a denial of a same-sex marriage request, simply that (a) the state marriage law precluded same-sex marriages, and (b) the United States Constitution was not offended.[49] Unlike *Baehr v. Lewin*, no state constitutional ques-

39. *Baehr*, 852 P.2d at 60 n.20.

40. *Id.* On this point, the *Baehr* court noted City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985) ("It is plain that the electorate as a whole, whether by referendum or otherwise, could not order . . . action violative of the Equal Protection Clause.").

41. Answering Brief of DOH at 21.

42. *Id.* at 7.

43. *Id.* at 21.

44. 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

45. 476 A.2d 952 (Pa. Super. Ct. 1984).

46. *Baehr*, 852 P.2d at 61.

47. *Baker*, 191 N.W.2d at 186 n.1.

48. *Id.* at 186.

49. *Baker*, 191 N.W.2d at 186-87.

tions had apparently been raised or addressed, therefore, the *Baehr* court deemed *Baker* "inapposite."[50]

The same fate fell to *De Santo*, where the court had held that common law same-sex marriage did not exist in Pennsylvania.[51] The *Baehr* court called this result "irrelevant to the present case."[52] After reviewing several authorities, including *Baker*, the *De Santo* court concluded that "common law marriage has been regarded as a relationship that can be established only between two persons of opposite sex."[53] However, the *De Santo* court did not address how a denial of same-sex marriage violated Pennsylvania's Equal Rights Amendment because the issue had not been raised in the lower court.[54] Thus, the *Baehr* court distinguished both *Baker* and *De Santo* by the failures of those courts to address the relevant state constitutional concerns at issue in *Baehr*.

The *Baehr* court singled out two other cases relied on by the DOH, *Jones v. Hallahan*[55] and *Singer v. Hara*,[56] for a more in-depth analysis.[57] In *Jones*, two Kentucky women sought review of a marriage license denial.[58] The *Jones* court observed that the Kentucky marriage statutes did not specifically prohibit marriage between persons of the same sex.[59] However, the statutes did contain references to "the male and female of the species."[60] Affirming the denial of the marriage license, the *Jones* court held that:

> [M]arriage has always been considered as the union of a man and a woman and we have been presented with no authority to the contrary.
>
> It appears to us that appellants are prevented from marrying, not by the statutes of Kentucky . . . but rather by their own incapability of enter-

50. *Baehr*, 852 P.2d at 61.
51. *De Santo*, 476 A.2d at 952.
52. *Baehr*, 852 P.2d at 61.
53. *De Santo*, 476 A.2d at 953-54.
54. *De Santo*, 476 A.2d at 956; *Baehr*, 852 P.2d at 61.
55. 501 S.W.2d 588 (Ky. Ct. App. 1973).
56. 522 P.2d 1187 (Wash. Ct. App. 1974), *review denied*, 84 Wash. 2d 1008 (1974).
57. *Baehr*, 852 P.2d at 61.
58. *Jones*, 501 S.W.2d at 589.
59. *Id.* at 589. The Kentucky marriage statutes are similar to Hawaii's in this regard. *See* Hawaii Marriage Law, partially set out, *supra* note 38.
60. *Jones*, 501 S.W.2d at 589 n.1.

> ing into a marriage as that term is defined.
>
> A license to enter into a status or a relationship which the parties are incapable of achieving is a nullity.[61]

With respect to *Jones*, the *Baehr* court noted that the appellants there asserted neither federal nor state equal protection rights.[62] Thus, unlike the *Baehr* court, the *Jones* court did not need to address or distinguish the decision of the United States Supreme Court in *Loving v. Virginia*.[63]

Like the plaintiffs in *Jones*, in *Singer v. Hara*, a same-sex couple sought judicial review after they were denied a marriage license.[64] On appeal, the couple argued that the denial violated the Washington Equal Rights Amendment[65] and various provisions of the United States Constitution.[66] The *Singer* court held that neither the Federal nor State constitutions were offended by the denial.[67] The couple was "not denied a marriage license because of their sex; rather, they were denied a marriage license because of the nature of marriage itself."[68] The *Baehr* court observed that "but for the fact that the *Singer* court was unable to discern sexual discrimination in the state's marriage laws, it would have engaged in a 'strict scrutiny' analysis."[69]

In *Loving v. Virginia*,[70] the Virginia courts had declared

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61. *Id.* at 589.

62. *Baehr*, 852 P.2d at 61.

63. 388 U.S. 1 (1967). *See* discussion, *infra* notes 70-77 and accompanying text.

64. *Singer*, 522 P.2d at 1188.

65. *Id.* at 1190. Washington's Equal Rights Amendment reads: "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex." WASH. CONST. art. XXXI, § 1 (1972).

66. Including the Eighth, Ninth, and Fourteenth Amendments. *Singer*, 522 P.2d at 1188-89.

67. *Id.* at 1197.

68. *Id.* at 1196.

