The State Marriage Cases: Implications for Hawaii's Marriage Equality Debate in the Post-Romer and Lawrence Era

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"You are a human being. You have rights inherent in that reality. You have dignity and worth that exist prior to law."1

I. INTRODUCTION

In four paragraphs, or slightly fewer than one thousand words, the Hawai‘i Supreme Court effectively ended Hawai‘i’s marriage equality debate in 1999.2 But now is a new civil rights era,3 and nationwide, citizens, courts, and legislatures are debating the civil rights issue of our time: marriage equality for gays and lesbians.4

While some would say the debate is over in Hawai‘i, this article urges a re-examination of the issue in light of four recent state supreme court decisions,5


3 See, e.g., Matthew B. Stannard, Obama Will End ‘Don’t Ask’ Rule, Spokesman Says, SAN FRANCISCO CHRONICLE, Jan. 14, 2009, at A1, available at 2009 WLNR 708031 (noting that Barack Obama, the United States’ first African-American President, has pledged to end the U.S. military policy prohibiting openly homosexual soldiers from serving, known as the “Don’t Ask, Don’t Tell” policy); Tennessee GOP: As President, Obama to Repeal Defense of Marriage Act, US FED. NEWS, Feb. 29, 2008, available at 2008 WLNR 8879023 (reporting that President Obama has also said that he supports repealing the federal Defense of Marriage Act).


5 In re Marriage Cases, 183 P.3d 384 (Cal. 2008); Kerrigan v. Comm’r of Pub. Health, 957
recognizing marriage equality for gay persons, and two United States Supreme Court cases, holding that animosity or moral disapproval of homosexuality are not legitimate governmental interests.\(^6\)

The four state marriage equality cases provide promising new arguments for state constitutional claims under the Hawai‘i Constitution’s Equal Protection, privacy, and Establishment Clauses. A federal constitutional question could also be raised based on the two Supreme Court decisions, Romer v. Evans,\(^7\) and Lawrence v. Texas.\(^8\) These six cases combine to seriously undermine the validity of the continued denial of marriage equality to gay persons in Hawai‘i.

Hawai‘i’s same-sex marriage ban has been in effect since the 1998 ratification of a constitutional amendment that specifically targeted gay persons by denying them the opportunity to marry the partner of their choice.\(^9\) The amendment does not preclude gay persons from marrying; rather it precludes them from marrying a person of the same sex, much like the discriminatory statute at issue in Loving v. Virginia.\(^10\)

Hawai‘i’s marriage amendment granted the legislature the power to define marriage as a union between a man and a woman.\(^11\) The then-existing statute embodied the discriminatory, heterosexist definition,\(^12\) and therefore there is currently no marriage equality in Hawai‘i.

However, nothing in the 1998 marriage amendment precludes the Hawai‘i State Legislature from reversing course, agreeing with Massachusetts, Vermont, Iowa, and Connecticut, and finding that denying marriage equality to gay and lesbian couples violates their privacy, due process, and equal protection rights.

This article suggests that it is time to re-visit the same-sex marriage question in Hawai‘i because the 1998 amendment was passed without consideration of the important legal and social issues recently considered in the California, Massachusetts, Iowa, and Connecticut decisions.\(^13\) Additionally, the Hawai‘i

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\(^7\) Romer, 517 U.S. 620. See infra Part III for a discussion of how Romer impacts gay marriage in Hawai‘i.

\(^8\) Lawrence, 539 U.S. 558. See infra Part III for a discussion of how Lawrence impacts gay marriage in Hawai‘i.

\(^9\) Haw. Const. art. I, § 23 (declaring “[t]he legislature shall have the power to reserve marriage to opposite-sex couples”).

\(^10\) 388 U.S. 1 (1967) (holding that a Virginia statute prohibiting interracial marriage violated the Equal Protection Clause of the Fourteenth Amendment).


\(^12\) Haw. Rev. Stat. § 572-1 (2006) (declaring that a valid marriage contract “shall be only between a man and a woman”).

\(^13\) See, e.g., Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407, 418 (Conn. 2008) (considering historical oppression against gay persons as part of the suspect classification
amendment was ratified prior to the Supreme Court’s landmark decision in Lawrence v. Texas,\textsuperscript{14} which decriminalized consensual homosexual sex and warned against laws that demean gay persons’ lives.\textsuperscript{15}

Section II discusses the historical background of Hawai’i’s marriage amendment. Section III discusses a renewed marriage equality debate in the post-Romer and Lawrence era. Section IV discusses the four state marriage equality cases in detail, highlighting the commonalities, legal theories, and relevance for a renewed challenge to the same-sex marriage ban in Hawai’i. Section V concludes that the state marriage cases seriously threaten the legitimacy of Hawai’i’s continued denial of gay person’s civil rights in marriage.

II. HISTORICAL BACKGROUND OF HAWAI’I’S MARRIAGE AMENDMENT

In 1993, the Hawai’i Supreme Court in Baehr v. Lewin,\textsuperscript{16} held that denying marriage licenses to same-sex couples violated the Equal Protection Clause of Hawai’i’s Constitution\textsuperscript{17} because the practice discriminated on the basis of sex.\textsuperscript{18} Sex is a suspect classification in Hawai’i,\textsuperscript{19} and therefore, the court remanded the case to determine if the State could meet its burden under the strict scrutiny standard.\textsuperscript{20} Although the court remanded for application of equal protection doctrine, the plaintiffs’ privacy claim failed outright because the court declined to hold that Hawai’i’s citizens have a fundamental right to same-sex marriage under the Hawai’i Constitution’s\textsuperscript{21} privacy provision.\textsuperscript{22}

The Baehr decision generated a contentious policy debate about how marriage should be defined in Hawai’i.\textsuperscript{23} The case also sparked national policy determination); Varnum v. Brien, No. 07-1499, 2009 WL 874044, at *28 (Iowa Apr. 3, 2009) (considering establishment clause principles and legitimacy of religious opposition to gay marriage as a state interest).

\textsuperscript{14} 539 U.S. 558 (2003).

\textsuperscript{15} Id. at 575.


\textsuperscript{17} HAW. CONST. art. I, § 5.

\textsuperscript{18} Baehr, 74 Haw. at 561, 852 P.2d at 59.


\textsuperscript{20} See Baehr, 74 Haw. at 582, 852 P.2d at 68. In Equal Protection jurisprudence, the strict scrutiny standard requires that practices and policies be “narrowly tailored measures that further compelling governmental interests.” Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (2000).

\textsuperscript{21} See HAW. CONST. art. I, § 6.

\textsuperscript{22} Baehr, 74 Haw. at 550, 852 P.2d at 55.

debate because of concerns that the federal Constitution’s Full Faith and Credit clause would require other states to recognize same-sex marriages performed in Hawai‘i. Those opposed to granting same-sex marriage quickly mobilized to promote a constitutional amendment prohibiting same sex marriage.

The proponents of the amendment tended to be religious leaders, primarily belonging to the Catholic and Mormon faiths, who worked through activist organizations. The Church of Jesus Christ of Latter-day Saints (Mormon Church) spent an estimated $600,000 to encourage ratification of the amendment. Religious groups were involved in the debate early, and given great deference by the legislature.

After the Baehr decision, the legislature created a “Commission on Homosexuality and the Law” to study the ways in which Hawai‘i statutes impact gay persons. The commission was comprised of eleven seats, four of which were reserved for religious leaders in the Catholic and Mormon faiths. A federal district court decision later invalidated these appointments as a violation of the Establishment Clause of the First Amendment.

