The Lessons of the Law: Same-Sex Marriage and Baehr v. Lewin

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THE LESSONS OF THE LAW: SAME-SEX MARRIAGE AND BAEHR V. LEWIN

I. THE OLD LESSON

A. Why Does It Matter

In November 1983, a drunk driver struck Sharon Kowalski’s car. Sharon, then twenty-seven years old, suffered severe brain damage and debilitating physical injuries. Obviously, she was unable to act on her own behalf; someone needed to be appointed her guardian.1 Luckily, Sharon had a loving committed partner of four years. Sharon and her partner, Karen Thompson, had exchanged rings, purchased a house, and had named each other as beneficiaries in their life insurance policies.2

Ordinarily, a person’s spouse undertakes to act on the other’s behalf under such circumstances. However, at the hospital, Karen Thompson was treated as a stranger, denied visitation rights, and made to wait several hours before being told that Sharon was still alive. Thereafter, Sharon’s parents arrived. Upon discovering Karen and Sharon’s relationship, Sharon’s parents petitioned a court for guardianship and the right to determine visitation, denying Karen all access to their daughter. During Karen’s last allowed visit, Sharon typed (she was unable to speak), “[H]elp me. Get me out of here. Take me home with you.”3 The two would not see each other again for three and one-half years.4

Currently, no state recognizes same-sex marriages, despite the United States Supreme Court’s repeated assertion that marriage is a fundamental right.5 Marital status carries with it numerous economic and

3. Id. at 582.
4. Id. Karen Thompson spent $125,000 in legal fees and went to court more than 20 times before she was named guardian in 1991. Id. See In re Guardianship of Kowalski, 478 N.W.2d 790 (Minn. Ct. App. 1991).
symbolic benefits. Married couples gain favorable tax treatment, intestate succession rights, employer health coverage, and Social Security entitlements. They also receive legal benefits such as spousal communication privileges, hospital and jail visitation rights, and the ability to authorize emergency medical treatment.6

Further, marriage is much more than a civil contract authorized by the state. "It is the centerpiece of our entire social structure, the core of the traditional notion of 'family.'"7 Ultimately, this debate is not about joint tax returns or health insurance; it is about the lesson the law teaches. By denying gay and lesbian couples access to the "sacred" union, society proclaims them less worthy, less committed, insignificant.8

B. Substitutes; or Lesser Equality

Gays and lesbians have demonstrated the resiliency and strength of their commitments through a myriad of legal devices that attempt to mimic the benefits of marriage that they are denied.

1. Legal Instruments

Some of the legal benefits of marriage can be replicated by executing wills, contracts, trusts, or powers of attorney.10 Such instruments may ensure that property will pass to the partner at death,11 that medical and financial decisions will be made by the partner in case of incapacitation, and that common property will be shared after a dissolution.12

9. Some have argued that same-sex marriages will aid in securing social acceptance for gays and lesbians. Alma G. Lopez, Homosexual Marriage, the Changing American Family, and the Heterosexual Right to Privacy, 24 SETON HALL L. REV. 347, 352 n.21 (1993). Professor Richard Mohr has asserted that "[s]ociety currently makes gay coupling very difficult: a life of hiding is a tense and pressured existence not easily shared with another.... If discrimination ceased, the energies that the typical gay person wastes worrying in the closet would be released for" personal flourishing and societal benefit. RICHARD D. MOHR, GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY AND LAW 44 (1988).
10. Rubenstein, supra note 7, at 431.
12. Rubenstein, supra note 7, at 431.
In Whorton v. Dillingham, a California appellate court, following the lead of Marvin v. Marvin, upheld an oral agreement made by a gay couple to share equally all property acquired during the relationship. The court found that any sexual services called for in the agreement were severable from the rest of the contract, which was enforceable. More importantly, the court recognized that agreements between unmarried same-sex partners are often indistinguishable from those between unmarried heterosexual couples.

Nevertheless, even when courts enforce cohabitation agreements, these contracts only protect the couple against each other; they extend no benefits in the public realm. They are no aid in gaining employment benefits, provide no protection for inheritance, afford no power to act for a partner in a medical emergency, and give no ability to provide funeral arrangements for a deceased partner.

Although durable powers of attorney and wills evade some of the preceding difficulties, cohabitation agreements are also more likely to be challenged than similar documents executed by heterosexuals. For example, where a beneficiary and testator were involved in a gay or lesbian relationship, charges of undue influence are common, even though there is no evidence such influence occurs with greater frequency among same-sex couples.

2. Adult Adoption

Since every state recognizes the inheritance rights of the adopted child of an unmarried intestate decedent, some gays and lesbians have sought to adopt their partners in order to secure legal sanction for the relationship.

However, the availability of adult adoption varies from state to state. Some jurisdictions prohibit adult adoption completely; others expressly...
allow it. Still others permit only certain kinds of adult adoption. For a number of reasons, most courts have been reluctant to allow the adoption of adults who are not wards of the state. First, adoption has traditionally been viewed as a mechanism to protect the well-being of a child. Second, with few exceptions, adult adoptions are irrevocable. While a married person can always disinherit the other spouse through divorce, an adoptee continues to be the adoptor’s legal heir forever, unless he or she is adopted by someone else. Finally, adult adoption does nothing to help gain the employment and tax benefits available to spouses and dependents.

3. Domestic Partnerships

Several municipal governments have passed domestic partnership ordinances as an alternative legal status that can be conferred upon non-traditional families. A domestic partnership has generally been defined as two people who are committed to each other and have decided to share their lives in an intimate familial relationship. Partners must register with their municipality, which usually entails filing an affidavit declaring the creation of a partnership and paying a nominal fee.

While certainly a step forward, domestic partnership ordinances fall far short of the protections afforded by marriage. Unlike marriage, domestic partnership does not provide tax benefits, inheritance rights, or dissolution procedures. No state legislature recognizes domestic partnerships. Should the couple decide to leave their present city, any benefits accrued through their registration will not travel with them. Further, even in those few cities recognizing the relationship, the benefits offered are only guaranteed for city employees; it is left to the discretion of private employers whether they will offer similar benefits to their employees and their employees’ partners.

20. Id. at 1626-27.
21. Id. at 1627.
22. Id.
23. Rubenstein, supra note 7, at 447. In Succession of Bacot, 502 So. 2d 1118 (La. Ct. App.), cert. denied, 503 So. 2d 466 (La. 1987), a former partner who had been adopted actually challenged a later will. Further, in most states, the adopted partner loses the right to inherit from his or her natural parents. Rubenstein, supra note 7, at 447.
24. Cameli, supra note 1, at 465 n.140.
25. Lopez, supra note 9, at 358. These cities include: Los Angeles, Berkeley, West Hollywood, and Laguna Beach, California; New York City and Ithaca, New York; Seattle, Washington; Madison, Wisconsin; and Takoma Park, Maryland. Id. at 358 n.54. The benefits provided usually include sick/bereavement leave and health benefits. Id. at 358 n.55.
26. Id. at 358 n.54.
27. Id. at 358 n.55, 359.
Domestic partnerships are available to both same-sex and different-sex partners. Perhaps the "lower" level of protections afforded to heterosexual couples can be justified—they could always wed and thereby enjoy the entire spectrum of legal, economic, and social benefits that inhere in that union. Same-sex couples have no such choice.

Of all the devices examined above, none comes close to the status of marriage. Thus far, prejudice has prevented gays and lesbians from enjoying the same freedoms, protections, and rights as heterosexuals.28 The time has come to recognize the worth of all intimate relationships.

Part II of this comment will marshall the constitutional arguments for allowing same-sex marriage, as well as critically examine the cases that have denied this right. Part III will then analyze *Baehr v. Lewin*,29 a recent case in which the Supreme Court of Hawaii held that the state's denial of marriage licenses to same-sex couples must withstand "strict scrutiny," the highest constitutional test.30 Since very few statutes can meet this standard, it is believed that Hawaii may become the first state to recognize same-sex marriages. Working on that assumption, Part IV will analyze the possible conflict of laws issues that will inevitably arise when one state allows a marriage that others deny.