69. *Baehr*, 852 P.2d at 63 n.27. The *Singer* court had distinguished *Loving*, noting that the United States Supreme Court "did not change the basic definition of marriage as the legal union of one man and one woman; rather, [it] merely held that the race of the man or woman desiring to enter that relationship could not be considered by the state in granting a marriage license." *Singer*, 522 P.2d at 1192 n.8.

70. 388 U.S. 1 (1967). The Lovings were an interracial Virginia couple who were married out of state and were later convicted of violating Virginia's miscegenation laws after returning there to reside. *Id.* at 2-3. The trial judge suspended their sentence, however, on the condition that they leave the state and not return to Virginia together for a period of 25 years. *Id.* at 3. Four years later, the Lovings sought to vacate the judgment

that interracial marriage simply could not exist because the Deity had deemed such a union intrinsically unnatural.[71] The *Baehr* court observed that "[w]ith 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."[72]

The *Baehr* court was unpersuaded by the DOH argument that same-sex marriage was an innate impossibility because marriage only included a man-woman option.[73] The court analogized the DOH argument to the rationale used by the courts of Virginia to deny interracial marriages, i.e., that interracial marriages were impossible because the Deity had declared them unnatural.[74] Characterizing the argument as "circular" and an "exercise in tortured and conclusory sophistry," the *Baehr* court dismissed contentions that the marriage license had been denied because of the nature of marriage itself and not because of the sex of the applicants.[75] Thus, similar to *Loving* where marriage

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on the ground that the miscegenation laws they were convicted under were unconstitutional under the Fourteenth Amendment. *Id.* When the Virginia courts refused to set aside their sentences, the Lovings pressed their appeal to the United States Supreme Court. *Id.* at 3-4.

71. During the initial conviction and sentencing of the Lovings, the trial court had invoked the name of God to support the proposition that interracial marriages should remain illegal stating 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.*" *Loving*, 388 U.S. at 3 (quoting the trial judge) (quoted in *Baehr*, 852 P.2d at 62). In upholding the constitutionality of Virginia's miscegenation laws in the wake of the Loving's subsequent challenge to their conviction, the Supreme Court of Appeals of Virginia referred to its earlier decision in Naim v. Naim, 87 S.E.2d 749 (Va. 1955). The *Naim* court stated that the Fourteenth Amendment to the United States Constitution did not prohibit Virginia from enacting legislation to "preserve the racial integrity of its citizens . . . so that it shall not have a mongrel breed of citizens." *Id.* at 756. The *Naim* court concluded that the State may legislate "to prevent the obliteration of racial pride" and does not need to "permit the corruption of blood even though it weaken or destroy the quality of its citizenship." *Id.* The United States Supreme Court characterized this as "obviously an endorsement of the doctrine of White Supremacy." *Loving*, 388 U.S. at 7.

72. *Baehr*, 852 P.2d at 63.

73. *Id.*

74. *Id.*

75. *Id.* Other courts have come to different conclusions. For instance, the court in *Baker v. Nelson* distinguished *Loving*, stating that there was a "clear distinction" between marital restrictions based on race and those based upon the fundamental difference in sex. *Baker*, 191 N.W.2d at 187.

was finally extended to interracial couples, extending marriage to a same-sex couple should be based on an "evolving social order," not the will of a Deity that predetermined a fundamental and unchanging definition of marriage.[76] By regulating access to the marriage status on the basis of the applicants' sex, the court found that an equal protection issue arose.[77]

C. Equal Protection Under the Hawaii Constitution Requires Laws Containing Sex-Based Classifications to Pass Strict Scrutiny

The Hawaii Marriage Law regulated access to the marital status on the basis of sex, therefore, the law established a sex-based classification.[78] However, in order to decide whether the sex-based classification at issue was constitutional, the *Baehr* court needed to determine what level of equal protection analysis to apply under the Hawaii Constitution.

The Hawaii Supreme Court applies strict scrutiny analysis to challenges of laws which classify on the basis of suspect categories[79] or impinge on fundamental rights.[80] These laws are presumed unconstitutional unless the state shows a compelling state interest[81] that justifies the classification,[82] and the laws are narrowly drawn to avoid unnecessary abridgments of constitutional rights.[83]

However, for laws which classify on a basis other than sus-

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76. *See Baehr*, 852 P.2d at 63.

77. *Id.* at 60.

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

79. A suspect classification exists where the class of individuals formed by a statute, on its face or as administered, has been ". . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* at 72 (Heen, J., dissenting) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28, *reh'g denied*, 411 U.S. 959 (1973).

80. *Id.* at 63 (citing Holdman v. Olim, 581 P.2d 1164, 1167 (Haw. 1978)).

81. A "compelling state interest" is a "[t]erm used to uphold state action in the face of attack grounded on Equal Protection . . . because of serious need for such state action." Black's Law Dictionary 283 (6th ed. 1990). *See infra* note 93 for an example of a "compelling state interest" as determined in Hawaii.