Yet even after the religious representatives were removed from the commission, some religious leaders continued the rancorous debate, calling homosexuality a “moral infection” that “pollutes the flesh.” Gay parents who sought protection for their families and children were cast as “promoters of a moral aberration” whose goal was to destroy the traditional family.

By 1998 the marriage equality debate was over. By a two-to-one margin, Hawai‘i voted to amend the state constitution to effectively define marriage as a union between a man and a woman. In light of this amendment, the Hawai‘i

24 U.S. CONST. art. IV, § 1 (“Full faith and credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”).
25 See Coolidge, supra note 23, at 28 (noting that “debate over the possible passage of a Marriage Amendment began almost immediately” after the court issued the plurality opinion in Baehr).
26 See id. at 34 (documenting the heavy involvement of the Mormon and Catholic Churches in the marriage amendment debate).
27 Id. at 101.
28 Id. at 31 n.44 (noting that of the eleven seats on the legislature-appointed committee to study homosexuality and the law, four seats were mandated to be filled by Mormon and Catholic leaders, and two seats were to be filled by the Quaker-established American Friends Service Committee).
30 See Coolidge, supra note 23, at 31 n.44.
33 Id.
34 HAW. CONST. art. I, § 23 (declaring “[t]he legislature shall have the power to reserve
Supreme Court issued a summary disposition order in the then-pending, *Baehr v. Miike*, holding that the recent marriage amendment took the statute “out of the ambit of the Equal Protection Clause of the Hawai‘i Constitution, at least insofar as the statute, both on its face and as applied, purported to limit access to the marital status to opposite-sex couples.”

The *Baehr* summary disposition order did not satisfactorily address any equal protection or due process issues with the amendment, or employ any other statutory interpretation methods available to the court. The court held that the petitioners’ “narrow” claims were now moot and refused to address any due process or privacy claims.

However, the court offered hope for a new challenge. In a footnote, the court acknowledged that Hawai‘i’s constitutional convention of 1978 intended for the article prohibiting sex discrimination to also prohibit discrimination on the basis of sexual orientation. It is unclear whether this case has any precedential value because the summary disposition order is an unpublished opinion.

To date, no new challenge to Hawai‘i’s same-sex marriage ban has been brought, but a judicial solution is not required. Legislative action would suffice because the marriage amendment reserves the power to define marriage to the legislature.

Marriage in Hawai‘i is currently defined as a union between a man and a woman. However, nothing in the 1998 marriage amendment precludes the legislature from enacting a more inclusive statute, one that reflects the evolving trend of recognizing the inherent legitimacy of same-sex couples’ relationships and their right to define those relationships as any opposite sex couple would.
The legislature now has the opportunity to correct this mistake by updating Hawai‘i’s marriage statute to a more inclusive definition that respects gay persons’ privacy, due process, and equal protection rights. A legislative response is not the only solution, however. The next section addresses how a federal constitutional claim may prevail in light of Supreme Court precedent supporting the notion of ending discrimination against gay persons.

III. THE ROMER AND LAWRENCE ERA

Two Supreme Court decisions, *Lawrence v. Texas* and *Romer v. Evans*, ushered in a new era for gay persons’ struggle for equality. These two decisions legitimize equal protection claims calling for equal treatment of gay persons. In these cases, the Court invalidated legislation motivated out of animus toward and moral disapproval of gay persons.

A. Lawrence v. Texas: Moral Disapproval of Gay Persons is not a Legitimate State Interest

*Lawrence* is critically important to the debate because it shows the evolution in the Supreme Court’s jurisprudence as well as the increasing societal acceptance of gay persons. In *Lawrence*, the Court struck down a Texas statute that punished homosexual, but not heterosexual, sodomy under the Due Process Clause of the Fourteenth Amendment.

In the 6-3 decision, the Court held that the homosexual sodomy laws violate gay persons’ liberty interests because “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,” and more importantly, that “[t]he State cannot demean [gay persons’] existence or control their destiny by making their private sexual conduct a crime.”

*Lawrence* is essential to the marriage equality debate because prior to the decision, the criminalization of gay persons’ intimate sexual conduct was a
barrier to equal protection claims, and was used to justify legalized discrimination against gay persons in many spheres of life. While all four state marriage cases rely heavily upon Lawrence, Hawai‘i has never questioned whether continued reprobation of same-sex marriage is legally sound in the wake of Lawrence.

In Lawrence, the Court applied rational basis review and concluded that “moral disapproval” of homosexuals is not a legitimate state interest. This conclusion is critically important in shifting perceptions about gay marriage. Indeed, even Justice Scalia’s dissent, which analogized consensual homosexual sex to bestiality and incest, acknowledged that the ruling in Lawrence “leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples.”

Justice Scalia went on to write that under the majority’s reasoning, the state’s interest in “preserving the traditional institution of marriage” could be re-cast as a “kinder way of describing the state’s moral disapproval of same-sex couples.” Justice Scalia’s prediction came to fruition as all four state marriage decisions relied upon Lawrence in holding that excluding gay persons from civil marriage is unconstitutional.

51 See Romer, 517 U.S. at 641 (Scalia, J., dissenting) (relying on pre-Lawrence precedent, Bowers v. Hardwick, 478 U.S. 186 (1986), and reasoning “[i]f it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely disfavoring homosexual conduct”).

52 See Lawrence, 539 U.S. at 582 (noting that Texas admitted its sodomy law “legally sanctions discrimination against homosexuals in a variety of ways unrelated to the criminal law, including in the areas of employment, family issues, and housing” (quoting State v. Morales, 826 S.W.2d 201, 203 (Tex. App. 1992), rev’d, 869 S.W.2d 941 (Tex. 1994)) (internal quotation marks and brackets omitted)); Lofton v. Sec’y of the Dep’t of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004) (upholding a Florida statute prohibiting gay parents from adopting).

53 Lawrence, 539 U.S. at 582.

54 Id. at 599 (Scalia, J., dissenting).

55 Id. at 601.

56 Id.

57 See, e.g., Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407, 467 (Conn. 2008) (holding that “[t]o a very substantial degree, Lawrence undermines the validity of federal circuit court cases that have held that gay persons are not entitled to heightened judicial protection”); In re Marriage Cases, 183 P.3d 384, 451 (Cal. 2008) (citing Lawrence and noting that “prevailing societal views and official policies” can often “mask an unfairness and inequality that frequently is not recognized or appreciated by those not directly harmed by those practices or traditions”); Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (broadening the notion of marriage equality and reiterating the proposition that “[o]ur obligation is to define the liberty of all, not to mandate our own moral code” (quoting Lawrence, 539 U.S. at 570)) (internal quotation marks omitted).
B. Romer v. Evans: *Animus Toward Gay Persons is Not a Legitimate State Interest*

*Romer*, considered alongside *Lawrence*, is a critical ingredient in a renewed marriage equality debate in Hawai‘i. Hawai‘i’s Supreme Court decided its same-sex marriage case on state constitutional claims, and a sex discrimination theory, but a renewed challenged would likely invoke *Romer*’s proscription against laws based on animus.

In *Romer*, the Supreme Court struck down a Colorado constitutional amendment that eviscerated all protections for gay persons against discriminatory practices. The Court found that the amendment “inflicts on [gay persons] immediate, continuing, and real injuries.” The Court reasoned that the purported state interest of “conserving resources to fight discrimination against other groups” and protecting “the liberties of landlords or employers who have personal or religious objections to homosexuality” were not legitimate state interests.

