Baehr v. Lewin: Questionable Reasoning; Sound Judgment

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BAEHR v. LEWIN: QUESTIONABLE REASONING; SOUND JUDGMENT

I. INTRODUCTION

In *Baehr v. Lewin*, a plurality of the Hawaii Supreme Court held that a state statute restricting marriage to a male-female relationship discriminates on the basis of sex, and is therefore subject to "strict scrutiny" under equal protection analysis. The court remanded the case for a determination as to whether the statute satisfies the criteria of strict scrutiny. Curiously, the court applied the strict scrutiny test even though it failed to find a fundamental right to same-sex marriage, and it did not proclaim homosexuals to be a suspect class. The court applied strict scrutiny by drawing an analogy to *Loving v. Virginia*.

In *Loving*, the State of Virginia argued that its antimiscegenation statutes did not classify on the basis of race because they equally punished...
both racial groups who entered into a marriage. The United States Supreme Court disagreed, holding that the laws were unconstitutional because they were based on an impermissible racial classification.

Similar to the statute in Loving, the Hawaii statute governing marriage (HRS § 572-1) prohibits both males and females from entering into same-sex marriages. Relying on Loving, the Baehr court found that HRS § 572-1 discriminates on the basis of sex even though it punishes the participants equally. As such, it found that the statute violates the equal protection clause of the Hawaii Constitution.

Because many laws classify on the basis of marital status, the legitimization of same-sex marriages in Hawaii would affect more than the right to marry. For example, the eligibility of a partner's health benefits often depends on marital status, and marital relationships often affect the issue of consent with regard to medical procedures. In addition, many other benefits are conditioned upon marital status, including, but not limited to: joint federal and state tax returns, dependency deductions, gift and estate tax benefits, wrongful death recovery, Social Security benefits, and other welfare benefits.

6. Id. at 7-8.
7. Id. at 11-12.
9. The Baehr court concluded that HRS § 572-1 limited marriage to opposite-sex couples, even though the statute did not explicitly prohibit same-sex marriage. See infra notes 142-144 and accompanying text.
11. Id. at 67.
12. Jorge Aquino, Will Other States Say “Aloha” to Same-Sex Marriages?, Recorder, May 10, 1993, at 3 (“The right to marry legally would entitle gay and lesbian couples to a host of legal rights that only heterosexuals now enjoy in Hawaii, including . . . an expansion of rights to life and health insurance . . . .”).
13. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 18 at 115 (5th ed. 1984). “Under certain circumstances, someone regarded as the next of kin, such as a spouse or a niece, may have the capacity to consent, especially an emergency, to a surgical procedure performed to save a life.” Id.
17. E.g., id. §§ 2056, 2513, 2523.
Same-Sex Marriages

Security Old Age Survivors and Disability Insurance benefits,\textsuperscript{19} intestate inheritance,\textsuperscript{20} community property rights,\textsuperscript{21} state-enforced support obligations,\textsuperscript{22} and other benefits.\textsuperscript{23} Moreover, \textit{Baehr} has an effect on the law beyond Hawaii because other states are required to recognize the validity of an out-of-state marriage unless it violates the strong public policy of the state.\textsuperscript{24}

Part II of this Note surveys both federal and state court decisions that have prohibited same-sex marriages. Part III discusses the invocation of strict scrutiny under fundamental rights and equal protection analyses. Part IV introduces the \textit{Baehr} decision, beginning with the facts and procedural history of the case, and then discusses the Hawaii Supreme Court’s fundamental rights and equal protection holdings. Finally, Part V analyzes the \textit{Baehr} court’s rationales and proposes alternative bases for the decision.

This Note concludes that there are difficulties in the court’s holding that HRS § 572-1 classifies on the basis of sex because the holding is inconsistent with the rationale for applying heightened scrutiny to statutes classifying on the basis of sex. In addition, the court can be criticized for failing to follow its own reasoning for determining the level of scrutiny to be applied to sex-based classifications. Nonetheless, this Note concludes that the holding is justified because the statute could be struck down under both fundamental rights and equal protection analyses.\textsuperscript{25}

\begin{itemize}
  \item \textsuperscript{19} 42 U.S.C. §§ 401-433 (1988).
  \item \textsuperscript{20} \textit{E.g.}, \textit{Haw. Rev. Stat.} §§ 560:1-401-403 (1993) (defining rights to notice, protection, benefits, and inheritance under the Uniform Probate Code); \textit{id.} ch. 533 (defining rights relating to dower, curtesy, and inheritance).
  \item \textsuperscript{21} \textit{E.g.}, \textit{id.} ch. 510 (1993).
  \item \textsuperscript{22} \textit{E.g.}, \textit{id.} § 572-24 (1993) (right to spousal support); \textit{id.} ch. 575 (right to file a non-support action); \textit{id.} ch. 571 (award of child custody and support payments in divorce); \textit{id.} ch. 580 (post-divorce rights relating to support and property division).
  \item \textsuperscript{24} \textit{Restatement (Second) of Conflicts} § 283(2) (1969). “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.” \textit{Id.} See \textit{Aquino, supra} note 12, at 3 (discussing whether other states will be required to recognize same-sex Hawaiian marriages).
  \item \textsuperscript{25} It certainly can be argued that courts should refrain from recognizing same-sex marriages, leaving the issue to the legislature. \textit{See} G. Sidney Buchanan, \textit{Same-Sex Mar-
court's questionable determination that the statute classifies on the basis of sex is a way for it to apply a strict scrutiny analysis without dealing with such controversial issues as whether there is a fundamental right to same-sex marriage, or whether homosexuals constitute a suspect class.

II. STATE AND FEDERAL DECISIONS DENYING SAME-SEX MARRIAGE

Prior to the decision in *Baehr*, all federal and state courts considering the issue of same-sex marriage declined to extend state definitions of marriage to include same-sex couples. The validity of same-sex marriage was first addressed by the Minnesota Supreme Court in *Baker v. Nelson*, which denied a marriage license to two men solely because they were of the same sex. In that case, the petitioners contended that Minnesota law authorized same-sex marriages because the statute governing marriage did not expressly prohibit them. Rejecting this argument, the Minnesota Supreme Court implied a prohibition on same-sex marriages based on the "common usage" of the words in the statute. It found that the common usage of the term "marriage" included only unions between persons of the opposite sex, as evidenced by the usage of "heterosexual import" terms throughout the statute, such as "husband and wife" and "bride and groom." The petitioners further asserted that interpreting the Minnesota statute to prohibit same-sex marriages violated the First, Eighth, Ninth, and Fourteenth Amendments to the United States Consti-
tution. The court dismissed without discussion the petitioners' claims that the statute violated their First Amendment rights of expression and association, and the Eighth Amendment proscription against cruel and unusual punishment. Furthermore, it found that a fundamental right was not violated by the prohibition because the understanding of mar-

33. Id. at 186 n.2.

34. Id. A claim that prohibition of same-sex marriages violates the First, Eighth, and Ninth Amendments to the Constitution probably cannot be sustained under existing precedent. Note, The Legality of Homosexual Marriages, 82 Yale L.J. 573, 573-74 n.3 (1973).

