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# Playing The *Loving* Card: Same-Sex Marriage and the Politics of Analogy

David Orgon Coolidge\*

## I. INTRODUCTION

Of all the legal arguments offered in favor of legalizing "same-sex marriage"<sup>1</sup> the one with the greatest rhetorical punch is the *Loving* analogy. "Just as the U.S. Supreme Court struck down Virginia's ban on interracial marriage in *Loving v. Virginia*<sup>2</sup>," the analogy goes, "so the courts should strike down bans on same-sex marriage." In one fell swoop one can invoke race, civil rights, and the freedom to marry while simultaneously painting one's opponents as the Bull Connors of the 1990s.

The use of *Loving* in our time is preeminently a *political* use. In the debate over the definition of marriage, *Loving* is the wedge, the theme piece, the call to arms. One might call *Loving* "the race card" of the marriage debate. Advocates are "playing the *Loving* card."

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This text was originally delivered in November, 1997 at *Law and the Politics of Marriage: Loving v. Virginia After Thirty Years*, at The Catholic University of America, co-sponsored by the Columbus School of Law, Howard University School of Law, and the J. Reuben Clark School of Law at Brigham Young University. I have retained its informal flavor.

My thanks to Bernard Dobranski, Dean of the Columbus School of Law, and Professor Robert Destro, Director of the CSL's Interdisciplinary Program in Law and Religion, for supporting the Marriage Law Project and making the *Loving* conference part of the Centennial series of the Columbus School of Law. Thanks also to Duke Dorotheo, Marian Lally, Joanne Lytle-Miller, Greg Stack and Joan Vorrasi for making the Conference so successful. Between Conference and publication I received excellent technical and intellectual assistance from Jeremy Root, Eva Simmons, Teresa Stanton Collett, Richard Duncan, Lynn Wardle, and William C. Duncan.

1. I put the term "same-sex marriage" in quotation marks here to indicate my belief that same-sex unions are not marriages, and should not be called marriages. I realize that this may be deeply offensive to those other views, and I regret this. For more on my views, the reader may consult David Orgon Coolidge, *Same-Sex Marriage? Baehr v. Miike and the Meaning of Marriage*, 38 S. TEX. L. REV. 1 (1997).

I do not know Ninia, Genora, Pat, Joe, Tammy or Toni personally, although I have friends on the Islands who do. Should they read this, I want them to know that I believe they deserve respect as persons and as fellow citizens. Nothing I write here is meant to injure them in any way. In this paper, I focus on the role that *Loving* plays in the highly debatable political and legal claims being made by their attorneys. I try to do so remembering that I am participating in a debate that involves real human beings. Indeed, the marriage debate involves all of our hopes, fears and dreams for the future of our communities.

2. 388 U.S. 1 (1967).

Of course, this is nothing new. For almost thirty years, there has been a spirited debate going on about the implications of *Loving* for the status and rights of same-sex couples in our society.<sup>3</sup> From *Baker v. Nelson*, in 1971, to *Baker v. Vermont*, in 1997, plaintiffs and states have squared off over the meaning of *Loving*.<sup>4</sup> With the thirtieth anniversary of *Loving*, supporters of same-sex marriage have been asserting "the *Loving* analogy" with increasing confidence and boldness. Indeed, the analogy is now presented as a self-evident fact.<sup>5</sup>

The academic literature on "same-sex marriage" only reinforces this impression. Between 1990 and June 1995, seventy-five law review articles or essays in major legal periodicals were published on the issue. Sixty-nine of these were openly supportive of same-sex marriage, but only *one* supported marriage defined as the union of one man and one woman.<sup>6</sup> Articles and essays that discuss "the meaning of *Loving*" in anything more than a cursory fashion argue, almost without exception, that same-sex marriage should be legalized based on *Loving*.<sup>7</sup>

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3. Twenty-six years ago, Robert J. Sickels anticipated that *Loving* might eventually be used to challenge laws that define marriage as the union of a man and a woman. "Logically," he speculated, "it would be simple to add to the choice of race, in *Loving*, the choices of number, of sex, and of duration." RACE, MARRIAGE AND THE LAW 148 (1972). The first law review articles on the issue were also published in 1972; see Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, app. A at 96.

4. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971) (reaffirming the existing marriage law); *Baker v. Vermont*, No. S1009-97Cnc (Vt. Sup. Ct., Dec. 17, 1997), *appeal docketed*, No. 98-32 (Vt. 1998) (same, but with considerably less enthusiasm). Between the two cases, the most significant decisions actually discussing the relevance of *Loving* for the "same-sex marriage" debate were *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974) (rejecting the *Loving* analogy) and *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), *sub. nom. Baehr v. Muike*, 910 P.2d 112 (Haw. 1996) (accepting by a plurality, but with an aggressive dissent).

5. See, e.g., Richard Delgado & David Yun, *The Lessons of Loving vs. Virginia*, ROCKY MOUNTAINS NEWS, June 27, 1997, at 57A ("Same-sex attraction is as natural and inborn as one's race, and deploring or condemning it is as senseless as the prohibitions on interracial marriage the Warren court thankfully struck down in *Loving vs. Virginia*. In 30 years, will we look back, as we do now, and wonder how we could have been so blind - or heartless?"); Deb Price, *Civil Rites: Arguments Against Same-Sex Marriage Mirror Those That Kept the Races Apart*, DETROIT NEWS, April 18, 1997, at E1:

[W]e can take heart from the parallels to the successful struggle to make interracial marriage legal nationwide. Those parallels are strong, numerous and encouraging. They're also instructive. We've much to learn from the way that earlier marriage-rights battle was eventually won — especially from the reluctant but ultimately decisive role played by the Supreme Court in making good on our Constitution's promise of equal protection for all.

*Id.*; Eric Zorn, *Marriage Issue Just as Plain as Black and White*, CHI. TRIB., May 19, 1996, at 1 (using racist arguments from the last hundred years, but substituting "gays and lesbians," to make a rhetorical point: "The stench is familiar. The future is listening.").

6. See Wardle, *supra* note 3, at 18-26 (discussing imbalance), 97-101 (offering a comprehensive list of articles).

7. A focused search for articles between 1990 and 1997 which discuss both *Loving* and "same-sex marriage" yields 76 citations. Of these, 22 have substantive discussions of the *Loving* analogy. Twenty support the analogy; two question it.

The three most prominent exponents of the *Loving* analogy have been William Eskridge, Andrew Koppelman, and Mark Strasser. For William N. Eskridge, Jr.'s views, see THE CASE FOR SAME-SEX

In short, disagreement with the "correct" view of *Loving* is hard to find in the legal academy. Although legal-theoretical debates about the relationship between race, sex, and sexual orientation are important, it is hard to learn much from them if there is not much debate going on. Debate *is* going on, however, in specific states.<sup>8</sup> Perhaps this is as it should be, if the debate is to be democratic. Perhaps something can be gleaned by looking at these debates in a concrete situation.

MARRIAGE 153-63 (1996); *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1504-10 (1993). For Andrew Koppelman's views, see *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988); *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIAC L. REV. 105 (1996); *Three Arguments for Gay Rights*, 95 MICH. L. REV. 1636, 1661 (1997). For Mark Strasser's view, see LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION 66-69 (1997); *Family, Definitions, and the Constitution: On the Miscegenation Analogy*, 25 SUFFOLK U. L. REV. 981, 1001 (1991); *Domestic Relations Jurisprudence and the Great, Slumbering Baehr: On Definitional Preclusion, Equal Protection and Fundamental Interests*, 64 FORDHAM L. REV. 921, 927 (1995); *Constitutional Limitations and Baehr Possibilities: On Retroactive Legislation, Reasonable Expectations, and Manifest Injustice*, 29 RUTGERS L.J. 271, 275-76 (1998).