The Court held that the amendment violated the Equal Protection Clause and concluded that “laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.” Such a prohibition against animus-based laws applies here in Hawai‘i as well.

In Hawai‘i, opposition toward gay marriage and civil unions appears primarily to come from religious groups. For example, one of two main rallies against the 2009 civil union bill was organized by religious leaders and named “God’s ‘Ohana Day.”

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60 Id. at 624.
61 Id. at 635.
62 Id.
63 Id. at 634 (“If the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” (quoting U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973)) (internal quotation marks omitted)).
64 See Coolidge, *supra* note 23, at 31 n.44 (documenting religious institutions’ involvement in passing the 1998 marriage amendment); Derrick DePledge, *Colorado-Based Ministry Gave $20K for Ad Against Hawaii Same-Sex Union Legislation, HONOLULU ADVERTISER*, Apr. 5, 2009, *available at* http://www.honoluluadvertiser.com/article/20090405/NEWS02/904050363 (reporting that Focus on the Family, a conservative Christian group, gave $20,000 to defeat Hawai‘i’s 2009 proposed civil union bill and noting that the donation was part of a $50,000 fundraising campaign directed at Hawai‘i).
the failure of the court and legislature to guarantee gay persons’ civil rights, then activists will have a new tool in their arsenal because Romer and the Iowa case, Varnum v. Brien, counsel that accommodating homophobic religious sentiment is not a legitimate state interest.66

The Hawai‘i Supreme Court has never entertained a direct challenge to the 1998 constitutional amendment, and Romer may have implications for such a challenge because the Hawai‘i amendment could be characterized as motivated out of animus toward gay persons. For example, The Foundation for a Christian Civilization purchased a full-page advertisement in the Honolulu Advertiser two days before the election, urging Hawai‘i voters to “Defend God’s Law and the American Family.”67 The advertisement went on to quote various religious leaders suggesting that gay persons should be punished for their conduct,68 that homosexuality “cri[e]s out to Heaven for vengeance,” and calling the country’s increasing egalitarianism and tolerance for differences a “descent to depravity.”69

Regardless of whether a new challenge based on Romer and Lawrence would be successful, four recent state supreme court cases have created a new jurisprudence of equality, and have contributed immensely to the dialogue about civil rights for gay persons.

IV. THE STATE MARRIAGE CASES

This section discusses four state supreme court decisions in Connecticut, California, Massachusetts, and Iowa70 and their implications for renewing the marriage equality debate in Hawai‘i. One commonality among these four cases is that all four courts recognized the previous litigative advances gay persons had made on other civil rights fronts, such as adoption and employment.71 Furthermore, these advances required the inexorable conclusion that current state social policies did not support the continued ban on same-sex marriage, because it was paradoxical to protect gay persons in some state policies and relegate them to second class citizens in others.72

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68 Id.
69 Id.
71 See, e.g., Goodridge, 798 N.E.2d at 967.
72 See, e.g., id.; MASS. GEN. LAWS ch. 151B (LEXIS through 2008 legislation) (employment, housing, credit, services); MASS. GEN. LAWS ch. 265, § 39 (LEXIS through 2008 legislation)
In addition, three of the decisions documented the historical changes in marriage, including the shift away from the procreative purpose of marriage. All four cases relied upon Romer's condemnation of animus and Lawrence's more expansive definition of liberty, though each case was decided on state constitutional grounds. Perhaps most importantly, all four cases documented the history of invidious discrimination gay persons have faced.

The Connecticut decision was especially thorough, documenting the history of discrimination. The Connecticut opinion drew heavily on the California and Massachusetts cases, and because it aptly encapsulates the discourse, that case will be discussed in depth. Similarities and differences among the four cases will also be highlighted.

A. Connecticut: Kerrigan v. Commissioner of Public Health

Connecticut is the second-most recent state to embrace a more inclusive civil marriage policy by judicial opinion. The Connecticut Supreme Court held that excluding gay persons from civil marriage is a violation of Connecticut’s equal protection clause and concluded that:

In light of the history of pernicious discrimination faced by gay men and lesbians, and because the institution of marriage carries with it a status and significance that the newly created classification of civil unions does not embody, the segregation of heterosexual and homosexual couples into separate institutions constitutes a cognizable harm.

The Connecticut Supreme Court considered three primary issues related to same sex marriage: (1) whether the separate institutions for homosexual and heterosexual couples discriminates on the basis of sexual orientation, (2)
whether sexual orientation is a suspect or quasi suspect class for purposes of equal protection under the Connecticut Constitution, and (3) whether the state has provided “sufficient justification for excluding same sex couples from the institution of marriage.”

1. Excluding same-sex couples from marriage discriminates on the basis of sexual orientation

With regard to the first issue, whether the law excluding same-sex couples from civil marriage discriminated on the basis of sexual orientation, the State defended the same-sex marriage ban, contending that the law was facially neutral because “anyone who wishes to marry may do so with a person of the opposite sex.”

However, the Connecticut Supreme Court, like the Hawai‘i Supreme Court, rejected this reasoning, finding instead that the law was facially invalid, and that the statute relegating same-sex couples to civil union status was “intended to assuage those citizens and legislators who believed that sexual conduct involving persons of the same sex is immoral, wrong, or otherwise not to be condoned.”

While the plaintiffs’ action was pending in the trial court, the Connecticut Legislature passed the statute that created absolute equality between marriage and civil unions. The statute left no doubt about the legislature’s intent to render marriage and civil unions identical except in name only.

Because the plaintiffs’ suit was pending at the time, the logical inference was that the statute had been adopted to avoid an equal protection challenge to the gay marriage ban. Furthermore, the legislative history of the civil union statute revealed its true discriminatory intent, and therefore, the court held that the statute was “manifestly not neutral and must be read to express this state’s preference for heterosexual conduct.”

The civil union statute read in totality:

Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether derived from the general statutes,
administrative regulations or court rules, policy, common law or any other source of civil law, as are granted to spouses in a marriage, which is defined as the union of one man and one woman.\footnote{Id.}

However, the State’s strategy to create a separate but equal designation for gay couples failed. The court concluded that the civil union statute also discriminated on the basis of sexual orientation, and that marriage and civil unions were not equal, despite the fact that parties to a civil union have the same rights, obligations, and benefits as married spouses.\footnote{Kerrigan, 957 A.2d at 418 (“Accordingly, we reject the trial court’s conclusion that marriage and civil unions are separate but equal legal entities.”).}

The court held that marriage and civil unions are not equal, although they confer the same legal rights, because marriage is “an institution of transcendent historical, cultural and social significance, whereas [a civil union] most surely is not.”\footnote{Id.}

The court explained that this type of discrimination which may be characterized as “symbolic or intangible” is “every bit as restrictive as naked exclusions.”\footnote{Id. (quoting Evening Sentinel v. Nat’l Org. for Women, 357 A.2d 498, 504 (Conn. 1975)) (internal quotation marks omitted).} Applying Connecticut precedent on intangible discrimination, the court found that the relegation of same-sex couples to civil union status is “no less real than more tangible forms of discrimination, at least when as in the present case, the statute singles out a group that historically has been the object of scorn, intolerance, ridicule or worse.”\footnote{Id. at 418.}

The State further maintained that the court should not engage in an equal protection analysis because same-sex couples and opposite sex couples are not similarly situated.\footnote{Id. at 424.} The State argued that “the conduct that [same-sex couples] seek to engage in—marrying someone of the same sex—is fundamentally different from the conduct in which opposite sex couples seek to engage.”\footnote{Id.}