Although the First Amendment rights to free speech and free assembly have been interpreted to include the right to free association, the Supreme Court has never declared a marital union to be an association under that amendment. Id. at 573 n.3. Harvard professor Jed Rubenfeld perceives the right to privacy as the right "not to have one's life too totally determined by a progressively more normalizing state." Jed Rubenfeld, The Right to Privacy, 102 Harv. L. Rev. 737, 784 (1989); see infra part V.B.2. for a discussion of Rubenfeld's right to privacy analysis. Rubenfeld asserts that prohibitions on marriage implicate the right to privacy, not the First Amendment. Rubenfeld, supra at 791-92; see Loving v. Virginia, 388 U.S. 1 (1967). The difference between laws that violate the First Amendment and laws that violate the right to privacy is the degree to which the law regulates the prohibited behavior. Rubenfeld, supra at 785.

Because of the signal role that speech plays in political freedom and because of the express constitutional guarantee, government in this country can hardly forbid or compel citizens to utter a single opinion without violating their rights. By contrast, in privacy cases, the government must go much further before it transgresses a constitutional limit.

Id. Thus, the right to privacy is implicated by laws prohibiting same-sex marriage, where "an existence is totally informed or occupied." The First Amendment is not implicated because laws prohibiting same-sex marriage involve more than "a single act of enforced loyalty." Id.

The petitioners' Eighth Amendment argument, that denial of a marriage license constituted cruel and unusual punishment, relied on Robinson v. California, 370 U.S. 660 (1962), for the principle that punishment for a status or condition that is involuntary violates the Eighth Amendment. See Note, supra at 574 n.3. In Robinson, the Court interpreted a state law that imprisoned a narcotics addict as cruel and unusual punishment because the law condemned a person for an "illness" that was "involuntary." Id. However, this interpretation probably does not extend beyond the context of criminal law. Id.

The petitioners' Ninth Amendment claim was based upon Justice Goldberg's concurring opinion in Griswold v. Connecticut, 381 U.S. 479, 488-97 (1965) (Goldberg, J., concurring), in which he stated that the right of marital privacy was preserved to the individual by the Ninth Amendment. Id. at 495. Some argue that Justice Goldberg had implied that the Ninth Amendment was made applicable against the states by the Fourteenth Amendment, see Damslet, supra note 4, at 569 n.62; but see Baker, 191 N.W.2d at 187 n.3 (denying the petitioners' claims under the Ninth Amendment because Justice Goldberg "stopped short" of making such an implication). Even if Justice Goldberg had made such an implication, the Ninth Amendment is not significant because the Fourteenth Amendment itself could carry the argument. Note, supra at 574 n.3.

Consequently, this Note will focus on the constitutionality of laws prohibiting same-sex marriage based on the due process and equal protection clauses of the United States Constitution and the Hawaii Constitution.
riage 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." Petitioners also argued that the state’s limitation on persons entitled to marry violated the equal protection clause because the statute was underinclusive. Rejecting this argument, the court simply stated that the Constitution does not require "abstract symmetry" between a statute and its purpose.

In Jones v. Hallahan, the State of Kentucky denied a marriage license to two women because they were of the same sex. The women argued that the denial deprived them of the right to marry, the right of association, the right to free exercise of religion, and subjected them to cruel and unusual punishment. Although Kentucky marriage laws did not specifically prohibit same-sex marriage, the court limited the definition of marriage to opposite-sex couples by citing sources similar to those in Baker: common usage, the dictionary, and provisions of the statute that referred to "the male and female of the species." Consequently, the court found that no constitutional provisions were involved, and that "appellants are prevented from marrying . . . by their own incapability of entering into a marriage as that term is defined."

The two men denied a marriage license in Singer v. Hara asserted that the Washington statute governing marriage permitted same-sex unions, and alternatively, that if the statute prohibited same-sex marriages, it violated the Washington Equal Rights Amendment (state ERA) and the Eighth, Ninth, and Fourteenth Amendments to the United States Constitution. Although the Washington statute provides that marriage may be entered into by "persons," the court held that same-sex marriages are prohibited because a provision of the statute refers to "the male" and

35. Baker, 191 N.W.2d at 186.
36. Id. They argued that although the purpose of the statute was to promote procreation, it permitted heterosexuals to marry even if they were not capable or willing to bear children. Id.
37. Id.
38. Id.
39. 501 S.W.2d 588 (Ky. 1973).
40. Id. at 589.
41. Id.
43. Id. at 590.
44. Id. at 589.
46. Id. at 1188-89.
"the female." The appellants in *Singer* next asserted that a prohibition on same-sex marriage violated the state ERA because the state ERA proscribes discrimination on the basis of sex. The appellants cited *Loving v. Virginia* in response to the state’s argument that the state ERA had not been violated because marriage licenses were denied equally to both male and female couples. Agreeing with the state, the appellate court found no analogy between the discriminatory racial classification in *Loving* and the sex-based classification in the Washington statute.

Whereas the statute in *Loving* was unconstitutional because it used race as a classification to prohibit interracial marriages, the court determined that the appellants in *Singer* were not prohibited from marrying by the Washington statute’s sex-based classification; 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." In considering the appellants’ equal protection claim, the court upheld the classification under a rational relationship standard of review, having determined that no suspect classifications were at issue. In doing so, it emphasized that the state’s interest in promoting the traditional family justified denying same-sex couples the right to marry.

The courts in *Baker* and *Singer* denied marriage licenses to same-sex couples based on a definition that limited marriage to a union between a man and a woman. Both courts reasoned that denial of marriage licenses to same-sex couples did not deny them the right to marry; rather, their own inability to enter into a marriage relationship prohibited them from marrying.

*Adams v. Howerton* is the only federal court case to examine the is-
sue of same-sex marriage. Two men, an American citizen and an Australian citizen, were married in Colorado upon the expiration of the Australian's visa to remain in the United States. They brought an action against the Immigration and Naturalization Service because it refused to classify the Australian as an "immediate relative" of the American based upon their marital relationship. In construing the applicable laws, the court determined that the Colorado marital statute was inconclusive as to whether same-sex marriages were prohibited; however, the court held that the federal immigration statute did not recognize same-sex marriages for immigration purposes.

III. CONSTITUTIONAL ISSUES

As the foregoing cases suggest, the question of same-sex marriage implicates both the due process and equal protection clauses of the Fourteenth Amendment. In the following sections, this Note explains the "strict scrutiny" standard of review and its invocation under fundamental rights and equal protection analyses.

