SEXUALITY, GENDER, AND THE LAW

by

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II.

These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. *Skinner v. State of Oklahoma*, 316 U.S. 535, 541 (1942). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.

These convictions must be reversed.

John F. Singer and Paul C. Barwick v. Lloyd Hara

Washington Court of Appeals, 1974.
11 Wash. App. 247, 522 P.2d 1187, review denied, 84 Wash.2d 1008 (1974).

■ SWANSON, CHIEF JUDGE.

Appellants Singer and Barwick, both males, appeal from the trial court's order denying their motion to show cause by which they sought to compel King County Auditor Lloyd Hara to issue a marriage license to them. * * *

Appellants * * * argue that if, as we have held, our state marriage laws must be construed to prohibit same-sex marriages, such laws * * * violate[] the ERA which recently became part of our state constitution.[4] The question thus presented is a matter of first impression in this state and, to our knowledge, no court in the nation has ruled upon the legality of same-sex marriage in light of an equal rights amendment. The ERA provides, in relevant part:

> Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.

In seeking the protection of the ERA, appellants argue that the language of the amendment itself leaves no question of interpretation and that the essential thrust of the ERA is to make sex an impermissible legal classification. Therefore, they argue, to construe state law to permit a man to marry a woman but at the same time to deny him the right to marry

4. HJR 61, commonly known as the 'equal rights amendment,' was approved by the voters November 7, 1972, and became effective December 7, 1972. Const. amend. 61, adding article 31. The language of the ERA is substantially similar to the federal ERA now before the states for ratification as the twenty-seventh amendment to the United States Constitution.

another man is to construct an unconstitutional classification "on account of sex."[5] In response to appellants' contention, the state points out that all same-sex marriages are deemed illegal by the state, and therefore argues that there is no violation of the ERA so long as marriage licenses are denied equally to both male and female pairs. In other words, the state suggests that appellants are not entitled to relief under the ERA because they have failed to make a showing that they are somehow being treated differently by the state than they would be if they were females. Appellants suggest, however, that the holdings in *Loving*; *Perez v. Lippold*, 32 Cal.2d 711, 198 P.2d 17 (1948); and *J.S.K. Enterprises, Inc. v. City of Lacey*, 492 P.2d 600 (1971), are contrary to the position taken by the state. We disagree.

In *Loving*, the state of Virginia argued that its anti-miscegenation statutes did not violate constitutional prohibitions against racial classifications because the statutes affected both racial groups equally. The Supreme Court, noting that the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes "drawn according to race," held that the Virginia laws were founded on an impermissible racial classification and therefore could not be used to deny interracial couples the "fundamental" right to marry. The California court made a similar ruling as to that state's anti-miscegenation law in *Perez*.

Although appellants suggest an analogy between the racial classification involved in *Loving* and *Perez* and the alleged sexual classification

5. Appellants also argue that prior to the November 7, 1972 election, the voters were advised that one effect of approval of the ERA (HJR 61) would be the legalization of same-sex marriages, but nevertheless voted in favor of the amendment. In this connection, appellants direct our attention to the following language in the "Statement against" HJR 61 contained in the 1972 Voters Pamphlet published by the Secretary of State:

> HJR 61 would establish rules in our society which were not intended and which the citizenry simply could not support. Examples are numerous: * * *
>
> (3) Homosexual and lesbian marriage would be legalized, with further complication regarding adopting children into such a "family." People will live as they choose, but the beauty and sanctity of marriage must be preserved from such needless desecration; * * *

We are not persuaded that voter approval of the ERA necessarily included an intention to permit same-sex marriages. On the contrary, the "Statement for" HJR 61 in the Voters Pamphlet indicated that the basic principle of the ERA

> is that both sexes be treated equally under the law. The States could not pass or enforce any law which places a legal obligation, or confers a special legal privilege on one sex but not the other.

Similarly, the Attorney General's explanation of the effect of HJR 61, also set forth in the Voters Pamphlet, focused on the idea that government "could not treat persons differently because they are of one sex or the other." In other words, as we discuss in the body of this opinion, to be entitled to relief under the ERA, appellants must make a showing that they are somehow being treated differently by the government than they would be if they were females.

[The court cited and quoted from newspaper accounts published at the time of the November 7, 1972 election, to show that proponents of the ERA consistently denied that it would require gender-neutral marriages and that voters as well as proponents saw the ERA only in terms of women's rights and not gay rights.]

involved in the case at bar, we do not find such an analogy. The operative distinction lies in the relationship which is described by the term "marriage" itself, and that relationship is the legal union of one man and one woman. Washington statutes, specifically those relating to marriage (RCW 26.04) and marital (community) property (RCW 26.16), are clearly founded upon the presumption that marriage, as a legal relationship, may exist only between one man and one woman who are otherwise qualified to enter that relationship. Similarly although it appears that the appellate courts of this state until now have not been required to define specifically what constitutes a marriage, it is apparent from a review of cases dealing with legal questions arising out of the marital relationship that the definition of marriage as the legal union of one man and one woman who are otherwise qualified to enter into the relationship not only is clearly implied from such cases, but also was deemed by the court in each case to be so obvious as not to require recitation. Finally, the courts known by us to have considered the question have all concluded that same-sex relationships are outside of the proper definition of marriage. *Jones v. Hallahan*, 501 S.W.2d 588 (Ky.1973); *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971); *Anonymous v. Anonymous*, 67 Misc.2d 982, 325 N.Y.S.2d 499 (1971). Appellants have cited no authority to the contrary.