However, the court decisively rejected this argument finding:

It is true, of course, that plaintiffs differ from persons who choose to marry a person of the opposite sex insofar as each of the plaintiffs seek to marry a person of the same sex. Otherwise, however, the plaintiffs can meet the same statutory eligibility requirements applicable to persons who seek to marry, including restrictions related to public safety, such as age . . . and consanguinity.\footnote{Id. (citing CONN. GEN. STAT. § 46b-21.30 (LEXIS through 2008 Legislation)).}

After determining that the statute intentionally discriminated against gay persons, and that same-sex couples are similarly situated to opposite-sex
couples, the court then proceeded with an equal protection analysis under the Connecticut Constitution. 94

2. Sexual orientation is a quasi-suspect classification warranting heightened equal protection scrutiny

Plaintiffs brought no federal constitutional claims, so the Connecticut Constitution governed. In order to determine the level of scrutiny to apply, the court had to address a novel legal issue in the state’s jurisprudence: whether sexual orientation is a suspect or quasi-suspect classification. 95

If sexual orientation were not at least a quasi-suspect classification, then the minimal level of equal protection scrutiny, rational basis, would apply. 96 This level of scrutiny would likely have been fatal to petitioners’ claims because “in areas of social and economic policy that neither proceed along suspect lines, nor infringe fundamental constitutional rights, the equal protection clause is satisfied as long as there is a plausible policy reason for the classification.” 97

Petitioners argued for heightened scrutiny by asserting that sexual orientation is at least a quasi-suspect classification. 98 The court noted the fact that no Connecticut cases had ever designated a group a quasi-suspect class, although the possibility had been mentioned. 99 As such, the court had yet to determine the criteria for such a classification.

The Connecticut Supreme Court relied upon U.S. Supreme Court precedent for determining what criteria should be applied for determining quasi-suspect status because of the lack of Connecticut precedent. 100 Federal equal protection jurisprudence affords heightened judicial scrutiny to policies affecting “discrete and insular minorities” 101 and politically powerless groups whose distinguishing characteristic is immutable, congenital, and not linked to legitimate decision-making criteria. 102

Anticipating a debate about the immutability of homosexuality, the court summarized Supreme Court jurisprudence and found that:

[T]he United States Supreme Court has placed far greater weight—indeed, it invariably has placed dispositive weight—on the first two factors, that is, whether

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94 Id. at 421-62.
95 Id. at 432.
96 Id. at 422.
98 Id. at 415.
99 Id. at 425-26.
100 Id. at 426.
the group has been the subject of long-standing and invidious discrimination and whether the group’s distinguishing characteristic bears no relation to the ability of the group members to perform or function in society.\textsuperscript{103}

The court circumvented the question whether sexual orientation is immutable by first noting that the Supreme Court considers the immutability of a characteristic, and a group’s political powerlessness as “subsidiary” factors that are relevant to the analysis of how isolated and stigmatized a group is.\textsuperscript{104} The court further noted that while some courts have found that sexual orientation is not immutable, other courts “as well as many, if not most, scholarly commentators have reached a contrary conclusion.”\textsuperscript{105} The court ultimately held that immutability was not dispositive for determining quasi-suspect status because “immutability and minority status or political powerlessness are subsidiary to the first two primary factors” of (1) a history of invidious discrimination, and (2) a lack of relationship between the characteristic and rational decision-making criteria.\textsuperscript{106} More importantly, the court stated “courts should ask whether the characteristic at issue is one governments have any business requiring a person to change.”\textsuperscript{107}

Applying the traditional four suspect classification factors, the court found that sexual orientation was a quasi-suspect classification because gay people have been “subjected to and stigmatized by a long history of purposeful and invidious discrimination” and being gay “bears no logical relationship” to the ability to “perform in society, either in familial relations or otherwise as productive citizens.”\textsuperscript{108}

As if to reinforce the decision to afford quasi-suspect status to sexual orientation, the court undertook a comprehensive discussion of the history of homosexual oppression in the United States.\textsuperscript{109} The discussion included

\textsuperscript{103} Kerrigan, 957 A.2d at 427.
\textsuperscript{104} Id. at 429 n.22 (citing City of Cleburne, 473 U.S. 432 (Marshall, J., concurring in the judgment and dissenting in part)); see also Baehr v. Lewin, 74 Haw. 530, 548 n.14, 852 P.2d 44, 54 n.14 (1993) (circumventing the immutability issue by finding that Hawai’i’s same-sex marriage ban discriminated on the basis of gender). In Baehr, Judge Burns’ concurring opinion argued that whether sexual orientation is “biologically-fated” is a relevant question, and if the answer were yes, then the Hawai’i Constitution would not be able to permit encouraging heterosexuality. Id. at 586-87, 852 P.2d at 70-71 (Burns, J., concurring).
\textsuperscript{105} Kerrigan, 957 A.2d at 436-37.
\textsuperscript{106} Id. at 427.
\textsuperscript{107} Id. at 438 (quoting Andersen v. King County, 138 P.3d 963, 1032 n.5 (Wash. 2006) (Bridge, J., concurring in the dissent)) (internal quotation marks omitted).
\textsuperscript{108} Id. at 432.
\textsuperscript{109} Id. at 432 n.25 (noting among other things, that “[a]t the height of the McCarthy witch-hunt, the Department of State fired more homosexuals than communists”) (internal brackets omitted). This open acknowledgement of the injustice of past discrimination of gay persons is particularly ground-breaking. In most cases up to this point, homosexual conduct was
analogies between the history of persecution suffered by African Americans and women; a review of policies excluding gay persons from the military, important professions, and government jobs; and an acknowledgement that gay persons were once labeled mentally ill, and their intimate, consensual conduct criminalized.\footnote{Kerrigan, 957 A.2d at 433 n.27. Hawai‘i’s Baehr v. Lewin opinion was devoid of this kind of critical judicial decision-making in the historical context of widespread discrimination against gay persons.}

Additionally the court cited the “large number of hate crimes” perpetrated against gay persons as evidence of a history of invidious discrimination.\footnote{Id. at 446 n.38 (citing \textit{Henry J. Kaiser Family Foundation, Inside-Out: Report on the Experiences of Lesbians, Gays and Bisexuals in America and the Public’s View on Issues and Policies Related to Sexual Orientation} 3-4 (2001)). The court reiterated findings from the Kaiser Family report noting that seventy-four percent of gay and bisexual persons have been verbally abused because of their orientation, and thirty-two percent had been physically assaulted. See \textit{Kerrigan}, 957 A.2d at 446 n.38.}

The Connecticut Supreme Court’s analysis of the relationship between sexual orientation and legitimate state decision making is equally thorough. Significantly, the court noted that “defendants also concede that sexual orientation bears no relation to a person’s ability to participate in or contribute to society, a fact that many courts have acknowledged.”\footnote{\textit{Kerrigan}, 957 A.2d at 434 (citing \textit{Watkins v. U.S. Army}, 875 F.2d 699, 725 (9th Cir.1989)) (Norris, J., concurring). As noted by the \textit{Watkins} court, “[s]exual orientation plainly has no relevance to a person’s ‘ability to perform or contribute to society.’” \textit{Watkins}, 875 U.S. at 725 (citation omitted), \textit{cert. denied}, 498 U.S. 957 (1990); see also \textit{Conaway v. Deane}, 932 A.2d 571 (Md. 2007) (explaining that gay persons have been subject to unique disabilities unrelated to their ability to contribute to society); \textit{Hernandez v. Robles}, 855 N.E.2d 1, 28 (N.Y. 2006) (Kaye, C. J., dissenting) (“Obviously, sexual orientation is irrelevant to one’s ability to perform or contribute.”); Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417, 437 (S.D. Ohio 1994) (“[S]exual orientation . . . bears no relation whatsoever to an individual’s ability to perform, or to participate in, or contribute to, society . . . .”), \textit{rev’d}, 54 F.3d 261 (6th Cir. 1995), \textit{vacated}, 518 U.S. 1001 (1996).}