82. *Baehr*, 852 P.2d at 64 (citing *Holdman*, 581 P.2d at 1167).

83. *Baehr*, 852 P.2d at 64 (citing Nagle v. Board of Educ., 629 P.2d 109, 111 (Haw. 1981)).

pect classifications and which do not infringe on fundamental rights, the court utilizes the rational basis test.[84] Under this test, the court will uphold the law if there exists any reasonable justification for the legislative enactment.[85] Somewhere between rational basis and strict scrutiny, the Hawaii Supreme Court has also recognized "heightened" scrutiny.[86]

The genesis of what level of scrutiny to apply to sex-based classifications under the Hawaii Constitution began when the Hawaii Supreme Court evaluated *Holdman v. Olim*.[87] In *Holdman*, a woman prison visitor[88] sued officials when she was refused admittance because she was not wearing a brassiere.[89] The refusal derived from a directive, promulgated by the Acting Prison Administrator, that "visitors will be properly dressed. Women visitors are asked to be fully clothed, including undergarments. Provocative attire is discouraged."[90] The trial court dismissed the action at the close of the plaintiff's evidence.[91] On appeal, the Hawaii Supreme Court affirmed.[92]

The *Holdman* court declined to set an absolute standard for what scrutiny to apply to sex-based classifications, concluding that the directive would survive strict scrutiny by reason of a compelling state interest if strict scrutiny were held to apply.[93]

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84. *Baehr*, 852 P.2d at 64. Under the rational basis test, the court inquires whether a statute rationally furthers a legitimate state interest. If it does, the statute will pass constitutional muster. Most statutes are cloaked by the courts with a presumption of constitutionality, primarily out of due regard for the legislative decision making process. *Nelson*, 546 P.2d at 1008; *see also* Oregon v. Mitchell, 400 U.S. 112, 207 (1970) (Harlan, J., concurring) ("Judicial deference is based, not on relative factfinding competence, but on due regard for the decision of the body constitutionally appointed to decide.").

85. *Baehr*, 852 P.2d at 64; *see also* Estate of Coates v. Pacific Eng'g, 791 P.2d 1257, 1260 (Haw. 1990) (applying the rational basis test to the Hawaii Workers' Compensation statute, finding legitimate the state interest of securing guaranteed compensation for injured parties and their dependents, even though precluding claims by non-dependent parents).

86. *See infra* note 94.

87. 581 P.2d 1164 (Haw. 1978).

88. The visitor happened to be the executive director of the American Civil Liberties Union of Hawaii. *Id.* at 1166 n.1. On appeal, it was not suggested that she was refused entry into the prison for reasons other than her lack of brassiere. *Id.*

89. *Id.* at 1166.

90. *Baehr*, 852 P.2d at 64 (quoting *Holdman*, 581 P.2d at 1166) (emphasis omitted).

91. *See Holdman*, 581 P.2d at 1165-66.

92. *Id.*

93. *Id.* at 1168. The court determined that maintenance of order and control in a prison was a vital governmental objective. *Id.* at 1167. Additionally, the court noted that

Nevertheless, the *Holdman* court enunciated some important principles that would buttress the logic of the *Baehr* court's opinion. First, the court established that sex-based classifications are subject to either strict or intermediate level scrutiny for purposes of equal protection analysis under the Hawaii Constitution.[94] Second, for purposes of analysis, the court assumed that sex-based classifications were subject to strict scrutiny.[95] Third, the court reaffirmed the principle that Hawaii's citizens could be given greater protections under the Hawaii Constitution than those recognized under the United States Constitution.[96] Finally, the court looked to United States Supreme Court

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lack of a brassiere had been controversial and regarded as sexually provocative by some members of society. *Id.* Thus, dress restrictions imposed on women visitors were required for maintenance of order and control in the prison and related to this vital government objective out of the assumption that inmates would regard the lack of a brassiere as provocative. *Id.* at 1168. Consequently, the court determined that the directive had a sufficiently substantial relationship to the achievement of the important governmental objective of prison security that it would withstand the test of strict scrutiny by reason of a compelling state interest. *Id.* at 1169. While declining to enunciate a standard of review for an equal rights claim, the court nevertheless found on the facts that the equal protection challenge had not been sustained. *Id.* at 1170.

94. *Holdman*, 581 P.2d at 1167-70. The *Holdman* court noted that under the Fourteenth Amendment to the United States Constitution, sex-based classifications were governed by a standard between rational basis and strict scrutiny. *Id.* at 1167 (quoting Craig v. Boren, 429 U.S. 190, 197 (1976) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.")).

In decisions subsequent to *Holdman*, the Hawaii Supreme Court reaffirmed that sex-based classifications were subject, at the very least, to "intermediate scrutiny" under the Hawaii Constitution. *Baehr*, 852 P.2d at 65 n.31; *see* State v. Tookes, 699 P.2d 983, 988 (Haw. 1985) ("Even if [a gender-neutral anti-prostitution statute was] deemed to set up a gender-based classification, it would be invalid only if it did not serve important government objectives and was not substantially related to achieving those objectives."); *see also* State v. Rivera, 612 P.2d 526, 529 (Haw. 1980) (upholding a rape statute that set up a gender-based classification while noting that under the State Equal Protection Clause, a sex-based distinction must serve governmental objectives and must be substantially related to achievement of those objectives in order to withstand judicial scrutiny).