A. Strict Scrutiny

Although the Fourteenth Amendment prohibits states from denying any person the equal protection of the laws, states must be able to draw some distinctions among individuals in order to function effectively. Consequently, the United States Supreme Court has developed "tiers" of review. Under the "rational basis" test, a statute will be upheld if the state can prove that the classification is rationally related to a legitimate state interest. However, this standard is not used in all circumstances. Such deference would prevent the equal protection clause from fulfilling its historical purpose—"protection of racial minorities from a hostile ma-

58. Id. at 1038.
59. Id.
60. Id. at 1039 (citing COLO. REV. STAT. § 14-2-104 (1973)). Interestingly, the court declined to find the marriage invalid under state law, a proposition that would have been supported by Baker, Jones, and Singer. Damslet, supra note 4, at 578-79.
61. Adams, 673 F.2d at 1040-41 (referring to § 201(b) of the Immigration and Nationality Act, codified as amended in 8 U.S.C. § 1151(b)).
62. Section 1 of the Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." U.S. Const. amend. XIV, § 1.
64. Id. at 1188.
Consequently, the Court has formulated a second tier of review, "strict scrutiny," a standard that requires the state to prove that the law is necessary to achieve a compelling governmental interest. Strict scrutiny is applied to laws that classify on the basis of suspect categories or impinge on a fundamental right. Because most laws viewed under the rational basis test are found constitutional, and most laws subjected to strict scrutiny are found unconstitutional, the standard of review is significant.

B. Fundamental Rights

Although petitioners in Baehr claimed violations of state constitutional rights, it is relevant to examine United States Supreme Court decisions. Examining the provision of the Hawaii Constitution explicitly guaranteeing the right to privacy, the Baehr court determined that the provision "encompassed all of the fundamental rights expressly recognized as being subsumed within the privacy protections of the United States Constitution." In construing the provision, the court looked to federal cases for guidance, because the Hawaii constitution article was expressly derived from the right to privacy of the United States Constitution, and because Hawaii courts had yet to define the right to marry.

The United States Supreme Court first expounded on the importance

67. Id. at 1189. Under the Hawaii strict scrutiny test, "laws are 'presumed to be unconstitutional unless the state shows compelling state interests which justify such classifications.'" Baehr v. Lewin, 852 P.2d 44, 64 (Haw. 1993) (quoting Holdman v. Olim, 581 P.2d 1164, 1167 (Haw. 1978)).
68. Developments in the Law, supra note 55, at 1189; Baehr, 852 P.2d at 65-66. See, e.g., Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (holding that any classification penalizing the right to interstate travel must meet the requirements of strict scrutiny); Korematsu v. United States, 323 U.S. 214 (1944) (racial classifications are subject to the strict scrutiny test).
69. Wilson, supra note 14, at 549; but see, e.g., City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (striking down under rational basis review a statute classifying on the basis of mental retardation).
70. Comment, supra note 14, at 200; but see Korematsu, 323 U.S. 214 (racial classification met demands of strict scrutiny test). For an argument that statutes prohibiting same-sex marriage violate the right to privacy but would nevertheless satisfy strict scrutiny, see generally Buchanan, supra note 25.
71. 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.").
73. Id.; see State v. Mueller, 671 P.2d 1351, 1358 (Haw. 1983) (explaining that the state court looks to the federal courts for guidance).
of "family" rights in *Meyer v. Nebraska*\(^7\) and *Pierce v. Society of Sisters*.\(^7\)

It specifically elaborated on the importance of marriage in *Skinner v. Oklahoma*,\(^6\) in which the Court struck down a statute that allowed the state to sterilize "habitual criminals" without their consent.\(^7\) The Court recognized that the law impinged on "one of the basic civil rights of man."\(^7\)

It also noted that "[m]arriage and procreation are fundamental to the very existence and survival of the race."\(^7\)

The right to privacy doctrine was first announced in *Griswold v. Connecticut*,\(^8\) in which the Court struck down a state statute forbidding the use of contraceptives by married couples.\(^8\) The Court determined "that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance," thus creating "zones of privacy."\(^8\)

The Court concluded that the marital relationship is protected by this right to privacy.\(^8\)

It again recognized the unique and important nature of the marital relationship in *Loving v. Virginia*,\(^8\) but stopped short of proclaiming marriage a fundamental right.\(^5\)

The right to privacy was expanded in *Eisenstadt v. Baird*\(^8\) and *Roe v.*
Wade\textsuperscript{87} to protect rights not traditionally recognized as fundamental. In Eisenstadt,\textsuperscript{88} the Court extended the right of marital privacy announced in Griswold\textsuperscript{89} to unmarried persons, holding that a statute prohibiting the distribution of contraceptives to unmarried couples violated the equal protection clause.\textsuperscript{90} Although Eisenstadt was decided on equal protection rather than fundamental rights grounds, the decision expanded the right of privacy to individuals.\textsuperscript{91} "If the right of privacy means anything, it is the right of the \textit{individual}, married or single, to be free from unwarranted governmental intrusion \ldots."\textsuperscript{92} In Roe,\textsuperscript{93} the Court held that the right to privacy protected a woman's decision whether or not to terminate her pregnancy.\textsuperscript{94} The Court determined that the guarantee of personal privacy includes "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.'"\textsuperscript{95} Although the right of privacy is not explicitly mentioned in the Constitution, the Court held that it can be found in the Fourteenth Amendment's concept of personal liberty.\textsuperscript{96}

The right to marriage was explicitly declared fundamental in\textit{Zablocki v. Redhail}.\textsuperscript{97} In that case, the Court found unconstitutional a statute providing that a parent who failed to comply with child support orders was prohibited from marrying without court permission.\textsuperscript{98} Applying a strict scrutiny analysis because of the infringement on the fundamental right of marriage, the Court found that the statute violated the equal protection clause.\textsuperscript{99}

The Court, however, has refused to construe the right of privacy to

\begin{footnotesize}
\begin{enumerate}
\item 410 U.S. 113 (1973).
\item Eisenstadt, 405 U.S. at 454-55.
\item Id. at 453.
\item Id. (emphasis in original).
\item Roe, 410 U.S. at 153.
\item Id. at 152 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).
\item Id. at 152-53.
\item 434 U.S. 374 (1978). The Court determined that its previous decisions "make clear that the right to marry is of fundamental importance" for all individuals. Id. at 383.
\item Id. at 382.
\item Id. at 386-87; \textit{but see} Califano v. Jobst, 434 U.S. 47 (1977) (applying rational basis scrutiny in upholding a provision that reduced the benefits of a certain class of persons upon marriage). The Court reconciled\textit{Zablocki and Jobst} on the grounds that the statute in\textit{Zablocki} "interfered directly and substantially with the right to marry."\textit{Zablocki}, 434 U.S. at 387. Thus, a significant interference with the right to marry is subject to strict scrutiny; a lesser interference is subject to rational basis scrutiny. Developments in the Law, supra note 55, at 1251. Statutes prohibiting same-sex marriage are therefore subjected to strict scrutiny, because the complete denial of a marriage license is a direct and substantial interference with the fundamental right to marry.
\end{enumerate}
\end{footnotesize}
include matters involving homosexual relationships. In Bowers v. Hardwick, a five to four majority of the Supreme Court held that a state statute criminalizing homosexual sodomy did not violate the right to privacy. Writing for the majority, Justice White characterized the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." Utilizing the tests that fundamental rights must be "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed" and "deeply rooted in this Nation's history and tradition," the Court concluded that the right to engage in homosexual sodomy was not fundamental.