II. SAME-SEX MARRIAGE

A. The Fourteenth Amendment

Marriage regulation is traditionally the domain of state legislatures.31 However, marriage laws, like all laws, must pass constitutional muster.32 Two aspects of the Fourteenth Amendment come into play when considering the validity of marriage regulations: due process and equal protection. Under the Due Process Clause, personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," are included in the guarantee of personal privacy.33 These fundamental rights

28. The degree of hostility towards gays and lesbians is beyond the scope of this comment. See generally Jeff Peters, *When Fear Turns to Hate and Hate to Violence*, 18 HUM. RTS. Q. 22 (1991); MaryAnn Dadisman, *Roots of Hate: Homophobia at Its Source*, 18 HUM. RTS. Q. 24 (1991) (presenting research that shows homophobia is similar to racial prejudice).
30. Id. at 68.
32. Trosino, *supra* note 6, at 95.
may be limited only in the furtherance of a compelling state interest, by means necessary and narrowly tailored to achieve the objective.\(^34\)

Review under the Equal Protection Clause occurs under one of three tiers. Garden-variety social or economic legislation is presumed valid, and the classifications drawn will be upheld if rationally related to a legitimate state interest.\(^35\) The general rule will give way, however, when classifications are drawn along lines of race,\(^36\) alienage, or national origin.\(^37\) These schemes will be subjected to strict judicial scrutiny; that is, they must be necessary to further a compelling state interest.\(^38\) Legislation that classifies along gender lines is subjected to "intermediate scrutiny," meaning it must be substantially related to the furtherance of an important state interest.\(^39\) Finally, legislation that affects a "fundamental right" is also subject to strict judicial scrutiny under the Equal Protection Clause.\(^40\)

The United States Supreme Court has repeatedly held that the freedom to marry is among a person's basic civil rights.\(^41\) Several recent cases have hinted that constitutional protection may be forthcoming for gays and lesbians, at least where the legislation serves no purpose other than discrimination.\(^42\)

1. Marriage as a Fundamental Right

In *Meyer v. Nebraska*,\(^43\) the United States Supreme Court invalidated a state law prohibiting the teaching of any language other than English in any public or private grammar school. In so holding, the Court stated:

[The liberty interest guaranteed by the Due Process Clause of the Fourteenth Amendment] denotes not merely the freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, . . . and, generally, to enjoy those privileges long recognized at

\(^{34}\) *Id.* at 155.


\(^{37}\) *Cleburne*, 473 U.S. at 440.

\(^{38}\) *Id.*


\(^{41}\) *See cases cited supra* note 5.

\(^{42}\) *See infra* part II.A.2.

\(^{43}\) 262 U.S. 390 (1923).
common law as essential to the orderly pursuit of happiness by free [people].\textsuperscript{44}

In 1942, the Court decided \textit{Skinner v. Oklahoma},\textsuperscript{45} in which it struck down that state's Habitual Criminal Sterilization Act.\textsuperscript{46} Finding that the legislation ran afoul of the Equal Protection Clause, the Court, speaking through Justice Douglas, stated: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."\textsuperscript{47}

In 1965, the Supreme Court began to state more forcefully what had been mere dicta in previous decisions: Marriage was a fundamental right protected by the Constitution.\textsuperscript{48} In \textit{Griswold v. Connecticut},\textsuperscript{49} the Court struck down a statute that prohibited the use of contraceptives by married people.\textsuperscript{50} More important, the Court for the first time defined a "zone of privacy"\textsuperscript{51} that protects individuals from governmental intrusion. Marriage, "intimate to the degree of being sacred," was firmly entrenched within that zone.\textsuperscript{52}

In the 1967 case of \textit{Loving v. Virginia},\textsuperscript{53} the Court considered the constitutionality of Virginia's anti-miscegenation statute, which prohibited all marriages between "a white person and a colored person."\textsuperscript{54} The Court recognized that marriage was a "social relation subject to the State's police power"; however, that power was limited by the Fourteenth Amendment.\textsuperscript{55} The Court then held that the statute was unconstitutional under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The State argued that the laws should be upheld, as they applied equally to both participants in the proscribed union—white and "colored."\textsuperscript{56} Rejecting this argument, the Court stated that the appropriate equal protection inquiry was "whether the

\textsuperscript{44} Id. at 399.
\textsuperscript{45} 316 U.S. 535 (1942).
\textsuperscript{46} Id. at 538.
\textsuperscript{47} Id. at 541.
\textsuperscript{49} 381 U.S. 479 (1965).
\textsuperscript{50} Id. at 480, 485.
\textsuperscript{51} Id. at 485.
\textsuperscript{52} Id. at 486.
\textsuperscript{53} 388 U.S. 1 (1967).
\textsuperscript{54} Id. at 4.
\textsuperscript{55} Id. at 7.
\textsuperscript{56} Id. at 8. This argument was accepted by the Court in Pace v. Alabama, 106 U.S. 583 (1882).
classifications drawn by [the] statute constitute an arbitrary and invidious discrimination."

Concluding that the anti-miscegenation statutes rested solely on impermissible racial distinctions, the Court applied the "most rigid scrutiny" to the laws. "There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification."

The Court also held that this statute violated the Due Process Clause. The Court's reasoning, although applied to race, is also applicable to the issue of same-sex marriage. "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes . . . is surely to deprive all the State's citizens of liberty without due process of law." The Court concluded that "[t]he freedom to marry, or not to marry, a person of another race resides with the individual and cannot be infringed by the State."

For years the states had considered it unthinkable that persons of different races would marry, just as today many states prohibit same-sex marriage on purely historical or definitional grounds. The Court in Loving demanded more than mere prejudice as a justification for legislation prohibiting certain persons from marrying.

In 1978, the Supreme Court considered the constitutionality of a Wisconsin statute that precluded divorced Wisconsin residents with minor children not in their custody, and whom they were ordered to support, from remarrying without first obtaining a court order certifying that they had fulfilled their support obligations. The Court, in Zablocki v. Redhail, struck the statute on equal protection grounds, stating that "the right to marry is of fundamental importance for all individuals." The Court, in critical language, further held that "reasonable regulations that do not significantly interfere with decisions to enter into the marital

57. Loving, 388 U.S. at 10.
58. Id. at 11.
59. Id.
60. Id. at 12.
61. Trosino, supra note 6, at 107.
63. Id.
64. See infra Part II.B.
65. Friedman, supra note 48, at 195-96.
67. Id. at 384.
relationship may legitimately be imposed." 68 Outright prohibitions of same-sex marriages certainly fail the Zablocki mandate.

The Court firmly established that marriage is a fundamental right, implicating both the Equal Protection and Due Process Clauses in Loving and Zablocki. These cases represent two major constitutional developments. The first was toward protecting intimate adult unions from prejudice. Thus, Loving held that states could not proscribe inter-racial unions. The second development was the removal of unreasonable burdens on an individual's right to marry. Thus, in Zablocki, the Court struck a statute that tied the right to marry to a person's wealth. 69 Despite these holdings, the ultimate burden remains in place for gay and lesbian couples desiring the benefits, protections, and status of legal marriage.