95. Noting that the more stringent compelling state interest test would be satisfied if it were held to be applicable, the court reserved for future consideration the application of this test to assess sex-based classifications under the Equal Protection Clause of the Hawaii Constitution. *Holdman*, 581 P.2d at 1168.

96. *Baehr*, 852 P.2d at 65-66; *Holdman*, 581 P.2d at 1168; State v. Texeira, 433 P.2d 593, 597 n.2 (Haw. 1967) ("As long as we afford defendants the minimum protection required by federal interpretations of the Fourteenth Amendment to the Federal Constitution, we are unrestricted in interpreting the constitution of this state to afford greater protection."); State v. Grahovac, 480 P.2d 148, 151-52 (Haw. 1971) (holding that the court was free to go beyond the minimal requisites of the Federal Constitution in protecting one's right of silence under the State Constitution); State v. Santiago, 492 P.2d 657, 664 (Haw. 1971) (noting that although the United States Supreme Court is the final arbiter of the meaning of the United States Constitution and its Amendments, the Ha-

cases for guidance.[97]

Of the United States Supreme Court cases cited in *Holdman*, the *Baehr* court singled out *Frontiero v. Richardson*[98] for analysis.[99] *Frontiero* involved the right of a female member of the armed services to claim her spouse as a "dependent" for the purposes of obtaining increased housing allowances and other benefits on a par with male members.[100] According to the regulations then existing, a serviceman could claim his wife as a "dependent" without regard to whether she was, in fact, dependent upon him for any part of her support.[101] A servicewoman, on the other hand, could not claim her husband as a "dependent" unless he was in fact dependent upon her for over one-half of his support.[102] Thus, the question was whether this differential treatment constituted unconstitutional discrimination in violation of the Due Process Clause of the Fifth Amendment.[103] In concurring opinions, eight Supreme Court justices concluded that the regulations established impermissibly differential treatment between men and women.[104]

Nonetheless, there was disagreement on the level of judicial scrutiny applicable to statutory sex-based discrimination. In a four-justice plurality opinion, Justice Brennan wrote that sex-based classifications, like those based on race, alienage, and national origin, are inherently suspect and should be subjected to

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waii Supreme Court is the final arbiter of the Hawaii Constitution and that nothing prevents Hawaii from providing greater protections than required by the United States Constitution); State v. Kaluna, 520 P.2d 51, 57-62 (Haw. 1974) (extending the protections of the Hawaii Bill of Rights beyond those of textually parallel provisions in the Federal Bill of Rights resulting in greater restrictions on police in Hawaii who conduct searches incident to lawful arrests); State v. Manzo, 573 P.2d 945, 953 (Haw. 1977) (recognizing the court had the power to give wider protections to obscene material under the Hawaii Constitution than accorded under the Federal Constitution).

97. *Baehr*, 852 P.2d at 66.

98. 411 U.S. 677 (1973).

99. *See Baehr*, 852 P.2d at 66-67.

100. *Frontiero*, 411 U.S. at 678.

101. *Id.*

102. *Id.*

103. *Id.* at 679. Although the Fifth Amendment does not contain an Equal Protection Clause, it is interpreted to forbid discrimination that is so unjustifiable as to be violative of due process. *Id.* at 680 n.5.

104. *Frontiero*, 411 U.S. at 690-92. Justice Rehnquist filed the sole dissenting opinion.

strict judicial scrutiny.[105]

However, in a three-justice concurring opinion, Justice Powell maintained that while the challenged statutes unconstitutionally discriminated against servicewomen, a finding that sex was a suspect classification invoking strict scrutiny should have been deferred.[106] Justice Powell contended that the Equal Rights Amendment, approved by Congress and submitted for ratification by the States would, if adopted, resolve the very question at issue in *Frontiero*.[107] According to Justice Powell, the Court should not "pre-empt by judicial action a major political decision which is currently in the process of resolution."[108]

Finally, Justice Stewart concurred in a single sentence, simply agreeing that the statutes at issue worked an "invidious discrimination."[109]

Frontiero demonstrated to the *Baehr* court that a large majority of the United States Supreme Court would have subjected statutory sex-based classifications to strict scrutiny in the presence of the Equal Rights Amendment.[110] Since Hawaii has an equal rights amendment,[111] the *Baehr* court concluded that it was time to resolve the precise level of scrutiny to apply to sex-based classifications.[112] Consequently, the court held that sex is a "suspect category" for purposes of equal protection analysis under the Hawaii Constitution.[113] Therefore, the Hawaii Marriage Law, and the sex-based classification it contains, must now