C. Equal Protection

In Baehr, the Hawaii Supreme Court had to determine the test to be applied to sex-based classifications in order to assess their validity under the equal protection clause of the state constitution. In formulating the standard, the Baehr court looked to the case law of the United States Supreme Court. Consequently, it is important to analyze United States Supreme Court decisions on equal protection.

A "suspect class" is "a disadvantaged group deemed to need special judicial protection." The Supreme Court has determined that race, national origin, and to some extent, alienage, are suspect classifications. Classifications based on gender are subject to an intermediate standard of scrutiny, which lies between strict scrutiny and rational ba-

98. Id. at 190-91.
99. Id. at 190.
100. Id. at 191-92 (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)).
101. Id. at 191-92 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)).
102. Id. at 191.
104. Id. at 66.
105. Comment, supra note 14, at 200. See Developments in the Law, supra note 55, at 1189. "A suspect class is normally a 'discrete and insular minority' that has been 'saddled with 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. (quoting San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).
sis. Under current law, classifications based on sexual orientation are not suspect under the equal protection clause. The Supreme Court has never considered the standard of review applicable to such classifications, and has declined the opportunity to do so.

Reed v. Reed was the first Supreme Court decision to invalidate a gender classification under the equal protection clause. Applying only a rational basis test, the Court found unconstitutional a statute preferring males over females as executors of wills. Two years later, in Frontiero v. Richardson, a plurality of the Court found that classifications based on sex are inherently suspect and thus subject to strict scrutiny. However, subsequent case law has clarified the current governing test: "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."

Although heightened scrutiny originally was provided to strike down laws discriminating against women, it eventually extended to laws that discriminated against men. The subjection of classifications discriminating against men to a strict scrutiny analysis illustrates that classifications based on gender will be invalidated when they perpetuate stereotypes about the role of either sex.

The Hawaii Supreme Court was first confronted with a sex-based classification in Holdman v. Olim, in which plaintiff challenged a prison rule requiring women visitors to be fully clothed, including undergarments. The court found it unnecessary to determine the standard of

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110. Friedman, supra note 4, at 145; Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982); Craig v. Boren, 429 U.S. 190, 197 (1976). Legislative classifications based on gender "have been held to be unconstitutional unless substantially related to an important state interest." Friedman, supra note 4, at 145.

111. Friedman, supra note 4, at 147.


114. Id.


116. Id. at 688.


118. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723 (1982) ("That this statutory policy discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review.").

119. Id. at 729.

120. 581 P.2d 1164 (Haw. 1978).

121. Id. at 1166. Plaintiff was not allowed to enter the prison because she was not wearing a brassiere. Id.
review for sex-based classifications because it concluded that the classification could survive even under the strict scrutiny test.122

IV. BAEHR V. LEWIN

A. Facts and Lower Court Opinion

In Baehr, the marriage license applications of three couples were denied solely on the basis that the applicants were of the same sex.123 The applicant couples filed suit against the Department of Health, alleging that its interpretation and application of HRS § 572-1 as prohibiting same-sex marriage violated their right to privacy,2 and their rights to equal protection and due process of law as guaranteed by the Hawaii Constitution.

The circuit court order granting defendant's motion for judgment on the pleadings contained findings of fact relating to homosexuality.126 Based on these "facts," the circuit court determined that there is no fundamental right to enter into a homosexual marriage because the right to privacy provision of the Hawaii Constitution protects only heterosexual marriages.128 The court also determined that no fundamental right to same-sex marriage exists under the due process clause of the Hawaii Constitution.129 Employing a "rational relationship" standard of review, the circuit court denied that homosexuals were a "suspect class" for the purposes of equal protection analysis.130 It concluded that HRS § 572-1 is "clearly a rational, legislative effort to advance the general welfare of the community by permitting only heterosexual couples to legally marry."131

122. Id. at 1167.
124. HAW. CONST. art. 1, § 6 (1988) ("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.").
125. Id. § 5 ("No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.").
126. Baehr, 852 P.2d at 53-54. For example, the circuit court determined that "the issue of whether homosexuality constitutes an immutable trait has generated much dispute in the relevant scientific community." Id. at 53.
127. The circuit court made findings of fact notwithstanding the absence of any evidentiary record before it. Id.
128. Id. at 54.
129. Id.
130. Id.
131. Id.
B. The Hawaii Supreme Court Decision

1. The Right to Privacy Does Not Include a Fundamental Right to Same-Sex Marriage

a. The Right to Marry Does Not Extend to Same-Sex Couples

The Hawaii Supreme Court first addressed plaintiffs' arguments that HRS § 572-1 violated their rights to privacy and due process of law under the Hawaii Constitution, as interpreted by federal law.\textsuperscript{132} The \textit{Baehr} court interpreted \textit{Zablocki} to provide an implicit link "between the right to marry, on the one hand, and the fundamental rights of procreation, childbirth, abortion, and child rearing" because the right to marry "is simply the logical predicate of the others."\textsuperscript{133} As such, it found that the fundamental right to marry "presently contemplates unions between men and women."\textsuperscript{134}

b. The Present Boundaries of the Fundamental Right to Marriage Should Not Be Extended to Include Same-Sex Couples

After determining that the right to marry does not include the right to same-sex marriage, the \textit{Baehr} court inquired next whether the right to marry can be extended to include same-sex unions.\textsuperscript{135} Examining whether same-sex couples have a fundamental right to marry, the court turned "to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there]... as to be ranked as fundamental.'"\textsuperscript{136} Finding that a right to same-sex marriage has not been traditionally recognized, the court held that "the applicant couples do not have a fundamental constitutional right to same-sex marriage arising out of the right to privacy or otherwise."\textsuperscript{137}

2. HRS § 572-1, On Its Face, Discriminates Based On Sex, Thereby Implicating the Equal Protection Clause of Article I, Section 5 of the Hawaii Constitution

The equal protection clause of the Hawaii Constitution is more expan-

\textsuperscript{132} For a discussion of the development of the right to privacy under the United States Constitution, see \textit{supra} part III.B.
\textsuperscript{133} \textit{Baehr}, 852 P.2d at 56.
\textsuperscript{134} \textit{id}.
\textsuperscript{135} \textit{id} at 56-57.
\textsuperscript{136} \textit{id} at 57 (quoting Griswold v. Connecticut, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring)).
\textsuperscript{137} \textit{id}.
sive than its federal counterpart. Whereas the equal protection clause to the United States Constitution is couched in general terms, the Hawaii provision specifies that "[n]o 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." Thus, the court determined that the Hawaii Constitution prohibits discrimination on the basis of sex.

a. HRS § 572-1 Establishes a Sex-Based Classification

The Baehr court determined that HRS § 572-1 was facially discriminatory, even though it does not explicitly prohibit same-sex marriage. It concluded that marriage is limited to opposite-sex couples because the provisions of the statute refer to opposite-sex relationships. For example, it prohibits marriage between "brother and sister," "uncle and niece," and "aunt and nephew." Because HRS § 572-1 regulated access to the status of marriage on the basis of the applicants' sex, the Baehr court next considered whether the applicant couples had been denied the equal protection of the laws. It concluded that the statute implicated equal protection because its prohibition of same-sex marriage constitutes discrimination on the basis of sex.