Other sympathetic discussions of the *Loving* analogy include Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 601 n.158 (1997); Kathryn Dean Kendell, *Principles and Prejudice: Lesbian and Gay Civil Marriage and the Realization of Equality*, 22 J. CONTEMP. L. 81, 84-85 (1996); Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 68 (1996); Rodney Patton, *Queerly Unconstitutional?: South Carolina Bans Same-Sex Marriage* 48 S.C. L. REV. 685, \_\_\_ at n.5 (1997) (forthcoming 1998); Richard Ante, Book Note, 15 B.C. THIRD WORLD L. J. 421, 438-49 (1995) (reviewing JOHN BOSWELL, *SAME-SEX UNIONS IN PRE-MODERN EUROPE* (1994)); Anne M. Burton, Note, *Gay Marriage—a Modern Proposal: Applying Baehr v. Lewin to the International Covenant on Civil and Political Rights*, 3 INDEP. J. GLOBAL LEG. STUD. 177, 180-84 (1995); Heather Hodges, Note, *Dean v. The District of Columbia: Goin' to the Chapel and We're Gonna Get Married*, 5 AM. U. J. GENDER & L. 93, 136 (1996); William M. Hohengarten, Note, *Same-Sex Marriage and the Right of Privacy*, 103 YALE L.J. 1495, 1506 (1994); Thomas M. Keane, Note, *Aloha, Marriage? Constitutional and Choice of Law Arguments for Recognition of Same-Sex Marriages*, 47 STAN. L. REV. 499, 520 (1995); Jeffrey J. Swart, Comment, *The Wedding Luau — Who is Invited?: Hawaii, Same-Sex Marriage, and Emerging Realities*, 43 EMORY L.J. 1577, 1606 (1994); James Trosino, Note, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93, 107-16 (1993); Kevin Aloysius Zambrowicz, Comment, *"To Love and Honor all the Days of Your Life": A Constitutional Right to Same-Sex Marriage?*, 43 CATH. U. L. REV. 907, 932 (1994).

The two pieces which question the *Loving* analogy are Lynne Marie Kohm, *A Reply to "Principles and Prejudice": Marriage and the Realization that Principles Win Over Political Will*, 22 J. CONTEMP. L. 293, 299-300 (1996) and Wardle, *supra* note 3, at 75-82. These pieces have now been joined by Coolidge, *supra* note 1; Richard F. Duncan, *From Loving to Romer: Homosexual Marriage and Moral Discernment*, 12 BYU J. PUB. L. 239 (1998); Lynne Marie Kohm, *Liberty and Marriage — Baehr and Beyond: Due Process in 1998*, 12 BYU J. PUB. L. 253 (1998); Jay Alan Sekulow and John Tuskey, *Sex and Sodomy and Apples and Oranges—Does the Constitution Require States to Grant a Right to Do the Impossible?*, 12 BYU J. PUB. L. 309 (1988); Raymond C. O'Brien, *Single-Gender Marriage: A Religious Perspective*, 7 TEMPLE POL. & CIV. RTS. REV. 1301 (1998); Lynn D. Wardle, *Loving v. Virginia and the Constitutional Right to Marry, 1790-1990*, 41 *Howard L. J.* (forthcoming, 1998).

8. A Nexis search of newspaper editorials and commentary between 1990 and 1997 on the specific topic of "same-sex marriage" and interracial marriage yielded 62 different articles totaling almost 150 pages of text. Only twelve articles appeared prior to 1996; fifty appeared in 1996 and 1997. On the use of the *Loving* analogy in the lawsuit in Hawaii, see *infra*.

Nowhere has the *Loving* analogy been more ubiquitous and significant than in Hawaii, which has been “ground zero” in the definition-of-marriage debate. Indeed in the Aloha State, *Loving* has appeared so often, and so significantly, in court documents, newspaper opinion pieces, official reports, political advertisements, and legislative documents, that it would be almost impossible to catalog the number of times it has been invoked or contested.