105. *Id.* at 683.
106. *Id.* at 691-92.
107. *Id.*
108. *Frontiero,* 411 U.S. at 691-92. The Equal Rights Amendment (ERA) was passed by Congress in 1972, but was defeated in 1982 when it fell three states short of ratification. *See* John Galotto, Note, *Strict Scrutiny for Gender, via Croson*, 93 COLUM. L. REV. 508, 519 (1993). As the twenty-seventh amendment to the Constitution, the ERA would have provided that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." *Id.* at 519 n.75; *see* H.R.J. Res. 208, 92d Cong., 1st Sess. (1971).
109. *Id.* at 691 (Stewart, J., concurring) (citation omitted).
110. *Baehr,* 852 P.2d at 67.
111. "Equality of rights under the law shall not be denied or abridged by the State on account of sex. The legislature shall have the power to enforce, by appropriate legislation, the provisions of this section." HAW. CONST. art. I, § 3 (1978).
112. *Baehr,* 852 P.2d at 67.
113. *Id.*

be subject to strict scrutiny.[114] Accordingly, the court held that the Hawaii Marriage Law is presumptively unconstitutional and will require a showing by the DOH that the sex-based classification is justified by compelling state interests.[115]

D. Plurality's Conclusion

Because sex-based classifications had now been elevated to the status of "suspect category," and the Hawaii Marriage Law denied access to the marital status based on the sex of the applicant couples, the plurality held that the circuit court erroneously granted the DOH's Motion for Judgment on the Pleadings.[116] Therefore, they vacated the circuit court's judgment and remanded the case to the circuit court for further proceedings consistent with their opinion.[117] The burden now rests on the DOH to rebut the presumption that the Hawaii Marriage Law is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly tailored to avoid an unnecessary infringement of constitutional rights.[118]

IV. CONCURRENCE

While concurring with the plurality that the circuit court erroneously granted the DOH's Motion for Judgment on the Pleadings, Judge Burns believed that a genuine issue of material fact remained.[119] Although he agreed that the Hawaii Constitution mandates that any State action that discriminates against a person because of his or her "sex" requires a strict scrutiny analysis, he believed the word "sex" referred only to aspects that were "biologically fated."[120] Thus, to Judge Burns, the question

114. *Id.*

115. *Id.* Interestingly, unlike the court in *Holdman*, the *Baehr* court expressed no opinion on whether the DOH would be able to show such a compelling state interest.

116. *Baehr*, 852 P.2d at 68.

117. *Id.*

118. *Id.*; *see* Motion for Reconsideration or Clarification, *granted in part*, 852 P.2d 74 (Haw. 1993). As stated *supra* note 24, Justice Nakayama took her seat on the Hawaii Supreme Court and joined the plurality in the Motion for Reconsideration or Clarification, effectively converting the holding to that of an outright majority.

119. *Baehr*, 852 P.2d at 68.

120. *Baehr*, 852 P.2d at 69. Judge Burns observed that there was considerable debate of whether a person's sexual orientation was a product of biology or environment. *Id.* He believed that the Hawaii Constitution only provides protection to those sexual

of whether homosexuality was "biologically fated" would need to be answered in order to determine whether the Hawaii Constitution bars discrimination against same-sex marriages.[121]

The plurality, however, took exception to Judge Burns' determination that sexual orientation must be "biologically fated" in order to be protected.[122] They wrote that for the purposes of constitutional analysis germane to this case, it does not matter whether homosexuality is "an immutable trait," i.e., "biologically fated," because it did not matter whether the plaintiffs were homosexuals.[123] The determination of the immutability of homosexuality was not necessary to: 1) determine whether the Hawaii Marriage Law denied same-sex couples access to the marital status and its related rights and benefits, 2) support the conclusion that Hawaii's regulation of marital access, on the basis of sex, gave rise to an equal protection violation, or 3) exercise strict scrutiny review since the plurality was "unable to perceive any conceivable relevance of [homosexuality] to . . . whether [the Hawaii Marriage Law] furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights."[124]

V. DISSENT

The dissenting writer, Judge Heen, agreed with the plurality that the applicant same-sex couples did not have a fundamental right to marriage under the Hawaii State Constitution.[125] This was one of the few points he did agree with. Judge Heen did not agree with the plurality that the applicant couples had a "civil right" to same-sex marriage;[126] the Hawaii Marriage Law uncon-

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characteristics that were "biologically fated." *Id.* at 70.

121. *Id.* at 70.

122. *Id.* at 53 n.14.

123. *Id.*

124. *Id.*

125. *Baehr*, 852 P.2d at 70.