In response to the state precedents advanced by the defendant, the court found Baker v. Nelson and De Santo v. Barnsley inapplicable because no state constitutional questions were addressed in either case. Although Jones v. Hallahan did not address equal protection rights, the court discussed it in order to "unmask the tautological and circular nature

\[\text{\footnotesize 138. Id. at 59-60.}\]
\[\text{\footnotesize 140. Baehr, 852 P.2d at 60.}\]
\[\text{\footnotesize 141. Id.}\]
\[\text{\footnotesize 142. Id.}\]
\[\text{\footnotesize 144. Baehr, 852 P.2d at 60.}\]
\[\text{\footnotesize 145. Id. at 60-61. The court explained its conclusion only by distinguishing state cases that have prohibited same-sex marriages, and by refuting the dissent's argument. See id. at 61-63, 67-68.}\]
\[\text{\footnotesize 146. 191 N.W.2d 185 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972). For a discussion of the facts and holding in the case, see supra part II.}\]
\[\text{\footnotesize 148. Baehr, 852 P.2d at 61.}\]
\[\text{\footnotesize 149. 501 S.W.2d 588 (Ky. 1973). For a discussion of the facts and holding in the case, see supra notes 39-44 and accompanying text.}\]
of Lewin's argument that HRS § 572-1 does not implicate article I, section 5 of the Hawaii Constitution because same sex marriage is an innate impossibility.\(^{150}\)

In Jones, the court reasoned that "the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage."\(^{151}\) Analogous to the Jones rationale, the Virginia Supreme Court of Appeals declared in Loving v. Virginia\(^{152}\) that interracial marriage did not exist because "[t]he fact that [God] separated the races shows that he did not intend for the races to mix."\(^{153}\) In striking down the antimiscegenation statute, the Supreme Court rejected the argument that mixed race marriages should not be recognized because they had never been the "custom."\(^{154}\) The Baehr court applied this rationale to the context of same-sex marriages, concluding that a "custom" is not a valid basis for prohibiting same-sex unions.\(^{155}\) Furthermore, it stated that "constitutional law may mandate, like it or not, that customs change with an evolving social order."\(^{156}\) Consequently, the court also rejected the Singer v. Hara\(^{157}\) rationale that the appellants "were denied a marriage license because of the nature of marriage itself."\(^{158}\)

The dissent argued that HRS § 572-1 did not discriminate on the basis of sex because it applied equally to both sexes.\(^{159}\) Under the statute, "[n]either 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."\(^{160}\) The dissent cited a Wisconsin state case for the proposition that a statute only discriminates based on sex when it discriminates on its face or in effect between males and females.\(^{161}\)

In reply, the plurality contended that the dissent's thesis was explicitly considered and rejected by the Loving Court.\(^{162}\) In Loving, the state ar-
gued that the antimiscegenation statutes did not discriminate on the basis of race because they punished equally both racial groups who entered into a marriage.\textsuperscript{163} The \textit{Baehr} court quoted the \textit{Loving} Court's declaration, "we reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscriptions of all invidious discriminations."\textsuperscript{164} The \textit{Baehr} court proposed that the "[s]ubstitution of 'sex' for 'race' and article I; section 5 for the fourteenth amendment yields\textsuperscript{165} the conclusion that HRS § 572-1 discriminates on the basis of sex, just as the statute at issue in \textit{Loving} discriminated on the basis of race, even though both statutes punished the participants equally."\textsuperscript{166}

\textbf{b. Sex is a "Suspect Category" for Purposes of Equal Protection Analysis under Article I, Section 5 of the Hawaii Constitution, and HRS § 572-1 is Subject to the "Strict Scrutiny" Test}

Having determined that HRS § 572-1 established a sex-based classification, the \textit{Baehr} court considered the standard of review for such classifications. Although \textit{Holdman v. Olim}\textsuperscript{167} did not decide on a test,\textsuperscript{168} it did look to federal law for guidance.\textsuperscript{169} Thus, the \textit{Baehr} court reasoned that the standard for sex-based classifications could be determined by looking at the then current case law of the United States Supreme Court.\textsuperscript{170}

The court examined \textit{Frontiero v. Richardson},\textsuperscript{171} in which the United States Supreme Court applied a strict scrutiny test for gender classifications.\textsuperscript{172} Although a strict scrutiny analysis was adopted by only a plurality, the concurring opinion of Justice Powell indicates that he and Justice Blackmun would have joined the plurality had the Federal Equal Rights Amendment been adopted.\textsuperscript{173} The \textit{Baehr} court concluded that, "had the Equal Rights Amendment been incorporated into the United States Constitution, the

\begin{itemize}
  \item \textsuperscript{163} Loving v. Virginia, 388 U.S. 1, 8 (1966).
  \item \textsuperscript{164} \textit{Id.}
  \item \textsuperscript{165} \textit{Id.}
  \item \textsuperscript{166} \textit{Id.}
  \item \textsuperscript{167} 581 P.2d 1164 (Haw. 1978).
  \item \textsuperscript{168} \textit{Id.} at 1170; see discussion of \textit{Holdman supra} notes 120-22 and accompanying text.
  \item \textsuperscript{169} \textit{Holdman,} 581 P.2d at 1167.
  \item \textsuperscript{170} \textit{Baehr,} 852 P.2d at 66 (emphasis in original). For a discussion of the standard of review applied to sex-based classifications under the United States Constitution, see \textit{supra} part III.C.
  \item \textsuperscript{171} 411 U.S. 677 (1973).
  \item \textsuperscript{172} \textit{Id.} at 688.
  \item \textsuperscript{173} \textit{Id.} at 692 (Powell, J., concurring). In considering whether strict scrutiny was the
stitution, at least seven members of the *Frontiero* court . . . would have subjected statutory sex-based classifications to ‘strict’ judicial scrutiny.” 174 Because Hawaii had added an equal rights amendment, the *Baehr* court held that sex was a suspect category under article I, section 5 of the Hawaii Constitution and was subject to the strict scrutiny test. 175 Therefore, the court held that: “(1) HRS § 572-1 is presumed to be unconstitutional (2) unless Lewin, as an agent of the state of Hawaii, can show that (a) the statute’s sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgements of the applicant couples’ constitutional rights.” 176