I will begin by looking at the use of *Loving* in Hawaii’s *Baehr* debate. Then I will point out some problematic aspects of the analogy that have not typically been mentioned by the advocates of same-sex marriage. I will illustrate this by reference to contrasting amici curie. Based on this, I conclude “the *Loving* analogy” has been of vital *political* utility to the advocates of same-sex marriage precisely because it is more about politics than law. Indeed, those advocating “same-sex marriage” are not making a legal argument; instead, they are “playing the *Loving* card.”

## II. “THE *LOVING* ANALOGY” IN ACTION

### A. *What is the Analogy?*

What exactly is the *Loving* analogy? The answer is more complex than it might appear. It can be formulated in different ways, ranging along a spectrum from somewhat friendly to outright hostile. The difference in the formulations becomes more evident if the analogy is presented sequentially. Here is a relatively mild-sounding version:

*As Loving is about broadening marriage to include interracial couples, so Baehr is about broadening marriage to include same-sex couples.*

It can also be stated in the following manner:

*As thirty years ago, people defined marriage as something between people of the same race, but this was redefined, so today people define marriage as a relationship between people of the same sexual orientation, and this should be redefined.*

Then again, the alleged analogy can be restated in another, slightly more pointed way:

*As race was irrelevant to marriage then, so sex is irrelevant to marriage now.*

Finally, here is a statement of the analogy which exemplifies the hostile end of the spectrum:

As Virginia's law was enacted by racist citizens and elected officials, embodied the ideology of white supremacy, and was validly overturned by the courts, so Hawaii's law was enacted by heterosexual citizens and elected officials, and embodies the ideology of heterosexual supremacy, and should be overturned by the courts.

Needless to say, this formulation is clearly not designed to persuade one's opponents. It is a subtle way of telling people that they are no different than a bunch of Jim Crow racists, and ought to be ashamed of themselves — so ashamed that they should get out of the way and leave the definition of marriage to the courts.

Now, let us see how these ways of formulating the argument have appeared in Hawaii.

### B. *The Role of the Analogy in the Baehr Litigation*<sup>9</sup>

Until the time of the 1993 plurality opinion of the Hawaii Supreme Court, it was the State that made a point of discussing *Loving*, to affirm the due process right to marry rather than to address questions of equal protection.<sup>10</sup> Up to this time, the plaintiffs paid little attention to *Loving*.<sup>11</sup> During the pleadings below, the local ACLU filed an amicus brief that equated

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9. The *Baehr* case has involved two events at the trial level and two at the appellate level. The first round, from 1991 to 1994, proceeded under the name *Baehr v. Lewin*. References to these documents either appear with the trial-level case number, No. 91-1394-05, or with the docket number No. 15689, if they were submitted in connection with the first appeal to the Hawaii Supreme Court. In 1995, with the replacement of the Director of the Department of Health, the case was renamed *Baehr v. Miike*. References to trial-level documents also appear by the case number, No. 91-1394-05, and references to documents submitted as part of the second, currently pending appeal appear as No. 20371, the docket number for *Baehr v. Miike*.

10. See State's Motion for Judgment on the Pleadings at 5, 29, *Baehr v. Lewin* (Haw. Cir. Ct. 1991) (No. 91-1394-05); Answering Brief of Defendant-Appellee John C. Lewin at 29, *Baehr* (Haw. Cir. Ct. 1991) (No. 91-1394-05) (discussing *Loving* solely in the context of the freedom to marry). On appeal in 1992, *Loving* was ignored by the only brief filed in support of the State. See Amicus Curiae Brief of Rutherford Institute of Hawaii, *Baehr* (Haw. 1992) (No. 15689).

