Divining the Priest: A Case Comment on *Baehr v. Lewin*[1]

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I. Introduction

> Sopwith went on talking . . . The soul itself slipped through the lips in thin silver disks which dissolve in young men's minds like silver . . . manliness. He loved it. Indeed to Sopwith a man could say anything, until perhaps he had grown old, or gone under, gone deep, when the silver disks would tinkle hollow, and the inscription read a little too simple, and the old stamp look too pure, and the impress always the same-a Greek boy's head. But he would respect still. A woman, divining the priest, would, involuntarily, despise.[2]

The men and women plaintiffs[3] in *Baehr v. Lewin* are similar to the woman in *Jacob's Room*.[4] Virginia Woolf's narrator, with her nose pressed against a Cambridge classroom window, describes the scribe inside pontificating with knowledge and authority, which is at once coin and communion wafer, to his admiring flock of schoolboys.[5] The teacher, as "priest," mediates between his sacred texts and the boys.[6] A male receiving the currency of the "silver disks" respects the "priest" from whom value derives; a woman, for whom the male-impressed currency of enlightenment and authority is both unapproachable and foreign, unwittingly despises priestly

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† A week before this issue of *Law and Inequality* went to press, the governor of Hawaii signed House Bill No. 2312 (Standing Committee Report No. 2777) which attempts to legislatively overrule the effect of the equal protection decision in *Baehr*. Please see postscript.

1. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

2. VIRGINIA WOOLF, JACOB'S ROOM, 40-41 (1922).

3. The plaintiffs in this case are Ninia Baehr, Genora Dancel, Tammy Rodrigues, Antoinette Pregil, Pat Lagon, and Joseph Melilio.

4. WOOLF, *supra* note 2, at 40-41.

5. This analysis of the passage by Virginia Woolf is offered by Christine Froula, *When Eve Reads Milton: Undoing the Canonical Economy*, *in* CANONS, 149, 149-150 (Robert von Hallberg ed., 1984).

6. *Id.* at 150.

dominance.[7] Value derives from the mind of the male scribe and is passed on in the milieu of a classroom in which all but men are excluded.[8] For Woolf, that woman can "divine" for herself from outside the sacred precinct of the classroom, challenges the teacher's authority and his exclusive relationship as mediator of value.[9]

Woolf's representation of "man" as one who "respects still" the teacher's cultural authority and "woman" as one who, "divining the priest, would, involuntarily despise him," calls into criticism the groundings, motives, and interests of the scribe's authority. This definition identifies woman not by sex, but exposes the complex relationship of woman to the cultural authority which has traditionally silenced and excluded her. She resists the blind submission which authority threatens to imprint upon her with the face of a male.[10]

The plaintiffs in *Baehr*, as gays and lesbians, are similar to the woman narrator in *Jacob's Room* because they stand outside the sacred precinct of marriage looking in, divining the priest — in this instance, the state.[11] The plaintiffs in this case seek marriage licenses, the state's legitimation of their intimate relationship, and access to the valuable property rights which flow from marriage.[12] As homosexuals, they are excommunicated from the mystical authority of the priest; their relationships are denied social validity. These homosexuals, like the divining woman, refuse to submit to the heterosexual values which the state imposes on them by denying sanction to their relationships. Like the narrator in *Jacob's Room* kept from the classroom, they are kept from the state's altar where authority flows, empowers and legitimates. Yet they are there. Looking in. Divining the priest.

The *Baehr* court issued two rulings. First, Hawaii's Marriage Law, HRS 572-1, violates the Equal Protection Clause of the Hawaii Constitution because the statute grants marriage licenses on the basis of sexual classification; this denies gay and lesbian applicants a marriage license because of the gender of their partners.[13] Such sexual classifications in Hawaii are subject to strict scrutiny,

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7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 150.
11. John C. Lewin is the defendant in this case. He is the Director of the Department of Health for the state of Hawaii. Baehr v. Lewin, 852 P.2d 44, 48 (Haw. 1993). For the purposes of the commentary, the male judges deciding this case can also be considered symbolic priests, conferring or denying cultural sanction and authority.
12. *Id.* at 48-52; *see infra* note 61 for examples of rights flowing from marriage.
13. Baehr v. Lewin, 852 P.2d 44, 57-67 (Haw. 1993).

and require the state to provide compelling interests with restrictions being narrowly tailored to meet this statute's objectives.[14] The *Baehr* court remanded this question to the lower court for findings on the statute consistent with this ruling.[15]

In the second part of its ruling, the Hawaii court contrarily held that there is no fundamental right to same-sex marriage.[16]

This comment offers a cursory synopsis of the *Baehr* court's equal protection analysis. However, this comment does not undertake a separate examination of the equal protection analysis of the *Baehr* opinion. Analysis of this holding and its implications will fill the pages of numerous other articles. Instead, this comment will examine the fundamental rights ruling of *Baehr*. First, this comment will show that the Hawaii court ignored significant U.S. Supreme Court privacy rulings which suggests a contrary fundamental rights rule than that of the *Baehr* court. The *Baehr* court gave no analysis to the substantive rules in *Griswold v. Connecticut*,[17] *Loving v. Virginia*,[18] *Eisenstadt v. Baird*,[19] or *Roe v. Wade*.[20] Failure to consider these opinions in determining a liberty interest leads to a spurious interpretation of federal privacy doctrine and renders ignominious consequences to the individual plaintiffs who seek enforcement of their civil rights.

Second, this comment will consider how the "traditions and collective conscience" test used by the Hawaii court to deny fundamental right status to same-sex marriage is inherently prejudicial and spurious as a means of determining fundamental rights. The *Baehr* court employed the "traditions and collective conscience" test,[21] stated in Justice Goldberg's concurring opinion in *Griswold*, as the means of determining which rights are fundamental.[22] For

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14. *Id.* at 62-63.
15. *Id.*
16. *Id.* at 57.
17. 381 U.S. 479 (1965).
18. 388 U.S. 1 (1967).
19. 405 U.S. 438 (1972).
20. 410 U.S. 113 (1973).
21. Baehr v. Lewin, 852 P.2d 44, 57 (Haw. 1993). Justice Goldberg observed that judges "determining which rights are fundamental" must look not to "personal and private notions," but

> to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." . . . The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.". . .

Id. (quoting Griswold v. Connecticut, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring) (citations omitted)).
22. *Baehr*, 852 P.2d at 57.

reasons expressed in Section III-B of this text, employing this test privileges the cultural assumptions of dominant heterosexual values at the expense of the rights of homosexuals. This "traditions and collective conscience" test assumes an easily accessible, universal history, unaffected by the prejudices of the one who redacts and narrates it. History, however, is a matter of interpretation. Lesbians have a history, gay men have a history, African-Americans in the South have a history, the Ku Klux Klan, Family First, and the Moral Majority each have a history. The "traditions and collective conscience" of our people is a panoply of struggles between these groups and their "histories." What test determines which history will be used to delineate liberty rights? As evidenced in *Baehr*, the history of the dominant heterosexual majority is employed via the "traditions and collective conscience" test to overpower, illegitimize, and disparage homosexuals' civil liberty interest in marriage. Not only is the history of the dominant culture's prejudice used against the homosexual, but use of this "history" by the court legitimizes a unitary theory of history from which the court superimposes cultural assumptions of the majority on the creation of law. In effect, by interpreting and redacting history through its heterosexual value structure, the court creates history. This article's criticism of the *Baehr* court's use of the "traditions and collective conscience" test is both a refusal to accept the prejudice of the dominant heterosexual culture and an attempt by this homosexual to wrestle the articulation and creation of "history" relating to my gay brothers and sisters from those who have not lived our lives.

Third, the fundamental rights analysis of *Baehr* is illogical in relation to the equal protection ruling in *Baehr*. Fourth, an affirmative rule upholding same-sex marriage as a fundamental right is consistent with the debate on fundamental rights at the Hawaii Constitutional Convention of 1978, and various Hawaii Supreme Court privacy rulings.[23]

Finally, denial of fundamental rights status to same-sex marriage perpetuates stereotypes of homosexuals as not having the same personal and sexual integrity as heterosexuals, which also perpetuates violence against homosexuals. The denial of fundamental right status to gay and lesbian relationships renders gays and lesbians non-persons. The matter of sexual identity is inherently a question of personal identity. "Personhood" is a term which captures an essential component of our being. A common thread in privacy jurisprudence involves the "right to make decisions" which

23. 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII 671 (1978).

form the kernel of personal autonomy.[24] The issue has been, which of these personal choices are protected? The best answer the U.S. Supreme Court has offered is that privacy rights are those which protect individual decisions "important" to a person's destiny,[25] and the rights apply to "matters fundamentally affecting a person."[26] The denial of these rights to homosexuals, as in *Baehr*, is an explicit refusal to recognize basic personal integrity of gays and lesbians. This lack of recognition of homosexual personal integrity tacitly legitimizes societal prejudice and violence against gays and lesbians.[27]

II. Statement of the Case

The plaintiffs in *Baehr* filed a complaint on May 1, 1991 for injunctive and declaratory relief in the Circuit Court of the First Circuit, State of Hawaii, seeking: 1) a declaration that the section of the Hawaii Marriage Law[28] enumerating the requirements for a valid marriage contract is unconstitutional insofar as it is construed by the Department of Health[29] to prohibit same-sex mar-

24. Jeb Rubenfield, *The Right of Privacy*, 102 HARV. L. REV. 737, 751 (1989), (quoting Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution*, 58 NOTRE DAME L. REV. 445, 454 (1983)). *See, e.g.*, *Poe v. Ullman*, 367 U.S. 497, 542 (1961); Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

25. *Id.* *See* Whalen v. Roe, 429 U.S. 589, 600 (1977). *See also* Paris Adult Theatre v. Slaton, 413 U.S. at 65 (quoting Roe v. Wade, 410 U.S. 113 (1973).

26. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

27. *See infra* text Section IV.

28. The Hawaii Revised Statute states:

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

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

29. Hawaii Revised State Statutes Section. 572-5(a) (Supp. 1992) provides in relevant part that "[t]he department of health shall appoint . . . one or more suitable persons as agents authorized to grant marriage licenses . . . in each judicial circuit."

> Exhibits "A," "C," and "D," attached to the plaintiffs' complaint, purport to be identical letters dated April 12, 1991, addressed to the respective

riage;[30] and 2) preliminary and permanent injunctions prohibiting denial of marriage licenses based on sex-specific affiliations of the couples.[31]

The plaintiffs' complaint stated that: 1) The Department of Health's interpretation and application of Section 572-1, denying same-sex couples a marriage license, violates the plaintiffs' right to privacy, as guaranteed by Article I Section 6 of the Hawaii Constitution,[32] as well as the plaintiffs' rights to equal protection and due process of law, as guaranteed by Article I, Section 5 of the Hawaii Constitution;[33] and 2) the plaintiffs have no adequate or complete remedy at law.[34]

The Director of the Department of Health, in his memorandum to the court, stated that the plaintiffs' complaint failed to state a claim upon which relief could be granted because: 1) the state's marriage laws "contemplate marriage as a union between a man and a woman;" 2) [as] the only legally recognized right to marry "is the right to enter a heterosexual marriage, [the] plaintiffs do not have a cognizable right, fundamental or otherwise, to enter into state-licensed homosexual marriages;" 3) the state's marriage laws do not "burden, penalize, infringe, or interfere in any way with the [plaintiffs'] private relationships;" 4) the state is under no obligation "to take affirmative steps to provide homosexual unions with its official approval;" 5) the state's marriage laws "protect and foster and may help to perpetuate the basic family unit, regarded as vital to society, that provides status and a nurturing environment to children born to married persons" and, in addition, "constitute a

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applicant couples, from DOH's Assistant Chief and State Registrar, Office of Health Status Monitoring, which state:

> This will confirm our previous conversation in which we indicated that *the law of Hawaii does not treat a union between members of the same sex as a valid marriage*. We have been advised by our attorneys that *a valid marriage within the meaning of ch. 572, Hawaii Revised Statutes, must be one in which the parties to the marriage contract are of different sexes*. In view of the foregoing, *we decline to issue a license for your marriage to one another since you are both of the same sex and for this reason are not capable of forming a valid marriage contract within the meaning of ch. 572*. Even if we did issue a marriage license to you, *it would not be a valid marriage under Hawaii law*.

Baehr v. Lewin, 852 P. 2d 44, 49-50 n.3 (Haw. 1993).

30. *Id.* at 48-49.

31. *Id.* at 49.

32. *Id.* at 50.

33. Hawaii Constitution Article I, Section 5 (1978) states:

> 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.