The court also stated the fact that Connecticut’s child rearing policies acknowledge no relationship between the ability to raise children and sexual orientation was “highly significant.”\footnote{\textit{Kerrigan}, 957 A.2d at 435 (citing \textit{Conn. Gen. Stat.} § 45a-727 (LEXIS through 2008 legislation)) (allowing same-sex adoption); \textit{Conn. Gen. Stat.} § 45a-727a(3) (sexual preference of parents is not relevant to best interest of child determination).} Furthermore, Connecticut’s commitment to allowing gay persons to “participate fully in every important economic and social institution and activity that the government regulates”\footnote{\textit{Kerrigan}, 957 A.2d at 435 (citing \textit{Conn. Gen. Stat.} § 46a-81a-n (LEXIS through 2008 legislation))} minimized or forgiven due to mitigating circumstances. See, \textit{e.g.}, \textit{Morrison v. State Bd. of Educ.}, 461 P.2d 375, 378 (Cal. 1969) (reinstating a gay teacher after dismissal for homosexual conduct because the homosexual affair was only one “week-long” and he had been under “severe emotional stress” at the time of the homosexual conduct).
demonstrated “an acknowledgment by the state that homosexual orientation is no more relevant to a person’s ability to perform and contribute to society than is heterosexual orientation.”

Connecticut’s equal protection jurisprudence requires the application of Geisler factors when determining whether a particular group should be considered a suspect class. Among other things, Geisler factors include “contemporary economic and sociological considerations, including relevant public policies.” In this section, the Kerrigan court carefully investigated the sociological factors related to marriage equality and in the process sufficiently addressed many of the concerns of same-sex marriage opponents.

In the Geisler analysis, the court first held that allowing same-sex couples to marry would not “deprive opposite sex couples of any rights” and “limiting marriage to opposite sex couples is not necessary to preserve the rights that those couples now enjoy.”

Next, relying on Loving and borrowing language from Goodridge, the court held that extending marriage equality to gay persons would not “diminish the validity or dignity of opposite sex marriage” anymore than the decision to allow interracial marriages did in Loving. On the contrary, the fact that same-sex couples were willing “to embrace marriage’s solemn obligations of
exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.”

Quoting from California’s *In re Marriage Cases*, the court found that disallowing same-sex marriage “works a real and appreciable harm” on same sex couples, and their children, in part because “providing only a novel, alternative institution for same-sex couples” would most likely be viewed as “an official statement that the family relationship of same-sex couples is not of comparable stature or equal dignity to the family relationship of opposite-sex couples.”

The court concluded its analysis of sociological factors by considering the position of religious opponents to same-sex marriage. The court distinguished between civil and religious marriage and stated that “[b]ecause . . . marriage is a state sanctioned and state regulated institution, religious objections to same sex marriage cannot play a role in our determination of whether constitutional principles of equal protection mandate same sex marriage.”

While the court considered the arguments presented by the religious opposition, it ultimately concluded that religious organizations’ “autonomy” and “freedom” would not be jeopardized or threatened because those organizations would not be required to perform same-sex marriages or condone them.

3. **There is no exceedingly persuasive justification for discrimination on the basis of sexual orientation**

In both federal and Connecticut equal protection jurisprudence, an exceedingly persuasive justification is required for discriminating on the basis of a quasi-suspect classification. Furthermore, the classification must be substantially related to important governmental objectives which were not created post-hoc for litigation purposes.

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123 *Kerrigan*, 957 A.2d at 474 (quoting *Goodridge*, 798 N.E.2d at 965) (internal quotation marks and brackets omitted).
124 183 P.3d 384 (Cal. 2008).
125 *Kerrigan*, 957 A.2d at 474 (quoting *In re Marriage Cases*, 183 P.3d at 452) (internal quotation marks and brackets omitted).
126 *Id.* at 475.
127 *Id.*
128 See, e.g., *United States v. Virginia*, 518 U.S. 515, 531 (1996) (requiring exceedingly persuasive justification for discriminating on the basis of gender, a quasi-suspect classification); *see also Kerrigan*, 957 A.2d at 477 n.79 (citing *Virginia*, 518 U.S. at 532-33, for the proposition that discrimination against quasi-suspect classes require exceedingly persuasive justification).
129 *Virginia*, 518 U.S. at 533.
The State offered two justifications for continuing the same-sex marriage ban: “(1) to promote uniformity and consistency with the laws of other jurisdictions; and (2) to preserve the traditional definition of marriage as a union between a man and a woman.”

First, the court rejected the uniformity and consistency argument as possibly meeting a rational basis level of review, but held that this argument failed heightened scrutiny. The State could not meet its burden on this part of the test by merely reciting the assertion that uniformity and consistency of the laws is an important governmental objective, in the absence of precedent or other reasoning.

Second, the court considered the argument that tradition in and of itself is a reason to continue to ban same-sex marriage. The State’s main contention was that the legislature has a compelling interest in retaining the traditional definition of marriage as an opposite-sex union because “that is the definition of marriage that has always existed in Connecticut.” The court rejected this reasoning by noting that however deeply held the personal beliefs of many of the state’s legislators and constituents were about this traditional definition of marriage, those beliefs “do not constitute the exceedingly persuasive justification required to sustain a statute that discriminates on the basis of a quasi-suspect classification.”

More to the point, the court reasoned “to say that the discrimination is traditional is to say only that the discrimination has existed for a long time.” And, most importantly, “a history or tradition of discrimination—no matter how entrenched—does not make the discrimination constitutional.”

Having found that the same-sex marriage ban discriminated on the basis of sexual orientation, that sexual orientation is a quasi-suspect class, and that the state failed to meet its burden of an exceedingly persuasive justification under the Equal Protection Clause, the court abolished the same-sex marriage ban in Connecticut.

Lest Hawai‘i’s legacy be one of intransigency in an era of expanding civil rights, Hawai‘i should heed the Kerrigan court’s historical retrospective:

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130 Kerrigan, 957 A.2d at 476.
131 Id. at 477.
132 Id. at 478.
133 Id.
134 Id.
135 Id. (citing Romer v. Evans, 517 U.S. 620, 635 (1996)) (holding that the Equal Protection Clause forbids “a classification of persons undertaken for its own sake”).
136 Id. (quoting Hernandez v. Robles, 855 N.E.2d 1, 34 (N.Y. 2006) (Kaye, C.J., dissenting)) (internal quotation marks omitted).
137 Id. at 482.
It is instructive to recall in this regard that the traditional well-established legal rules and practices of our not-so-distant past (1) barred interracial marriage, (2) upheld the routine exclusion of women from many occupations and official duties, and (3) considered the relegation of racial minorities to separate and assertedly equivalent public facilities and institutions as constitutionally equal treatment.\footnote{Id. at 482 (quoting \textit{In re Marriage Cases}, 183 P.3d 384, 451 (Cal. 2008)) (internal brackets omitted).}

Approximately five months before the Connecticut case, the California Supreme Court arrived at the same conclusion and struck down that state’s same-sex marriage ban.