2. Class Analysis

The Supreme Court has never considered gays and lesbians a suspect class for purposes of equal protection analysis. In fact, given the Court's holding in Bowers v. Hardwick, 70 it may be more appropriate to conclude that gays and lesbians are legally disfavored. 71 In Bowers, the Court held that states may constitutionally proscribe consensual, homosexual sexual activity, stating, "[T]here is no such thing as a fundamental right to commit homosexual sodomy." 72 The Court held that the right to privacy enunciated in previous cases did not apply to Michael Hardwick because there was "[n]o connection between family, marriage, or procreation . . . and homosexual activity." 73

In many states, discrimination against gays and lesbians does not end with the illegality of their intimate relations. Gays are subject to vio-

68. Id. at 386 (emphasis added). For a discussion of direct or substantial as compared to indirect or insubstantial restrictions on the right to marry, see Friedman, supra note 48, at 199-202, where the author argues that only a direct interference with the right to marry will trigger strict scrutiny review.
70. 478 U.S. 186 (1986) (holding that states may constitutionally proscribe consensual, homosexual sex).
71. Twenty-three states and the District of Columbia still have statutes criminalizing sodomy. Those states include: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Kansas, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, North Carolina, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Utah, and Virginia. Rubenstein, supra note 7, at 80.
73. Id. at 191. Bowers has been widely criticized elsewhere, thus I will not detail its failings here. See, e.g., Anne B. Goldstein, History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick, 97 YALE L.J. 1073 (1988).
ience and harassment based simply on who they are. A recent study found that over ninety percent of gays and lesbians had been victimized in some form because of their sexual orientation.74 "Greater than one in five gay men and nearly one in ten lesbians had been punched, hit, or kicked; a quarter of all gays [have] had objects thrown at them. . . ."75 At its most extreme, prejudice against gays and lesbians takes the form of queerbashing, a type of anti-gay violence in which groups of young men target someone they perceive to be gay. These groups stalk, attack, and often beat the perceived gay individual into unconsciousness, while hurling taunts and slurs.76 Professor Richard Mohr has drawn an analogy between queerbashing and the lynchings of blacks—both serve to stigmatize an entire group.77

Gays have also been subjected to discrimination in employment. Few among the general populace realize that gays and lesbians can be, and often are, fired simply based upon their sexual orientation.78 Ironically, government may be the biggest discriminator of all. "The federal government explicitly discriminates against gays in the armed forces, the CIA, the FBI, the National Security Agency, and the state department. The federal government refuses to give security clearances to gays," thereby forcing defense contractors to fire openly gay personnel in sensitive positions.79 Further, "State and local governments regularly fire gay teachers, police and fire personnel, and anyone who has contact with the public."80

Given the pervasive discrimination suffered by gays and lesbians, suspect class status may be appropriate.81 However, we may not need to go

74. Mohr, supra note 9, at 27-28.
75. Id. at 28.
76. Id. Even worse, the courts often tacitly condone this violence. "In 1984, a District of Columbia judge handed suspended sentences to queerbashers whose victim had been stalked, beaten, stripped at knife point, slashed, kicked, threatened with castration, and pissed on, because the judge thought the bashers were good boys at heart - after all they went to a religious prep school." Id. Police often discount assaults on gays. All the attacker need do is claim he was provoked by a sexual overture. Id. at 28-29.
77. Id. at 28.
78. Id. at 30. But see infra note 144.
79. Id.
80. Id. The federal government's proffered reason for denying security clearances is the possibility of blackmail, which could occur if "enemy agents" learn the sexual orientation of someone in a sensitive position and use it against him or her. This is, in large part, a circular and self-created fear. If the government did not discriminate against gays and lesbians there would be little to "hold over" homosexual employees.
81. The Ninth Circuit Court of Appeals had declared homosexuals a suspect class in Watkins v. United States Army, 847 F.2d 1329, 1349 (9th Cir. 1988). However, the court subsequently granted rehearing sitting en banc, Watkins v. United States Army, 847 F.2d 1362 (9th
that far. Many of the schemes that discriminate against gays and lesbians cannot survive even minimum rationality review. Denial of same-sex marriage could be similarly scrutinized.

In *Meinhold v. United States Department of Defense*, a sailor had been discharged from the service after admitting he was gay on a television program. Meinhold sued the Department of Defense, alleging deprivation of his equal protection rights. The court, applying the rational-basis test, granted Meinhold's motion for summary judgment, permanently enjoining the department from "discharging or denying enlistment to any person based on sexual orientation in absence of sexual conduct which interferes with the military mission." The court cited numerous studies commissioned by the Department of Defense that found no relation between sexual orientation and military performance. Rather, the policy was based on false stereotypes, similar to those which had undergirded racial segregation of the armed forces.

Another recent case held that the military's policy on gays and lesbians violated the equal protection component of the Fifth Amendment. In *Cammermeyer v. Aspin*, the District Court ordered the reinstatement of an army nurse who had been dismissed upon admission of her sexual orientation.

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83. Id. at 1458. The Supreme Court stayed the order as applied to others than Meinhold, pending review by the Court of Appeals. Meinhold v. United States Dep't. of Defense, 114 S. Ct. 374 (1993). The Ninth Circuit then affirmed the order as applied to Meinhold, but reversed and vacated the opinion as applied to others. Meinhold, 34 F.3d at 1479-80.
84. Meinhold, 808 F. Supp. at 1457.
85. Id. at 1457-58.
86. Equal protection law binds the federal government, just as it does the states, by "reverse incorporation" through the Fifth Amendment. See, e.g., Bolling v. Sharpe, 347 U.S. 497 (1954).
88. Id. at 929.
The court relied heavily on the cases of *Palmore v. Sidoti*[^89] and *Cleburne v. Cleburne Living Center*.[^90] In *Palmore*, the United States Supreme Court overturned a state court's decision to remove a woman's child from her custody after she remarried a black man, stating that the law could not give effect to the prejudices of third parties.[^91] Of course, that case implicated racial classifications and was decided under strict scrutiny review.[^92]

However, the logic of *Palmore* was extended to rational-basis review in *Cleburne*. There, the city denied a special use permit to a group home for retarded people.[^93] The Court refused to hold that the mentally retarded constituted a suspect or quasi-suspect class, yet found an equal protection violation nonetheless.[^94] The denial was based purely on prejudice, stereotypes, and irrational fears—not any of the city's proffered reasons (safety, property values, etc.).[^95] The court in *Cammermeyer* adopted a similar analysis. "A cardinal principle of equal protection law is that the government cannot discriminate against a class in order to give effect to the prejudice of others."[^96] Finding that the military's policy was based on irrational fears and stereotypes, the court held that it was not rationally related to any legitimate goal.[^97]

The analogy to same-sex marriage is clear. If states cannot advance reasons for their denial beyond mere historical prejudice, the Equal Protection Clause has been violated.

Finally, in *Evans v. Romer*,[^98] the Colorado Supreme Court affirmed a lower court's entry of a preliminary injunction enjoining the State of Colorado from enforcing its controversial voter-initiated amendment to the Colorado Constitution (Amendment Two). The amendment stated that no protected status would be afforded based on homosexual, lesbian, or bisexual orientation.[^99]

The trial court held that Amendment Two "may burden fundamental rights of an identifiable group," namely, the "right not to have the State

[^91]: *Palmore*, 466 U.S. at 433.
[^92]: *Id.* at 432.
[^93]: *Cleburne*, 473 U.S. at 435.
[^94]: *Id.* at 446-47.
[^95]: *Id.* at 450.
[^96]: *Cammermeyer*, 850 F. Supp. at 926.
[^97]: *Id.*
[^99]: *Id.* at 1272. For an interesting discussion of the circumstances surrounding the passage of Amendment Two, see Bella Stumbo, *The State of Hate*, ESQUIRE, Sept. 1993, at 73.
endorse and give effect to private biases." Since fundamental rights were implicated, the court engaged in strict scrutiny review and concluded that the plaintiffs had shown a reasonable probability that Amendment Two would be found unconstitutional beyond a reasonable doubt at a trial on the merits.

On review, the Colorado Supreme Court noted that homosexuals did not constitute a suspect class. Nevertheless, the Equal Protection Clause "applies to all citizens." The court went on to analyze the plaintiffs' equal protection claim upon different grounds than the trial court. It held that Amendment Two infringed upon the "fundamental right to participate equally in the political process and that any attempt to infringe on an independently identifiable group's ability to exercise that right is subject to strict scrutiny review."

Citing Hunter v. Erickson, the court wrote that "a State may no more disadvantage any particular group by making it more difficult to enact legislation on its behalf than it may dilute any person's vote." Protection of fundamental rights, such as political participation (or marriage) is available to all citizens, not only members of suspect classes.

The court concluded that Amendment Two clearly affects the right to participate equally, "because it bars gay men, lesbians, and bisexuals from having an effective voice in governmental affairs insofar as [they may seek legislative protection] from discrimination based on their sexual orientation." By "fencing out" a clearly identifiable group from the political process for no compelling reason, Amendment Two ran afoul of the Equal Protection Clause.