11. See Plaintiffs' Memorandum in Opposition to Defendant's Motion for Judgment on the Pleadings at 25, 27, *Baehr v. Miike* (Haw. Cir. Ct. 1991) (No. 91-1394-05); Plaintiffs-Appellants Opening Brief at 19, *Baehr* (Haw. 1992) (No. 15689); Plaintiffs-Appellants Reply Brief at 2, 7, *Baehr* (Haw. 1992) (No. 15689) (distinguishing the use of *Loving* in *Baker v. Nelson*, 191 N.W. 2d 185 (1971), from the present case, and citing *Loving* for the proposition that the U.S. Supreme Court has "rejected 'morality' as a basis to justify infringement of a privacy right or discrimination against a suspect class").

racism and criticism of homosexuality.<sup>12</sup> But Judge Klein did not cite *Loving* in his opinion and order.<sup>13</sup>

As far as I can tell, the *Loving* analogy was first explicitly introduced into the case in the amicus brief submitted in 1992 to the Hawaii Supreme Court by the Lambda Legal Defense and Education Fund. It was co-authored by Kirk Cashmere, Lambda's local counsel in Honolulu, and Evan Wolfson,<sup>14</sup> a senior staff attorney at Lambda's headquarters in New York City. This brief argued that Virginia's law was based on a "long social history of defining marriage as intrinsically *intraracial*," and went on to claim that "the 'opposite sex' requirement burdening gay people's right to choose our life partners, like the analogous racial restriction in *Loving*, is unconstitutional."<sup>15</sup>

The most dramatic example of the use of the *Loving* analogy came in *Baehr v. Lewin*, the landmark decision issued by a plurality of the Hawaii Supreme Court on May 5, 1993.<sup>16</sup> In contrast to the use of *Loving* in the pleadings below, the plurality opinion in *Baehr* ignored *Loving* in its due process analysis. Indeed, the plurality agreed with the dissent (and implicitly with the concurrence) that there was no fundamental right to same-sex marriage at all under the due process or right to privacy provisions of the Hawaii State Constitution.<sup>17</sup>

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12. See Memorandum of Amicus Curiae American Civil Liberties Union of Hawaii Foundation in Opposition to Defendants' Motion for Judgment on the Pleadings at 12, *Baehr* (Haw. Cir. Ct. 1991) (No. 91-1394-05) ("Of course, the use of 'scientific' evidence to rationalize prejudice is not unique to homosexuals. The accentuated racism of American [sic] in the first half of the twentieth century was often justified by a scientific theory that influenced both popular culture and academic thought and writing."). However, *Loving* was only cited for the proposition that marriage is a fundamental right. See *Id.* In its brief before the Hawaii Supreme Court in 1992, the ACLU did not cite to *Loving*. See Amicus Curiae Brief of the American Civil Liberties Union in Support of Plaintiffs-Appellants, *Baehr* (Haw. 1992) (No. 15689).

13. See Order Granting Defendant's Motion for Judgment on the Pleadings, *Baehr* (Haw. Cir. Ct. 1991) (No. 91-1394-05).

14. After the Hawaii Supreme Court's decision in 1993, Wolfson would become co-counsel in the *Baehr* case. He also serves as Director of the Lambda-sponsored Marriage Project. See, e.g., Evan Wolfson, *A Truly National Civil Rights Movement: Marriage Project Director's Update*, NEWS & VIEWS (October 1, 1997) (visited on April 22, 1998) <<http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=42>>.

15. Brief of Amicus Curiae Lambda Legal Defense & Education Fund, Inc., at 1, 3, *Baehr* (Haw. 1992) (No. 15689). The Lambda brief made both a due process and equal protection argument. *Id.* Their equal protection claim, however, was based on "sexual orientation" as a suspect class, rather than on "sex," which was the later innovation offered by the Hawaii Supreme Court itself. *Id.*

16. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). The Court's plurality opinion has been described by a prominent legal scholar as one of the ten worst state supreme court decisions in American history. BERNARD SCHWARTZ, *A BOOK OF LEGAL LISTS: THE BEST AND WORST IN AMERICAN LAW* 182-84 (1997) (calling the reasoning in the second half of the plurality opinion "an affront to both law and language that well deserves its place on the list of worst decisions").