\textbf{B. California: \textit{In re Marriage Cases}}

In May 2008, California also adopted a more inclusive definition of civil marriage that ended that state’s same-sex marriage ban. Under then-existing California law, same-sex unions were designated domestic partnerships and opposite-sex unions were designated marriages.\footnote{\textit{In re Marriage Cases}, 183 P.3d at 384.}

As with Connecticut’s “civil unions,” California’s “domestic partnerships” differed from marriage only in name.\footnote{Id. at 417-18 (“[T]he current California statutory provisions generally afford same-sex couples the opportunity to enter into a domestic partnership and thereby obtain virtually all of the benefits and responsibilities afforded by California law to married opposite-sex couples.”).} Thus the issue before the courts was identical: whether the difference in nomenclature offended equal protection.\footnote{Id. at 399.}

The court held that separate was not equal, and that gay persons should be allowed to marry.\footnote{Id. at 384.}

The backlash against this decision was swift and furious. In November 2008, California voters subsequently passed an initiative measure, Proposition 8, which overturned \textit{In re Marriage Cases}, and amended the California Constitution so that “[o]nly marriage between a man and a woman is valid or recognized in California.”\footnote{CAL. CONST. art. I, § 7.5.}

Funding for Proposition 8 was record-breaking, with opponents of same-sex marriage raising nearly forty million dollars.\footnote{Jesse McKinley & Kirk Johnson, \textit{Mormons Tipped Scale in Ban on Gay Marriage}, \textit{N.Y. Times}, Nov. 15, 2008, at A1, available at 2008 WLNR 21813466 (noting that Mormons contributed approximately half of the $40 million dollars donated to pass Proposition 8).}

Proposition 8 also had unintended consequences: it mobilized people in three hundred American cities, and some foreign countries to demonstrate in support of gay civil
rights.\textsuperscript{145} Regardless of the outcome of the legal challenge to Proposition 8,\textsuperscript{146} the debate over same-sex marriage in California has reinvigorated a new generation of gay rights activists.\textsuperscript{147}

Despite its nullification by Proposition 8, the California marriage equality case has much to offer the debate here in Hawai‘i because in addition to finding that a same-sex marriage ban violated equal protection principles, the court also held that the ban violated gay couples’ due process right to marry.\textsuperscript{148}

1. Same-sex marriage ban fails strict scrutiny under California’s constitution

California equal protection cases utilize only two tiers of scrutiny: “rational basis” or “strict scrutiny” for “suspect classifications.”\textsuperscript{149} The Supreme Court of California, like the Supreme Court of Connecticut, held that sexual orientation deserved heightened scrutiny for the same reasons: a history of invidious discrimination against gay persons, and a lack of relationship between

\begin{footnotesize}
\begin{enumerate}
\item Jay Lindsay, Gay Advocates Protest Marriage Ban Across Nation, USA TODAY, Nov. 16, 2008, at A1, available at http://www.usatoday.com/news/nation/2008-11-15-668737864_x.htm (reporting on the magnitude of the nationwide Proposition 8 protests and estimating the total number of participants to be around one million). Some Proposition 8 protestors used less-than-democratic means to express their disappointment in Proposition 8’s passage. See, e.g., Jesse McKinley, Marriage Ban Donors Feel Exposed by List, N.Y. TIMES, Jan. 19, 2009 at A12, available at 2009 WLNR 1036184 (documenting boycotts of businesses, death threats directed at Proposition 8 supporters, and two cases of white powder being sent to Mormon and Catholic-owned buildings).
\item See John Schwartz & Jesse McKinley, Court Weighs Voters’ Will Against Gay Rights, N.Y. TIMES, Mar. 6, 2009, at A12, available at 2009 WLNR 4322897 (reporting that the California Supreme Court heard oral arguments about the validity of Proposition 8 on March 5, 2009, and that a decision is expected within 90 days of the hearing).
\item In re Marriage Cases, 183 P.3d 384, 420 (Cal. 2008). Hawai‘i and California’s due process clauses are virtually identical. Compare HAW. CONST. art. 1, § 5, with CAL. CONST. art. 1, § 7. Nevertheless, the Hawai‘i court characterized the issue as whether one has a right to a same-sex marriage and concluded that same-sex marriage is neither “so rooted in the traditions and collective conscience of our people” nor “implicit in the concept of ordered liberty” so as to require due process protection. Baehr v. Lewin, 74 Haw. 530, 556-57, 852 P.2d 44, 57 (1993). But this is an unacceptable narrowing of a right. How many years behind in racial equality would the United States be if the Loving court had accepted a similarly narrow definition of the fundamental right to marry? See generally Loving v. Virginia, 388 U.S. 558 (1967).
\item In re Marriage Cases, 183 P.3d at 436.
\end{enumerate}
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sexual orientation and legitimate state decision-making regarding the group’s ability to perform or contribute to society.  

The California opinion is more expansive than Connecticut’s in that the California Supreme Court found another reason to apply strict scrutiny. In particular, the court accepted petitioners’ claim that the same-sex marriage ban “impinges upon a same-sex couple’s fundamental, constitutionally protected privacy interest, creating unequal and detrimental consequences for same-sex couples and their children.” The privacy analysis should be especially salient to the debate in Hawai‘i because Hawai‘i has some of the most stringent privacy protections of any state in the union.

After finding that sexual orientation is a suspect classification, the California Supreme Court applied the highest level of equal protection review, strict scrutiny, which placed a “heavy burden of justification” on the state and required that the asserted state interest be a “constitutionally compelling one” that could justify the discrimination “prescribed by the statute . . . .”

The California opinion devoted significant space to addressing the argument that traditional opposite-sex marriage serves a compelling interest in promoting procreation. This argument was rejected based on the fact that physical capacity to have children has never been an eligibility requirement for marriage.

The California opinion’s main difference from Hawai‘i’s Baehr case was that the California Supreme Court recognized that gay persons had fundamental privacy and due process rights in choosing their spouse without state intrusion. Ultimately, the California Supreme Court’s state interest analysis was analogous to the Massachusetts’ decision, discussed immediately below.

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150 Id. at 442.
151 Id. at 445-46 (relying on Hill v. Nat’l Collegiate Athletic Ass’n, 865 P.2d 633, 653 (Cal. 1994)) (holding the California Constitution’s privacy clause includes “the freedom to pursue consensual family relationships”).
152 See, e.g., State v. Tanaka, 67 Haw. 678, 701 P.2d 1274 (1985) (invalidating warrantless search of defendant’s trash that was in a closed, opaque bag). But Hawai‘i citizens may have more privacy rights in their trash than in their intimate relationships. See Baehr, 74 Haw. at 556-57, 852 P.2d at 57 (holding gay persons do not have a privacy or due process right to same-sex marriage).
153 In re Marriage Cases, 183 P.3d at 446 (citing Darces v. Woods, 679 P.2d 458 (1984)).
154 See id. at 430-34.
155 Id. at 431.
156 See id. at 420; see also supra note 148 and accompanying text.
C. Massachusetts: Goodridge v. Department of Public Health

As the first marriage equality case in the country, Goodridge v. Department of Public Health is a civil rights case in a class with Brown v. Board of Education and Loving v. Virginia. Goodridge, even more so than the California, Connecticut, and Iowa decisions, can be seen as a beacon of liberty because in that case the Massachusetts Supreme Court struck down the same-sex marriage ban under rational basis review, the lowest level of constitutional scrutiny, and the most deferential to legislatures.