V. ANALYSIS AND ALTERNATIVE RATIONALES

A. The *Baehr* Court’s Reasoning

The *Baehr* court’s analogy between statutes prohibiting interracial marriages and statutes prohibiting same-sex marriages seems persuasive due to the remarkable resemblance between the *Loving* quote 177 and the situation at issue. However, the court misquoted *Loving*. The Supreme Court specifically mentioned the Fourteenth Amendment’s proscription against “all invidious racial discriminations.” 178 This specific reference to racial discrimination suggests that the *Loving* rationale does not transfer easily to another context; it may be limited to racial discrimination. 179

Indeed, the *Loving* court stressed the fact that the statute involved race: “[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.” 180 Nonetheless, the analogy survives because the *Baehr* court does not depend on the Fourteenth Amendment; its decision is based on proper standard of review, Justice Powell stated, “[t]he Equal Rights Amendment . . . if adopted will resolve the substance of this precise question.” *Id.*


175. *Id.*

176. *Id.*

177. See *supra* note 164 and accompanying text for a discussion of the *Loving* analogy.


Hawaii's equal protection amendment, which specifically prohibits discrimination on the basis of sex. However, the analogy is still imperfect because, whereas Virginia's miscegenation statute obviously "rest[ed] solely upon distinctions drawn according to race," it is unclear whether HRS § 572-1 discriminates on the basis of sex.

It has been argued that "[a] statute or administrative policy which permits a man to marry a woman, subject to certain regulatory restrictions, but categorically denies him the right to marry another man clearly entails a classification along sexual lines." The argument seems logical, but it does not consider the reasons that discrimination on the basis of sex is prohibited. The United States Supreme Court has invalidated classifications that discriminate on the basis of sex where they perpetuate stereotypes about the role of either sex. Indeed, it is difficult to argue that statutes prohibiting same-sex marriage have the same effect as other statutes that discriminate on the basis of sex, such as a statute preferring men over women as executors of wills.

Constitutional scholar Kenneth Karst criticizes the Loving analogy:

[f]or all its abstract symmetry, such a mechanical view of the issue is unhelpful. What makes a miscegenation law invalid, after all, is not merely that it classifies on the basis of race, but that it is designed to promote white supremacy. Surely there is no comparable implication of male inferiority in a rule limiting a man's choice of marriage partners to females.

It is unsound to apply heightened scrutiny to statutes that discriminate on the basis of sex when the reasons for applying heightened scrutiny no longer exist. Professor William Eskridge states that:

[a] gap in the analogy to Loving is that the connection between the discriminatory classification (sex) and the harm (reinforcing gender stereotypes) is abstract and hard to connect with legislative motivations. Judges may find it difficult to understand how denying two gay men the right to marry is driven by an ideology that oppresses straight women.

However, Eskridge fills this "gap" by arguing that discrimination on the

181. Id. at 11.
182. Note, supra note 34, at 583.
183. See supra part III.C.
184. See Reed v. Reed, 404 U.S. 71 (1971).
basis of sexual orientation implicates the equal protection clause because it is a form of discrimination on the basis of sex.\textsuperscript{187} However, this argument does not fill the gap in \textit{Baehr} because the court did not make findings to determine or even consider whether discrimination on the basis of homosexuality constituted discrimination on the basis of sex. Without this argument and findings in support to fill the logical "gap," statutes prohibiting same-sex marriage do not discriminate on the basis of sex.

Although intermediate scrutiny is the standard for sex-based classifications under the United States Constitution,\textsuperscript{188} the \textit{Baehr} court decided to apply strict scrutiny to such classifications.\textsuperscript{189} It arrived at this standard by a strange route. Examining \textit{Holdman}, the \textit{Baehr} court found that the standard could be derived by looking at the then current case law of the United States Supreme Court.\textsuperscript{190} However, it chose to adopt the strict scrutiny standard set forth in \textit{Frontiero}, a case decided in 1973, rather than the intermediate standard that was currently being applied when \textit{Holdman} was decided.\textsuperscript{191} The \textit{Holdman} court recognized, after citing \textit{Frontiero}, that "subsequent cases have made it clear that the current governing test under the Fourteenth Amendment [to the United States Constitution] is a standard intermediate between rational basis and strict scrutiny."\textsuperscript{192} Moreover, the phrase "then current case law" does not refer to the test governing when Hawaii's equal rights amendment was adopted. The amendment was adopted in 1978,\textsuperscript{193} the decision that established the intermediate standard, \textit{Craig v. Boren}, was decided in 1976.\textsuperscript{194}

It seems that the \textit{Baehr} court did not follow its own proposition that

\textsuperscript{187} \textit{Id.} at 1510. See Sylvia A. Law, \textit{Homosexuality and the Social Meaning of Gender}, 1988 Wis. L. REV. 187. The author explains that "heterosexism reinforces the social meaning of gender by affirming a sex-differentiated, patriarchal conception of marriage." \textit{Id.} at 232. In addition, Kenneth Karst argues that discrimination against homosexuals constitutes discrimination on the basis of sex by stating:

In the case of a lesbian marriage . . . it is arguable that historic assumptions about the need for a male-headed nuclear family play some role in the state's withholding of recognition of the relationship. And, by extension, it is arguable that the denial of marriage to homosexual men similarly supports the traditional nuclear family, with its potential for maintaining male domination.

Karst, \textit{supra} note 185, at 683-84. See \textit{infra} part V.C.

\textsuperscript{188} See \textit{supra} part III.C.

\textsuperscript{189} \textit{Baehr} v. Lewin, 852 P.2d 44, 67 (Haw. 1993).

\textsuperscript{190} See \textit{supra} part IV.B.2.b.

\textsuperscript{191} \textit{See Baehr}, 852 P.2d at 67; \textit{Holdman} v. Olim, 581 P.2d 1164, 1167 (Haw. 1978).

\textsuperscript{192} \textit{Baehr}, 852 P.2d at 64 (quoting \textit{Holdman}, 581 P.2d at 1167).

\textsuperscript{193} HAW. CONST. art. I, § 5 (1988).


Holdman directed it to look to the "then current case law of the United States Supreme Court." Rather, the court decided to adopt Frontiero's reasoning because "[o]f the decisions of the United States Supreme Court cited in Holdman, Frontiero v. Richardson... was by far the most significant." However, it is difficult to perceive how Frontiero was the "most significant" case cited in Holdman. The Holdman court did not single it out in any way; it simply discussed Frontiero among other cases that had considered the standard for sex-based classifications.

Although the court did not arrive at a principled reason to invoke strict scrutiny, it was still within its power to adopt a more stringent test than that utilized by the United States Supreme Court. Indeed, it recognized the "long-standing principle that this court is free to accord greater protections to Hawaii's citizens under the state constitution than are recognized under the United States Constitution." Thus, the fact that the court ignored its own construction of case law to support invoking strict scrutiny is not erroneous; however, it may be important in revealing the court's motivation. The court's search for a basis to invoke strict scrutiny only to arbitrarily accept it reflects the court's belief that strict scrutiny is justifiable. Indeed, strict scrutiny would be the standard under other, more controversial rationales that the court may support, but may not be prepared to adopt.