34. *Baehr*, 852 P.2d at 51.

statement of the moral values of the community in a manner that is not burdensome to [the] plaintiffs"; 6) plaintiffs [as homosexuals] . . . "are neither a suspect nor a quasi-suspect class and do not require heightened judicial solicitude"; and 7) even if heightened judicial solicitude is warranted, the state's marriage laws "are so removed from penalizing, burdening, harming, or otherwise interfering with [the] plaintiffs and their relationships and perform such a critical function in society that they must be sustained."[35]

The circuit court granted the state's motion for summary judgment.[36] The Hawaii Supreme Court, however, ruled that the circuit court's judgment on the pleadings was erroneously granted.[37] First, the supreme court held that the circuit court made evidentiary findings of fact outside the pleadings, on a motion for summary judgment.[38] Second, the Supreme Court found that the

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35. *Id.* at 51-52.

36. *Id.* at 52.

37. *Id.*

> "A rule 12(c) motion . . . for a judgment on the pleadings only has utility when all material allegations of fact are admitted in the pleadings and only questions of law remain." Marsland v. Pang, 5 Haw. App. 463, at 475 (1985).
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> Based on the foregoing authority, it is apparent that an order granting an HRCP 12(c) motion for judgment on the pleadings must be based solely on the contents of the pleadings. A claim that is evidentiary in nature and requires findings of fact to resolve cannot properly be disposed of under the rubric of HRCP 12(c) *Cf.* Nawahie v. Goo Wan Hoy, 26 Haw. 111 (1921) . . . We have recognized that consideration of matters outside the pleadings transforms a motion seeking dismissal of a complaint into an HRCP 56 motion for summary judgment. *See* Au v. Au, 63 Hawaii 210, 213 (1981); Del Rosario v. Kohanuinui, 52 Haw. 583 (1971); HRCP 12(b) (1990). But resort to matters outside the record, by way of "[u]nverified statements of fact in counsel's memorandum or representations made in oral argument" or otherwise, cannot accomplish such a transformation.

See Au, 63 Haw. at 213; *cf.* Asada v. Sunn, 66 Haw. 454, 455 (1983); Mizoguchi v. State Farm Mut. Auto. Ins. Co., 66 Haw. 373, 381-82 (1983); HRCP 56(e) (1990).

Id. at 52-53.

38. *Id.*

> Notwithstanding the absence of any evidentiary record before it, the circuit court's October 1, 1991 order granting Lewin's motion for judgment on the pleadings contained a variety of findings of fact. For example, the circuit court "found" that: (1) HRS § 572-1 "does not infringe upon a person's individuality or lifestyle decision, *and none of the plaintiffs has provided testimony to the contrary*"; (2) HRS § 572-1 "does not . . . restrict [or] burden . . . the exercise of the right to engage in a homosexual lifestyle"; (3) Hawaii has exhibited a "history of tolerance for all peoples and their cultures"; (4) "*the plaintiffs have failed to show* that they have been ostracized or oppressed in Hawaii and have opted to rely on a general statement of historic problems encountered by homosexuals which may not be relevant to Hawaii"; (5) "homosexuals in Hawaii have not been relegated to a position of 'political powerlessness.' . . . *[T]here is no evidence* that homosexuals and the homosexual legislative agenda have failed to gain legislative support in Hawaii"; (6) *the "[p]laintiffs have failed to show* that homosexuals constitute a suspect

circuit court's order, stripped of its improper factual findings, did not support its legal conclusions.[39]

The Hawaii Supreme Court then considered the right to privacy claim. The court ruled that at a minimum, Article I, Section 6 of the Hawaii Constitution incorporates[40] the privacy right the U.S. Supreme Court found and institutionalized within the penumbra of the federal Constitution.[41] The Hawaii court has held that "as the ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the Hawaii Constitution, we are free to give

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> class for equal protection analysis under [a]rticle I, [s]ection 5 of the Hawaii State Constitution;" . . .
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> Ultimately, our task on appeal is to determine whether the circuit court's order, stripped of its improper factual findings, supports its conclusion that Lewin is entitled to judgment as a matter of law . . .
>
> We conclude that the . . . unresolved factual questions preclude entry of judgment, as a matter of law, in favor of Lewin and against the plaintiffs.

Id. at 53-54 (emphasis in original).

39. *Id.* at 54.

40. Article I, Section 6 of the Hawaii Constitution expressly states that "[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest." The framers of the Hawaii Constitution declared that the "privacy concept" embodied in Article I, Section 6 is to be "*treated as a fundamental right*." State v. Kam, 748 P.2d 372, 378 (Haw. 1988) (quoting COMM. WHOLE REP. NO. 15, IN 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, 1024 (1980)). *Id.* at 55.

41. The specific guarantees, which in the Court's opinion created zones of privacy, were in the First, Third, Fourth, Fifth, and Ninth Amendments. The relevant discussion in the federal cases reads as follows:

> Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizens to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

The Hawaii court, quoting the PROCEEDINGS OF THE HAWAII CONSTITUTIONAL CONVENTION OF 1978 stated:

> More importantly, this privacy concept encompasses the notion that in certain highly personal and intimate matters, the individual should be afforded freedom of choice absent a compelling state interest. This right is similar to the privacy right discussed in cases such as Griswold v. Connecticut, 381 U.S. 479 (1965), Eisenstadt v. Baird, 405 U.S. 438 (1972), Roe v. Wade, 410 U.S. 113 (1973), etc. It is a right, though unstated in the federal Constitution, emanates from the penumbra of several guarantees of the Bill of Rights.

State v. Mueller, 66 Haw. 616, 625 (1983) (quoting COMM. WHOLE REP. NO. 15, I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978 1024 (1978)).

broader privacy protection [under Article I, Section 6 of the Hawaii Constitution] than that given by the federal constitution."[42]

The *Baehr* Court concluded that the issue of same-sex marriage as a fundamental right was one of first impression, and "because there are no Hawaii cases that have delineated the fundamental right to marry, this court, as we did in *State v. Mueller*,[43] looks to federal cases for guidance."[44] The *Baehr* court looked to *Skinner*[45] and from that case concluded that the right to marry is inextricably linked to the right of procreation.[46] The court then looked to *Zablocki v. Redhail*[47] and determined that procreation is simply the logical predicate to the fundamental right to marry.[48] The court concluded that since only heterosexual couples can produce children, the federal construct of the fundamental right to marry only contemplates marriages between men and women.[49]

The court then considered whether it would extend the scope of the federal construct of the fundamental right to marry. The court decided to employ the "traditions and collective conscience" test as defined and the concurring opinion of Justice Goldberg in *Griswold*.[50] To determine what rights are fundamental, judges look:

> to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental.". . . The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' "[51]

Beyond conclusory assertion, the Hawaii Supreme Court gives no reason why this test is determinative of fundamental rights.[52] The court made no analysis of this test and stated in one sentence that

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42. State v. Kam, 478 P.2d 372, 377 (Haw. 1988).

43. 671 P.2d 1351 (Haw. 1983). "Thus, we are led back to *Griswold, Eisenstadt*, and *Roe* and appear to have come full circle in our search for guidance on the intended scope of the privacy protected by the Hawaii Constitution." *Id.* at 1358.

44. Baehr v. Lewin, 852 P.2d 44, 52 (Haw. 1993).

45. 316 U.S. 535 (1942) (striking down a statute which allowed the state to sterilize "habitual criminals").

46. *Baehr*, 852 P.2d at 55.

47. 434 U.S. 374 (1978) (striking down a Wisconsin statute that prohibited any resident with minor children not in his custody and which he is under obligation to support from obtaining a marriage license until the resident demonstrated to the court that he was in compliance with his child support. Applying strict scrutiny, the Court held that the statute burdened the fundamental right to marry).

48. 852 P.2d at 56.

49. *Id.*

50. 381 U.S. 479 (1965).

51. *Id.* at 493 (Goldberg, J., concurring) (citations omitted).

52. Baehr v. Lewin, 852 P.2d 44, 57 (Haw. 1993).

same-sex marriage is not rooted in the traditions and collective conscience of the people of Hawaii; therefore, such marriage is not a fundamental right.[53]

The *Baehr* court also concluded that the circuit court's order was an improper construction of law regarding the application of the Equal Protection Clause of the Hawaii Constitution to Section 572-1 of the Hawaii Revised Statutes.[54] The court concluded that *prima facie*, and as applied, Hawaii Revised Statutes Section 572-1 discriminates against homosexuals because the state denies marriage licenses to same-sex couples on the basis of the applicant's sex.[55] Hawaii Revised Statutes Section 572-1 establishes a sex-based classification, and according to Article I, Section 5 of the Hawaii Constitution, sex is a suspect category.[56] When a regulation makes rights, privileges, or penalties dependent upon a distinction within a suspect category — in this case "sex" — that regulation or law must pass "strict scrutiny" by a showing of "compelling state interests" for making the distinction.[57] Therefore, Hawaii Revised

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53. *Id.*

> Applying the foregoing standards to the present case, we do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither do we believe that a right to same-sex marriage is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed. Accordingly, we hold that the applicant couples do not have a fundamental constitutional right to same-sex marriage arising out of the right to privacy or otherwise.

Id.

54. *Id.* at 57-63.

55. *Id.* at 67.

> Rudimentary principles of statutory construction render manifest the fact that, by its plain language, HRS § 572-1 restricts the marital relation to a male and a female . . . Accordingly, on its face and (as Lewin admits) as applied, HRS § 572-1 denies same-sex couples access to the marital status and its concomitant rights and benefits.

Id. at 60.

56. *Id.* at 67.

> [I]t is time to resolve once and for all the questions left dangling in *Holdman*. Accordingly, we hold that sex is a "suspect category" for purposes of equal protection analysis under article I, section 5 of the Hawaii Constitution and that HRS § 572-1 is subject to the "strict scrutiny" test.

See also Holdman v. Olim, 581 P.2d 1164 (Haw. 1978) (ruling that sex-based classifications are subject, as a *per se* matter, to some form of "heightened scrutiny" be it "strict" or "intermediate," rather than mere "rational basis" analysis).

57. *Holdman*, 581 P.2d at 1167.

> [T]his court has recognized that laws classifying on the basis of suspect categories or impinging upon fundamental rights expressly or impliedly granted by the Constitution are presumed to be unconstitutional unless the state shows compelling state interests which justify such classifications.

Statutes Section 572-1 is presumed unconstitutional unless the Department of Health as an office of the State of Hawaii can show that the statute's sex-based classification is justified by compelling state interests and the statute is narrowly tailored to avoid unnecessary abridgments of the applicant couple's constitutional rights.[58] Sections 572-5[59] and 572-6[60] of the Hawaii Revised Statutes grant the Department of Health exclusive authority to issue marriage licenses. The court concluded that the Department of Health's reading and application of Section 572-1, which led to the denial of marriage licenses to plaintiffs, deprived plaintiffs of access to the myriad rights and benefits that similarly situated persons of opposite gender marriages possess.[61]

Id. (quoting Nelson v. Miwa, 546 P.2d 1005, 1008 n.4 (Haw. 1976)).

> By contrast, "[w]here suspect classifications or fundamental rights are not at issue, this court has traditionally employed the rational basis test." "Under the rational basis test, we inquire as to whether a statute rationally furthers a legitimate state interest." "Our inquiry seeks only to determine whether any reasonable justification can be found for the legislative enactment."

Baehr v. Lewin, 852 P.2d 44, 64 (Haw. 1993) (citations omitted).

58. *Id.* at 67.

> [Section] 572-1 is presumed to be unconstitutional . . . unless Lewin, as an agent of the State of Hawaii, can show that (a) the statute's sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgements of the applicant couples' constitutional rights.

Id.

59. "The department of health shall appoint . . . one or more suitable persons as agents authorized to grant marriage licenses . . . in each judicial circuit." HAW. REV. STAT. § 572-5(a) (Supp. 1992).

60. APPLICATION; LICENSES; LIMITATIONS.

> In order to secure a license to marry, the persons applying there for the license shall appear personally before an agent authorized to grant marriage licenses and shall file with the agent . . . application in writing . . . The agent shall indorse on the application, over the agent's signature, the date of the filing thereof and shall issue a license which shall bear on its face the date of issuance. Every license shall be of full force and effect for thirty days commencing from and including the date of issuance. After the thirty day period, the license shall become void and no marriage ceremony shall be performed thereon.
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> It shall be the duty of every person, legally authorized to grant licenses to marry, to immediately report the issuance of every marriage license to the agent of the department of health in the district in which the license is issued, setting forth all facts required to be stated in such manner and on such form as the department may prescribe.

HAW. REV. STAT. § 572-6 (Supp. 1992).