Given the definition of marriage which we have enunciated, the distinction between the case presented by appellants and those presented in *Loving* and *Perez* is apparent. In *Loving* and *Perez*, the parties were barred from entering into the marriage relationship because of an impermissible racial classification. There is no analogous sexual classification involved in the instant case because appellants are not being denied entry into the marriage relationship because of their sex; rather, they are being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex. As the court observed in *Jones v. Hallahan*, 501 S.W.2d at 590: "In substance, the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage." *Loving* and *Perez* are inapposite.

J.S.K. Enterprises, Inc. v. City of Lacey is also factually and legally dissimilar to the case at bar. In that case, this court held that a city ordinance which permitted massagists to administer massages only to customers of their own sex constituted discrimination on the basis of sex, prohibited by the equal protection clause of the fourteenth amendment to the United States Constitution, and also violated RCW 49.12.200, relating to the right of women to pursue any employment. We see no analogy between the right of women to administer massages to men and the question of whether the prohibition against same-sex marriages is unconstitutional. The right recognized in *J.S.K. Enterprises, Inc.* on the basis of principles applicable to employment discrimination has nothing to do with the question presented by appellants.

Appellants apparently argue, however, that notwithstanding the fact that the equal protection analysis applied in *Loving*, *Perez*, and *J.S.K. Enterprises, Inc.* may render those cases distinguishable from the case at bar, the absolute language of the ERA requires the conclusion that the prohibition against same- sex marriages is unconstitutional. In this context, appellants suggest that definition of marriage, as the legal union of one man and one woman, in and of itself, when applied to appellants, constitutes a violation of the ERA. Therefore, appellants contend, persons of the same sex must be presumed to have the constitutional right to marry one another in the absence of a countervailing interest or clear exception to the ERA.

* * * We do not believe that approval of the ERA by the people of this state reflects any intention upon their part to offer couples involved in same-sex relationships the protection of our marriage laws. A consideration of the basic purpose of the ERA makes it apparent why that amendment does not support appellants' claim of discrimination. The primary purpose of the ERA is to overcome discriminatory legal treatment as between men and women "on account of sex." The popular slogan, "Equal pay for equal work," particularly expresses the rejection of the notion that merely because a person is a woman, rather than a man, she is to be treated differently than a man with qualifications equal to her own.

Prior to adoption of the ERA, the proposition that women were to be accorded a position in the law inferior to that of men had a long history. Thus, in that context, the purpose of the ERA is to provide the legal protection, as between men and women, that apparently is missing from the state and federal Bills of Rights, and it is in light of that purpose that the language of the ERA must be construed. To accept the appellants' contention that the ERA must be interpreted to prohibit statutes which refuse to permit same-sex marriages would be to subvert the purpose for which the ERA was enacted by expanding its scope beyond that which was undoubtedly intended by the majority of the citizens of this state who voted for the amendment. * * *

In the instant case, it is apparent that the state's refusal to grant a license allowing the appellants to marry one another is not based upon appellants' status as males, but rather it is based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children. This is true even though married couples are not required to become parents and even though some couples are incapable of becoming parents and even though not all couples who produce children are married. These, however, are exceptional situations. The fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race. Further, it is apparent that no same-sex couple offers the possibility of the birth of children by their union. Thus the refusal of the state to authorize same-sex marriage results from such impossibility of reproduction rather than from an invidious discrimination "on account of sex." Therefore, the definition of marriage as the legal

union of one man and one woman is permissible as applied to appellants, notwithstanding the prohibition contained in the ERA, because it is founded upon the unique physical characteristics of the sexes and appellants are not being discriminated against because of their status as males per se. In short, we hold the ERA does not require the state to authorize same-sex marriage.

[The court also rejected appellants' arguments under the federal due process and equal protection clauses. The court first determined that "rational basis" scrutiny is all that such a classification must meet and, then, that this law passed the rational basis test. The court concluded with this quotation from *Baker v. Nelson*, 191 N.W.2d at 186:]

> The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.... This historic institution manifestly 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. The equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry. * * *

NOTE ON CONSTITUTIONAL ARGUMENTS ALLOWING THE STATE TO DENY SAME-SEX MARRIAGE

1. *Definitional Arguments.* As of 1993, not a single judge or state attorney general had expressed an opinion that same-sex marriage is required by any principle of law.[f] Their main argument against same-sex marriage has

f. A chronological array of judicial decisions rejecting same-sex couples' petition for equal marriage rights is as follows: *Baker v. Nelson*, 191 N.W.2d 185 (Minn.1971), appeal dismissed, 409 U.S. 810 (1972); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky.1973); *Singer v. Hara*, 522 P.2d 1187 (Wash.App.), review denied, 84 Wash. 2d 1008 (Wash. 1974); *Adams v. Howerton*, 486 F.Supp. 1119 (C.D.Cal. 1980), affirmed on other grounds, 673 F.2d 1036 (9th Cir.1982); *Jacobson v. Jacobson*, 314 N.W.2d 78 (N.D.1981); *Slayton v. State*, 633 S.W.2d 934 (Tex.App.1982); *De Santo v. Barnsley*, 476 A.2d 952 (Pa.Super.Ct.1984); *Cuevas v. Mills*, No. 86-3244 (D. Kan., October 27, 1986) (unpublished opinion); *In re Succession of Bacot*, 502 So.2d 1118 (La. App.), writ denied, 503 So.2d 466 (La.1987); *Gajovski v. Gajovski*, 610 N.E.2d 431 (Ohio App.1991); *VanDyck v. VanDyck*, 425 S.E.2d 853 (Ga.1993); *Callender v. Corbett*, No. 296666 (Ariz. Super. Ct., April 13, 1994) (unpublished opinion); *Dean v. District of Columbia*, 653 A.2d 307 (D.C.1995).