Unlike the California, Iowa, and Connecticut supreme courts, the Goodridge court did not even reach the issues of whether sexual orientation is a suspect class or whether heightened scrutiny should apply.161

1. Same-sex marriage ban fails rational basis review under Massachusetts’ Constitution

In order for the same-sex marriage ban to pass rational basis review, the State was required to show that the statute “bear[s] a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare.”162 The court rejected all three proffered rationales for the marriage ban: “(1) providing a favorable setting for procreation; (2) ensuring the optimal setting for child rearing, which the department defines as a two-parent family with one parent of each sex; and (3) preserving scarce State and private financial resources.”163

The court dispatched with the first rationale by noting that the State’s interest in regulating marriage was not based on the concept that the “primary purpose of marriage is procreation.”164 “Our laws of civil marriage do not privilege procreative heterosexual intercourse between people above every other form of adult intimacy and every other means of creating a family.”165 Dismissing the

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158 347 U.S. 483 (1954) (holding that racial segregation in public schools violates the Equal Protection Clause and that separate schools are inherently unequal).
159 388 U.S. 1 (1967) (holding that statute banning interracial marriage violates the Equal Protection Clause).
160 Goodridge, 798 N.E.2d at 961 (“[W]e conclude that the marriage ban does not meet the rational basis test for either due process or equal protection.”).
161 Id. (“B]ecause the statute does not survive rational basis review, we do not consider the plaintiffs’ arguments that this case merits strict judicial scrutiny.”).
163 Id. at 961 (internal quotation marks and brackets omitted).
164 Id. (internal quotation marks and brackets omitted).
165 Id. (noting that “[f]ertility is not a condition of marriage, nor is it grounds for divorce.
second rationale, that the State preferred opposite-sex couples as parents, the court noted that adoption and insurance coverage are available for same-sex parents in Massachusetts,\footnote{Id. at 962 (citing MASS. GEN. LAWS ch. 210, § 1 (LEXIS through 2008 legislation); Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993)).} and that the “best interest of the child standard” in family law matters “does not turn on the parent’s sexual orientation or marital status.”\footnote{Id. at 963 (citing Doe v. Doe, 452 N.E.2d 293, 296 (Mass. App. Ct. 1983), for the proposition that “parent’s sexual orientation [is] insufficient ground to deny custody of child in divorce action”).}

With its third rationale, conserving economic resources, the State argued that “same-sex couples are more financially independent than married couples, and thus less needy of public marital benefits, such as employer-financed health plans that include spouses in their coverage.”\footnote{Id. at 964.} However, this argument was rejected because Massachusetts does not “condition receipt of public and private financial benefits to married individuals on a demonstration of financial dependence on each other.”\footnote{Id.} The court further noted that some married couples are financially interdependent, yet still entitled to these benefits.\footnote{Id.}

This argument for conserving state resources would not be convincing in Hawai’i either because the state allows gay couples to become reciprocal beneficiaries, and thereby to receive some of the rights of married couples.\footnote{See, e.g., HAW. REV. STAT. § 88-1(4) (2006) (allowing payment of sixty percent payment of public employee’s pension to reciprocal beneficiary so long as that person has not remarried or entered into another reciprocal beneficiary agreement).} The reciprocal beneficiaries designation is also an example of an inconsistent state policy used by the Goodridge court to conclude that marriage discrimination was incongruent in light of other state policies protective of gay persons.\footnote{Goodridge, 798 N.E.2d at 967.}

2. Goodridge highlighted incongruencies in state policies toward gay persons, and offered a historical retrospective on changing marriage policies.

Goodridge addressed other ancillary arguments and issues that were sometimes incorporated into the California and Connecticut opinions. Most important among these was the fact that the Goodridge court rejected the State’s assertion that the “community consensus” is that homosexuality is
immoral. The court proved this by cataloging the State’s “strong affirmative policies” contained in Massachusetts statutes of: (1) preventing sexual orientation discrimination in employment, housing, accommodations, public education and credit; (2) protecting gay persons from hate crimes; (3) decriminalizing private, consensual adult sexual conduct; and (4) allowing custody of children by gay parents.

The Goodridge court also engaged in an important historical retrospective of the abrogation of common law marriage that takes us beyond “the Loving analogy.” This is a critical contribution because “the Loving analogy” has been criticized by some scholars. For example, two commentators suggest that use of the Loving analogy is “bad law, based on bad precedent, logically flawed, historically inconsistent, repugnant to the core principles of Loving . . . deliberately stigmatizing, and abusive.” Yet for most, it is difficult to conceive how using landmark civil rights precedent to confer more rights on a historically oppressed group could somehow be regarded as “dangerous to civil rights” as some claim.

The court noted that common law marriage has undergone many transformations, most notably abolishing coverture, allowing prisoners to marry, and allowing interracial marriages. The court further noted that just as in the same-sex marriage debate, “[a]larms about the imminent erosion of the

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173 Id.
174 Id. (citing MASS. GEN. LAWS ch. 151B (LEXIS through 2008 legislation) (employment, housing, credit, services); MASS. GEN. LAWS ch. 265, § 39 (LEXIS through 2008 legislation) (hate crimes); MASS. GEN. LAWS ch. 272, § 98 (LEXIS through 2008 legislation) (public accommodation); MASS. GEN. LAWS ch. 76, § 5 (LEXIS through 2008 legislation) (public education); see also Commonwealth v. Balthazar, 318 N.E.2d 478 (Mass. 1974) (decriminalization of private consensual adult conduct); Doe v. Doe, 452 N.E.2d 293 (Mass. App. Ct. 1983) (custody to homosexual parent not per se prohibited). It is time for Hawai’i to re-examine its own conflicting state policies with regard to gay persons in the context of increasing societal acceptance and support for gay persons.
176 Wardle & Oliphant, supra note 175, at 168-69; see also David Orgon Coolidge, Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy, 12 B.Y.U. J. PUB. L. 201 (1998) (arguing that “The Loving Analogy” is inapposite to the debate on same-sex marriage and its use is a disingenuous political maneuver by gay civil rights activists).
177 Wardle & Oliphant, supra note 175, at 169.
natural order of marriage were sounded over the demise of antimiscegregation laws, the expansion of the rights of married women, and the introduction of no-fault divorces."\(^{179}\) The historical analysis of marriage concluded with "[m]arriage has survived all these transformations, and we have no doubt that marriage will continue to be a vibrant and revered institution."\(^{180}\)

Just as the Massachusetts Supreme Court offered a unique contribution in tracing the changes in the institution of civil marriage, so too did the Iowa Supreme Court by offering the first marriage equality opinion to analyze Establishment Clause principles as applied to the same-sex marriage ban. Furthermore, the court undertook this analysis sua sponte.

**D. Iowa: Varnum v. Brien**

Like the Massachusetts, Connecticut and California courts, the Iowa Supreme Court overturned Iowa’s gay-marriage ban on equal protection grounds.\(^{181}\) The court found that gay persons comprise a quasi-suspect class, and that classifications based on sexual orientation require heightened judicial scrutiny under Iowa’s equal protection clause. The court found that the State’s interest in maintaining traditional dual-gender marriage was not an important governmental objective and therefore did not satisfy equal protection.

Additionally, the court found the statute banning same-sex marriage was not substantially related to any of the respondent’s stated governmental interests: (1) ensuring an optimal environment for raising children, (2) promoting procreation, (3) promoting stability in opposite-sex relationships, and (4) conserving state resources.\(^{182}\) For each of those interests, the court focused on the under and over inclusivity of the statute.\(^{183}\) To underscore the statute’s under-inclusivity, the court reasoned that violent felons, sexual predators and previously neglectful parents, who are “undeniably less than optimal parents,” are still allowed to procreate and raise children in Iowa.\(^{184}\)

The analysis and rejection of these governmental interests was similar to the other state marriage cases. However, the Iowa court offered a novel approach to the debate by employing Iowa’s establishment clause.