126. The plurality wrote that Judge Heen made some basic "misconstructions" of their opinion. *Id.* at 67. Calling his conclusions "premature," they pointed out that they did not hold that the plaintiffs had a "civil right" to a same-sex marriage. *Id.* They pointed out that they had noted that the United States Supreme Court had recognized marriage to be a basic civil right for over 50 years. *Id.* Further, this recognition of marriage as a civil right was relevant to the prohibition in the Hawaii Constitution against discrimination in the exercise of a person's civil rights on the basis of sex. *Id.*

stitutionally discriminates against same-sex applicants who seek a marriage license;[127] the applicant couples were entitled to an evidentiary hearing where a strict scrutiny standard of review would be applied; or the Hawaii Marriage Law is presumptively unconstitutional.[128] Additionally, Judge Heen regarded the denial of statutory benefits accorded to legal, heterosexual marriages as a claim best left to the legislature.[129]

Judge Heen asserted that *Loving v. Virginia*[130] does not stand for the proposition that the "civil right" to marriage should be extended to same-sex couples, because *Loving* involved only race.[131] Because the Hawaii Marriage Law applied equally to both sexes, he concluded that equal protection under the Hawaii Constitution was not offended.[132] The plurality was quick to point out the deficiency they perceived in Judge Heen's reasoning, observing that his underlying rationale had been expressly considered and rejected in *Loving*.[133] Nevertheless, Judge

127. Again, the plurality took exception to Judge Heen's characterization. They pointed out that what they had held was that the Hawaii Marriage Law denied same-sex couples access to marriage, thus implicating the Hawaii Constitution's Equal Protection Clause. *Id.* at 67.

128. *Id.* at 70.

129. *Id. See supra* note 37 for a non-exhaustive list of benefits accorded to married couples.

130. 388 U.S. 1 (1967).

131. *Baehr*, 852 P.2d at 70.

132. *Id.* at 71. Judge Heen did agree with the plurality that the applicant couples' sexual preferences are completely irrelevant. *Id.* at 71 n.3. However, Judge Heen believed the plurality missed the real thrust of why sexual preferences were irrelevant to the Hawaii Marriage Law, i.e., the Law applied equally to both sexes. *Id.* Since all males and females are treated alike, the Hawaii Marriage Law did not create a "suspect" classification based on gender. *Id.* at 71. For Judge Heen, it was sufficient that "[a] male cannot obtain a license to marry another male, and a female cannot obtain a license to marry another female. Neither sex is being granted a right or benefit the other does not have, and neither sex is being denied a right or benefit that the other has." *Id.*

133. *Id.* at 67-68. The Commonwealth of Virginia contended in *Loving* that since its miscegenation statutes punished both interracial marriage participants equally, despite the statute's racial classifications, no "invidious discrimination" based upon race occurred. *Loving*, 388 U.S. at 8. In *Loving*, the United States Supreme Court rejected "the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations." *Id.* The Court noted that equal application of statutes which contained racial classifications did not immunize them "from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." *Id.* at 8-9. By substituting the word "sex" for "race" and the Hawaii Equal Rights Amendment for the Fourteenth Amendment, the *Baehr* court believed *Loving* to be identical to the case before it, yielding the same conclusion that it had reached. *Baehr*, 852 P.2d at 68.

Heen did not find the analogy between the race-based classification in *Loving* and the sex-based classification of the Hawaii Marriage Law persuasive, claiming that the "operative distinction lies in the relationship which is described by the term 'marriage' itself, and that relationship is the legal union of one man and one woman."[134] Judge Heen agreed with the DOH and the courts which had reached a result contrary to that of the plurality.[135] Judge Heen borrowed the language and reasoning of the *Singer* court when he wrote that:

> [A]ppellants are not being denied entry into the marriage relationship because of their sex; rather, they are being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex.[136]

The plurality had called this reasoning "tautological and circular."[137]

VI. CRITIQUE

After writing an exhaustive opinion which examined many cases, the plurality authoritatively held that sex-based classifications were subject to strict scrutiny under the Hawaii Constitu-

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134. *Id.* at 71.

135. *Id.*; *see* Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973) (holding that a lesbian couple was prevented from marrying by their incapability of entering into a marriage as that term is defined); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972) (holding the state marriage law precluded same-sex marriages and the United States Constitution was not offended by this preclusion); De Santo v. Barnsley, 476 A.2d 952 (Pa. Super. Ct. 1984) (holding common law marriage was a relationship that could be established only between persons of the opposite sex); and Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974), *review denied*, 84 Wash. 2d 1008 (1974) (holding neither the Federal nor State constitutions were offended by the denial of the marriage license and that the applicant couple was denied a marriage license because the nature of marriage did not include a same-sex configuration). *See* discussion, *supra* part III.C.

136. *Baehr*, 852 P.2d at 71 (quoting *Singer*, 522 P.2d 1187, 1192).

137. *Baehr*, 852 P.2d at 63. One author describes the *Singer* quotation as both "contradictory and circular," pointing out that the quote says that the reason the applicant couple was "denied equal protection of the laws is not because of their sex, but because of their sex; second, it says that the reason same-sex couples cannot marry is because same-sex couples cannot marry." Otis R. Damslett, Note, *Same-Sex Marriage*, 10 N.Y.L. Sch. J. Hum. Rts. 555, 574 (1993).

tion.[138] In so doing, the plurality almost incidentally, and perhaps, accidentally, marked a victory for "gay rights." However, by characterizing *Baehr v. Lewin* as a "sex" issue rather than a "homosexual" one, the plurality has divested legal reasoning from practical reality.