For negative responses from state attorneys general, see 190 Opinions of the Attorney General of Alabama 30 (1983); Opinions of the Attorney General of Arkansas (April 26, 1995); 1975 Opinions of the Attorney General of Colorado (1975); 1993 Opinions of the Attorney General of Idaho 11 (1993); 77 Opinions of the Attorney General of Kansas (Aug. 4, 1977); 1992 Opinions of the Attorney General of Louisiana 699(A) (1992); 1984 Opinions of the Attorney General of Maine 28 (1984); 1978 Opinions of the Attorney General of Mississippi 684 (July 10, 1978); 1977 Opinions of the Attorney General of Nebraska 170 (1977); 1976 Opinions of the Attorney General of South Carolina 423 (1976); 88 Opinions of the Attorney General of Tennessee 43 (1988); 1977–1978 Opinions of the Attorney General of Virginia 154 (1977).

been definitional: marriage is necessarily different-sex and therefore cannot include same-sex couples. Hence, any statute that talks of "marriage" can only contemplate different-sex couples, even if the statute is not gendered (i.e., does not use the specific terms "husband" and "wife"). Typical is the discussion in *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky.1973):

> 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. * * * [M]arriage has always been considered as the union of a man and a woman and we have been presented with no authority to the contrary. * * * It appears that appellants are prevented from marrying, not by the statutes of Kentucky or the refusal of the County 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.

This definitional approach naturally dispatches any statutory interpretation argument, since all the state marriage statutes (whether gendered or not) do use the term "marriage." Note that the Kentucky court relied on history and tradition to figure out what marriage is, definitionally. Other courts have also defined the essence of marriage more philosophically, as requiring procreation as one purpose. See *Baker v. Nelson*, 191 N.W.2d 185 (Minn.1971), appeal dismissed, 409 U.S. 810 (1972). Courts have also used the definitional argument as a way to reject constitutional challenges based upon the right to marriage recognized in *Loving*. By defining marriage as essentially different-sex, *Singer* was able to avoid the charge that the state was creating an invidious discrimination by denying licenses to same-sex couples.

What results when a post-operative male-to-female transsexual wants to marry a man? See the contradictory case law in Chapter 12, Section 2. How is that different from same-sex marriage? What about the case of a person with Klinefelter's syndrome (XXY chromosomes, rather than the male XY pattern or the female XX pattern)? See Chapter 2, Section 3(A) for a description of chromosomal variations and the determination of a person's sex.

2. *Functional Arguments.* The opponents of same-sex marriage have also developed functional justifications for this definitional barrier. Accordingly, the second type of oppositionist argument invokes community values, including the values of traditional morality. The federal court in *Adams v. Howerton*, 486 F.Supp. 1119, 1123 (C.D.Cal.1980), affirmed on other grounds, 673 F.2d 1036 (9th Cir.1982), made the definitional argument by linking it to traditions of Judeo–Christian morality:

> The definition of marriage, the rights and responsibilities implicit in that relationship, and the protections and preferences afforded to marriage, are now governed by the civil law. The English civil law took its attitudes and basic principles from canon law, which, in early times, was administered in the ecclesiastical courts. Canon law in both

> Judaism and Christianity could not possibly sanction any marriage between persons of the same sex because of the vehement condemnation in the scriptures of both religions of all homosexual relationships. Thus there has been for centuries a combination of scriptural and canonical teaching under which a "marriage" between persons of the same sex was unthinkable and, by definition, impossible.

Although this decision rested upon a suspiciously sectarian vision of morality, it could as easily have invoked general "family values," as some courts and commentators have done.[g]

3. *Pragmatic Arguments.* A milder argument against same-sex marriage appeals to pragmatism. The pragmatist unconstrained by formal definitions and uninterested in traditional morality might still be reluctant to allow same-sex marriages if such marriages would be impractical and disruptive. Judge Richard Posner's *Sex and Reason* (1991) presents a pragmatic case against same-sex marriage at this time. Recognizing same-sex relationships as marriage would be problematic, he suggests, because it would "be widely interpreted as placing a stamp of approval on homosexuality"; would carry an "information cost" in that the socially informative value of knowing someone is married would be somewhat reduced as the term is broadened; and would have "many collateral effects, simply because marriage is a status rich in entitlements, many of which were not designed with same-sex couples in mind." *Id.* at 311–13. The last point is the most important. If the state suddenly recognized same-sex marriage, employers would have to refigure fringe benefits for many of their newly married gay and lesbian employees; legislatures would become embroiled in a spate of controversies about which (if any) marriage entitlements they would deny to same-sex couples, and then litigation over the constitutionality of any new but more specific discriminations; and agencies would have to rethink their regulations and cost-benefit analyses in a number of areas. For a pragmatic response, see William N. Eskridge, Jr., "A Social Constructionist Critique of Posner's *Sex and Reason*," 102 *Yale L.J.* 333, 352–59 (1992).