\(^{179}\) Goodridge, 798 N.E.2d at 967.

\(^{180}\) Id.


\(^{182}\) Id. at *22-27.

\(^{183}\) See id. at *26 (noting, for example, that excluding gay persons from civil marriage to conserve state resources is a “blunt instrument” that is both over and under inclusive and offering the example that “[e]xcluding any group from civil marriage—African-Americans, illegitimates, aliens, even red-haired individuals—would conserve state resources” but would “obviously offend our society’s collective sense of equality”).

\(^{184}\) Id. at *23.
1. Varnum enters uncharted territory: The establishment clause prevents basing same-sex marriage ban on religious sentiment.

The unanimous opinion contains a bold, novel section in which the court addressed the “unspoken” reason for the same-sex marriage ban: “religious opposition.”\(^\text{185}\) The court acknowledged that respondents were constrained by the establishment clause from citing this as an important governmental interest, but nevertheless noted that religious sentiment seemed to be behind most opposition to gay marriage.\(^\text{186}\)

The court held that religious anti-gay sentiment “cannot . . . be used to justify a ban on same-sex marriage.”\(^\text{187}\) Additionally the court signaled that free exercise claims would fail because allowing same-sex marriage does not offend the free exercise of religion when the state only regulates “civil marriage.”\(^\text{188}\) Furthermore, religious sects are still free to “define marriage as a union between a man and a woman.”\(^\text{189}\)

In a few short paragraphs, the Varnum decision squarely confronted the Christian hegemonic tendency to commandeer and control the definition of marriage.\(^\text{190}\) The court offered a bifurcated definitional approach focusing on the difference between sacred marriage, regulated and conducted by the church, and civil marriage, regulated and licensed by the state.\(^\text{191}\) Critics will likely attack this analysis as simplistic because the court’s establishment and free exercise analysis was minimal.\(^\text{192}\) However, the court actually offered an ingenious solution that clearly separates sacramental, religious marriage from secular, civil marriage.\(^\text{193}\) This solution will likely be met with opposition

\(^\text{185}\) Id. at *28.
\(^\text{186}\) Id. at *27 (citing Ben Schuman, Gods & Gays: Analyzing the Same-Sex Marriage Debate from a Religious Perspective, 96 GEO. L.J. 2103 (2008)) (analyzing research completed by the Pew Center on religious belief and opposition to same-sex marriage).
\(^\text{187}\) Id.
\(^\text{188}\) Id. at *29.
\(^\text{189}\) Id.
\(^\text{190}\) See McKinley & Johnson, supra note 144 (discussing the millions of dollars funneled into Proposition 8 by fundamentalist Christian groups). The Christian influence is pervasive in Hawai‘i too. See Coolidge, supra note 23, at 100 (discussing the $600,000 donation from Mormons to pass the Hawai‘i marriage amendment); see also DePledge, supra note 64 and accompanying text.
\(^\text{191}\) Varnum, 2009 WL 874044, at *28 (“The statute at issue in this case does not prescribe a definition of marriage for religious institutions. Instead, the statute declares, ‘Marriage is a civil contract’ and then regulates that civil contract.” (quoting IOWA CODE §595.1A (LEXIS through 2008 legislation))).
\(^\text{192}\) Id. at *27-29 (covering both establishment and free exercise issues in under three pages).
\(^\text{193}\) Id. at *28 (“[C]ivil marriage must be judged under our constitutional standards of equal protection and not under religious doctrines or the religious views of individuals.”); see also id. at *29 (“A religious denomination can still define marriage as a union between a man and a
however, in Hawai‘i and elsewhere, because it requires some Christian sects to give up their monopoly on defining marriage.\textsuperscript{194}

Nevertheless, the establishment clause argument may be effective in Hawai‘i because the Iowa and Hawai‘i establishment clauses are nearly identical.\textsuperscript{195} In Hawai‘i, a helpful step to support an establishment clause claim would be to investigate the role of religious opposition in passing the 1998 same-sex marriage ban, and failure of the 2009 civil union bill. If religious opposition is the primary reason for the continued denial of basic civil rights to gay persons in Hawai‘i, gay rights activists may have yet another way to revive the debate in Hawai‘i.

V. CONCLUSION

Four state supreme court cases and two United States Supreme Court cases seriously compromise the legitimacy of Hawai‘i’s continued ban on same-sex marriages. In each of those cases, courts have been willing to embrace evolving, and more inclusive notions of liberty, privacy, equal treatment, and freedom of religion.

The Connecticut, California, Massachusetts, and Iowa courts were forthright in examining incongruencies in state policies that, on the one hand, afforded many benefits and protections to gay persons, while on the other hand maintained a caste system that stigmatized gay persons, and excluded them from one of the most important civil institutions in our culture. The Iowa court forthrightly admitted that religious opposition was the primary, yet unspoken, and unacceptable reason for excluding gay persons from civil marriage.\textsuperscript{196} And, religious opposition is a salient feature of the debate in Hawai‘i too.

Two U.S. Supreme Court decisions, \textit{Lawrence} and \textit{Romer}, further destabilize Hawai‘i’s same-sex marriage ban by holding that legislation and

woman, and a marriage ceremony performed by a minister . . . does not lose its meaning as a sacrament or other religious institution.”).

\textsuperscript{194} \textit{Cf. id.} at *28 (“[S]uch views are not the only religious views of marriage . . . . [O]ther equally sincere groups and people in Iowa and around the nation have strong religious views” that support gay marriage.”). The \textit{Varnum} court actually utilized the split of opinion among Christian groups to bolster the establishment clause reasoning noting: “[t]his contrast of opinions in our society largely explains the absence of any religion-based rationale to test the constitutionality of Iowa’s same-sex marriage ban. Our constitution does not permit any branch of government to resolve these types of religious debates and entrusts to courts the task of ensuring government avoids them.” \textit{Id.}

\textsuperscript{195} \textit{Compare HAW CONST.} art. I, § 4 (“No law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof”), \textit{with IOWA CONST.} art. I, § 3 (“The general assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”).

\textsuperscript{196} \textit{See Varnum}, 2009 WL 874044, at *27.
voter initiatives cannot be motivated by animus toward gay persons, and that
criminalization of homosexual conduct violates gay persons’ fundamental due
process and privacy rights.

In light of Romer’s prohibition against animus-based legislation and
Lawrence’s expanded definition of liberty, Hawai‘i’s marriage amendment is
vulnerable to federal constitutional claims. Furthermore, even though the
Hawai‘i Supreme Court has denied claims based on equal protection and
privacy arguments, the marriage amendment is vulnerable to a state
constitutional attack under Hawai‘i’s due process and anti-establishment
constitutional provisions. The four state marriage equality cases provide the
road map for this attack.

Kristin D. Shotwell

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197 See Romer v. Evans, 517 U.S. 620, 634 (1996) (animosity and “bare desire to harm a
politically unpopular group” are not legitimate state interests for purposes of Equal Protection
Analysis).

disapproval of a group cannot be a legitimate governmental interest under the Equal Protection
Clause because legal classifications must not be drawn for the purpose of disadvantaging the
group burdened by the law.” (citation and internal quotation marks omitted)).


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