100. Evans, 854 P.2d at 1273-74. The trial court cited Palmore v. Sidoti in support of this conclusion. Id. at 1274 n.5.
101. Id. at 1274.
102. Id. at 1275.
103. Id. at 1275-76. The court relied on the "voting" cases: see, e.g., Kramer v. Union Free School District, 395 U.S. 621 (1969); Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966); the "reapportionment" cases: see, e.g., Reynolds v. Sims, 377 U.S. 533 (1964); and the "access to the ballot" cases: see, e.g., Williams v. Rhodes, 393 U.S. 23 (1968), to formulate this fundamental right to political participation. See also Reitman v. Mulkey, 387 U.S. 369 (1967) (striking down an amendment to the California Constitution that abolished fair housing laws aimed at protecting blacks).
104. 393 U.S. 385 (1969) (involving a voter referendum in the city of Akron, Ohio that made it more difficult to enact fair housing ordinances).
105. Evans, 854 P.2d at 1283.
106. Id. at 1284.
107. Id. at 1285.
108. Id.
The analogy to same-sex marriage is clear. By denying a fundamental right, whether it be marriage or political participation, to an identifiable group, whether suspect or not, a state denies that group the equal protection of the laws.

B. Denials of Same-sex Marriage

Given the preceding constitutional analysis, it would appear that states would be required to advance compelling, or at least rational, reasons for their denials of same-sex marriage licenses. Marriage is a fundamental right. Further, the Equal Protection Clause requires a justification for legislation beyond mere prejudice. Set out below are several cases which held that gays and lesbians may not marry their partners, advancing the "traditional" reasons for that denial.

Many courts simply argue that individuals of the same sex cannot marry because of the definition of marriage itself - one man joined with one woman.\textsuperscript{109} In \textit{Jones v. Hallahan},\textsuperscript{110} two women sued to compel a county clerk to issue them a marriage license. After finding that the marriage statutes did not specifically preclude same-sex unions, the court examined three dictionaries and concluded that marriage had traditionally been defined as the "union of a man [and] a woman."\textsuperscript{111} The women were not being prevented from marrying by the statutes (or on the basis of invidious gender discrimination), "but rather by their own incapability of entering into marriage as that term is defined."\textsuperscript{112}

In \textit{Baker v. Nelson},\textsuperscript{113} the Supreme Court of Minnesota stated that "[i]t is unrealistic to think" the original draftsmen of the state's marriage statutes, "which date from territorial days," would have construed them to allow same-sex unions.\textsuperscript{114} "The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."\textsuperscript{115}

In \textit{Singer v. Hara},\textsuperscript{116} the Washington Court of Appeals followed the "logic" of \textit{Jones} and \textit{Baker}. Marriage consisted only of a man and woman, the primary purpose of which is procreation. "[T]he refusal of the

\textsuperscript{109} Friedman, \textit{supra} note 48, at 188.
\textsuperscript{110} 501 S.W.2d 588 (Ky. Ct. App. 1973).
\textsuperscript{111} \textit{Id.} at 589.
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} 191 N.W.2d 185 (Minn. 1971).
\textsuperscript{114} \textit{Id.} at 186. The residents of "territorial" Minnesota would likely be shocked at many modern practices, such as racial integration and women in the workforce.
\textsuperscript{115} \textit{Id.}
state to authorize same sex marriages results from [the] impossibility of reproduction..."117 The court dismissed the challengers’ claim under Washington’s Equal Right’s Amendment (ERA) by determining that they were not being denied a marriage license because they were of the same sex, but rather “because of the nature of marriage itself.”118

The logic of these cases, and similar cases,119 is wholly circular: same-sex couples cannot marry because what they represent is not marriage. This reliance on the traditional notion of family belies both reality120 and recent constitutional developments.121 For centuries it was unthinkable that a white person would “debase” himself or (certainly) herself by wedding a person of color.122 Thus, the Supreme Court’s holding in Loving violated the traditional concept of marriage relied upon in the cases discussed above. The court in Singer evaded the Loving rationale by simply claiming that what same-sex couples propose is not marriage. Further, the court held that there was no violation of Washington’s ERA “so long as marriage licenses are denied equally to both male and female pairs.”123 In Loving, the State unsuccessfully made an identical argument: the anti-miscegenation statute should be upheld because it denied marriage to whites and blacks “equally.” Of course, that logic is superficial, glossing over the racial animus which undergirded the statute.

In Baker, the court distinguished Loving in a thoroughly disingenuous manner, claiming that case was decided “solely on the grounds of its patent racial discrimination.”124 Clearly, Loving meant more; it held that marriage was a fundamental right, which could not be denied “on so unsupportable basis as the racial classifications embodied in these stat-

117. Id. at 1195.
118. Id. at 1196.
120. As of 1991, barely one in five families fit the traditional definition of family (heterosexual two-parent, bread-winner father and home-maker mother). Lopez, supra note 9, at 350 n.11.
121. See, e.g., Moore v. City of East Cleveland, 431 U.S. 494 (1977) (endorsing an expanded definition of family). See also Braschi v. Stahl Assocs., 543 N.E.2d 49 (N.Y. 1989) (holding that a deceased tenant’s gay partner was “family” for purposes of rent control laws).
123. Singer, 522 P.2d at 1191.
Chief Justice Warren's majority opinion has broader implications for statutes restricting marriage; a state cannot deny the individual's choice of a marital partner based purely on prejudice. The Baker court transposed Justice Stewart's terse concurrence with the real holding of the case.

The procreation arguments forwarded by these courts are similarly superficial. Different-sex couples are not required to produce children; nor are those couples incapable of procreating without a marriage license. Further, Griswold and its progeny afforded constitutional protection to such intimate decisions as "whether to a bear or beget a child." If the only valid purpose of marriage was procreation, all the decisions concerning birth control were wrongly decided.

Three other major justifications have been advanced for the denial of same-sex marriages. First is the view that homosexuality is contrary to "natural law," an affront to "Judeo-Christian moral and ethical standards." Christians often cite the book of Leviticus, where it is written: "If a man lies with a male as a woman, both of them have committed an abomination." The destruction of Sodom and Gomorrah is commonly viewed as evidence of God's wrath against homosexuals.

The Biblical "evidence" may not be so clear. Christ never mentioned homosexuality. Further, those who cite the Old Testament to condemn homosexuality do so by reading selectively. Leviticus is filled with "rules" such as: do not eat rabbits, do not eat pigs, do not sleep with another man, do not eat finless water creatures, or do not remain near an "unclean woman." Which of these edicts are staunchly observed to-

125. Loving, 388 U.S. at 12.
126. Justice Stewart's one paragraph opinion simply stated it is "not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor." Id. at 13 (Stewart, J., concurring).
127. See, e.g., Marks v. Marks, 77 N.Y.S.2d 269 (Sup. Ct. 1948) (holding that an inability to procreate cannot be grounds for preventing people from getting married).
131. Genesis 18-19. However, some have argued that the destruction of these cities was due to the inhospitality of the citizens, not homosexual behavior. See John Boswell, Christianity, Social Tolerance, and Homosexuality 92-98 (1980). In Commonwealth v. Wasson, 842 S.W.2d 487, 498 (Ky. 1992), a presbyterian minister testifying for the defendant in a sodomy prosecution opined that Biblical references to homosexuals were not indictments, "but rather statements against aggression, inhospitality, and uncaring relationships."
132. Mohr, supra note 9, at 33.
day? Or are those who condemn homosexuality mean-spirited hypocrites (themselves often the object of Christ’s denunciations)?

Regardless, the biblical debate is outside the realm of law. As Justice Blackmun noted in his Bowers dissent, “The legitimacy of secular legislation depends... on whether the State can advance some justification for its law beyond its conformity to religious doctrine.” If states seek to deny same-sex couples the benefits and protections of their marriage laws on religious grounds, they run headlong into the Establishment Clause. States must look elsewhere for their justification.