Thomas E. Zablocki v. Roger C. Redhail, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978). The Supreme Court invalidated Wisconsin's law precluding the issuance of marriage licenses to people with outstanding (owed but unpaid) support obligations to children from a previous marriage. Justice Thurgood Marshall's opinion for the Court started with the *Loving* proposition that the "right to marry" is a fundamental due process right. "It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and familial relationships. As the facts of these cases illustrate, it would make little sense to recognize a right to privacy with respect

g. "The majority, therefore, may reasonably believe that legal recognition of same-sex marriage in the eyes of society and, by so doing, would impair the ability of opposite-sex marriage to advance the individual and community values that it has traditionally promoted." C. Sydney Buchanan, "Same-Sex Marriage: The Linchpin Issue," 10 *U. Dayton L. Rev.* 541, 567 (1985); see *id.* at 559–60 (state ought to be able to implement community moral standards by discouraging conduct inconsistent with those standards).

to other matters of family life and not with respect to the decision to enter into a relationship that is the foundation of the family in our society."

Justice Marshall then reasoned that any state discrimination in allocating the right to marry must be scrutinized strictly under the equal protection clause as well. "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." The Wisconsin statute flunked this stringent test. Although ensuring collection of support obligations owed one's children is an important state interest, the state has other, less constitutionally intrusive, ways of effectuating that interest.

Concurring only in the judgment, Justice Powell objected to the broad sweep of the opinion of the Court. (Five Justices joined Justice Marshall's opinion; three Justices concurred on the judgment; only Justice Rehnquist dissented.) He believed that federal law should not intrude on traditional state regulation of the marital relationship. "State regulation has included bans on incest, bigamy, and homosexuality, as well as various preconditions to marriage, such as blood tests. Likewise, a showing of fault on the part of one of the partners traditionally has been a prerequisite to the dissolution of an unsuccessful union. A 'compelling state purpose' inquiry would cast doubt on the network of restrictions that the States have fashioned to govern marriage and divorce."

William R. Turner v. Leonard Safley, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). A unanimous Court in an opinion by Justice Sandra Day O'Connor struck down a state regulation barring the ability of prisoners to marry. The Court held that the right to marry was implicated even in prison settings, where sex with outsiders is normally prohibited. "First, inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they will be fully consummated. Finally, marital status often is a precondition to the receipt of government benefits (*e.g.*, Social Security benefits), property rights (*e.g.*, tenancy by the entirety, inheritance rights), and other, less tangible benefits (*e.g.*, legitimation of children born out of wedlock). These incidents of marriage, like the religious and personal aspects of the marriage commitment, are unaffected by the fact of confinement or the pursuit of legitimate corrections goals."

Because of the prison setting, Justice O'Connor applied the Court's precedents requiring a "reasonable relationship" between a prison regulation and legitimate penological objectives. Another part of her opinion (joined only by five Justices) upheld prison surveillance of inmate mail, usually protected under the First Amendment. Unlike opening inmate mail,

preventing inmate marriages did not narrowly serve legitimate penological purposes, Justice O'Connor reasoned. The regulation was invalidated.

PROBLEM 9-2

SAME-SEX MARRIAGE IN THE DISTRICT OF COLUMBIA?

Joan Doe and Jane Roe are a lesbian couple residing in the District of Columbia. They desire to marry, but the District's Marriage License Bureau refuses to issue licenses to same-sex couples. In 1977, Doe and Roe come to you, a lawyer, to file a lawsuit seeking an injunction requiring the District to issue them a marriage license. Originally enacted by Congress in 1901, the District's Marriage Law is gender neutral, except for its consanguinity prohibitions: a man may not marry his sister etc.; a woman may not marry her brother etc. Also, the District's Divorce Law repeatedly refers to "husband" and "wife." What arguments would you make in light of the foregoing case law?

Consider the impact of two local statutes. The District's Human Rights Act, which is reprinted in Appendix 2, prohibits discrimination on the basis of sex and sexual orientation (as well as other categories). Is the denial of a marriage license to same-sex couples sex discrimination? Sexual orientation discrimination? Does the Human Rights Act's nondiscrimination duty apply to the District government? In 1982, the District of Columbia Council adopted the "Gender Rule of Construction Act," which provides: "Unless the Council of the District of Columbia specifically provides that this section shall be inapplicable to a particular act or section, all the words thereof importing 1 gender include and apply to the other gender as well." D.C. Code § 49–203.

For the real-life outcome, see *Dean v. District of Columbia*, 653 A.2d 307 (D.C.1995). For competing doctrinal analyses of *Loving/Zablocki/Turner*, compare William N. Eskridge, Jr., *The Case for Same–Sex Marriage* chs. 5–6 (1996), with Lynn D. Wardle, "A Critical Analysis of Constitutional Claims for Same–Sex Marriage," 1996 *Brigham Young L. Rev.* 1.

PART B. THE SAME-SEX MARRIAGE DEBATE

Ninia Baehr and Genora Dancel et al. v. John C. Lewin

Hawaii Supreme Court, 1993.
74 Haw. 530, 852 P.2d 44.

■ LEVINSON, JUDGE, in which MOON, CHIEF JUDGE, joins.

The plaintiffs-appellants Ninia Baehr, Genora Dancel, Tammy Rodrigues, Antoinette Pregil, Pat Lagon, and Joseph Melilio appeal the circuit court's order * * * granting the motion of the defendant-appellee John C. Lewin, in his official capacity as Director of the Department of Health (DOH), State of Hawaii, for judgment on the pleadings, resulting in the

dismissal of the plaintiffs' action with prejudice for failure to state a claim against Lewin upon which relief can be granted. * * *

[In 1991, the three plaintiff couples—Baehr/Dancel, Rodriguez/Pregil, and Lagon/Melilio—filed a lawsuit for declaratory judgment that Hawaii's Marriage Law, Hawaii Revised Statutes § 572–1, unconstitutionally denied same-sex couples the same marriage rights as different-sex couples. Plaintiffs further sought an injunction requiring the DOH to issue them marriage licenses. Plaintiffs' claims were based on the privacy and equal protection clauses of the Hawaii Constitution.]