B. Fundamental Rights

1. Does the Right to Marry Include Same-Sex Marriage?

It is difficult to argue that the right to marriage as articulated in Zablocki includes same-sex unions. First, the Zablocki Court emphasized that the fundamental right to marriage did not prohibit the state from enacting any laws burdening the right.

By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions

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196. Holdman, 581 P.2d at 1167.
Same-Sex Marriages

1995

...to enter into the marital relationship may legitimately be imposed.\textsuperscript{199}

Second, the \textit{Zablocki} court's concern with the right of an opposite-sex couple to marry does not necessarily transfer to same-sex marriages.\textsuperscript{200}

Same-sex couples have been denied the right to marry based on a narrow definition of "marriage" as a union between a man and a woman that involves procreation.\textsuperscript{201} However, a more contemporary definition of marriage could include the right to same-sex marriage. Indeed, courts need to reassess their view of marriage as characterized by procreation and child-bearing in the context of modern developments.\textsuperscript{202} One commentator has noted that although "procreation and child-rearing are descriptive characteristics of marriage . . . [they do] not tell us what is the essence of marriage."\textsuperscript{203} This commentator perceives the purposes of modern marriages to be an economic partnership and a mental coalition.\textsuperscript{204} Same-sex marriages would satisfy both of these purposes because neither is affected by the sex of the couple.

Similarly, another commentator has argued that "contemporary attitudes toward the marital relationship have changed and are continuing to change."\textsuperscript{205} As such, the modern marital relationship embodies many purposes:

\begin{quote}
It is a voluntary public commitment of two people to accept certain socially imposed obligations toward each other. It contemplates living together for some period of time. It involves sexual relations and the possibility of the birth or adoption of children. Yet, above all else, the bond of the relationship is the mutual love and respect each of the partners has for the other.\textsuperscript{206}
\end{quote}

Both commentators' contemporary definitions of marriage are broad

\begin{flushright}
\textsuperscript{200} Comment, \textit{supra} note 14, at 201.
\textsuperscript{202} See Edward Veitch, \textit{The Essence of Marriage—A Comment on the Homosexual Challenge}, 5 Anglo-Am. L. Rev. 41 (1976). In today's "modern marriage" there is "clear evidence of rising divorce rates, the increasing rate of remarriage and the facts of decreasing family sizes in the trend to zero population growth." \textit{Id. at 42.}
\textsuperscript{203} \textit{Id. at 43.}
\textsuperscript{204} \textit{Id.} For support of the proposition that lesbians and gay men engage in the essential functions of marriage, see Friedman, \textit{supra} note 4, at 152-60.
\textsuperscript{205} Cullem, \textit{supra} note 201, at 151.
\textsuperscript{206} \textit{Id. at 152.}
\end{flushright}
enough to encompass same-sex marriages under the right to marry.\textsuperscript{207}

2. \textit{Is Same-Sex Marriage Included in the Right To Privacy?}

The \textit{Baehr} court's holding that the right to same-sex marriage does not exist within the right to privacy of the Fourteenth Amendment is in accord with the traditional role of the due process clause.\textsuperscript{208} Constitutional scholar Cass Sunstein observes that the due process clause "looks backward" because it "has been interpreted largely (though not exclusively) to protect traditional practices against short-run departures."\textsuperscript{209} The due process clause serves this function especially in the right to privacy cases,\textsuperscript{210} which rely considerably on tradition for the definition of a fundamental right.\textsuperscript{211}

Reliance upon tradition creates many difficulties because traditions may be described at varying levels of generality.\textsuperscript{212} Complications may arise when the following occurs:

the general tradition of respect meets a particular context in which the general tradition has been repudiated and, to that extent, does not exist at all. There is no established tradition of protection of abortion, marital privacy, or use of contraception. In the hard cases, part of the question is whether the tradition should be read at a level of generality that draws the particular practice into question. Many of the important privacy cases read the role of tradition in precisely this way.\textsuperscript{213}

For example, the issue in \textit{Bowers}\textsuperscript{214} could have been alternatively phrased as whether there is a fundamental right to intimate

\textsuperscript{207} Id.

\textsuperscript{208} Analysis of the due process clause to the United States Constitution is relevant because Hawaii courts interpret the state constitution's right to privacy provision in accord with the federal standard. \textit{See supra} notes 71-73 and accompanying text.


\textsuperscript{210} Id. at 1172.

\textsuperscript{211} \textit{See Developments in the Law, supra} note 55, at 1178-79. "When an interest is initially brought before the Court for recognition as a fundamental liberty, the Court has often quite explicitly inquired into the interest's foundation in tradition." \textit{Id.} at 1178. However, in determining whether a right is fundamental, the Court looks not only to tradition, but also to whether the right is "something in which we continue to believe." \textit{Id.} at 1179. For an argument that same-sex marriages are traditional, see Damslet, \textit{supra} note 4, at 556.

\textsuperscript{212} Sunstein, \textit{supra} note 209, at 1173; \textit{see} \textit{JOHN HART ELY, DEMOCRACY AND DISTRUST} 60-63 (1980).

\textsuperscript{213} Sunstein, \textit{supra} note 209, at 1173.

\textsuperscript{214} \textit{See supra} notes 96-101 and accompanying text.
association.\textsuperscript{215} In \textit{Baehr}, the court did not recognize a right to enter into a same-sex marriage because it formulated the issue narrowly, considering only whether there is “a fundamental constitutional right to same-sex marriage.”\textsuperscript{216} Yet, had the court framed the issue more generally, it could have found a fundamental right to intimate association, which would include the right to enter into a same-sex marriage.\textsuperscript{217}

Manipulation of a tradition’s level of generality has been criticized for subverting the purpose of the test because it brings non-traditional rights within the scope of protection.\textsuperscript{218} However, those who argue for raising the level of generality find this criticism misplaced. Proponents of this method do not contend that the nontraditional right is actually traditional; rather, they require that, given the traditional respect for the right, there must be “some principled basis” for considering the right differently in the nontraditional context.\textsuperscript{219} The \textit{Baehr} court could have asked whether there is a fundamental right to marry, and then considered whether there was a principled reason for denying it to same-sex couples.\textsuperscript{220} As such, this approach utilizes equal protection analysis, but not exclusively. Because same-sex couples have never been considered a suspect class, only a rational basis test would be applied under equal protection analysis. Due process analysis is then used to apply a strict scrutiny test. A statute that infringes on the fundamental right to marry would be subject to strict scrutiny, and thus would fail.\textsuperscript{221}

Even if the method of raising the generality level of a tradition is accepted, Harvard professor Jed Rubenfeld raises other problems with the approach.\textsuperscript{222} For example, Justice Blackmun suggested in his \textit{Bowers} dissent that the state cannot bar any form of “sexual intimacy.”\textsuperscript{223} The diffic-

\textsuperscript{215} Bowers v. Hardwick, 478 U.S. 186, 206 (1986) (Blackmun, J., dissenting). “The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others.” \textit{Id.}

\textsuperscript{216} Baehr v. Lewin, 852 P.2d 44, 57 (Haw. 1993).