Second, states may argue that same-sex marriage can be proscribed based upon general majoritarian moral preferences—religion aside. After all, are not all laws, at some level, based on moral choices? The majority view, expressed through duly elected state legislatures, is that gay and lesbian couples should not be allowed to marry, or in many states, engage in private, consensual sexual activity. Bowers v. Hardwick represents the latter.

In 1992, the Supreme Court of Kentucky struck down that state’s sodomy statute in Commonwealth v. Wasson. The particular statute punished “deviant sexual intercourse with another of the same sex.” The court proceeded along a two-prong analysis, concluding that the statute ran afoul of the Kentucky Constitution’s guarantees of privacy and equal protection of the laws. Its opinion thoroughly punctured the “majoritarian morality” justification.

133. Id. These edicts are found in Leviticus 11:1-47, 15:19-47.
135. “Congress shall make no law respecting an establishment of religion...” U.S. Const. amend. I. See also Lemon v. Kurtzman, 403 U.S. 602 (1971) (requiring that legislation have a secular purpose, a neutral effect, and avoid excessive entanglement with religion).
136. Laws prohibiting homicide certainly reflect the moral determination that killing is wrong.
137. 478 U.S. 186 (1986).
138. 842 S.W.2d 487 (Ky. 1992).
139. Id. at 490.
140. Id. at 491. The court relied upon § 2 of the Kentucky Bill of Rights in its privacy or individual liberty analysis. “Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.” Id. at 494. The court held that the guarantees of individual liberty provided by the Kentucky Constitution exceeded those of the Federal Constitution as enunciated by the United States Supreme Court. Id. at 491.
141. Id. at 492. Section 3 of the Kentucky Constitution states: “All men, when they form a social compact, are equal...” Id. at 491. As Bowers failed to address the equal protection issue, the Kentucky Supreme Court was not inhibited by that decision in the second prong of its analysis.
Under the due process or privacy prong, the Wasson court noted that morality is an evolving concept. After chastising the United States Supreme Court for its “misdirected application of the theory of original intent” in Bowers, the court pointed to Loving, where “a contemporary, enlightened interpretation of the liberty interest” struck down the anti-miscegenation statute, despite the fact that it was “highly unlikely that protecting the rights of persons of different races to [marry] was one of the considerations behind the Fourteenth Amendment.”

As evidence of the “moral evolution” in the present context, the court noted that in 1961 all fifty states outlawed sodomy, whereas in 1992 barely half continued to do so. “[O]ur decision, rather than being the leading edge of change, is but a part of the moving stream.”

The court bolstered its privacy analysis by quoting from Commonwealth v. Bonadio, wherein the Pennsylvania Supreme Court struck down that state’s sodomy statute.

With respect to regulation of morals, the police power [should not be used] to enforce majority morality on persons whose conduct does not harm others. . . . [N]o significant state interest justifies legislation of norms simply because a particular belief is followed by a number of people, or even a majority.

The court concluded that society had undergone vast changes in its sexual morality. With adultery, fornication, and deviant sexual intercourse no longer considered crimes among heterosexuals, the state had no basis for declaring this type of sexual “immorality” more destructive

142. Id. at 497.
144. Wasson, 842 S.W.2d at 498. This “moving stream” has swept with it more than sodomy laws. Seven states (California, Connecticut, Hawaii, Massachusetts, New Jersey, Vermont, and Wisconsin) and the District of Columbia have adopted laws prohibiting discrimination in employment and housing on the basis of sexual orientation. Rubenstein, supra note 7, at 270. Courts are beginning to recognize gay and lesbian relationships in some circumstances. See, e.g., Crooke v. Gilden, 414 S.E.2d 645 (Ga. 1992) (enforcing contract between two lesbians); Braschi v. Stahl Assocs. Co., 543 N.E.2d 49 (N.Y. 1989) (holding that gay partner was “family” for purposes of rent control laws); Whorton v. Dillingham, 248 Cal Rptr. 405 (Ct. App. 1988) (enforcing contract between gay men). See also In re Adoption of Evan, 583 N.Y.S.2d 997 (Sup. Ct. 1992). There, the court allowed a lesbian couple to adopt the biological child of one of the partners. The court stated: “Here this Court finds a child who has . . . two adults dedicated to his welfare, secure in their loving partnership, and determined to raise him to the very best of their considerable abilities.” Id. at 1002.
146. Wasson, 842 S.W.2d at 498 (quoting Commonwealth v. Bonadio, 415 A.2d 47, 50 (Pa. 1980)).
to family values, warranting criminal punishment. In fact, the allowance of same-sex marriage would further the state's interest in family cohesion and stability among a previously excluded segment of the citizenry.

As an alternative basis for its holding, the Kentucky Supreme Court also invoked the equal protection component of the Kentucky Constitution. Relying on an opinion of the Ninth Circuit Court of Appeals in Watkins v. United States Army, the Wasson court recognized that the Due Process Clause typically protects deeply rooted traditions and practices. The purpose of the Equal Protection Clause, however, "is not to protect traditional values and practices, but to call into question such values and practices when they operate to burden disadvantaged minorities. . . . Equal protection simply requires that the majority apply its values even-handedly." Same-sex marriage asks no more than this; competent, adult gays and lesbians seek that same legal status long considered a birthright of heterosexuals.

More fundamentally, this type of "morality" is flawed. It maintains that the allowance of same-sex marriages may encourage "deviant" practices, implicitly endorsing the homosexual "lifestyle" as a legitimate "choice." This argument presupposes two unsupportable theories. The first theory assumes that sexual orientation is merely a choice, decided on a whim. Two recent studies by highly respected scientists point to a genetic or biological basis for sexual orientation. More pragmatically, how many people would choose a life of either secrecy or abuse?

147. Id. at 501.
148. Id. at 499.
149. 875 F.2d 699 (9th Cir. 1989), cert. denied, 498 U.S. 957 (1990).
150. Wasson, 842 S.W.2d at 499 (quoting Watkins v. United States Army, 875 F.2d 699, 718, 720 (9th Cir. 1989) (Norris, J., concurring)).
151. Sodomy laws remain in effect in 23 states and the District of Columbia. See supra note 71.
152. Trosino, supra note 6, at 110.
153. See Dean H. Hamer, et al., A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation, SCIENCE, July 16, 1993, at 321; Simon Levay, Beyond Belief: Are Homosexuals Born and Not Made?, THE GUARDIAN, Oct. 9, 1992, at 31 (discussing the author's discovery of a difference in the hypothalamus in the brains of homosexual and heterosexual men). Laura Allen and Roger Borski of the University of California at Los Angeles have also reported a difference in the brains of gay and heterosexual men, specifically in the anterior commissure, the pathway connecting the left and right hemispheres of the cerebral cortex. Id. Cognitive scientists have shown that gays and lesbians differ in a variety of perceptual and behavioral traits—such as verbal skills and left or right handedness—most easily explained in terms of different prenatal development. Id. See also Doreen Kimura, Sex Differences in the Brain, SCIENCE, Sept. 1992, at 118.
154. See generally MOHR, supra note 9, at 44.
The second assumption is that homosexuality is an inferior orientation, something to be discouraged or "cured." Gay and lesbian relationships are capable of the same love, caring, compassion, and respect as heterosexual unions. It is these elements that determine the value of a relationship, not ancient texts or current stereotypes.

Finally, a state may argue that homosexuality should be discouraged at every turn in order to protect children, certainly a legitimate interest. This justification fails in its selection of means, however. Once again, this argument is based on irrational stereotypes and prejudice. The fear of gays and lesbians as sexually deviant predators of children is totally unfounded. In fact, children are less likely to be molested by a homosexual adult than by a heterosexual adult. Further, many studies have shown that gay and lesbian parents are just as capable of parenting as heterosexual parents, and the children raised by gay and lesbian parents are no more likely to be homosexual than children raised by heterosexual parents. In short, gays and lesbians are no greater threat to children than heterosexuals.


156. Trosino, supra note 6, at 109.

157. See generally Fajer, supra note 2. Through studies and interviews, Fajer shows that gay and lesbian relationships evince the same warmth, love, and familiarity as heterosexual relationships.