* * * [A]rticle 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." * * *

When article I, section 6 of the Hawaii Constitution was being adopted, the 1978 Hawaii Constitutional Convention, acting as a committee of the whole, clearly articulated the rationale for its adoption:

> By amending the Constitution to include a separate and distinct privacy right, it is the intent of your Committee to insure that privacy is treated as a fundamental right for purposes of constitutional analysis.... This right is similar to the privacy right discussed in cases such as *Griswold, Eisenstadt, Roe v. Wade*, etc. * * * By inserting clear and specific language regarding this right into the [Hawaii] Constitution, your Committee intends to alleviate any possible confusion over the source of the right and the existence of it.

Comm. Whole Rep. No. 15, 1 Proceedings, at 1024. * * * We ultimately concluded in [*State v. Mueller*, 671 P.2d 1351 (1983)] that the federal cases cited by the Convention's committee of the whole should guide our construction of the intended scope of article I, section 6.

Accordingly, there is no doubt that, at a minimum, article I, section 6 of the Hawaii Constitution encompasses all of the fundamental rights expressly recognized as being subsumed within the privacy protections of the United States Constitution. In this connection, the United States Supreme Court has declared that "the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978). The issue in this case is, therefore, whether the "right to marry" protected by article I, section 6 of the Hawaii Constitution extends to same-sex couples. Because article I, section 6 was expressly derived from the general right to privacy under the United States Constitution and because there are no Hawaii cases that have delineated the fundamental right to marry, this court, as we did in *Mueller,* looks to federal cases for guidance.

The United States Supreme Court first characterized the right of marriage as fundamental in *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942). In *Skinner*, the right to marry was inextricably linked to the right of procreation. The dispute before the Court arose out of an Oklahoma statute that allowed the state to sterilize "habitual criminals" without their consent. In striking down the statute, the *Skinner* court

indicated that it was "dealing . . . with legislation which involve[d] *one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.*" *Id.* at 541 (emphasis added). Whether the Court viewed marriage and procreation as a single indivisible right, the least that can be said is that it was obviously contemplating unions between men and women when it ruled that the right to marry was fundamental. This is hardly surprising inasmuch as none of the United States sanctioned any other marriage configuration at the time.

The United States Supreme Court has set forth its most detailed discussion of the fundamental right to marry in *Zablocki*, which involved a Wisconsin statute that prohibited any resident of the state with minor children "not in his custody and which he is under an obligation to support" from obtaining a marriage license until the resident demonstrated to a court that he was in compliance with his child support obligations. The *Zablocki* court held that the statute burdened the fundamental right to marry; applying the "strict scrutiny" standard to the statute, the Court invalidated it as violative of the fourteenth amendment to the United States Constitution. In so doing, the *Zablocki* court delineated its view of the evolution of the federally recognized fundamental right of marriage as follows:

> Long ago, in *Maynard v. Hill*, 125 U.S. 190 (1888), the Court characterized marriage as "the most important relation in life," *id.* at 205, and as "the foundation of the family and of society, without which there would be neither civilization nor progress." *Id.* at 211. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court recognized that the right "to marry, establish a home and bring up children" is a central part of the liberty protected by the Due Process Clause, *id.* at 399, and in *Skinner* marriage was described as "fundamental to the very existence and survival of the race." 316 U.S., at 541.
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> . . . .
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> It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter into the relationship that is the foundation of the family in our society. The woman whom appellee desired to marry had a fundamental right to seek an abortion of their expected child, see *Roe v. Wade*, 410 U.S. 113 (1973), or to bring the child into life to suffer the myriad social, if not economic disabilities that the status of illegitimacy brings.... Surely, a decision to marry and raise the child in a traditional family setting must receive equivalent protection. And, if appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place.

[*Zablocki*, 434 U.S.] at 384–86. Implicit in the *Zablocki* court's link between the right to marry, on the one hand, and the fundamental rights of procreation, childbirth, adoption, and child rearing, on the other, is the assumption that one is simply the logical predicate of the others.

The foregoing case law demonstrates that the federal construct of the fundamental right to marry—subsumed within the right to privacy implicitly protected by the United States Constitution—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.)

Therefore, the precise question facing this court is whether we will extend the *present* boundaries of the fundamental right of marriage to include same-sex couples, or, put another way, whether we will hold that same-sex couples possess a fundamental right to marry. In effect, as the applicant couples frankly admit, we are being asked to recognize a new fundamental right. [Justice Levinson read his Court's prior privacy cases as expressing a reluctance to read Hawaii's privacy protection more expansively than the federal protection in *Zablocki*.]