61. Hawaii statutes grant many rights specifically to married individuals or couples. *See, e.g.*, HAW. REV. STAT. § 76-103 (veterans preference to spouse in the public employment); § 79-7 (vacation allowance on termination of public employment by death); § 79-13 (funeral leave for government employees); § 83-8 (travel and transportation expenses of government employees);§ 88-286 (accidental death benefit for surviving spouse for government employee); § 111-12 (assistance to displaced persons); § 166-6(2) (lease of agricultural parks); § 171-99 (continuation of rights under existing homestead leases, certificates of occupation, right to purchase leases

The *Baehr* court, in its equal rights analysis, distinguished the four previous decisions regarding gay marriage in other jurisdictions.[62] The first case dealing with the denial of a marriage license

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and cash free hold agreements concerning the management and disposition of public land); § 172-11 (inheritance of land patent); § 183D-22(1) (lower hunting license fee); § 201E-145 (eligibility for housing opportunity allowance program of the Housing Finance and Development Corporation); § 234-9 (tax relief for natural disaster losses); §§ 235-1, 235-2.4(a), 235-4, 235-7, 235-7.5, 235-51, 235-52, 235-54, 235-55.6, 235-61, 235-93, 235-97 (income tax deductions, credits, rates, exemptions, and estimates); § 246-29 (homes of totally disabled veterans exempt from property taxes); § 247-3(4) (exemption from conveyance tax); § 261-31 (airport relocation assistance for displaced persons) (definition of family); § 304-4(b) (non-resident tuition deferential waiver); § 327-3(a)(1) (making, revoking, and objecting to anatomical gifts); §§ 334-1, 334-60.4, 334-60.5, 334-125 (rights and proceedings from involuntary hospitalization and treatment); §§ 338-1, 338-21 (legal status and the rights, privileges, duties, and obligations of a child); § 338-14 (waiver of fees for certified copies and searches of vital statistics); § 338-18 (disclosure of vital statistic records); § 346-15(d) (permission to make arrangements for the burial or cremation of a spouse); § 346-29 (public assistance from the Department of Human Services); § 346-29.5(c) (exemption from real property lien of Department of Human Services of allowance to surviving spouse); § 346-37 (exemption from claims of Department of Human Services for social services payments, financial assistance, burial payments); § 346-237(3) (notice of guardian ad litem proceedings); § 351-2 (criminal injuries compensation) (definition of relative); §§ 363-5(3)(4), 363-7 (burial of servicemen's dependents); §§ 386-34, 386-41, 386-42, 386-43 (payment of worker's compensation benefits); § 388-4 (payment of wages to relative of deceased employee); § 417E-1 (beneficial owner status of corporate securities); § 425-4 (proof of business partnership); §§ 431:9-233, 431:10-206, 431:10-232, 431:10-234, 431:10A-103, 431:10-10A-116.5, 431:10A-401, 431:10A-403, 431:10C-103, 431:10C-304, 431:10D-104, 431:10D-114, 431:10D-201, 431:10D-203, 431:10D-212, 431:10D-308, 431N-1 (insurance licenses, coverage, eligibility, and benefits); § 432:1-104(2)(a)(i) (organization of mutual benefits society); § 432:1-604 (in-vitro fertilization procedures coverage); 453-15 (consent to a postmortem examination); § 486H-9 (right to a gasoline dealer franchise); §§ 510-5, 510-6, 510-9, 510-10, 510-22, 510-23 (control, division, acquisition, and disposition of community property); § 514A-108 (exemption from regulations of condominium sales to owner-occupants); § 516-181(b) (sole interest on property); § 524-1 (qualification as facility for the elderly) (definition of "facility"); §§ 533-1, 533-3, 533-4, 533-5, 533-7, 533-8, 533-16 (notice to probate proceedings, rights by way of dower or curtsey, right to inherit property); § 551-2 (appointment as guardian of minor); § 554B-6 (right of survivorship to custodial trust); §§ 560:2-102; 560:2-201, 560:2-207, 560:2-301, 560:2-401, 560:2-402, 560:2-403, 560:2-404, 560:2-508, 560:2-802, 560:3-101, 560:3-203, 560:3-303, 560:3-403, 560:3-901, 560:3-902, 560:3-906, 560:3-1212, 560:5-210, 560:5-301, 560:5-309, 560:5-311, 560:5-410, 560:5-422, 560:6-107 (rights to notice, protection, benefits and inheritance under the Uniform Probate Code); § 571-52 (award of child custody in divorce action); § 571-52.1 (support payments in divorce action); § 572-24 (right to support by spouse); § 572D-1 (right to enter into premarital agreement); § 574-5(a)(3) (right to change name); § 575-3 (right to file action for nonsupport); §§ 577-14, 577-15, 557-25, 577-26, 577A-3 (status of children); § 580-47 (right to support after divorce); § 580-56 (division of property after dissolution of marriage); §§ 706-670.5, 706-673 (right to be notified of parole or escape of inmate); § 801D-2 (bill of rights for victims and witnesses); § 801D-4 (definition of "surviving immediate family members"); and succession to Hawaii Homes Commission leases, Hawaii Homes Commission Act § 209.

62. *Baehr v. Lewin*, 852 P.2d 44, 61-63 (Haw. 1993).

to a same gender couple was *Baker v. Nelson*.[63] In *Baker*, the Minnesota Supreme Court had to decide whether same-sex marriage was authorized by state statutes and, if not, whether state authorization was constitutionally compelled.[64] The court held that the Minnesota statute did not authorize same-sex marriage and that such marriages were properly prohibited.[65] Thus, the Minnesota court reached the same decision as the *Baehr* court: the plain statutory language discriminated with regard to sex.

The Minnesota court also ruled that the Minnesota statute did not offend the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution.[66] The Minnesota court said:

> Marriage and procreation are fundamental to the very existence and survival of the race. This historic institution is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend. The due process clause of the Fourteenth Amendment is not a charter for restructuring it by judicial legislation.[67]

The Minnesota Supreme Court found that, because marriage was historically a union between a man and a woman, there was a rational basis to deny two males a marriage license.[68] The Minnesota court additionally found no invidious discrimination as in *Loving*, where the United States Supreme Court found a statute prohibiting interracial marriage to be a violation of the Fourteenth Amendment.[69] Because the Minnesota Supreme Court in *Baker* did not discuss heightened scrutiny of a statute discriminating against homosexuals, nor any state constitutional questions,[70] the *Baehr* court distinguished this case from the instant one.[71]

DeSanto v. Barnsley[72] was also distinguished by the *Baehr* court.[73] John DeSanto asserted that he had entered into a common law marriage with William Barnsley.[74] Mr. DeSanto sought equitable property distribution and alimony upon dissolution of this relationship.[75] The Superior Court of Pennsylvania refused to

63. 191 N.W.2d 185 (Minn. 1971), *appeal dismissed* (for want of a substantial federal question), 409 U.S. 810 (1972).
64. *Id.* at 186.
65. *Id.*
66. *Id.* at 186-87.
67. *Id.* (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).
68. Baker v. Nelsen, 191 N.W.2d 185, 186 (Minn. 1971).
69. Loving v. Virginia, 38 U.S. 1, 12 (1967).
70. *Baker*, 191 N.W.2d at 185-87.
71. Baehr v. Lewin, 852 P.2d 44, 61 (Haw. 1993).
72. 476 A.2d 952 (Pa. Super. Ct. 1984).
73. *Baehr*, 852 P.2d at 61.
74. *De Sonto*, 476 A.2d at 952.
75. *Id.*

expand common law marriage to include a contract between two persons of the same sex.[76]

The Pennsylvania court refused to consider appellant's argument, because he failed to raise it at trial, that denial of the validity of common law marriage between two persons of the same sex violated the Pennsylvania Equal Rights Amendment.[77] The common law marriage issues, upon which the *DeSanto* case was based, made it readily distinguishable from *Baehr*.

The Kentucky court in *Jones v. Hallahan*[78] addressed the question of whether denial of a marriage license to a female couple abridged their constitutional rights to marry, associate, and exercise religion freely.[79] The court affirmed denial of a marriage license based on the historical vision of marriage as only between a man and a woman, as outlined in *Baker*, and little else.[80] The Kentucky court found no constitutional issue involved;[81] the *Baehr*

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76. *Id.* at 956. The court stated:

> Finally, attention to the respective roles of the Legislature and the judiciary compels the conclusion that common law marriage should not be expanded. Generally speaking, statutory marriage and common law marriage have been alternative, common law marriage being seen not as competing with statutory marriage but, rather, as substituting for it when social conditions made obtaining a marriage license impractical . . . Appellant, however, would have us create a form of common law marriage, not in response to the *impracticability* of obtaining a marriage license, but in response to the *impossibility* of obtaining one. For we have no doubt that under our Marriage Law it is impossible for two persons of the same sex to obtain a marriage license. If, under the guise of expanding the common law, we were to create a form of marriage forbidden by statute, we should abuse our judicial power: our decision would have no support in precedent, and its practical effect would be to amend the Marriage Law — something only the Legislature can do.

Id. at 955-56 (emphasis original) (citations omitted).

77. *Id.* at 956.

78. 501 S.W.2d 588 (Ky. 1973).

79. *Id.* at 589.

> Kentucky statutes do not specifically prohibit marriage between persons of the same sex nor do they authorize the issuance of a marriage license to such persons.
>
> Marriage was a custom long before the state commenced to issue licenses for that purpose. For a time the records of marriage were kept by the church. Some states even now recognize a common-law marriage which has neither the benefit of license nor clergy. In all cases, however, marriage has always been considered as the union of a man and a woman and we have been presented with no authority to the contrary.
>
> It appears to us that appellants are prevented from marrying, not by the statutes of Kentucky or the refusal of the County Court Clerk of Jefferson County to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined.

Id. at 589.

80. *Id.*

81. *Id.*

court based its decision on constitutional argument and distinguished *Jones* from the instant case on that basis.[82]

Plaintiffs in the case of *Singer v. Hara*[83] were two men who had been refused a marriage license. The Washington Court of Appeals ruled that denial of a marriage license to a male couple did not violate their equal rights under the Washington Constitution nor their rights under the Eighth, Ninth, or Fourteenth Amendments to the United States Constitution.[84] The court also found that the plaintiffs were "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."[85] Citing *Baker* and *Jones*, the Washington Appellate Court found that homosexuals are not a suspect class and applied the rational basis test[86] in affirming denial of the marriage license.[87] The rational basis found by the Washington Appeals Court was the historical treatment of marriage as an institution between male and female.[88] Answering the same definitional argument asserted by the defendant in the instant case, the *Baehr* court held that such a rationale for prohibiting same-sex marriage is "circular and unpersuasive."[89]

The *Baehr* case was remanded to the lower court for determination of whether the state had "compelling interests" to overcome the presumption of unconstitutionality of Hawaii Revised Statutes Section 572-1 based on its suspect sexual classification. The case is pending a hearing in the lower court.

III. Fundamental Rights Analysis

> Wherever, therefore, it has been established that it is shameful to be involved in homosexual relationships, this is due to evil on the part of the legislators, to despotism on the part of the rulers, and to cowardice on the part of the governed.[90]

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82. Baehr v. Lewin, 852 P.2d 44, 61 (Haw. 1993).

83. 522 P.2d 1187 (Wash. Ct. App. 1974).

84. *Id.* at 1190-97.

85. *Id.* at 1192.

86. *See supra* note 57 for discussion of Hawaii's rational basis test.

87. *Singer*, 522 P.2d at 1196.

88. *Id.* at 1192.

89. Baehr v. Lewin, 852 P.2d 44, 61 (Haw. 1993).

90. PLATO, SYMPOSIUM (*cited in* JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY 51 (1980)).

A. The Baehr *Court's Misinterpretation of Federal Precedent of the Fundamental Right to Marry*

The Hawaii Supreme Court in *Baehr* first examined the U.S. Supreme Court's fundamental rights analysis in *Skinner*.[91] The *Baehr* court interpreted *Skinner* to hold that the right to marry was inextricably linked to the right to procreate.[92] The United States Supreme Court in *Skinner* indicated that it was "dealing with legislation which involve[d] one of the basic civil rights of man."[93] "Marriage and procreation are fundamental to the very existence and survival of the race."[94] Because procreation is linked to the right to marriage found fundamental in *Skinner*, the *Baehr* court argued that the union which the Court contemplated is "obviously . . . between men and women."[95] The *Baehr* court bolstered this argument by asserting that the only sanctioned marriage at the time of *Skinner* was one which contemplated a union between a man and a woman.[96]

The United States Supreme Court in *Skinner* did not rule that procreation is a necessary antecedent to a fundamental marital right.[97] Rather, the *Skinner* Court stated that marriage is "one of the basic civil rights of man."[98] A "basic" civil right would be one shared by all. A lesbian's need for companionship and intimacy is just as strong as a straight man's. If marriage is denied to a lesbian or gay man, then clearly marriage is not a "basic civil right of man,"[99] but a basic civil right of "*straight* man." Logically, then, gay people are marginalized as not having the same basic needs or rights as other humans; they are not persons in the eyes of the *Baehr* court.

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91. *Baehr*, 852 P.2d at 55, 56 (citing Skinner v. Oklahoma, 316 U.S. 535 (1942)).

92. *Id.* at 55 (citing *Skinner*, 316 U.S. 535 (1942)).

93. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

94. *Id.*

95. *Baehr*, 852 P.2d at 56.

96. "[T]he foregoing case law demonstrates that the federal construct of the fundamental right to marry . . . presently contemplates unions between men and women. (Once again, this is hardly surprising inasmuch as such unions are the only state-sanctioned marriages currently acknowledged in this country.)" *Id.* *See infra* part III-C (discussing reasoning used by the Virginia district court to uphold Virginia's miscegenation law).

The *Baehr* court itself disparages arguments that legitimize homoracial marriage because of the *Loving* history in Virginia. *Baehr*, 852 P.2d at 61-63. The *Baehr* court discounts any comparison between homoracial marriage and homosexual marriage as "sophistry." *Id.* at 63. Yet, they themselves employ similar reasoning here.

97. *Skinner*, 316 U.S. at 541.

98. *Id.*

99. *Id.*

The *Skinner* Court qualified the right to marriage by saying: "[m]arriage and procreation are fundamental to the very existence and survival of the race."[100] An argument for the procreative predicate to the fundamental right of marriage would assert: The basic civil right of marriage relates to that union which is capable of propagating children and sustaining the survival of the race. Because homosexual couples are not capable of such procreation, their unions are not sanctioned as a fundamental civil right. This argument, however, is based on two false assumptions. First, heterosexual marriages in which procreation is impossible are not excluded from fundamental rights status.[101] Second, homosexual couples are falsely assumed incapable of producing children through methods such as sperm donation, egg donation, and surrogate mothers. Homosexual couples can propagate and help "sustain the race."

Further, gay parents can rear children. State law in Hawaii does not prohibit unmarried homosexuals or homosexual couples from adoption, birth, or raising children. In fact, if the state has an interest in providing a nurturing and caring environment for children in "sustaining the race," it is illogical for the state to support laws which discriminate against homosexual couples and their children by denying them the many rights and benefits that married heterosexual couples and their children are eligible to receive.[102] Conceivably it is this discrimination, not homosexuality, which inhibits a nurturing environment for children.[103]

The *Baehr* court also relied on the rationale of *Zablocki*,[104] in which the United States Supreme Court offered its most detailed discussion of the fundamental right to marriage.[105] In *Zablocki*, the Court ruled that a Wisconsin statute[106] burdened the funda-

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100. *Id.*

101. *Id.*

102. *See supra* note 61, listing various benefits afforded partners in heterosexual marriage, and their survivors and children.

103. *See* Richard Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 AM. J. PSYCHIATRY 692 (1978); Steven Susoeff, *Comment, Assessing Children's Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard*, 32 U.C.L.A. L. REV. 852 (1985); Marilyn Riley, *Note, The Avowed Lesbian Mother and Her Right to Child Custody: A Constitutional Challenge That Can No Longer Be Denied*, 12 SAN DIEGO L. REV. 799 (1975).

Since 1967 several jurisdictions have established precedent protecting the custody and visitation rights of gay and lesbian parents. *See, e.g.*, Nadler v. Superior Court, 63 Cal. Rptr. 352 (1967); Bezio v. Patenaude, 410 N.E.2d 1207 (Mass. 1980) (sexual preference is *per se* irrelevant to consideration of his or her parenting skills).

104. *Baehr*, 852 P.2d at 55, 56 (citing Zablocki v. Redhail, 434 U.S. 374, 384 (1978)).

105. Zablocki v. Redhail, 434 U.S. 374 (1978).

106. Wisconsin State Statute Section 245.10(1) provided in pertinent part:

mental right to marriage.[107] The statute prohibited any resident with minor children "not in his custody and which he is under obligation to support" from obtaining a marriage license until the resident demonstrated to a court that "he was in compliance with his child support."[108] The Court ruled "that the right to marry is of fundamental importance, and since the classification at issue here significantly interferes with the exercise of that right, we believe that 'critical examination' of the state interests advanced in support of the classification is required."[109]

The *Baehr* court interpreted the *Zablocki* decision to represent a U.S. Supreme Court assumption that marriage is a fundamental right because marriage is a predicate to procreation and childbearing.[110] The facts of *Zablocki* do not support this interpretation.[111] The *Zablocki* Court spoke of the right to procreate only because Wisconsin made it a criminal offense for one to have sexual intercourse with a person not his or her spouse.[112] Hence, in Wisconsin, one could not exercise the right to procreate except through the institution of marriage.[113] The *Zablocki* case concerned people with children who sought a marriage license.[114] The case did not address childless marriages, marriages with adopted children, or same-sex marriages.[115] The *Baehr* court's assertion that the United States Supreme Court defined marriage as a fundamental right simply because of the procreative function of marriage is a misinterpretation of the holding in *Zablocki*.

> No Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment, may marry in this state or elsewhere, without the order of either the court of this state which granted such judgment or support order, or the court having divorce jurisdiction in the county of this state where such minor issue resides or where the marriage license application is made. No marriage license shall be issued to any such person except upon court order.

WIS. STAT. § 245.10(1) (1973); repealed by L. 1977, c. 418 § 745R.

107. *Zablocki*, 434 U.S. at 388-391.

108. WIS. STAT. § 245.10(1) (1973). *See supra* note 109, for text of the statute.

109. *Zablocki*, 434 U.S. at 383.

110. *Baehr*, 852 P.2d at 56 ("Implicit in the *Zablocki* court's link between the right to marry, on the one hand, and the fundamental rights of procreation, childbirth, abortion and child rearing, on the other, is the assumption that the one is simply the logical predicate of the others.")

111. 434 U.S. at 377-78.

112. *Id.* at 386. Wisconsin punishes fornication as a criminal offense: "Whoever has sexual intercourse with a person not his spouse may be fined not more than $200 or imprisoned not more than 6 months or both." WIS. STAT. § 944.15 (1973).

113. *Id.*

114. *Zablocki*, 434 U.S. at 375, 378.

115. *Id.*

The Court in *Zablocki* emphasized that marriage itself is " 'the most important relation in life' "[116] and as such is worthy of fundamental rights protection.[117] The Court also stated "the right to marry is of fundamental importance for *all* individuals."[118] The Court found that the right to marry is part of the fundamental "right of privacy."[119] The *Baehr* court does not examine why the broad grant of these rights by the U.S. Supreme Court does not apply to homosexuals in the same manner it does heterosexuals.[120] In conclusory language, the *Baehr* court simply says it is so.[121]

The *Baehr* court, in its search to delineate the fundamental right to marriage, failed to consult an important line of constitutional privacy cases which begin with *Griswold*.[122] The holding in *Griswold* protects persons from government interference with their sexual relations.[123] The *Griswold* Court held that it is impermissible for the state to prohibit married couples from purchasing contraception.[124] Justice Douglas, writing for the majority, rested his opinion upon the notion that marital privacy is deserving of heightened judicial protection from state interference:

> We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate of the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[125]

Same-sex marriage fosters the same harmony in living and the same bilateral loyalty as heterosexual unions. The *Baehr* court gives no reason why the sex of the couple has anything to do with the advancement of the purposes of marriage the Court seeks to protect in *Griswold*.

The U.S. Supreme Court indicated in the period between *Griswold* and *Roe* that other "family" values would receive heightened

116. *Id.* at 384 (quoting Maynard v. Hill, 125 U.S. 190, 205 (1888)).
117. *Zablocki*, 434 U.S. at 384.
118. *Id.* (emphasis added).
119. *Id.* (citing Griswold v. Connecticut, 381 U.S. 479 (1965)).
120. *Baehr v. Lewin*, 852 P.2d 44, 55-57 (Haw. 1993).
121. *Id.*
122. Griswold v. Connecticut, 381 U.S. 479 (1965).
At the least, the *Baehr* court failed to distinguish *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), which ruled that a statute which intrudes upon the private realm of family life, including life of nontraditional families, must be subjected to heightened scrutiny to survive constitutional muster. *Id.* at 498, 499.
123. *Griswold*, 381 U.S. at 479.
124. *Id.* at 485-86.
125. *Id.* at 486.

protection.[126] In *Loving v. Virginia*,[127] the Court found an antimiscegenation statute constitutionally infirm for both its invidious race discrimination and its infringement of the right to marry, which had "long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[128] The long "tradition" of homoracial marriage in Virginia was no reason in the Court's eyes to bar heteroracial individuals from exercising their freedom to enter into a familial relationship. A long-standing tradition of prejudice, in the Court's opinion, was no basis for determining individual liberty interests.[129] The *Baehr* court failed to distinguish the impermissibility of grounding a liberty interest in tradition in *Loving*, from the permissibility of grounding the denial of the liberty interest of marriage to homosexuals based on the "traditions and collective conscience" of our people.[130]

In *Eisenstadt v. Baird*,[131] the Court invalidated a Massachusetts law which criminalized the sale of contraceptive drugs or devices except to married persons with a physician's prescription.[132] Under the Massachusetts law, single persons could not obtain contraceptives.[133] The *Eisenstadt* court held that such prohibition is impermissible because:

> [T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[134]

Because the Court states that a basic element of that decision is the possibility to choose to use contraceptives and not have children,[135] it follows that it is a fundamental right to choose to be in an intimate sexual relationship for purposes beyond procreation.[136] *Ei-*

126. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Eisenstadt v. Baird, 405 U.S. 438 (1972).

127. 388 U.S. 1 (1967).

128. *Id.* at 12.

129. *Id.*

130. *See infra* discussion in Section III-B (analyzing the prejudicial "traditions and collective conscience" standard).

131. 405 U.S. 438 (1972).

132. *Id.* at 440.

133. *Id.* at 442.

134. *Id.* at 453.

135. *Id.*

136. This right of choice is also underscored by the Court's decision in Whalen v. Roe, 429 U.S. 589 (1977), stating that the individual's interest in making the marriage decision is sufficiently important to merit special constitutional protection (citing Paul v. Davis, 424 U.S. 693 (1976)).

senstadt further supports the argument that procreation is not an essential ingredient for protection of sexual associations.

Most importantly, the *Eistenstadt* decision gives rise to the individual freedom to have intercourse regardless of procreative intent. If the individual has the freedom to choose to have intercourse, certainly an aspect of this freedom must include with whom you will have intercourse. As Justice Marshall stated in *Zablocki*, "it would make little sense to recognize a right to privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society."[137] A basic element of choosing to enter a relationship is deciding with whom you are going to make and define that relationship. The Court does not provide specific restrictions about who can make a family; it does not say only African-American with African-American, man with woman, Catholic with Catholic. Why, then, except for homophobia, should a man be denied the choice to marry a man? This preclusion of choice is based on prejudice and the inability to accept the fact that many persons are homosexual. Such conclusions are the result of the dominant heterosexual majority prohibiting any deviation from its value system.[138]

The doctrine that certain intimate activities, broadly linked with matters of procreation and family life, are protected as aspects of personal autonomy was firmly established in *Roe v. Wade*, where the Court held a Texas statute prohibiting nontherapeutic abortions unconstitutional.[139] The Court's rule in *Roe* gave the individual woman the right to choose to do with the fruits of her body what she herself desired. This is a specific right to choose not to bear children. And it is a right to determine for yourself, without regard to the state government, Moral Majority, or the Catholic Church's moral parameters of a woman's right to choose. From time immemorial, humans have never agreed when life begins.[140] The Court has, therefore, determined that the moral determination is best left to the individual. Similarly, philosophers and scientists have never been able to conclusively agree if homosexuality is a product of nature or nurture, but it has always existed.[141] Like the right to

137. Zablocki v. Redhail, 434 U.S. 374, 386 (1978).

138. *See supra* note 122.

139. Roe v. Wade, 410 U.S. 113 (1973).

140. *See* discussion of historical ethical debate about abortion in *Roe v. Wade*, 410 U.S. at 129-130 (citing A. Castigliani, A HISTORY OF MEDICINE 84 (2d ed. 1947); LUDWIG EDELSTEIN, THE HIPPOCRATIC OATH: TEXT, TRANSLATION AND INTERPRETATION 10 (1943).

141. *See* BOSWELL, *supra* note 90.

choose to have an abortion, this choice of how to order one's personal life should be afforded the same protection as the personal moral determination regarding aborition. The resolution of such intimate questions of personal morality, the Court reasoned in *Roe*, are best determined within the sanctuary of one's conscience and consciousness. Just as the Court held in *Roe* that the Constitution protects the right of a woman to make a moral choice, it must also recognize the right of a man or a woman to be free from government intrusion in making a moral decision about who they are and how to construe their most intimate personality through sexuality. And as the act of abortion is protected as the expression of a woman's moral choice, the state must protect same-sex marriage, as this marriage is the mature expression of a personal, moral decision and the assertion of fundamental sexual identity.