\textsuperscript{217} \textit{See Bowers}, 478 U.S. at 214 (Blackmun, J., dissenting).

\textsuperscript{218} \textit{Developments in the Law, supra} note 55, at 1182.

\textsuperscript{219} \textit{Id.}

\textsuperscript{220} \textit{See Damslet, supra} note 4, at 582. “By framing the question as whether there is a special fundamental right to \textit{same-sex} marriage, the court confused its equal protection analysis and its due process analysis.” \textit{Id.}


\textsuperscript{222} \textit{See Rubenfeld, supra} note 34, at 752-82.

ulty is that Blackmun would have to explain why sexual intimacy "in its various forms rises to constitutional stature." Commentators frequently invoke this "personhood" concept to justify the protection of a particular right as fundamental. They argue that actions essential to "our identity as persons" must remain inviolable, at least as against the state. Rejecting the "personhood" thesis, Rubenfeld articulates an anti-totalitarian right to privacy.

Right to privacy methodology usually begins by considering what conduct is prohibited, and determining whether that conduct is fundamental. Rubenfeld suggests that we begin "by asking not what is being prohibited, but what is being produced." From this perspective, he observes that "[t]he distinctive and singular characteristic of the laws against which the right to privacy has been applied lies in their productive or affirmative consequences." These laws "tend to take over the lives of the persons involved: they occupy and preoccupy" and "inform the totality of a person's life."

Under Rubenfeld's anti-totalitarian analysis, same-sex marriage should be protected by the right to privacy. Analyzing Loving from the perspective of the affirmative consequences produced by laws prohibiting interracial marriage, he concluded that marriage is an undertaking that substantially shapes "the totality of a person's daily life and consciousness." Although his analysis considered only opposite sex marriage, it is not limited to this context. Because the analysis looks not to what the laws prohibit (interracial or same-sex marriage) but to what they produce, a law prohibiting same-sex marriage has the same effect as a law prohibiting interracial marriage: both the same-sex couple and interracial couple are denied marriage licenses.

224. Rubenfeld, supra note 34, at 750.
225. See id. at 752-82.
226. Id. at 753.
227. Id. at 782. Rubenfeld argues that the personhood thesis must be rejected, ultimately because "it betrays privacy's — if not personhood's own — political aspirations. By conceiving of the conduct that it purports to protect as 'essential to the individual's identity,' personhood inadvertently reintroduces into privacy analysis the very premise of the invidious uses of state power it seeks to overcome." Id.
228. Id. at 783.
229. Id.
230. Id. at 784.
231. Id.
232. Id. at 801-02. See id. at 791-92 (Rubenfeld applies his anti-totalitarian analysis to Loving).
233. Id. at 784.
In addition, Rubenfeld’s analysis of Bowers lends support to the argument that same-sex marriages are protected by a right to privacy defined as “the fundamental freedom not to have one’s life too totally determined by a progressively more normalizing state.” Law against homosexual sex violate the right to privacy because they maintain “institutionalized sexual identities and normalized reproductive relations.” Indeed, the same affirmative consequences are produced by a ban on same-sex marriage. Consequently, a law that prohibits same-sex marriage violates the anti-totalitarian view of the right to privacy.

C. Equal Protection

If HRS § 572-1 is declared unconstitutional under Hawaii’s equal protection clause, the result will be consistent with the role of the equal protection clause to the Fourteenth Amendment. Sunstein observes that the equal protection clause to the United States Constitution “looks forward,” operating “to protect disadvantaged groups from discriminatory practices, however deeply engrained and longstanding.” Because same-sex marriage has not been traditionally recognized, laws prohibiting it are probably more likely to be struck down under equal protection, rather than due process analysis.

Even if Loving does not support the conclusion that a statute prohibiting same-sex marriage discriminates on the basis of sex, several commentators argue that discrimination on the basis of sexual orientation is a form of discrimination on the basis of sex. Sunstein summarizes the arguments:

Advocates of that position argue that discrimination on the basis of sexual orientation is (a) at least on its face, a form of sex discrimination; (b) part of a system of sex role stereotyping; and (c) even if in not readily apparent ways, a method of disadvantaging women.

234. Id.
235. Id. at 800.
236. Sunstein, supra note 209, at 1163.
237. But see Damslet, supra note 4, at 558-60.
238. But see Friedman, supra note 4, at 152. “[B]ecause the values served by the institution of marriage—‘family values’—are reflected most straightforwardly in substantive due process privacy doctrine, states’ failure to recognize same-sex marriages is most appropriately challenged under that doctrine.” Id.
239. See generally Law, supra note 187; Claudia A. Lewis, Note, From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage, 97 YALE L.J. 1783 (1983).
240. Sunstein, supra note 209, at 1163 n.11.
Acceptance of the argument that laws proscribing homosexual conduct are a form of discrimination on the basis of sex would fill the logical gap in the *Loving v. Virginia* analogy.\(^{242}\)

In the alternative, laws prohibiting same-sex marriage could be subject to strict scrutiny on the basis that homosexuals are a suspect class.\(^{243}\) However, the Supreme Court has indicated its unwillingness to declare any other suspect classes,\(^{244}\) and in light of its decision in *Bowers*, suspect classification of homosexuals is even less likely.\(^{245}\)

VI. **Conclusion**

The *Baehr* court’s conclusion that HRS § 572-1 classifies on the basis of sex is not supported by the reasons that statutes classifying on the basis of sex have been accorded heightened scrutiny. Moreover, the court did not follow its own reasoning for determining the standard to be applied to sex-based classifications. Consequently, the court may have been considering other reasons when it decided to subject the statute to the strict scrutiny test. Its rationale allowed it to avoid other approaches that would require it to proclaim a new legal principle, such as expanding the definition of marriage, raising the generality of the right to marriage to include same-sex marriage, or endorsing the anti-totalitarian theory of the right to privacy. The United States Supreme Court has never indicated support for any of these approaches. Even more controversial would be for the court to apply strict scrutiny based on the premise that discrimination on the basis of homosexuality is discrimination on the basis of sex, or that homosexuals constitute a “suspect class.” Although the court may not be prepared to adopt any of these arguments that would strike down a statute prohibiting same-sex marriage, such arguments could justify an otherwise unsound decision. Indeed, such arguments indicate that *Baehr* was correctly decided, even if the court is presently unable to acknowledge the reasons.

*Megan E. Farrell*

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242. See supra part V.A.
245. See Friedman, *supra* note 4, at 149.
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