* * * [W]e do not believe that a right to same-sex marriages 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. * * *

The applicant couples correctly contend that the DOH's refusal to allow them to marry on the basis that they are members of the same sex deprives them of access to a multiplicity of rights and benefits that are contingent upon that status. * * * [Those rights] include: (1) a variety of state income tax advantages, including deductions, credits, rates, exemptions, and estimates; (2) public assistance from and exemptions relating to the Department of Human Services; (3) control, division, acquisition, and disposition of community property; (4) rights relating to dower, curtesy, and inheritance; (5) rights to notice, protection, benefits, and inheritance under the Uniform Probate Code; (6) award of child custody and support payments in divorce proceedings; (7) the right to spousal support; (8) the right to enter into premarital agreements; (9) the right to change of name; (10) the right to file a nonsupport action; (11) post-divorce rights relating to support and property division; (12) the benefit of the spousal privilege and confidential marital communications; (13) the benefit of the exemption of real property from attachment or execution; and (14) the right to bring a wrongful death action. For present purposes, it is not disputed that the applicant would be entitled to all of these marital rights and benefits, but for the fact that they are denied access to the state-conferred legal status of marriage. * * *

* * * Article I, section 5 of the Hawaii Constitution provides in relevant part that "[n]o person shall ... be denied the equal protection of the laws, *nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of* race, religion, *sex*, or ancestry." (Emphasis added.) Thus, by its plain language, the Hawaii Constitution prohibits state-sanctioned discrimination against any person in the exercise of his or her civil rights on the basis of sex.

"The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free [people]." *Loving*, 388 U.S. at 12. So "fundamental" does the United States Supreme Court consider the institution of marriage that it has deemed marriage to be "one of the 'basic civil rights of [men and women].'" *Id.* (quoting *Skinner*, 316 U.S. at 541).

[Justice Levinson found that the Hawaii Marriage Law, and Lewin acting under it, discriminated against the plaintiff couples in the exercise of this important "civil right" because of their "sex." That is, a female/female couple would be denied a marriage license simply because of the sex of one of the partners—if she were a man, the license would be routinely granted.]

* * * Lewin contends that "the fact that homosexual [sic—actually, same-sex] partners cannot form a state-licensed marriage is not the product of impermissible discrimination" implicating equal protection considerations, but rather "a function of their biologic inability as a couple to satisfy the definition of the status to which they ascribe." Lewin's answering brief at 21. Put differently, Lewin proposes that "the right of persons of the same sex to marry one another does not exist because marriage, by definition and usage, means a special relationship between a man and a woman." *Id.* at 7. We believe Lewin's argument to be circular and unpersuasive. * * *

The facts in *Loving* and the respective reasoning of the Virginia courts, on the one hand, and the United States Supreme Court, on the other, * * * unmask the tautological and circular nature of Lewin's argument that HRS § 572–1 does not implicate article I, section 5 of the Hawaii Constitution because same-sex marriage is an innate impossibility. Analogously to Lewin's argument * * *, the Virginia courts declared that interracial marriage simply could not exist because the Deity had deemed such a union intrinsically unnatural, and, in effect, because it had theretofore never been the "custom" of the state to recognize mixed marriages, marriage "always" having been construed to presuppose a different configuration. With all due respect to the Virginia courts of a bygone era, we do not believe that trial judges are the ultimate authorities on the subject of Divine Will, and, as *Loving* amply demonstrates, constitutional law may mandate, like it or not, that customs change with an evolving social order. * * *

* * * 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. It therefore follows, and we so hold, that (1) [the Hawaii Marriage Law] is presumed to be unconstitutional (2) unless Lewin ... 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.

[Justice Levinson then directed a remand to the circuit court for a hearing to determine whether Lewin and the State could overcome the presumption that the Marriage Law is unconstitutional, by showing that its sex discrimination furthers a compelling state interest and is narrowly drawn. He concluded his opinion with some responses to dissenting Judge Heen.]

We understand that Judge Heen disagrees with our view in this regard based on his belief that "HRS § 572–1 treats everyone alike and applies equally to both sexes[,]" with the result that "neither sex is being *granted* a right or benefit the other does not have, and neither sex is being *denied* a right or benefit that the other has." The rationale underlying Judge Heen's belief, however, was expressly considered and rejected in *Loving*:

> Thus, the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications do not constitute an invidious discrimination based upon race.... [W]e reject the notion that the mere "equal application" of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscriptions of all invidious discriminations.... In the case at bar, ... we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.

388 U.S. at 8. Substitution of "sex" for "race" and article I, section 5 for the fourteenth amendment yields the precise case before us together with the conclusion we have reached. * * *

■ BURNS, INTERMEDIATE COURT OF APPEALS CHIEF JUDGE [specially appointed to hear this case], concurs in the result. * * *

* * * In my view, the Hawaii Constitution's reference to "sex" includes all aspects of each person's "sex" that are "biologically fated." The decision whether a person when born will be a male or female is "biologically fated." Thus, the word "sex" includes the male-female difference. Is there another aspect of a person's "sex" that is "biologically fated"?

[Judge Burns then quoted from three accounts in the popular press as to the basis for a person's sexual orientation. Two of the accounts suggest the hormonal and genetic basis for a homosexual orientation. A third account disputed that claim.]

If heterosexuality, homosexuality, bisexuality, and asexuality are "biologically fated[,]" then the word "sex" also includes these differences. Therefore, the questions whether heterosexuality, homosexuality, bisexuality, and asexuality are "biologically fated" are relevant questions of fact which must be determined before the issue presented in this case can be

answered. If the answers are yes, then each person's "sex" includes both the "biologically fated" male-female difference and the "biologically fated" sexual orientation difference, and the Hawaii Constitution probably bars the State from discriminating against the sexual orientation difference by permitting opposite-sex Hawaii Civil Law Marriages and not permitting same-sex Hawaii Civil Law Marriages. If the answers are no, then each person's "sex" does not include the sexual orientation difference, and the Hawaii Constitution may permit the State to encourage heterosexuality and discourage homosexuality, bisexuality, and asexuality by permitting opposite-sex Hawaii Civil Law Marriages and not permitting same-sex Hawaii Civil Law Marriages.