The only criterion for excluding homosexual associations from protection in the *Baehr* court's analysis of federal privacy cases is precisely the individual's homosexuality.[142] The court concluded that because same-sex couples cannot do the same thing as heterosexual couples — procreate — same-sex couples do not have a right to marry. Yet this is clearly in conflict with the *Baehr* court's equal protection analysis which stated it is presumptively unconstitutional for the State of Hawaii to deny persons a marriage license based on sexual classifications.[143] The court made clear that the State cannot use one's sex against an individual to deny that person's civil rights. In an absurd result, the court's fundamental rights conclusion is based precisely on the sex-stereotyping it ruled impermissible under the Hawaii Equal Protection Clause. The *Baehr* court also gives no reason why homosexuals do not enjoy the same definition of "individual"[144] as applied to fundamental rights, as do heterosexuals. What makes a homosexual less of an individual than the "individual" contemplated by the U.S. Supreme Court in its delineation of fundamental rights?

The *Baehr* court completely ignored the case that lends the most strength to its conclusion, *Bowers v. Hardwick*,[145] in which the U.S. Supreme Court held there exists no right to homosexual sodomy.[146] By its self-proclaimed duty to look to the federal cases

142. Baehr v. Lewin, 852 P.2d 44, 52-57 (Haw. 1993).

143. *Id.* at 57-67.

144. *Cf.* Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Zablocki v. Redhail, 434 U.S. 374 (1978).

145. 478 U.S. 186 (1986).

146. *Id.* at 190, 191.

for guidance in determining liberty interests,[147] and its selective use of *Skinner*[148] and *Zablocki*,[149] it is evident the *Baehr* court incorporated those cases it deemed pertinent law. The *Baehr* court's exclusion of the *Bowers* rule demonstrates its rejection of the *Bowers* rationale which holds that there is no fundamental right to sodomy. In fact, the Hawaii legislature decriminalized private, consensual adult sodomy in 1972.[150] Yet the court employed the "traditions and collective conscience" test in a manner similar to Justice White's use of the test in *Bowers*.[151] Therefore, it is necessary to analyze the use of the "traditions and collective conscience" test in *Bowers* to further understand the rationale of the *Baehr* court's fundamental rights ruling.

B. *The "Traditions and Collective Conscience" Test is Inherently Prejudicial and an Improper Standard for Determining Fundamental Rights*

The United States Supreme Court has never granted an absolute freedom to sexual association. There is not, for example, a constitutional right to pedophilia, incest, or rape. Traditional factions within society have argued that homosexuality is a similarly regulatable sexual association.[152] This analogy is false. Both rape and pedophilia are criminalized because they violate the rights of others who are involved without consent. Lack of consent in the context of rape is an element of the crime.[153] And society's conception of children renders impossible consent to sexual activity between an adult

147. "[B]ecause there are no Hawaii cases that have delineated the fundamental right to marry, this court, as we did in [State v.] Mueller, looks to the federal cases for guidance." *Baehr v. Lewin*, 855 P.2d at 55 (citations omitted).

148. *Id.*; Skinner v. Oklahoma, 316 U.S. 535 (1942).

149. *Baehr*, 852 P.2d at 55 (citing Zablocki v. Redhail, 434 U.S. 374, 384 (1986)).

150. HAW. REV. STAT. § 768-71 *repealed by* 1972 Haw. Sess. Laws, act 9.

151. *Baehr*, 852 P.2d 44. *See Bowers*, 478 U.S. at 192, 194 (employing the test to deny a liberty interest).

It is interesting to note that the *Baehr* court did not cite the precedent of *Bowers* for use of the "traditions and collective conscience" test. *See Bowers*, 478 U.S. at 57. Rather, it cited the dicta in *Griswold* (where the test was employed to find a liberty interest) as authority for its use. One can read between the lines that the *Baehr* court does not accept the rule of *Bowers*. Given the ruling in its equal protection analysis, which effectively allows gays and lesbians to marry, coupled with the court's refusal to cite *Bowers*, leads one to speculate if this fundamental rights analysis isn't a means of a political compromise among the court, where some members would go along with the equal protection rule on the condition that same-sex marriage was not ruled a fundamental right. There must be some unstated reason why the court goes out of its way to avoid citing *Bowers*. We are left to wonder about this glaring omission.

152. Gunter Schmidt, *The Debate on Pedophilia*, J. HOMOSEXUALITY 1-4 (1990).

153. CRIMINAL LAW AND ITS PROCESSES 220-221 (Sanford H. Kadish & Monrad G. Paulsen eds. 1969).

and child.[154] Although incest does not necessarily involve a lack of consent, society has recognized a strong interest in avoiding relationships which are as biologically and psychologically destructive as incest.[155] It is the potential for domination and exploitation in incestuous relationships which undermines consent to the extent that the value of the liberty interest is grossly outweighed by its potential for harm. And unlike pedophilia or incest, there is no possible remedy for the homosexual if he or she is prohibited from his or her sexual expression. The polygamist or incestor may pursue a solitary or nonconsanquinious relationship. The homosexual is inhibited from expressing her basic sexual identity, and is forced to be something she can never be: heterosexual. It is the ability to define one's identity that is essential to any concept of ordered liberty.[156] Therefore, the expression of gay and lesbian identity should be equally protected.

The issue of sodomy is more difficult. The Court in *Bowers v. Hardwick*[157] ruled that homosexual intimate associations are not "deeply rooted in the nation's history and tradition."[158] The sole reason is because homosexual intimacy does not pass the "traditions and collective conscience" test.[159] This test was never employed in previous or subsequent privacy cases to delineate fundamental rights and, therefore, renders the decision in *Bowers* derelict. The problem with the "traditions and collective conscience test" is twofold: 1) it is inherently prejudicial and 2) its employment is antithetical to the Framers' notion of determining individual liberties.

The majority in *Bowers* arbitrarily drew the line of personal privacy at the boundary of intimate homosexual relations and, in a manner unprecedented in a privacy case, narrowly limited previous

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154. *See* Schmidt, *supra* note 152.

155. *Id.*

156. Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984). The Court stated:

> The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must be afford the formation and preservation of certain kinds of highly personal relationships a substantial amount of sanctuary from unjustified interference by the State . . . Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability *independently to define one's identity that is central to any concept of liberty.*

Id. (emphasis added).

157. 478 U.S. 186 (1986).

158. *Id.* at 192, 194.

159. *Id.*

privacy rules to their specific facts.[160] Justice White, writing for the Court, obsessed on the homosexual aspect[161] of the case before him and wholly ignored the fact that the statute at issue also pertained to heterosexual sodomy.[162] Instead of considering whether the state of Georgia may constitutionally regulate the private sexual behavior of consenting adults in their bedroom, the Court presented the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[163] So stated, the conclusion logically preceded its analysis. White's framing of the issue misconstrued the right at stake. The statute, as is plainly evidenced upon reading, states nothing about homosexuals.[164] It refers to "persons."[165] The issue, in fact, is similar to that in *Griswold* and *Zablocki*, where the statutes under examination regulated the intimate associations of individuals in the privacy of their homes.[166] The holdings in these cases focused on the broader right of persons to be free in their intimate associations from the reach of state regulation absent a compelling state interest by reason of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment.[167] Justice White concluded that homosexual activity has no connection to any of the previously protected categories of privacy.[168] However, Justice White gave no reason why

160. *Bowers*, 478 U.S. 186 (limiting cases to their specific facts). *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965); Loving v. Virginia, 388 U.S. 1 (1967); Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973); Zablocki v. Redhail, 434 U.S. 374 (1978).

161. "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." *Bowers*, 478 U.S. at 190.

162. Georgia Code Annotated Section 16-6-2 provides, in pertinent part:

> (a) A *person* commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one and the mouth or anus of another . . .
>
> (b) A *person* convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years . . .

GA. CODE ANN. § 16-6-2 (1984) (emphasis added).

163. *Bowers*, 478 U.S. at 190.

164. GA. CODE ANN. § 16-6-2 (1984).

165. *Id. see supra* note 165 for text of statute.

166. Griswold v. Connecticut, 381 U.S. 479 (1965); Zablocki v. Redhail, 434 U.S. 374 (1978).

167. *Griswold*, 381 U.S. at 496 (Justice Goldberg concurring, describing majority opinion); *Zablocki*, 434 U.S. at 396 (Justice Powell concurring, describing majority opinion); U.S. CONST. amend. X; U.S. CONST. amend. XIV.

168. *Bowers*, 478 U.S. at 191. *Eisenstadt*, *Roe*, and *Zablocki* clearly dealt with issues related to an *individual's* choices relating to the intimacies of his or her sexual relationships. Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973); Zablocki v. Redhail, 434 U.S. 374 (1978).

Why the expression of an individual's sexual intimacy, as in *Bowers*, has nothing to do with these decisions is not clear. The only answer can be because it involves homosexuals. Homosexuality clearly erases one's individual integrity for Justice White. Being a homosexual disqualifies you from all the fundamental rights

this activity is not related to other protected categories of sexual relations.[169]

Justice White also ignored the Court's previous counsel to not cut off constitutional protection "at the first convenient, if arbitrary boundary"[170] drawn by its former cases, and ignored the Court's preference to focus on "the basic reasons why certain rights . . . have been accorded shelter under the Fourteenth Amendment's Due Process Clause."[171] The *Bowers* Court, by referring to the Georgia sodomy statute as justification for denying privacy protection to consenual sodomy, disregarded its previous statement that the tradition of liberty under the Due Process Clause has never "been reduced to any formula [nor] determined by reference to any code."[172] Rather, it has been "a living thing"[173] that must grow and change over time within careful limits sketched by "solid recognition of the basic values that underlie our society."[174] The *Bowers* Court engaged in no examination of the state's burden of justification for denying homosexuals their privacy, other than a cursory reference to the "belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable."[175]

According to the Court in *Bowers*, constitutional legitimacy rests in the electoral will of the State of Georgia,[176] thus reducing this privacy question to a "formula or code," a jurisprudence previously disdained.[177] Such an appeal to democratic legitimation of constitutional rights would have rendered a different holding in *Loving*[178] and *Brown v. Board of Education*.[179] The role of judicial

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that the Court has ruled all other individuals possess. These previous cases did not protect activities, they protected the rights of individuals to make decisions about their personal lives absent compelling reasons for government intervention.

169. *Bowers*, 478 U.S. at 191.

170. Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977) (plurality opinion).

171. *Id.* at 501.

172. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J. dissenting).

173. *Id.*

174. *Moore*, 431 U.S. at 503 (plurality opinion) (citing Griswold v. Connecticut, 381 U.S 479, 501 (1965) (Harlan, J., concurring)).

175. Bowers v. Hardwick, 478 U.S. 195, 196 (1986).

176. *Id.*

177. *Poe*, 367 U.S. 497 at 542.

178. *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that an antimiscegenation law of the state of Virginia is unconstitutional even if it had been the tradition of the state to bar mixed-race marriages).

179. 347 U.S. 483 (1954). One of the most memorable events of American cultural history in the late 1950's and early 1960's is the riots accompanying desegregation. *See generally* WILLIAM MANCHESTER, THE GLORY AND THE DREAM 799-808 (1978). In states such as Alabama, Arkansas, and Mississippi, the enforcement of *Brown v. Board of Education* evidenced execution of constitutional law which was directly antithetical to the democratic will of a majority. *Id.* An example of this was exhibited by the public resistance which occurred in Little Rock, Arkansas in 1957. *Id.* School

interpretation in the United States is precisely to insure the existence of an arbiter of values which is independent from the tyranny of a majority.[180] At a time when judicial restraint is most needed to protect an historically oppressed minority from the irrational hatred of the majority, the *Bowers* Court caved in to that tyrannical will.

The words of Thomas Jefferson directly refute the rationale of Justice White in his employment of the "traditions and collective conscience" test:

> I believe all Americans are born with certain inalienable rights. As a child of God, I believe my rights are not derived from the Constitution. My rights are not derived from any government. My rights are not derived from any majority. My rights are because I exist.[181]

The assumption of Jefferson is that certain inalienable rights derive from the fact of being human from the integrity of the *individual qua individual*. According to Jefferson's intellectual mentor, John Locke, the inalienable rights of the individual are not derived from the will of the majority or the history of a people, but from human nature.[182] The essence of Lockean natural rights is well stated by Jefferson in the Declaration of Independence: "all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness."[183] Further, these claims are "self-evident;"[184] they are not to be divined from a statute, a Constitution or a majority's will.

Locke claimed that by nature we all equally share basic rights:

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authorities developed a plan for desegregation, but the legislature engaged in a program to perpetuate racial segregation in violation of *Brown v. Board of Education II* and the order of U.S. District Judge Ronald Davies. *Id.* Governor Orval Faubus sent state troops to prevent blacks from entering the previously white high school. *Id.* The governor was enjoined from further interference with the execution of *Brown II*. *Id.* To enforce the constitutional ruling, federal troops were sent to allow the blacks to attend the schools. *Id.* The will of the legislature, or the majority approval of segregation was *not* the legitimizing principle of *Brown*. A social evil such as racism in Mississippi in the 1950's would never have been rooted out if we relied on majoritarian legitimation of fundamental liberties. Clearly racism has not been rooted out of Mississippi, or the rest of America, but we have come farther than we were in 1954 thanks to non-majoritarian dependent constitutional principles.