17. *Baehr*, 852 P.2d at 57 (plurality opinion), 70 (Heen, J., dissenting). In his concurrence, Judge Burns did not contest the due process holding, but focused on what he considered "genuine issues of material fact" relevant to equal protection analysis. *Id.* at 68-70 (Burns, J., concurring)

Instead, taking a page from Lambda's play book, the plurality adopted the *Loving* analogy as part of its equal protection analysis. In their narrative of *Loving*, Justices Levinson and Moon set the U.S. Supreme Court against the Virginia courts. On one side was *Loving v. Virginia*, based on the Fourteenth Amendment's antipathy to "invidious discrimination" based on "racial classifications," regardless of what form they took.<sup>18</sup> On the other side were the Virginia Courts, exemplified by *Loving v. Commonwealth*,<sup>19</sup> committed to the unholy trio of (1) appeals to Divine Will, (2) appeals to "custom," and (3) the use of a formalistic theory of "equal application."<sup>20</sup>

The Attorney General of Hawaii, however, had made no appeals to Divine Will, so the court's heavy emphasis on the Virginia trial court's diatribe was apparently gratuitous. Perhaps the plurality meant to attack the very idea that *anything* could be intrinsically natural or unnatural. If so, it could then have applied that approach to its views about "couples" and "civil liberties." Indeed, it could have deconstructed the very idea of the individual. But it stopped with marriage. So far as Justice Levinson and Chief Justice Moon were concerned, the State's appeals to custom and equal application were as faulty as those made thirty years earlier by the State of Virginia in the defense of racism. Just as the Lovings were discriminated against based upon their race, the *Baehr* plurality contended, the three plaintiff couples were being discriminated against based on their *sex*.<sup>21</sup> In two now-classic quotes, the *Baehr* plurality put the issue in the following terms.

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.<sup>22</sup>

Therefore, in the words of the second quote, "substitution of 'sex' for 'race' in Article I, Section 5 of the Fourteenth Amendment yields the precise case before us together with the conclusion that we have reached."<sup>23</sup>

(arguing that due process hinges on whether people are "biologically fated" for a particular sexual orientation).

18. *Id.* at 62.

19. *Loving v. Commonwealth*, 147 S.E.2d 78 (Va. 1966).

20. *Baehr*, 852 P.2d at 62, 67-68.

21. *Id.* at 63. The plurality and dissent both ignored the plaintiffs' claim that the marriage statute discriminated on the basis of "sexual orientation." Judge Burns, in his concurrence, only addressed the issue in the context of his question whether "sexual orientation" should be included in the term "sex." *Id.* at 68-70 (Burns, J., concurring).

22. *Id.* at 63.

23. *Id.* at 68.

In his dissent, Judge Heen was not impressed by this analogy. "*Loving*," he replied, "is simply not authority for the plurality's proposition that the civil right to marriage must be accorded to same sex couples."<sup>24</sup> Echoing arguments that had been made before, and have been made since, Heen argued that *Loving* was a case about race, not analogous to a case about same-sex couples. Because the Hawaii marriage law is equally open to both sexes, it is therefore *not* parallel to the so-called "equal application" theory advanced by Virginia. The rationales were not parallel, he insisted, because while the Virginia law was based on invidious racial discrimination, the Hawaii law is *not* based upon invidious sex discrimination.<sup>25</sup> Instead, the Hawaii law was based on the nature of the institution of marriage. Judge Heen did not invoke Divine Will; nor did he invoke custom, in the sense of mere convention. Instead, he made a definitional argument, drawing upon *Singer v. Hara*, a key decision from the State of Washington, which had addressed the question of sex-based classifications:

[A]ppellants 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.<sup>26</sup>

Heen insisted that this was *not* a circular argument, but simply a true description of marriage. The plurality, not surprisingly, rejected this "exercise in tortured and conclusory sophistry."<sup>27</sup> In response to Heen's arguments, they simply quoted back from the text of the *Loving* decision. Here we see how the *Loving* analogy becomes less of a legal argument, and more of a powerful political weapon. The plurality was directly comparing Judge Heen to the Virginia judges.<sup>28</sup>

In its Motion for Reconsideration, filed shortly after the initial decision in *Baehr v. Lewin*, the State attacked the plurality's use of *Loving*. First, it drew the following contrast between Virginia's and Hawaii's laws: In Virginia, interracial couples were also forbidden to cohabit. In Hawaii, on the other hand, same-sex couples are free to cohabit, make private contractual promises, and receive recognition from established formal or informal social institutions.<sup>29</sup>

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24. *Id.* at 70 (Heen, J., dissenting).