■ HEEN, INTERMEDIATE COURT OF APPEALS JUDGE [also specially appointed to hear this case], dissenting.

[Judge Heen distinguished *Loving* and *Zablocki*, two right to marry cases on which the plurality opinion relied. Neither case involved a same-sex marriage. Instead, he urged the court to follow other state courts that had considered and rejected a right to same-sex marriage, particularly *Singer*.]

HRS § 572–1 treats everyone alike and applies equally to both sexes. The effect of the statute is to prohibit same sex marriages on the part of professed or non-professed heterosexuals, homosexuals, bisexuals, or asexuals, and does not effect an invidious discrimination. * * *

HRS § 572–1 does not establish a "suspect" classification based on gender because all males and females are treated alike. A male cannot obtain a license to marry another male, and a female cannot obtain a license to marry another female. Neither sex is being *granted* a right or benefit the other does not have, and neither sex is being *denied* a right or benefit that the other has. * * *

In my view, the statute's classification is clearly designed to promote the legislative purpose of fostering and protecting the propagation of the human race through heterosexual marriage and bears a reasonable relationship to that purpose. I find nothing unconstitutional in that.

■ [On motion for rehearing, the court by a vote of four to one denied the state's request to reconsider the foregoing decision. Judge Heen dissented and Judge Burns concurred, as they had earlier. Newly appointed Justice Paula Nakayama joined Chief Justice Moon and Justice Levinson in voting to deny the rehearing.]

NOTES ON THE HAWAII SAME–SEX MARRIAGE CASE AND INTERSTATE RECOGNITION OF SAME–SEX MARRIAGES

1. *The Miscegenation Analogy and the Court's Sex Discrimination Argument.* Note the three ways in which *Loving* is relevant to Justice Levinson's opinion in *Baehr*. Its due process fundamental right to marry holding, the basis for *Zablocki* and *Turner*, was found insufficient to establish a right for same-sex couples to marry. But *Loving*'s equal protection holding that

race-based classifications in marriage statutes are suspect was extended by the Hawaii justices to form the analytical basis for a claim that sex-based classifications in marriage statutes are suspect under the state ERA. How can Justice Levinson reject the *Zablocki* privacy argument on tradition-based grounds, while accepting the *Loving* argument against tradition-based attack? Also, is there something of a "transvestic" quality to the sex discrimination argument? Judge Heen suggests that it dresses up gay rights in feminist garb.

Sylvia Law, "Homosexuality and the Social Meaning of Gender," 1988 *Wis. L. Rev.* 187, and Andrew Koppelman, "Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination," 69 *NYU L. Rev.* 197 (1994) (excerpted in Chapter 1, Section 3[B][3]), have suggested a similar argument that could support *Baehr*: the prohibition against same-sex marriage is a gender *classification*, because the license is denied to a female-female couple simply because of their gender (a female-male couple would be treated differently), and it contributes to the subordination of a gender *class* (women). Hence, not only should heightened scrutiny be applicable (and lethal) to the discrimination, but the fit with *Loving* becomes quite snug. Should it be extended to the federal equal protection clause, as interpreted in the VMI case (Chapter 1, Section 3[A])? For a critical historical examination of the Law–Koppelman argument, see William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* ch. 5 (forthcoming 1998). For a constructionist analysis of the gendered structure of marriage, see Nan D. Hunter, "Marriage, Law and Gender: A Feminist Inquiry," 1 *Law & Sexuality* 9 (1991).

Note how Justice Levinson deployed *Loving* to rebut the *Singer* argument that same-sex couples are being discriminated against only because of the "nature" of marriage—this was exactly the kind of argument that had been the basis of statutes prohibiting different-race marriage.[h] For example, the Georgia Supreme Court upheld its statute in part because "amalgamation of the races is . . . unnatural," yielding offspring who are "generally sickly, effeminate, and . . . inferior in physical development and strength, to the full-blood of either race" and in part because

> equality [of the races] does not in fact exist and never can. The God of nature made it otherwise, and no human law can produce it, no human tribunal can enforce it. There are gradations and classes throughout the universe. From the tallest arch angel in Heaven, down to the meanest reptile on earth, moral and social inequalities exist, and must continue to exist through all eternity.

Scott v. Georgia, 39 Ga. 321, 324 (1869). The Tennessee Supreme Court emphasized the necessity of such laws "[t]o prevent violence and bloodshed which would arise from such cohabitation, distasteful to our people, and unfit to produce the human race in any of the types in which it was

h. See Eva Saks, "Representing Miscegenation Law," 8 *Raritan* (1988), and Paul Lombardo, "Miscegenation, Eugenics, and Racism: Historical Footnotes to *Loving v. Virginia*," 21 *U.C. Davis L. Rev.* 421 (1988).

created." *Lonas v. State*, 50 Tenn. 287, 299–300 (1871). What is the legal relevance of this rhetorical deployment of *Loving*?