180. *See infra* part III-B (discussing the writings of James Madison).

181. Thomas Jefferson, cited by SENATOR JOSEPH BIDEN, SENATE COMM. ON THE JUDICIARY, NOMINATION OF ROBERT H. BORK TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES SUPREME COURT, S. EXEC. REP. No. 7, 100th Cong., 1st Sess. 8 (1987) (citing Comm. Print Draft, Vol. 1, at 68).

182. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 92-95 (1960).

183. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776). The use of the word "men" in this text unfortunately was sexist and racist as it flowed from the pen of Jefferson. "Men" referred only to white propertied men, not to women or black slaves. But the substance of these words, even if couched in the form of sexism and racism, have empowered us as a society to make substantial gains in challenging

> [It] is very evident, [that] Man has a *Natural Freedom* . . . since all that share in the same common Nature, Faculties and Powers, are in Nature equal, and ought to partake in the same common Rights and Privileges, till the manifest appointment of God . . . can be produced to shew [sic] any particular Person's Supremacy, or a Mans [sic] own consent subjects him to a Superior.[185]

An appeal to majoritarian normative assertions as the legitimation of constitutionally implicit unenumerated liberties is dubious when these majoritarian norms are employed to deny individuals rights which all humans share. Recall that the Court has repeatedly asserted that "marriage is a fundamental right of man."[186] This clearly must include *all* humans. White's analysis in *Bowers* appears to suggest that there are characteristics, such as homosexuality, which can cancel basic, self-evident human rights. But from where does the Court divine the standard that homosexuality renders one non-human?

James Madison contemplated that in a democratic republic there is always the danger of the majority asserting a tyrannical will over a minority, in disregard of principles of justice.[187] These principles of justice are ignored by the Court; in their place is substituted the homophobic prejudice of the electorate of Georgia and the majority of the Court. The Constitution's purpose is to guard against this mendaciousness.[188]

Madison worried about factions further, and stated:

> By a faction I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of

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both sexism and racism. It is the power of the spirit of equality in this passage which I wish to stress.

184. *Id.*

185. LOCKE, *supra* note 182, at 208.

186. *E.g.*, Maynard v. Hill, 125 U.S. 190 (1888); Skinner v. Oklahoma, 316 U.S. 535 (1942); Loving v. Virginia, 388 U.S. 1 (1965); Zablocki v. Redhail, 434 U.S. 374 (1978). Is the word "man" here, again, a sexist term? Does this rule apply to only men, or did the nine male Justices simply forget that half of those who marry are women? Is man here suppose to be synonomous with "human?" And if the word man does mean "human" does it apply to homosexual men and women?

187. In his apologetics for the Constitution, Madison stated:

> Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.

THE FEDERALIST, No. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961).

188. *Id.*

> interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.[189]

As the architect of the Bill of Rights concluded, different people will always have divergent opinions, values, interests, and lifestyles.[190] When the minority's interest is not harmful to the majority, the minority's interest is to be protected from tyrannical passions of a majority.[191] Justice White articulated no reason why intimate homosexual associations have an adverse affect on the rights of heterosexuals.[192] Offending the sensibilities of some, even a majority, has never been a justification for denying citizen's fundamental human rights.[193] The gay men in *Bowers* were not asking for a special right. Rather, they sought not to be incarcerated[194] for the intimate expression of the most personal aspects of their identity.[195] Madison stated that the first priority of government is to protect the right of persons to exercise the different manifestations of human nature:

> As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves. The diversity in the faculties of men, from which the rights of property originate, is not less and insuperable obstacle to uniformity of interests. *The protection of these faculties is the first object of government*.[196]

The Court's decision does violence to Madison's rationale and offends the human integrity of the gay plaintiffs in *Bowers*.

Succumbing to the electoral majority's will — the collective conscience — Justice White redacts history (the tradition portion of the test) and calls upon a history tainted with prejudice against homosexuals:[197]

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189. *Id.* at 78.

190. *Id.*

191. *Id.*

192. The converse, however, is true: it is the prejudice of a homophobic majority which denies homosexuals basic human dignity.

193. *See, e.g.* Evans v. Romer, 854 P.2d 1270 (1993) (where the Supreme Court of Colorado ruled that a voter-initiated Amendment to the Colorado Constitution which prohibited the legislature from granting minority or protected status to homosexuals, infringed the plaintiffs' fundamental right to participate on equal basis in the political process); *See also supra* note 180.

194. GA. CODE ANN. § 16-6-2(b) (1984) (providing a prison term of from one to twenty years for acts of sodomy).

195. Bowers v. Hardwick, 478 U.S. 186 (1986).

196. THE FEDERALIST, *supra* note 187, at 78 (emphasis added).

197. Justice White's appeal to history does not include a review of the places and times where homosexuality has been fostered and legitimate. The priest in this case employs only the history he wants to consider and perpetuates his assumptions of

> Proscriptions against that conduct [consensual sodomy] have ancient roots . . . Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue, to provide criminal penalties for sodomy performed in private and between consenting adults . . . Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.[198]

This appeal to history is at best disingenuous. The Court's previous rulings in the area of privacy disavow such an anachronistic and ahistorical interpretation of history.[199] In *Thornburgh v. American College of Obstetricians and Gynecologists*, Justice White in his dissent rejected this very use of history as a decisive model of constitutional interpretation.[200] He recognized that constitutional interpretation often revises the Founders' explicit understanding for the more abstract principles that the Constitution serves.[201] The issue of constitutional interpretation is not how a previous generation failed to recognize a fundamental right, but how today, in light of cultural circumstances, fundamental rights should be construed with current constitutional principles.[202] Further, as John Boswell demonstrates through exposition of primary ancient texts

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the world. This appeal to history is utterly subjective and is unworthy of employment as constitutional jurisprudence. *See Bowers*, 478 U.S. 186 (1986).

198. *Id.* at 192-94. Chief Justice Burger asserts the same rationalization in his concurring opinion:

> Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law . . . During the English Reformation when powers of the ecclesiastical courts were transferred to the King's Courts, the first English statute criminalizing sodomy was passed . . . Blackstone described "the infamous crime against nature" as an offense of "deeper malignity" than rape, a heinous act "the very mention of which is a disgrace to human nature," and a "crime not fit to be named."

Id. at 196-97.

199. Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 789 (1986) (White, J., dissenting). "As its prior cases clearly show, however, this Court does not subscribe to the simplistic view that constitutional interpretation can possibly be limited to the 'plain meaning' of the Constitution's text, or to the subjective intention of the Framers." *Id.*

200. *Id.*

201. *Id.* "The Constitution . . . is a document announcing fundamental principles in value-laden terms that leave ample scope for the exercise of normative judgment by those charged with interpreting and applying it."

202. *See infra* part III-C.

in *Christianity, Social Tolerance and Homosexuality*, through the late middle ages homosexuality was well tolerated and encouraged, and gay marriages were sanctioned by the Catholic Church.[203] This again shows that it depends on whose history you choose to exposit when making sweeping conclusions. Justice White is recalcitrant to searching for and expositing positive gay history; he is a myopic editor.

David Richards notes that an important document in the construction of the final Constitution describes the Framers' drafting style:

> In the [draft] of a fundamental constitution, two things deserve attention:
> 1. To insert essential principles only; lest the operations of government should be clogged by rendering those provisions permanent and unalterable, *which ought to be accommodated to times and events*; and
> 2. To use simple and precise language, and general propositions, according to the example of the (several) constitutions of the several states. (For the construction of a constitution necessarily differs from that of law.)[204]

Madison and his colleagues regarded Constitutional interpretation as an historically continuous enterprise among free, rational, equal persons.[205] An historically continuous interpretation of the Constitution requires sensitivity to context — to the factors that bear upon the forms public justification must take in different circumstances and periods.[206] The Founders conceived the Constitution as a structure of governance that would endure over many generations, and they drafted the Constitution in anticipation of an interpretive practice that would be historically sensitive to an enduring community of principles.[207] Chief Justice Marshall articulated this sentiment in *McCulloch v. Maryland*:[208] "[A] constitution [is] intended to endure for ages to come, and, consequently, to be adapted to various crises of human affairs."[209] Marshall argued that the Framers intended to provide a general constitution which would be sensitive to the peculiar circumstances of particular generations.[210]

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203. *See* BOSWELL, *supra* note 90.

204. David A.J. Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800, 821 (1986) (citing document apparently prepared for use by Committee of Detail, reprinted in NOTES OF JAMES MADISON 4, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 37-38 (M. Farrand rev. ed., 1966) (emphasis added)).

205. *Id.* at 821.

206. *Id.* at 822-24.

207. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 902-13 (1985).

208. 17 U.S. (4 Wheat) 316 (1819).

209. *Id.* at 415.

210. *Id.*

The "traditions and collective conscience" test begs the question. If homosexual marriage was an aspect of our cultural tradition, then it would be an established institution not in need of adjudication. It is implicitly impossible for liberty and fundamental rights to evolve if they are not found in the tradition of our people. Gay people should be afforded the same liberation of their civil rights as other minorities within our culture. The evolution of their civil rights should not be dependent upon a test by which the conclusion precedes its analysis.

Traditional moral condemnation of homosexuality has diminished the intimate, imaginative, emotional, and intellectual freedom through which homosexuals construct a personal and ethical way of life. Violence against moral and personal independence is not at the outpost of the constitutional notion of privacy as an unenumerated right: it is at its very soul. It is paradoxical to mitigate the scope of unenumerated rights, like the right to intimate association, exactly where the right would protect the moral independence of a traditionally oppressed minority.[211] Appeals to the "traditions and collective conscience" legitimizes the hate and disenfranchisement of homosexuals.[212] As Madison thought, judicial power is most legitimate when it holds democratic majorities to arguments of principles and establishes in the minds of the people truths and principles which they might never have thought otherwise.[213] One such principle is that equal rights must be fairly extended to the most despised minorities.[214] That view of the written constitution is betrayed when the judiciary fails to respect the right of homosexuals to the moral independence of a private life that is the right of heterosexuals. The protection of homosexual intimate associations is one of the most necessary elaborations of the constitutional right to privacy, because homosexuals are in greatest need of protection concerning those matters most fundamentally affecting their identity and personhood.

Employment of the "traditions and collective conscience" test is dubious as legitimate constitutional jurisprudence. As such, use of this test to delineate fundamental rights, as in *Baehr*,[215] should be disdained and rejected as a means for settling an important issue such as the right to same-sex marriage.

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211. *Id.* at 415-37.

212. The conclusion of this test would perpetuate homophobia.

213. *See supra* notes 187 and 196 and accompanying text.

214. This logically follows the philosophical assumptions of Jefferson, Locke, and Madison as expostulated in notes 185, 187 and accompanying text.

215. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

C. *Modern Culture Evidences a Collective Conscience That Gay and Lesbian Rights are a Liberty Interest Worthy of Fundamental Rights Protection.*

Even if we were to accept, *arguendo*, the "traditions and collective conscience" test as a means to determine liberty interests, there is much evidence which indicates that gay and lesbian rights are an aspect of society's collective conscience and worthy of fundamental rights protection. It has not been until recently that homosexuals have asserted themselves as equals in our society.[216] John D'Emilio traces how World War II uprooted tens of millions of men and women from traditional family settings, depositing them in a variety of sex-segregated, non-familial environments.[217] For a generation of Americans, World War II provided a mechanism for many persons to experience same-sex love, affection, and sexuality, and participate in a larger social group of gay men and women.[218] For many, the sexual milieu of the war years provided an environment of sexual experiences that had been unimaginable in small town and traditional family environments.[219] While the war years allowed gay men and women to discover themselves and each other, postwar repression heightened consciousness of belonging to a group.[220] Cold War politics strove to reconstruct traditional sexual roles by pressuring women to exit the labor force.[221] Homosexuals found themselves under virulent attack.[222] They were removed from the military, subject to congressional investigation into government employment of "perverts", and disbarred from federal jobs.[223] They were subject to widespread FBI surveillance, state psychopath laws, increased harassment from urban police forces, and the inflammatory headlines of city presses warning residents of the dangers of "sex deviants."[224] The oppression of McCarthyism helped create the minority it sought to eradicate.[225]

The combined influence of the war, publication in 1948 of the Kinsey survey on human sexual behavior, the persecutions of McCarthyism, and a growing civil rights movement animated gays and

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216. *See infra* notes 230-237 and accompanying text.

217. John D'Emilio, *Gay Politics, Gay Community*, *in* HISTORY OF HOMOSEXUALITY IN EUROPE AND AMERICA 88-112 (Wayne R. Dynes & Stephen Donaldson eds., 1992).

218. *Id.* at 88.