Although the plurality observed that the DOH was the party which put the plaintiffs' homosexuality at issue,[139] the fact remains that a same-sex couple is, for all practical purposes, synonymous with a homosexual couple. As the court points out, it is theoretically possible for a same-sex union to exist where the parties are, nevertheless, heterosexual.[140] However, simple logic and common sense dictate that these configurations would be somewhat rare since the marital relationship is typically one where emotions, intimacy and sex occur.[141] Therefore, it can be stated with objective reasonableness that opposite-sex marriage partners would be heterosexual and same-sex marriage partners would be homosexual. Regardless, it is not necessary to illustrate the absurd or the very rare; the applicant couples in *Baehr v. Lewin* are homosexuals and, as homosexuals, were selected for their role as plaintiffs to test the Hawaii Marriage Law.[142] All wordplay aside, the core issue at stake in *Baehr v. Lewin* is whether to extend a basic civil right in our society to homosexuals.[143]

It must be noted that not all gay or lesbian Americans wish to achieve parity in civil rights with heterosexual America through the institution of marriage. Some see marriage as a "sexist, patriarchal institution that lesbian and gay people should not be seeking to enter."[144] However, advocates counter that same-sex marriage should be a high priority because "as long as lesbian and gay people are denied this privilege, they are

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

139. *Id.* at 52 n.12.

140. *Id.* at 51 n.11.; *see* discussion *supra* note 18.

141. The question of whether sex is inherent in marriage is a premise that may be open to argument.

142. Michelangelo Signorile, *Bridal Wave*, OUT, Dec. 1993 at 69, 72.

143. In his concurrence, Judge Burns at least considered the fact that the sexuality of the plaintiffs was relevant, albeit only those aspects of sexuality that are "biologically fated." *Baehr*, 852 P.2d at 69-70. In so doing, he explicitly mentions the word "homosexual," whereas the plurality had determined sexual orientation to be irrelevant to their holding. *See* discussion *supra* section IV.

14. Ruth Colker, *Marriage*, 3 YALE J.L. & FEMINISM 321 (1991) (citations omitted).

denied full citizenship."[145] Andrew Sullivan, the gay conservative editor of *The New Republic*, argues that equal access to marriage is the critical measure necessary for full gay equality.[146] He states that:

> [T]he marriage ban deals with the core of what it is to be a member of civil society. Marriage is not simply a private contract; it is a social and public recognition of a private commitment. As such it is the highest public recognition of our personal integrity. Denying it to gay people is the most public affront possible to civil equality. . . . In contemporary America, marriage has become a way in which the state recognizes an emotional and economic commitment of two people to each other for life. No law requires children to consummate it. And within that definition, there is no civil way it can logically be denied homosexuals, except as a pure gesture of public disapproval.[147]

Whether or not all of gay and lesbian America embraces the idea, the court in *Baehr v. Lewin* has brought same-sex marriage significantly closer to a reality. However, by utilizing a "backdoor" approach rather than addressing the real issue of extending a basic civil right to homosexuals, the court has engaged in the same type of circular reasoning that it found objectionable in *Jones* and *Singer*.[148] Here, the court finds that equal protection of the laws is offended, *not because the plaintiffs are homosexual, but because the plaintiffs are denied access to marriage on account of being the same sex*. Not only does this approach offend the sensibilities by characterizing an obvious issue as something else via legalistic legerdemain, it offends many gays and lesbians by continuing to treat homosexuals as second-class citizens who deserve protection under the laws only because the legislature was not careful when it drafted its statutes.

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145. *Id.* at 322 (citations omitted).

146. Andrew Sullivan, *The Politics of Homosexuality: a New Case for a New Beginning*, THE NEW REPUBLIC, May 10, 1993, at 24.

147. *Id.*

148. As discussed, *supra* part III.B, the courts in *Singer v. Hara* and *Jones v. Hallahan*, found that applicant same-sex couples were not denied marriage licenses because of their sex, but, rather, were denied marriage licenses because of the nature of marriage. The *Baehr* court had termed this "circular" and an "exercise in tortured and conclusory sophistry." *Baehr*, 852 P.2d at 63.