158. See Friedman, supra note 48, at 209; Trosino, supra note 6, at 110-11; William B. Rubenstein, We Are Family: A Reflection on the Search for Legal Recognition of Lesbian and Gay Relationships, 8 J.L. & POL. 89, 101 n.36 (1991) (citing VINCENT DE FRANCIS, PROTECTING THE CHILD VICTIM OF SEX CRIMES COMMITTED BY ADULTS 216-17 (1969) (stating that 97% of sex offenders against children are male and 90% of victims are female)).


160. Trosino, supra note 6, at 111; Charlotte J. Patterson, Children of Lesbian and Gay Parents, 63 CHILD DEV. 1025, 1036 (1992) ("There is no evidence to suggest that psychosocial development among children of gay men or lesbians is compromised in any respect relative to that among offspring of heterosexual parents."). With approximately three million gay men and lesbians raising eight to ten million children in this country, Rubenstein, supra note 7, at
I have attempted to outline the constitutional bases for allowing same-sex marriages, while exploring the circular, unpersuasive logic of its opponents. Until 1993, no court had deviated from the traditional view. Then the Hawaii Supreme Court decided the case of *Baehr v. Lewin*.

### III. *Baehr v. Lewin; The Pendulum Swings*

On May 1, 1991, six plaintiffs filed a complaint in Hawaii Circuit Court challenging that state’s marriage statute, which explicitly referred to “man and woman.” The trial court granted the state’s motion for judgment on the pleadings, dismissing the plaintiffs’ action with prejudice for failure to state a cause of action upon which relief could be granted.

On appeal to the Hawaii Supreme Court, the plaintiffs averred that application of section 572-1 to deny same-sex marriage violated the right to privacy, as guaranteed by Article I, section 6 of the Hawaii Constitution, as well as the equal protection and due process clauses found in Article I, section 5 of the same. The court analyzed each claim in turn before concluding that the circuit court’s order “runs aground on the shoals of the Hawaii Constitution’s equal protection clause,” vacating the judgment and remanding the case for further proceedings.

#### A. The Right to Privacy

The framers of the Hawaii Constitution inserted the right to privacy, as articulated by the United States Supreme Court in cases such as *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Roe v. Wade*, di-

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475, perhaps the *Bowers* court erred in concluding there is “no connection between family ... and homosexuality.” *Bowers*, 478 U.S. at 191.


165. *Id.* at 50. “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, § 6.

166. *Baehr*, 852 P.2d at 50. “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.” *Haw. Const.* art. I, § 5 (1978).


168. 381 U.S. 479 (1965).

rectly into that document, in Article I, section 6. When construing that section, the Hawaii Supreme Court has been guided by the cases of the United States Supreme Court. Thus, the Hawaii Supreme Court began its analysis in *Baehr* with the United States Supreme Court cases construing marriage as a fundamental right.

After reviewing the federal "marriage" cases, the court concluded that the "federal construct of the fundamental right to marry . . . presently contemplates unions between men and women." While acknowledging that it could give broader privacy protection under Hawaii's own constitution, the court felt compelled to follow the lead of the United States Supreme Court. Applying what it perceived to be the present federal privacy standard, the court concluded that the right to same-sex marriage is not so deeply "rooted in the traditions and collective conscience of [the] people that failure to recognize it would violate the fundamental principles of liberty and justice."

B. Equal Protection Review

The court began by stating that the "equal protection clauses of the United States and Hawaii Constitutions are not mirror images of one another." The more elaborate Hawaiian version provides that "no person shall . . . 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." The court then concluded that section 572-1, on its face and as applied, regulated access to the marital relationship on the basis of sex. Since the Hawaii Constitution's equal protection guarantee is "broader" than that of the United States Constitution, the court held that classifications based on sex are subject to strict scrutiny, rather than the intermediate scrutiny mandated in *Craig v. Boren*. Under this standard, the court ruled that section 572-1 "is presumed to be unconstitutional," unless the state can show that it is justified by a compelling state interest

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174. *Id.* at 57.
175. *Id.* at 59.
176. *Id.* at 60.
177. *Id.* at 67.
and is narrowly drawn to avoid unnecessary abridgments of constitutional rights.  

The court, while commendably jettisoning the Singer court's construction of the sex discrimination and ERA issue, seemed a bit too eager to avoid the realities of the case. The plaintiffs were only incidentally denied marriage licenses on the basis of gender. The real motivation behind these statutes, as the court certainly realized, was not gender discrimination, but homophobia. Thus, while the result is laudable, a better rationale is provided by the Colorado Supreme Court in Evans. Plaintiffs were denied the exercise of a fundamental right, in this case marriage, based solely on their membership in a disfavored class. As the courts in Meinhold and Cammermeyer also noted, the Equal Protection Clause protects all citizens from legislation based purely on antiquated stereotypes or irrational prejudice. Under any standard of review, a court should strike down legislation resting on these impermissible bases.

C. The Concurrence

The judgment of the court discussed above was a mere plurality of two. The third vote necessary to reverse the lower court's ruling was provided by Justice Burns, who articulated his views in a peculiar concurrence.

Justice Burns agreed that the circuit court erred in granting judgment on the pleadings, as the case involved genuine issues of material fact, namely "to what does the word 'sex' refer" in the Hawaii Constitution. In his view, sex included all the aspects of gender that are "biologically fated." Noting several studies that indicated homosexuality may be biological, as well as several commentators who disagree, the Justice concluded that the matter should be returned to the trial court for fact-finding. If sexual orientation is "biologically fated," the "Hawaii Constitution probably bars the State from discriminating against the sex-

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183. Baehr, 852 P.2d at 68 (Burns, J., concurring). The Hawaii Supreme Court is comprised of five justices.
184. Id. at 68-69 (Burns, J., concurring).
185. Id. at 69 (Burns, J., concurring).
186. Although the Justice did not elaborate, he appeared to be referring to the DNA and brain region studies discussed in note 155, supra.
ual orientation difference by permitting opposite-sex Hawaii Civil Law marriages and not permitting same-sex Hawaii Civil Law Marriages."\(^\text{187}\) If sexual orientation is not "biologically fated," the state may "encourage heterosexuality and discourage homosexuality" through its marriage laws.\(^\text{188}\)

As noted earlier, a growing body of scientific evidence has indicated that sexual orientation is at least partially inherited by the individual.\(^\text{189}\) Nevertheless, proving this theory in a court of law seems unlikely. The Justice unnecessarily injected a scientific argument into a case his brethren in the plurality had disposed of in a purely legal, thoroughly rational (if simplistic) manner. One can only hope the litigants in the trial court follow the plurality's lead and leave this issue to the scientific community.

**D. The Dissent**

The dissent in *Baehr* resurrected the same tired definitional or traditional "argument"\(^\text{190}\) that was used in prior cases to deny same-sex marriage.\(^\text{191}\) The plurality rightly called this argument an "exercise in tortured and conclusory sophistry."\(^\text{192}\) In a bald denial of all that *Loving v. Virginia*\(^\text{193}\) taught, the dissent stated "HRS sec. 572-1 treats everyone alike and applies equally to both sexes."\(^\text{194}\) Of course, so did the anti-miscegenation statute, punishing both white and black partners in the "illicit" union.\(^\text{195}\) Concluding that this statute should be reviewed under the rational basis test, the dissent approved the state's proffered interest in creating a "desirable forum for procreation and the rearing of children."\(^\text{196}\) This assertion ignores the fact that no decision has ever prevented infertile different-sex couples from marrying, or required those capable of having children to do so. In fact, the Hawaii legislature specifically removed a section from the state's family code that required marriage applicants to show they were not impotent.\(^\text{197}\) The dissent quickly glossed over the legislature's statement that this provision was

\(^{187.}\) *Baehr*, 852 P.2d at 69-70 (Burns, J., concurring).
\(^{188.}\) *Id.* at 70 (Burns, J., concurring).
\(^{189.}\) See supra note 153 and accompanying text.
\(^{190.}\) Same-sex couples cannot marry because what they represent is not marriage.
\(^{191.}\) See supra part II.B.
\(^{192.}\) *Baehr*, 852 P.2d at 63.
\(^{193.}\) 388 U.S. 1 (1967).
\(^{194.}\) *Baehr*, 852 P.2d at 71.
\(^{195.}\) *Loving*, 388 U.S. at 8.
\(^{196.}\) *Baehr*, 852 P.2d at 72-73.
\(^{197.}\) *Id.* at 74 n.9.
"narrow and outdated" by asserting, without explanation and only within a footnote, that this "characterization should not be expanded to include the applicants in this case." Even more damaging to the state's argument is the fact that the available empirical data indicates that same-sex couples provide as good a forum for the raising of children (whether from a previous union, adoption, or artificial insemination) as heterosexual couples.