219. *Id.*

220. *Id.*

221. *Id.* at 89.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

lesbians to coalesce and build a political movement.[226] Black militants in the late 1950s and early 1960s provided a model for an oppressed minority to reject assimilation and transform their stigma into a source of pride and power.

Stonewall is the most significant instance in American culture of homosexual assertion of self-respect.[227] Social consciousness was born amongst many homosexuals with this first act of self-respect. Stonewall represents the birth of an outwardly expressive cultural tradition.[228] There is a large body of critical literature today which speaks to the injustices underlying traditional conceptions of homosexuality as a disease or a vice.[229] It is finally recognized in a growing area of broader culture that homosexuals live with as much personal and ethical value as heterosexuals.[230] During the past 25 years, more than half of the states have decriminalized private homosexual acts between consenting adults.[231] Some traditional condemnations of homosexuality interpret sexual preference in the same way race was interpreted by Nineteenth Century theories of racial difference.[232] Such theories stereotypically associate homosexuality with images of incompe-

226. *Id.* at 90.

227. In late June of 1969, New York police raided the Stonewall bar in Greenwich Village arresting persons for engaging in criminal behavior. That criminal behavior was being and associating with homosexuals. Gay men and women took to the streets that weekend and following week in an angry, violent response to police brutality and harassment. The riot is heralded as the beginning of the gay liberation movement in the United States.

228. If any culture is a macrocosm of a myriad of smaller cultures, the United States would be so defined. Which, again, underscores the question: Whose culture and whose tradition is given primacy in determining fundamental rights?

229. David A. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957 (1979); *see e.g.* ALAN P. BELL, et al., SEXUAL PREFERENCE, ITS DEVELOPMENT IN MEN AND WOMEN (1981); ALAN P. BELL & MARTIN WEINBERG, HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN (1978); *see also* DERRICK SHERWIN BAILEY, HOMOSEXUALITY AND THE WESTERN CHRISTIAN TRADITION (1955); PHILIP BLUMENSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES: MONEY, WORK, SEX (1983); WAINWRIGHT CHURCHILL, HOMOSEXUAL BEHAVIOR AMONG MALES: A CROSS-CULTURAL AND CROSS-SPECIES INVESTIGATION (1967); MARTIN HOFFMAN, THE GAY WORLD: MALE HOMOSEXUALITY AND THE SOCIAL CREATION OF EVIL (1968); WILLIAM H. MASTERS & VIRGINIA E. JOHNSON, HOMOSEXUALITY IN PERSPECTIVE (1979); JOHN J. MCNEILL, THE CHURCH AND THE HOMOSEXUAL (1976).

230. Richards, *supra* note 229.

231. There are 26 states which have decriminalized private, consensual adult homosexual acts, either by legislative (Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Maine, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oregon, South Dakota, Vermont, Washington, West Virginia, Wisconsin, and Wyoming) or judicial means (New York, Pennsylvania, and Massachusetts).

232. Richards, *supra* note 229.

tence, immaturity, licentiousness, and animalistic immorality.[233] These theories, once accepted, are laughable today. As David Richards notes, these stereotypes are themselves the cultural artifacts of a long history of uncritical prejudice about proper sexuality and a morality that required sex to be procreational and to follow masculine domination and feminine submission.[234]

It has not been since Stonewall that our "collective conscience" has listened to and considered that homosexuals live lives of integrity similar to heterosexuals. As this consciousness grows, and as more homosexuals "come out of the closet" it is appropriate to admit that homosexuality is a vibrant aspect of our "collective conscience" and homosexuals are worthy of the same fundamental rights as heterosexuals.

D. The Baehr *Court Misconstrues Article I, Section 6 of the Hawaii Constitution as Evidenced in the Legislative History of Article I, Section 6.*

The Framers of the Hawaii Constitution, in their debate about the right to privacy at the Constitutional Convention in 1978, explicitly stated that individuals have the right to control certain highly intimate and personal affairs.[235] If the *Baehr* Court was concerned with the most pertinent history regarding homosexuality and privacy, it would have consulted the legislative history of Article 1, Section 6 of the Hawaii Constitution.[236] The discussion regarding sexual orientation at the Constitutional Convention of 1978 did not question whether homosexuality was protected under the Hawaii Constitution but, rather, under which provision of the Bill of Rights of the Hawaii Constitution sexual orientation would be covered.[237]

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233. *Id.* at 978-83.

234. *See* Richards, supra note 229.

235. COMMITTEE ON THE BILL OF RIGHTS, SUFFRAGE AND ELECTIONS, STAND COMM. REP. NO. 69, 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF HAWAII OF 1978 at 671, 675 (1978) [hereinafter COMMITTEE ON THE BILL OF RIGHTS].

236. *Id.* at 674-75.

237. The Committee explained that Article 1, Section 6 of the Hawaii Constitution "gives each and every individual the right to control certain highly personal and intimate affairs of his own life." STAND. COMM. REP. NO. 69, *reprinted in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF HAWAII 674 (1978). The right to personal autonomy, to dictate one's lifestyle, to be oneself are included in the concept of liberty. *Id.* The Committee quoted Justice Abe's concurring opinion in *State v. Kanter*, 493 P.2d 306 (Haw. 1972), that each person has the "fundamental right of liberty to make a fool of himself as long as his act does not endanger others." *Id.*

The Committee of the Whole of the Convention adopted a report on Committee Proposal 15, which stated that Section 6, the Right to Privacy, was "intended to insure that privacy is treated as a fundamental right for purposes of constitutional

The Committee on Bill of Rights stated:

> The question of whether provisions regarding discrimination based on sexual orientation should be included in the Constitution concerned your Committee. Certain members of your Committee argued that the inclusion of such a provision would extend nondiscrimination to another minority group.
>
> Your Committee believes that the inclusion of such a provision would be duplicative of the equal protection and due process protections already existing in the Constitution. Accordingly, your Committee believes that the inclusion of a provision related to discrimination based on sexual orientation would be superfluous.[238]

"Superfluous" is defined in Webster's Dictionary as "exceeding what is sufficient or necessary; extra; marked by wastefulness."[239] For a provision on sexual orientation to have been excluded from the right to privacy section for the sole reason that its inclusion would have been superfluous, sexual orientation must therefore be considered a fundamental right.[240]

In the most pertinent privacy case decided by the Hawaii court since the 1978 Amendment, the court in *State v. Kam*[241] extensively reviewed the legislative history of Article 1, Section 6 of the Hawaii Constitution. The Court stated that the Amendment "gives each and every individual the right to control certain highly personal and intimate affairs of his own life. The right to personal au-

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analysis." 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII at 1024. The Committee wrote: "this privacy concept encompasses the notion that in certain highly personal and intimate matters, the individual should be afforded freedom of choice absent a compelling state interest." *Id.* The Committee explained that

> This privacy right is similar to the privacy right in cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973). It is a right that, though unstated in the federal Constitution, emanates from the penumbra of several guarantees of the Bill of Rights. Because of this, there has been some confusion as to the source of the right and the importance of it. As such, it is treated as a fundamental right subject to interference only when a compelling state interest is demonstrated.

Id.

Delegate Hale, speaking in opposition to an amendment to remove the privacy section in Stand Comm. Rep. No. 69 stated:

> I recall, for instance, that somebody in an election campaign on the mainland is being accused of being a homosexual. This is a very private, personal thing; it has nothing to do with whether the person is qualified to be a governor. This is the kind of information that I consider would be protected by a right to privacy.

PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII 640 (1978).

238. 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII 675 (1978).

239. WEBSTER'S NEW COLLEGIATE DICTIONARY 1160 (G & C Merriam Co. 1980).

240. 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII at 675.

241. 748 P.2d 372 (Haw. 1988) (ruling that Hawaii Revised Statute Section 712-1214(1)(a), which bans the commercial sale of pornography, impermissibly abridges Article 1, Section 6 of the Hawaii constitution).

tonomy, to dictate his lifestyle, to be oneself are included in this concept of privacy."[242] It is inconsistent that the court explicitly underscored that a man has the right to be "oneself" and "dictate his lifestyle," yet does not have the right to marry the man he loves. Gays and lesbian do not have the same rights to order their intimate lives. This is evidenced by the myriad property and personal rights granted to married persons[243] in support of their unions. Same-sex couples suffer a disparate effect in ordering their lives together. Clearly, the logical conclusion of the court's rule is that gays and lesbians are not "each and every individual" or for that matter, any individual. What, then, are they?

The *Baehr* court states that it is "free to give broader privacy protection [under Article I, Section 6 of the Hawaii Constitution] than that given by the federal constitution."[244] Yet, the court refused to state what is most plain from the federal cases: that all individuals have the right to marry. The *Baehr* court stated this rule would have "talismanic effect;"[245] it would be a "magical or miraculous" result for it to declare that rules which have been held to apply to all individuals, actually do. In fact, the true "talismanic effect" of which the court is afraid, is that the plainest reading of privacy doctrine — which applies fundamental marital rights to all individuals — smashes the heterosexual familial paradigm and admits that gay people have equally legitimate family lives. This, of course, is an admission the patriarchal court was unwilling to grant. And as Richard Mohr observes, this type of legal interpretation is "the chief way that society as a whole tells gays they are scum."[246]

E. The Baehr *Court's Fundamental Rights Rationale is Logically Inconsistent with Its Equal Protection Rationale.*

The *Baehr* court's interpretation of *Loving v. Virginia*'s[247] equal protection analysis renders its fundamental rights analysis inconsistent.[248] In a ruling that the United States Supreme Court

242. *Id.* at 492.

243. *See supra* note 61.

244. Baehr v. Lewin, 852 P.2d 44, 57 (Haw. 1993) (quoting State v. Kam, 748 P.2d at 377).

245. *Baehr*, 852 P.2d at 57; WEBSTER'S defines "talismanic" as "something producing apparently magical or miraculous results . . . to initiate into the mysteries." WEBSTER'S NEW COLLEGIATE DICTIONARY, *supra* note 243 at 1180.

246. Richard Mohr, *Mr. Justice Douglas at Sodom: Gays and Privacy*, 18 COLUM. HUM. RTS. L. REV. 43, 53 (1987).

247. 388 U.S. 1 (1967).

248. Baehr v. Lewin, 852 P.2d 44 at 63 (1993).

flatly overturned, the Virginia court declared that interracial marriage could not exist because the Deity had deemed such marriage intrinsically unnatural.[249] Therefore, it has never been the "custom" of the state to recognize mixed marriages; marriage always having been construed to presuppose a different configuration.[250] The *Baehr* court stated that "as *Loving* amply demonstrates, constitutional law may mandate, like it or not, that customs change with an evolving social order."[251] Further, the *Baehr* court stated in reference to the Virginia court's conclusions: "we reject this exercise in tortured and conclusory sophistry."[252] Reject it rhetorically they might, but this "tortured and conclusory sophistry" is the same reasoning employed in the *Baehr* fundamental rights analysis.[253]

The *Baehr* court, in reasoning similar to the Virginia district court, held that homosexual unions should be excluded as a fundamental right because heterosexual marriage was the only marriage considered legitimate at the time the U.S. Supreme Court decided *Skinner*[254] and *Zablocki*.[255] If Virginia's argument that tradition legitimates a law which prohibits interracial marriages is "tortured and conclusory sophistry,"[256] then clearly, the *Baehr* court's argument that, traditionally, marriage of heterosexual couples is the only type of marriage contemplated by its very definition is also "tortured and conclusory sophistry."[257] This obvious inconsistency suggests that it is not only the courts of Virginia which practice intellectual fraud to protect the mainstream interests and values of their state.

The *Baehr* court, with continued illogic, went on to assert that its determination of fundamental rights is grounded in "the traditions and collective conscience of our people."[258] As noted above, the court concluded that "we do not believe that a right to same-sex marriage is so rooted in the traditions of our people."[259] How can the same court which stated that "constitutional law may mandate, like it or not, that customs change with an evolving social order"[260]

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249. *Id.* at 62 (citing 388 U.S. at 3.)
250. *Id.*
251. *Id.* at 63.
252. *Id.*
253. *Id.* at 57 ("we do not believe that a right to same-sex marriage is rooted in the traditions and collective conscience of our people").
254. Skinner v. Oklahoma, 316 U.S. 535 (1942).
255. Zablocki v. Redhail, 434 U.S. 374 (1978).
256. Baehr v. Lewin, 852 P.2d 44, 63 (Haw. 1993). *See also*, Jones v. Hallahan, 501 S.W. 2d 588 (Ky. 1973).
257. *Baehr*, 852 P.2d 44.
258. *Id.* at 57.
259. *Id.* at 57.
260. *Id.* at 63.

declare that the basis for determining fundamental rights rests in the "customs and traditions of our people?"[261] It is impossible for the *Baehr* court to reconcile its condemnation of the use of tradition and custom with its own employment of this rationale in its fundamental rights analysis.[262] The core issue brought by the plaintiffs before the Hawaii court is whether the state may perpetuate its tradition of homophobia.[263] The court skirted this central issue by arguing, circularly, that a fundamental right denied to a class of people throughout history is not a fundamental right if society has traditionally denied that right to those people.[264] Such reasoning will lead to a social order in Hawaii that will never evolve, at least not for minorities. The *Baehr* court's reasoning is logically facetious and a spurious disposition of the fundamental rights issue.