25. "The statute treats everyone alike and applies equally to both sexes." *Id.* at 71 n.3.

26. *Id.* at 71 (quoting *Singer v. Hara*, 522 P.2d 1187, 1192 (Wash. Ct. App. 1974)).

27. *Id.* at 63.

28. This would have been especially insulting to Judge Heen, who is native Hawaiian.

29. See Memorandum in Support of Appellee's Motion for Reconsideration, or, In the Alternative, for Clarification, and Suggestion of the Appropriateness of Rebriefing and Reargument

Second, the State argued that the “basic civil right” to marry identified in *Loving*—the right, in *Loving*’s words, pertaining to our “existence and survival” — was based on a heterosexual definition of marriage.<sup>30</sup> “Only those who are blind to reality,” the Attorney General argued, “could read the precedents which define the ‘freedom to marry’ and to find that ‘marriage’ to a person of one’s own sex is ‘fundamental to our very existence and survival.’”<sup>31</sup> The view that marriage is “a mere state-endorsed partnership [is] nothing but ‘tortured and conclusory sophistry,’”<sup>32</sup> throwing the plurality’s words back at them. The plurality responded by reaffirming their decision and remanding it to the lower court for a trial.<sup>33</sup>

The case, renamed *Baehr v. Miike*, finally came to trial in 1996. Dan Foley, the plaintiffs’ lead counsel, invoked *Loving* eloquently in his opening and closing statements.<sup>34</sup> *Loving* was not an issue in the trial, however, and was only briefly discussed in the post-trial documents submitted by the parties.<sup>35</sup> While it was invoked in a number of the trial-level amicus briefs submitted by organizations on both sides,<sup>36</sup> Judge Chang’s trial court opin-

at 16, *Baehr* (Haw. 1993) (No. 15689).

30. *Id.* at 19.

31. *Id.* at 18.

32. *Id.*

33. See *Baehr v. Lewin*, 852 P.2d 44, 74-75 (Haw. 1993) (granting the motion in part, in order to reiterate its “strict scrutiny” mandate, denying the request for reargument, and remanding the case for trial).

34. In addition to news stories about the trial in the HONOLULU STAR-BULL. and the HONOLULU ADVERTISER, my own firsthand observations can be found at: David Orgon Coolidge, *Marriage on Trial: Leaving It to the Experts?*, HAW. CATH. HERALD, Sept. 20, 1996, at 1; *Marriage on Trial: Who is the Judge?*, HAW. CATH. HERALD, Oct. 4, 1996, at 22.

35. See Plaintiffs’ Post Trial Memorandum at 52-53, *Baehr* (No. 91-1394-05) (Oct. 25, 1996) (reminding the trial judge of the standard of scrutiny, using a lengthy *Loving* quote from the *Baehr* plurality opinion); Defendant State of Hawaii’s Post Trial Brief at 6, *Baehr* (No. 91-1394-05) (Oct. 25, 1996) (complaining that “the plaintiffs have unfairly compared the State’s position in this case to the position of the State of Virginia in *Loving*,” affirming the original holding in *Loving*, and arguing that the two cases can be distinguished: “The evil of the marriage prohibition in *Loving* was that the law sought to continue artificially segregating races. Whereas, in this case the sexes are not separated, neither sex is burdened relative to the other, and in fact the law only bans marriage where one sex is excluded”).