Finally, the dissent predicted "far-reaching and grave repercussions" from the decision, pleading for judicial restraint in an area properly left to the legislature. However, it has always been the province of the courts to invalidate legislation contrary to the Constitution. Courts cannot ignore violations of constitutional rights due to fear of social or economic upheaval. Gays and lesbians may not be socially accepted, and the extension of "benefits" to them may raise the ire of certain segments of the citizenry. Still, judges may not give effect to private prejudices. Gays and lesbians have been denied a fundamental right based purely on their sexual orientation. *Baehr v. Lewin* is the first step in rectifying this historic injustice.

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198. *Id.*
199. *Id.*
200. See supra notes 159-60.
202. *Id.*
204. See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982) (ordering the state of Texas to provide free public education to the children of illegal aliens); *Roe v. Wade*, 410 U.S. 113 (1973) (providing a broad right to choose an abortion despite vocal public opposition); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) (busing); *Brown v. Board of Education*, 347 U.S. 483 (1954) (ordering an end to segregated public schools). All of these cases involved controversial and/or costly issues, yet the Supreme Court refused to shirk its constitutional duties in response to those pressures.
205. See, e.g., James D. Wilson, *Gays Under Fire*, NEWSWEEK, Sept. 14, 1992, at 34, 37 (noting a recent poll that found 58% of the respondents opposed to legal same-sex marriages). A 1991 Gallup poll of white Americans found that 45% disapprove of interracial marriage, while 44% approve. Trosino, supra note 6, at 93 n.2. These bigoted attitudes do not change the fact that *Loving v. Virginia*, 388 U.S. 1 (1967), is still the law of the land. They should not carry the day in the area of same-sex marriage either.
206. Groups in Arizona, California, Florida, Idaho, Michigan, Ohio, Oregon, and Washington are seeking to pass constitutional amendments denying legal protections for gays and lesbians. See Stumbo, supra note 99, at 74. Given the result in *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993), wherein Colorado's amendment was struck down, these efforts may be doomed to failure.
208. The decision in *Baehr* has created a backlash from conservative groups in Hawaii. In newspaper ads, opponents of same-sex marriage warned that the decision could unleash the "wrath of God" and perhaps another hurricane. Deb Price, *Hawaii Leads Movement for Gay
IV. CONFLICTS ANALYSIS; WILL OTHER STATES VALIDATE?

One commentator on same-sex marriage has written: "If gay and lesbian marriage is legitimized in any state, other states would be forced to recognize gay marriages conducted in that state through the full faith and credit clause of the Constitution."\(^{209}\) Unfortunately, this is not necessarily the case. Gays and lesbians who "flocked to the state that would marry them"\(^{210}\) may well find their union denied recognition when they return to their home state.

Under Article IV, section 1 of the United States Constitution, a state must accord full faith and credit to the public acts and judicial decrees of other states. Thus, a state court must accord the divorce decree of a sister state full recognition, provided that state had proper jurisdiction.\(^{211}\) Nevertheless, as the Wisconsin Attorney General has stated: "This in no way means that one state can impose its legislation or practices on a sister state with respect to matters which are properly within the jurisdiction of the sister state."\(^{212}\) Thus, the determination as to "who shall occupy the matrimonial relationship within its borders" rests with the state.\(^{213}\) The full faith and credit clause provides no barrier to one state denying the validity of a marriage celebrated in a sister state.

However, states almost always validate marriages contracted elsewhere, based upon the policies contained in their family codes, or the notion of comity. As a general rule, a marriage valid where celebrated is valid everywhere, subject to two exceptions. First, if the marriage is expressly prohibited by a local statute, it will be denied recognition. Second, if the marriage is contrary to strong public policy, morality, and decency, it will likewise be deemed invalid.\(^{214}\)

This common law rule has given way in many states to statutory governance. Some states have enacted marriage validation statutes, which compel state officials to recognize any marriage valid where celebrated. Other states have enacted marriage evasion statutes, which render inva-

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\(^{209}\) Marriages, S.F. EXAMINER, Jan. 4, 1994, at C7. The Hawaii House of Representatives has held hearings on two bills aimed at retaining the ban on same-sex unions; one would amend the state constitution. Across the U.S.A.: News from Every State, USA TODAY, Feb. 1, 1994, at 7A. The final ruling on Baehr from the trial court is expected in 1995. Price, supra, at C7.

\(^{210}\) Cameli, supra note 1, at 477.

\(^{211}\) Id. at 478.


\(^{214}\) See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971); EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 13.5 (1982).
lid any marriage celebrated outside of the state that could not be contracted within the state. This section will analyze these statutes, their significance for same-sex couples married outside of their state of domicile, as well as some possible results in those states adhering to the common law rule of recognition.

In order to prevent the discussion from being swallowed by a myriad of conflict of laws principles, this section will be limited in two ways. First, it will only address the validity of marriage, specifically, whether the two individuals are lawful spouses. No discussion of the incidents of marriages, nor the formalities of celebration will occur. Second, it will only discuss same-sex couples that leave their state of domicile, travel to a state that will lawfully marry them (i.e. Hawaii), then return to their state of domicile.

The state where the couple was domiciled prior to their marriage and to which they intend to return subsequent to it has the most significant relationship to that couple. To date, marriages have only been invalidated when in violation of the strong public policy of the state of domicile. Regardless of the forum, or the state of celebration, the law of the state with the most significant relationship to the couple will usually be applied. Thus for the purposes of this comment, assume the state of marital domicile will apply its laws, including any evasion or validation statutes, as well as the specific provisions of its family code.

A. Marriage Validation Statutes

Section 210 of the Uniform Marriage and Divorce Act provides: "All marriages contracted ... outside this state, that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted or by the domicil [sic] of the parties, are valid in this state." Currently, twelve states have statutes which are similar to this one in effect. It would seem at first blush that same-sex couples traveling out

215. The issue of marital validity could arise in an action for annulment or a declaratory judgment action as to the marriage's existence. Restatement (Second) of Conflict of Laws § 283 cmt. a. (1971).
216. Id. cmt. c.
217. Id. cmt. k.; Willis L.M. Reese, Et Al., Conflict of Laws 829 (9th ed. 1990).
218. Reese, Et Al., supra note 219, at 829.
of their state to be wed could return to these states as their marital domicile. However, several factors militate against over-confidence.

1. Is This "Marriage"?

Recall that several courts have held that same-sex couples cannot marry because what they represent does not comport with the definition of that term. A court considering whether to validate a same-sex union may simply decree that, although they have been commanded to recognize foreign marriages by the legislature, this union does not constitute an actual marriage. In fact, the courts in California and Colorado, for example, could find statutory support for such a holding. In both states, the general definition of a civil marriage contains the terms "man and woman."

2. Illegal Consummation

Twenty-three states and the District of Columbia still have sodomy statutes on their books. What would be the result in Idaho or Kansas, for instance, when a court required to validate a same-sex marriage would tacitly sanction a criminal act? One of the conflicting policies contained in these two types of statutes would have to fall, unless the state decides to validate only celibate same-sex unions. This would almost be a parody of the Clinton administration's new "don't ask, don't tell" policy on gays and lesbians in the military.