IV. Denial of Fundamental Rights Status to Homosexual Unions Perpetuates the Violence Leveled Against Gays and Lesbians

Even though culture is more tolerant of homosexuals today than it was before Stonewall in 1969,[265] much of the story which encompasses homosexuality in America is filled with homophobic aggression and ideology.[266] The central theme of this story is fear, hatred, stigmatization, and violence.[267] Gay men and lesbians have been defined as "faggots" (after the pieces of kindling used to burn their bodies), "monsters," "fairies," "bull dykes," "perverts," "freaks," and "queers."[268] Their intimacies have been termed "abominations," "crimes against nature," and "sins not to be named among Christians."[269] In the United States, lesbians and gay men have been "condemned to death by choking, burning and drowning; . . . executed, [castrated], jailed, pilloried, fined, court-martialed,

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261. *Id.*

262. Long before the Hawaii court disparaged the use of tradition and custom as a rationale for construing the Constitution, Justice Holmes wrote in *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897):

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry the IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Id.

263. *Baehr*, 852 P.2d at 55.

264. *Id.*

265. *See supra* note 230.

266. JONATHAN KATZ, GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A.: A DOCUMENTARY 11, 22-23, 44, 127-28 (1976).

267. *Id.*

268. *Id.* This list is by no means exhaustive.

269. *Id.* Recall the similar language in the *Bowers* opinion of Justice White and Chief Justice Burger, *supra* III-B.

prostituted, fired, framed, blackmailed, disinherited, [lobotomized, shock-treated, psychoanalyzed and] declared insane, driven to insanity, to suicide, murder, self-hate, witch-hunted, entrapped, stereotyped, mocked, insulted, isolated, . . . castigated, . . . despised [and degraded]."[270]

The legal hostility to homosexuality, as demonstrated in the *Baehr* fundamental rights analysis, encourages those elements in society which inflict physical violence on gays and lesbians. The fundamental rights ruling in *Baehr* encourages others to prevent and punish deviations from heterosexual acts and identities because homosexuality is viewed through the law as not worthy of the same civil protections as heterosexual identity.

The denial of the fundamental right to marriage to homosexuals has a profound disparate effect on gays and lesbians. Thurgood Marshall argued before the Court in *Brown v. Board of Education*[271] that the Court must consider the *effect* of segregation on public education in their consideration of "separate but equal." The Court concluded that "separate but equal" had a clear disparate effect on African-Americans.[272] The structural violence affecting African-Americans was enough to motivate the Court to dispel the "separate but equal" of *Plessy v. Ferguson*.[273] A similar violent disparate impact affects lesbians and gay men.

A report issued by Community United Against Violence made a recent report about homophobic violence in America:

> One man's body was discovered with his face literally beaten off. Another had his jaw smashed into eight pieces by a gang of youths taunting "you'll never suck another cock, faggot!" Another had most of his lower intestine removed after suffering severe stab wounds in the abdomen. Another was stabbed 27 times in the face and upper chest with a screwdriver, which leaves a very jagged scar. Another had both lungs punctured by stab wounds, and yet another had his aorta severed.[274]

Such stories are not random, sporadic acts of violence, but are typical of a continuous pattern of hate.[275] A survey of anti-gay violence and harassment in eight major cities evidences this: 86.2% of homosexuals surveyed stated that they had been attacked verbally; 44.2% reported they had been threatened with violence; 27.3% had objects thrown at them; 19.2% had been punched, hit, kicked, or

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270. *Id.*
271. 347 U.S. 483, 488 (1954).
272. *Id.* at 485.
273. 163 U.S. 537 (1896).
274. Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1463 (1992).
275. *Id.* at 1463-64.

beaten; 9.3% had been assaulted with a deadly weapon; 18.5% had been the victims of property vandalism or arson; 30.9% reported sexual harassment, many by members of their own family or by the police.[276] A study commissioned by the National Institute of Justice (the research arm of the U.S. Department of Justice) found that homosexuals "are probably the most frequent victims [of hate violence today]."[277] Most gay persons have their own stories.

> At a recent hearing before the San Francisco Board of Supervisors, a physician at a city hospital testified to the peculiar brutality leveled against gays and lesbians. He testified the intent of the violence was "to kill and maim."[278]
>
> Weapons include knives, guns, brass knuckles, tire irons, baseball bats, broken bottles, metal chains, and metal pipes. Injuries include severe lacerations requiring extensive plastic surgery; head injuries, at times requiring surgery; puncture wounds of the chest requiring insertion of chest tubes; removal of the spleen for traumatic rupture; multiple fractures of the extremities, jaws, ribs, and facial bones; severe eye injuries, in two cases resulting in permanent loss of vision; as well as severe psychological trauma the level of which would be to difficult to measure.[279]
>
> And one study of homophobic murders concluded that in most circumstances, the victims were not just killed, but were "more apt to be stabbed a dozen or more times, mutilated, *and* strangled . . . [and] [i]n a number of instances . . . stabbed or mutilated even after being fatally shot."[280]

Why? Simply because they are gay or lesbian.

At a hearing on homophobic violence in October 1986, the district attorney of New York County told the U.S. House of Representatives Committee on the Judiciary, Subcommittee on Criminal Justice, that "at times [lesbian and gay men] have been, and in many areas of the country continue to be, taunted, harassed, and even physically assaulted by the very people whose job it is to protect them."[281] A recent survey of homophobic violence cites a report of police practices in which a police officer describes standard treatment of homosexuals:

> Now in my own case when I catch a guy like that I just pick him up and take him into the woods and beat him until he can't crawl. I have had seventeen cases like that in the last couple of years. I tell the guy if I catch him doing that again I will take him out to the woods and shoot him. I tell him that I carry a

276. *Id.* at n.125.
277. *Id.* at 1464 (citing PETER FINN AND TAYLOR MCNEIL, THE RESPONSE OF THE CRIMINAL JUSTICE SYSTEM TO BIAS CRIME: AN EXPLORATORY REVIEW 2 (1987)).
278. *Id.* at 1466.
279. *Id.*
280. *Id.*
281. *Id.* at 1465.

> second gun on me just in case I find guys like him and that I will plant it in his hand and say that he tried to kill me and that no jury will convict me.[282]

The brutality of violence against lesbian and gay men persuasively evidences the vicious hatred harbored and leveled against persons whom the law stigmatizes as unworthy of the same fundamental rights as heterosexuals. The recognition of marriage as a fundamental right for homosexuals is essential because marriage is the recognition of the mature expression of sexual identity. Sexual identity is the expression of integrated, mature personal identity. To deny homosexuals the recognition of their fundamental right of marriage, is to deny the ultimate expression of their sexual identity, and this is to deny a basic definition of personal integrity. Denial of fundamental rights status to homosexuals compels the homosexual to constantly deny and erase a basic element of her personality. This legally compelled erasure of sexual identity legitimates the acts of others, who through violence and brutality attempt to erase those who are homosexual. This effect is unconscionable for our Constitution and our society.

Drawing on the work of John Rawls, David Richards defends a broad principle of "love as a civil liberty:"

> Freedom to love means that a mature individual must have autonomy to decide how or whether to love one another. Restrictions on the form of love imposed in the name of the distorting rigidities of convention that bear no relation to individual emotional capacities and needs would be condemned. Individual autonomy, in matters of love, would ensure the development of people who would call their emotional nature their own, secure in the development of attachments that bear the mark of spontaneous human feeling and that touch one's original impulses.[283]

This notion offers a clearer definition of how to construe the American collective conscience about love and personal intimate relations. It also provides a more realistic notion by which to determine marital rights and liberties. Such an ethic would clearly contemplate gay and lesbian marriages.

VI. Conclusion

Baehr is a story with a hopeful ending. The Supreme Court of Hawaii reversed the lower court's holding, and ruled that Hawaii Revised Statutes Section 572-1, *prima facie* and as applied, imper-

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282. *Id.*

283. David Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957, 1006 (1979) (footnote omitted).

missibly categorized the issuance of marriage licenses on "sexual" classifications, in violation of the Equal Protection Clause of the Hawaii Constitution. Such a classification in Hawaii is subject to "strict scrutiny" and requires the state provide compelling interests, narrowly tailored, to meet its objectives. It is unlikely that the lower court will find such compelling interests. As a result, the plaintiffs and other same-sex couples will likely receive the same state sanction and rights from their unions as do heterosexual couples. This is a great triumph in the struggle for equality for gays and lesbians.

But there is another side to *Baehr*. As *Baehr* passes from courtroom to case reporter, a dark cloud lingers on the horizon of fundamental rights jurisprudence. *Baehr* is a dangerous precedent which forecloses an essential avenue for defining equality under the law. For those who are resistant to the notion of homosexual equality, and are entrenched in their homophobia, *Baehr* provides a device through fundamental rights analysis for the perpetuation of their intolerance.

The malignant device employed by the *Baehr* court is the "traditions and collective conscience" test. This test permits the traditional fears, hatred and prejudice of a mythical majority to be the filter through which fundamental civil liberties are defined. Appeal to tradition and collective conscience legitimizes the hate and disenfranchisement of the ignorant against homosexuals. As the Framers thought, judicial power is most legitimate when it holds democratic majorities to arguments of principles and establishes in the minds of the people truths and principles which they might never otherwise have thought. The "traditions and collective conscience" test does not foster jurisprudential reasoning based on principles of liberty, rather it appeals to and privileges popular prejudice. Jefferson and Madison did not locate the fundamental principles of the Declaration of Independence or Constitution in the history of our people, but rather found them within the nature of being human.

A basic purpose of our founding charters is to ensure that the tyrannical passions of a majority will not disparage fundamental liberty interests enjoyed by the majority to a despised minority simply because the minority expresses themselves differently. The test, in determining liberty interests, according to Madison, is to determine if the minority's claimed liberty interest is in conflict with that of the majority. If it is not, then the minority should not be denied the same liberty interest which the majority enjoys. In *Baehr,* we are given no reason why same-sex marriage conflicts

with heterosexual marriage. Nor are we provided a reason why homosexuality renders a homosexual outside of the definition of "all individuals" used by the Court to define marital rights. We are simply left with the circular conclusion that because history has not allowed same-sex marriage, than same-sex marriage is impermissible. But why??

If as a gay man I am denied the same fundamental rights granted to my heterosexual brother, I would like to be provided with an intelligent reason. The *Baehr* court has not given such reason, perhaps because there is none.

Postscript

> This legislation amends HRS Chapter 572, to state:
>
> Definition of marriage, Whenever used in the statutes or other laws of Hawaii, "marriage" means the union licensed under § 572-1.
>
> SECTION 3. Section 572-1, Hawaii Revised Statutes, is amended to read as follows:
>
> § 572-1 Requisites of valid marriage contract. In order to make valid the marriage contract, *which shall be only between a man and a woman*, it shall be necessary that. . .
>
> . . .
>
> 6) [It shall in no case be lawful for any person to marry in the State without] *The man and woman to be married in the State shall have duly obtained* a license for that purpose [duly obtained] from the agent appointed to grant marriage licensees;

HAWAII HOUSE BILL No. 2312, pp. 13-15.

The language "man and woman" is inserted throughout the rest of the marriage statute. By inserting this language the legislature sought to define marriage as legal only between men and women as a means to purposely exclude same-sex marriages.

The Hawaii legislature included several pages of policy statement in this Act declaring that the Hawaii Supreme Court had overstepped its authority, violating the separation of powers, in its equal protection ruling and had impermissibly legislated same-sex marriage from the bench. Further, the Act states that the Hawaii Supreme Court misinterpreted the word "sex" as found in Article 1, Section 5 of the Hawaii Constitution to include the notion of sexual orientation. The legislature stated that sex means gender, not sexual orientation. Therefore, the legislature concluded that the equal protection analysis of the *Baehr* court is presented in terms of sexual orientation rather than gender classifications and consequently impermissibly expanded the intention of that word as it appears in both the marriage statute and the Hawaii Constitution.

The validity of this law is dubious. It is the legislature, not the Supreme Court, which has violated the separation of powers by this Act. It is firmly established that the Hawaii Supreme Court has the ultimate authority to define and distinguish the meaning of the Constitution. The legislature through this Act is attempting to assert the power of the Supreme Court to interpret the Constitution. In its equal protection analysis, there is no evidence that the court was attempting to legislate same-sex marriage, rather the court issued what it reasoned to be the most equitable interpretation of the Hawaii Equal Protection Clause in relation to the statute at issue, HRS-572. This battle is obviously not over and the last word in this case is far from certain.