2. *Is There a Rational or Substantial Justification for Denying Same–Sex Couples Marriage Licenses?* The effect of *Baehr* was to remand for trial to determine whether the state can justify its discrimination against same-sex couples. What justifications could Hawaii offer for this policy? Hawaii advanced various state interests, such as encouraging procreation and protecting state financial resources and the freedom of religious groups who are prejudiced against homosexuals,[i] but emphasized and presented evidence on only one interest when the case went to trial in September 1996: protecting children. The state argued that children raised by same-sex spouses would lose intimate contact with a parent of one gender and never observe at close hand the modeling of male-female relationships. It identified encouragement of children being raised by male-female couples as a compelling state interest. All of the evidence introduced at trial, by both sides, addressed the impact on children of lesbian and gay family settings. The trial judge found this evidence insufficient to justify the sex discrimination and in December 1996 invalidated the state's bar to same-sex marriages. As this book goes to press, both the state's appeal and a state constitutional convention are pending.

3. *Recognition of Hawaii Marriages in Other States.* Assume that Hawaii does ultimately recognize same-sex marriages. Article IV, § 1 of the U.S. Constitution requires: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." Does this full faith and credit clause require Kansas to recognize the same-sex marriage of a Hawaii couple that later moves to Kansas? Like a number of other states, Kansas has enacted a statute precluding its courts from recognizing Hawaii same-sex marriages in Kansas. Is the Kansas statute constitutional, or does it violate the full faith and credit clause?

The Supreme Court has held that divorces are judgments that must be recognized in all other states, unless the state of divorce lacked jurisdiction over the parties or subject matter. *Williams v. North Carolina*, 317 U.S. 287 (1942); *Williams v. North Carolina*, 325 U.S. 226 (1945). Marriage, on the other hand, has never been recognized as a "judgment," but is probably an "act" or "record" for full faith and credit purposes. Common law

i. Hawaii's tentative responses as of 1995 are noted and answered in Evan Wolfson, "Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men, and the Intra–Community Critique," 21 *NYU J.L. & Soc. Change* 567 (1995). See also Jennifer Gerarda Brown, "Competitive Federalism and the Legislative Incentives to Recognize Same–Sex Marriages," 68 *S.Cal.L.Rev.* 745 (1995). Commentators have attacked state restrictions on same-sex couples' right to marry "because states cannot articulate legitimate interests that are rationally related to the restrictions they impose." "Developments in the Law: Sexual Orientation & the Law," 102 *Harv. Law Rev.* 1508, 1609 (1989); see Alissa Friedman, "The Necessity for State Recognition of Same–Sex Marriage: Constitutional Requirements and Evolving Notions of the Family," 3 *Berkeley Women's L.J.* 134, 157–160 (1988); Jed Rubenfield, "The Right to Privacy," 102 *Harv. Law Rev.* 737, 800 (1989); Claudia Lewis, "From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage," 97 *Yale L.J.* 1783 (1988) (student note).

marriages valid under the law of the partners' domicile are recognized in other states. *E.g.*, *Thomas v. Sullivan*, 922 F.2d 132, 134 (2d Cir.1990); *Parish v. Minvielle*, 217 So.2d 684, 688 (La.Ct.App.1969). Some states recognize "child marriages" if valid in the state of the partners' domicile (states have varying ages of consent). *E.g.*, *Wilkins v. Zelichowski*, 129 A.2d 459 (N.J.Super.1957). It is not clear how much these decisions were inspired by full faith and credit considerations.

Eleven states and D.C. allow first cousins to marry, which is considered incest elsewhere. Some cases recognize "incestuous" first-cousin marriages if valid in the state of the partners' domicile. *E.g.*, *In re Miller's Estate*, 214 N.W. 428 (Mich.1927). Other cases, however, refuse to recognize out-of-state first-cousin marriages, though the only cases we have found are ones where domiciliaries of one state go to another state in order to evade the no-first-cousin rule of their home state. *E.g.*, *In re Mortenson's Estate*, 316 P.2d 1106 (Ariz.1957). Should there be a "public policy exception" to full faith and credit obligations? For commentary on this issue, see Joseph W. Hovermill, "A Conflict of Law and Morals: The Choice of Law Implications of Hawaii's Recognition of Same–Sex Marriages," 53 *Md.L.Rev.* 450 (1994); Thomas M. Keane, "Aloha, Marriage? Constitutional and Choice of Law Arguments for Recognition of Same–Sex Marriages," 47 *Stan.L.Rev.* 499 (1995) (student note).

PROBLEM 9–3

THE DEFENSE OF MARRIAGE ACT

Responding to the possibility of same-sex marriages in Hawaii, Congress passed and the President signed the "Defense of Marriage Act" (DOMA) in 1996. Section 1 of the bill forbids any federal recognition of same-sex marriages for purposes such as income tax or Social Security. Section 2 of the bill relieves other states from giving full faith and credit to "any public act, record, or judicial proceeding * * * respecting a relationship between persons of the same sex." Assume that Kansas, our example above, would be prohibited by the full faith and credit clause from refusing to recognize a same-sex marriage entered into by Hawaii domiciliaries (hence, ignore the issue of evasion). DOMA would be taking away constitutional rights under this assumption.

Can Congress derogate from rights created in the Constitution? Usually not, but the sponsors of the bill point to the second sentence of the full faith and credit clause: "And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, *and the Effect thereof*." (Our emphasis.) Does Congress' authority to "prescribe * * * the Effect" of state marriages mean that it can take away constitutional rights? Section 5 of the Fourteenth Amendment gives Congress "power to enforce, by appropriate legislation, the provisions" of the amendment. Does this section permit Congress to take away constitutional rights? Most Americans dislike different-race marriages, according to recent polls. Can Congress adopt a statute which deprives different-race