3. Contrary Holdings

Finally, the state of Kentucky, which has a validation statute, was also the state where Jones v. Hallahan was decided. The Jones court held that two women could not marry because they failed to satisfy the definition of marriage. Could a court in Kentucky recognize an out-of-

(Michie 1978)); South Dakota (S.D. CODIFIED LAWS ANN. § 25-1-38 (1992)); and Wyoming (Wyo. STAT. § 20-1-111 (1987)). While several of these statutes are not based on the Uniform Marriage and Divorce Act, and refer to marriages celebrated in other countries, all apply to marriages contracted in others states as well. It should also be noted that Kentucky has specifically proscribed same-sex marriages by judicial decision, Jones v. Hallahan, 501 S.W.2d (Ky. Ct. App. 1973), while Utah has enacted a specific statutory ban. UTAH CODE ANN. § 30-1-2(5) (1994). On March 1, 1995, in specific response to Baehr, the Utah legislature changed their marriage validation statute to an evasion statute. See David W. Dunlap, Some States Trying to Stop Gay Marriages Before They Start, N.Y. TIMES, March 15, 1995, at A18.

220. See supra part II.B.
221. See supra note 71.
222. KY. REV. STAT. ANN. § 402.040 (Baldwin 1989).
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state marriage that was expressly denied to inhabitants of that state in 1973? However, as discussed earlier, the Kentucky Supreme Court struck down that state’s sodomy statute in 1992. Perhaps the strong public policy against homosexuality in Kentucky has waned.

B. Marriage Evasion Statutes

As indicated, the presence of a marriage validation statute would not appear to guarantee a same-sex couple recognition of their union. Similarly, in the fourteen states that have some sort of marriage evasion statute, the result does not appear to be preordained. There are two general types of evasion statutes. The first type is exemplified by the Uniform Marriage Evasion Act, which states that if any person “prohibited from contracting marriage under the laws of this state” travels to another state and marries there, “such marriage shall be null and void for all purposes in this state.” These statutes would appear to spread a blanket ban over all marriages that could not be contracted within that state, and are, in some form, in effect in seven states.

The courts in most states have not passed on the issue of same-sex marriage, and only a few proscribe it by statute. Thus, a court asked

224. Id. This same dilemma could confront the courts in Utah, which proscribe same-sex unions via statute.
227. REESE, ET AL., supra note 217, at 830.
228. These states are: Arizona, Connecticut, Georgia, Massachusetts, New Hampshire, Vermont, and Wisconsin. DEL. CODE ANN. tit. 13 § 104 (1993) voids marriages “prohibited by this chapter” of the family code. Thus, while not specifically enumerated, Delaware’s law does not appear to be a true blanket ban either. It should also be noted that New Hampshire has enacted a specific statutory ban on same-sex marriage. See N.H. REV. STAT. ANN. § 457:1 (men) and § 457:2 (women) (1993).
229. For a list of those states whose courts have directly confronted the issue, see supra part II.B and note 119.
to validate a same-sex marriage contracted outside that state may be forced to pass on the question of whether such a union would be prohibited inside the state. A progressive court in a state that has not specifically answered this question could validate same-sex marriage, notwithstanding the existence of a stern marriage evasion statute, by simply holding that no law had been evaded.

The second type of evasion statute is more specific. It holds that marriages contracted elsewhere in order to evade a certain provision of the state's laws are void. For example, West Virginia has a statute that prohibits the evasion of its consanguinity provision by traveling to another state to marry. These enumerated statutes are typically concerned with evasion of the state's prohibitions against incest and polygamy, as well as their age requirements; none of these statutes specifically mention same-sex unions.

Thus, in these states, the evasion statute is theoretically no barrier to the recognition of same-sex marriages. However, the courts in these states could still refuse to validate on public policy grounds, evoking the old common law rule. However, they would not be statutorily required to do so.

C. The General Rule

The existence of marriage evasion and validation statutes does not necessarily preordain the result for a same-sex couple married outside the state. In those states that adhere to the general rule of recognition, the results could be even more unpredictable.

1. The First Exception

Some states have specifically denied same-sex couples the right to marry in their family codes. It seems extremely unlikely that a court in these states could validate a same-sex marriage. Recall that the first exception to the general rule, that a marriage valid where celebrated is valid everywhere, is a specific statutory prohibition. Although few states ban same-sex unions outright, most use the words "man and woman" or "male and female" in their codes. For a court seeking a rationale for its

231. W. VA. CODE § 48-1-17 (1994) prohibits leaving the state to intermarry in violation of § 48-1-2, "What Relatives a Man May Not Marry."
232. See, e.g., IND. CODE ANN. § 31-7-6-6 (Burns 1987). Indiana specifically bans same-sex marriages in § 37-7-1-2, yet, its enumerated evasion statute does not list this ban.
233. See, e.g., LA. CIV. CODE ANN. art. 89 (West 1993); TEX. FAM. CODE ANN. § 1.01 (West 1993).
denial of recognition, these scattered references in the statutes could provide all the backing necessary.

2. The Second Exception

The rights of gays and lesbians have long been denied on the basis of public policy, morality, and decency. Courts could quite easily deny recognition of same-sex unions solemnized elsewhere under this exception, reciting the litany of procreation, child protection, and decency arguments relied upon for generations.

Two competing policies permeate marriage validation analysis. First is the justified expectations of the parties, who would ordinarily expect the validity of their marriage to be governed by the local law of the state where it was contracted. Second is the legitimate public concern of the state wherein the couple will reside. Given the nature of this marriage, a court may find the couple’s expectations unrealistic. Obviously, an intentional decision was made to leave the state in order to escape its laws. Same-sex marriages have been universally denied. It could not be argued that the couple was ignorant of the reasons for its flight, or seriously expected quick and easy validation.

However, the interest of the state must also be tempered by constitutional limitations. As we have seen, the ability of a state to regulate the marital relationship is not unlimited. A same-sex couple facing a challenge to the validity of their marriage should confront the state’s argument that they had no expectation of recognition with a constitutional rebuttal. The state’s interest here is based upon impermissible stereotypes and prejudices; it should not be allowed to trump the interest of the couple in the sanctity of their union.

V. A New Lesson

If Hawaii does decide to allow same-sex marriage, the ideal response from other states would be to follow suit by amending their family codes. However, this domino effect is extremely unlikely. Alternatively, those couples who “flock” to Hawaii to wed could become the

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234. Restatement (Second) of Conflict of Laws § 283 cmt. b (1971).
235. Id.
236. Representative Tammy Baldwin (D-Madison) has said she will soon introduce a proposal in the Wisconsin legislature to permit same-sex marriages in that state. Joanne Weintraub, Activist Denounces Move To Legalize Gay Marriages, MILWAUKEE J., Feb. 11, 1994, at B7. Reverend Lou Sheldon of the Traditional Values Coalition called the proposal a “social reign of terror,” equating same-sex marriage with “inner-city violence, drugs and crime” as destroyers of the traditional family. Id. State wide domestic partnership legislation is being
plaintiffs in judicial challenges to discriminatory marriage statutes across the nation. An action for a declaratory judgment that their marriage is valid may be more persuasive than a simple challenge from unwed same-sex partners.

In any event, *Baehr v. Lewin* could be to the gay and lesbian community what *Brown v. Board of Education* was to African-Americans. It is well known that *Brown* signaled an end to racial segregation in American schools. But more importantly, it meant that discrimination against blacks would no longer be countenanced. The symbolic importance far out-stripped its actual holding. It signified a nation in evolution, one now prepared to deliver on its promise of emancipation and equal protection of the laws. *Brown* provided hope. In the years that followed, African-Americans secured those rights long considered the birthright of whites.

*Brown* taught all Americans that black schoolchildren were every bit as worthy as white schoolchildren. The status of the two races was equalized through integration. Similarly, by allowing gay and lesbian couples to marry, and enjoy that status long considered "one of the basic civil rights of man," the law will finally teach Americans that same-sex couples are every bit as worthy as different-sex couples. Let us hope the lesson is soon learned and that loving relationships in all their forms are accorded the same dignity and respect.

Jonathan Deitrich

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