Defending its holding and the underlying logic, the *Baehr* court observed that:

> 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 the equal protection of the laws.[149] If it should ultimately be determined that the marriage laws of Hawaii impermissibly discriminate against the appellants, based on the suspect category of sex, then that would be the result of the interrelation of existing legislation.[150]
>
> [W]hether the legislation under review is wise or unwise is a matter with which we have nothing to do. Whether it . . . work[s] well or work[s] ill presents a question entirely irrelevant to the issue. The only legitimate inquiry we can make is whether it is constitutional. If it is not, its virtues, if it have any, cannot save it; if it is, its faults cannot be invoked to accomplish its destruction. If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned.[151]

One author has written that "[s]omewhere among the many states with constitutions that explicitly protect rights to equal protection, freedom of religion, liberty, and privacy, it is possible that a court will be found that will enforce those lofty guarantees and provide all its citizens equal access to the marriage institution."[152] Hawaii may eventually be one of those "many states." However, the Hawaiian court would have more credibility if it enforced these "lofty guarantees" with a clear statement that gay and lesbian unions deserve as much dignity and respect as heterosexual unions and not simply shroud equal protection for same-sex unions in the mist of sex-based classifications.

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149. *Baehr*, 852 P.2d at 68 (citing *Loving*, 388 U.S. at 7).

150. *Id.*

151. *Id.* (quoting Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) (Sutherland, J., dissenting)).

152. Otis R. Damslet, *Same-Sex Marriage*, 10 N.Y.L. SCH. J. HUM. RTS. 555, 590 (1993).

VII. CONCLUSION

Hawaii's tentative steps towards same-sex marriage has fueled speculation on the effect such a union would have in other states.[153] *Baehr v. Lewin* becomes important not just for what may eventually happen in Hawaii, but also for these national implications.

The traditional rule is that a marriage is valid everywhere if valid under the law of the state where the marriage takes place.[154] However, when a claimed incident of marriage is sought to be enjoyed in a state where such enjoyment violates strong public policy, a marriage otherwise valid will be denied effect.[155] If the DOH cannot find a "compelling state interest," and Hawaii eventually legalizes same-sex marriage, at least some states will likely refuse to recognize such legal unions.[156] At some point, the United States Supreme Court may intervene as the final arbiter of disputes among the many states.

The *Loving* case demonstrates that the Supreme Court is willing to intervene when states fail to recognize marriages on constitutionally impermissible grounds.[157] In *Loving*, the plaintiffs were able to enter into a legal marriage in the District of Columbia but were unable to legally return to Virginia to establish their marital abode.[158] However, the real implication of *Lov-*

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153. In the aftermath of *Baehr v. Lewin*, many newspaper articles, columns, and letters to the editor appeared nationwide discussing the issue of same-sex marriage. A clipping of headlines paints a picture of confusion and dilemma: *Gay Marriage, Ruling in Hawaii Seed for Legal Chaos in Nation, Would Challenge States' Honoring of Each Others' Laws*, PHOENIX GAZETTE, May 17, 1993, at A10; *Hawaii's Solution, Ohio's Dilemma? Court Rulings Unclear on Same-Sex Nuptials*, PLAIN DEALER (Cleveland), May 18, 1993, at 5B; *Sunstroke on Hawaii's Supreme Court?*, NEWSDAY, May 11, 1993, at 80.

154. EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 13.5 (2d ed. 1992).

155. *Id.*; *see also* RESTATEMENT (SECOND) OF CONFLICTS § 283(2) (1988): "A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage."

156. Amongst these will probably be states where courts have previously issued decisions on the legality of same-sex marriages. *See* cases discussed *supra* notes 44-69 and accompanying text.

157. Loving v. Virginia, 388 U.S. 1 (1967) (holding anti-miscegenation statutes based on racial classifications violative of the United States Constitution) (*see* discussion *supra* notes 70-77 and accompanying text).

158. *Id.* at 2.

ing was not simply the right to enter into a marriage, *but the right also to live anywhere the plaintiffs chose. Baehr v. Lewin* has similar implications.

With the relatively recent decision of *Bowers v. Hardwick*[159] acting as a black cloud over gay civil rights, it is difficult to imagine the Supreme Court extending the fundamental right to marry to same-sex couples as they did to interracial couples in *Loving*.[160] However, while difficult to imagine, it is not impossible.[161] Significantly, not until 1967 were interracial couples given the right to marry.[162] As *Loving* amply illustrates, moral certainties do change with time.[163]

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159. 478 U.S. 186 (1986).

160. *In Hardwick*, the Supreme Court in a 5-4 decision upheld Georgia's sex-neutral sodomy statute, indicating that the presumed belief of a majority of the electorate that homosexual sodomy is immoral and unacceptable is an adequately rational basis to support the law. *Id.* at 196. The Court refused to find a "fundamental right" to engage in homosexual sodomy, even in the privacy of one's own home, noting that proscriptions against sodomy have ancient roots. *Id.* at 192. Justice White, in his majority opinion, characterized as "facetious" the notion that homosexual sodomy is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty." *Id.* at 194.

161. Justice White, the author of *Hardwick* is no longer on the Court.

162. *See Loving*, 388 U.S. 1.

163. James Trosino, Note, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93, 93 (1993). Mr. Trosino notes that in a 1991 poll of 1500 Americans of all races, one of every five caucasians believed that interracial marriage should be illegal. In 1972, two in five caucasians had held similar beliefs. *Id.* at 93 n.3.