36. *Loving* was invoked in trial-level briefs by a number of amici. See Brief of Amicus Curiae Gay & Lesbian Advocates & Defenders; National Center for Lesbian Rights; NOW Legal Defense and Education Fund, Inc.; National Organization for Women, Inc.; National Organization for Women Foundation, Inc., In Support of Appellees at 6, *Baehr* (No. 91-1394-05) (drawing an analogy between recognition of interracial marriages and anticipated recognition of same-sex marriages); Brief of the Amicus Curiae in Support of Defendant at 6, *Baehr* (No. 91-1394-05) (filed by Representatives Abinsay, Kahikina, Kanoho, Meyer, Stegmaier, Swain, Cachola, and Ward, with the assistance of the American Center for Law and Justice) (quoting *Loving* on marriage as “fundamental to our very existence and survival,” and citing it for the proposition that opposite-sex marriages “are the building blocks of democratic society”); Brief Amicus Curiae of the American Friends Service Committee in Support of Plaintiffs at 1, 4, *Baehr* (No. 91-1394-05) (emphasizing the Hawaii Supreme Court’s use of *Loving*, and drawing numerous parallels to discrimination against African-Americans); Trial Brief of Amicus Curiae Japanese American Citizens League-Honolulu Chapter at 5-8, *Baehr* (No. 91-1394-05) (rehearsing the Hawaii Supreme Court’s use of *Loving* and arguing that “[t]he court must, as a matter of law, view the arguments of the Defendant with the

ion of December 3, 1996 ignored it.<sup>37</sup> The debate about *Loving* has continued in the briefs filed in the pending appeal before the Hawaii Supreme Court. The State argues that *Loving* "proceeded from the premise, not present in this case, that the classification at issue employed a suspect criterion." It also claims that while the law at issue in *Loving* clearly discriminated in favor of whites and against blacks, in contrast, "Hawaii's marriage law has neither the purpose nor the effect of discriminating against either women or men. To the contrary, its purpose and effect are to treat men and women as co-equal partners, each a necessary part of the union."<sup>38</sup> The plaintiffs defend the Hawaii Supreme Court's original use of *Loving*, while using it to take aim at the State: "Apparently, the Director would have this court embrace the logic of the Virginia Supreme Court." "This court," they add, "should decline the Director's invitation to turn back the clock."<sup>39</sup> This is nothing but "playing the *Loving* card." The plaintiffs call the Hawaii Supreme Court to a supposedly nobler mission, explicitly recalling the earlier struggles against anti-miscegenation laws: "One state had to show leadership, and the court was properly asked to provide it through a direct and timely challenge to existing discrimination. The court did not flinch. History has upheld it."<sup>40</sup> Similar attacks were made by amici on the Attorneys General of other states filing in support of the State of Hawaii.<sup>41</sup>

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same level of strict scrutiny as if the Defendant was attempting to perpetuate a statute that was *racially discriminatory* on its face") (emphasis in original).

37. See *Baehr v. Miike*, Civ. No. 91-1394 (Dec. 3, 1996), reprinted in 23 FAM. L. REP. 2001 (Haw. Cir. Ct. 1996). On Dec. 4, Judge Chang orally agreed to stay his injunction, and formalized this in writing shortly thereafter. See Order Granting Defendant State of Hawaii's Motion to Stay Injunction Pending Appeal Filed on December 3, 1996, *Baehr* (No. 91-1394-05). The case is pending on appeal as *Baehr v. Miike*, No. 20371 (1997). For contrasting legal assessments of the trial, compare Samuel A. Marcossan, *The Lesson of the Same-Sex Marriage Trial: The Importance of Pushing Opponents of Lesbian and Gay Rights to Their "Second Line of Defense,"* 35 U. LOUISVILLE J. FAM. L. 721 (1996-97) with Lynn D. Wardle, *The Potential Impact on Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 884-91.

38. Defendant-Appellant's Opening Brief at 17-20, *Baehr* (No. 20371). See also Defendant-Appellant's Reply Brief at 5, *Baehr* (No. 20371) ("Moreover, plaintiffs have no answer to the fact that unlike the law challenged in *Loving*, which was rooted in notions of the inferiority of blacks, Hawaii's marriage law is *not* based upon any notion of the inferiority of females (or males).").

39. Plaintiffs-Appellees' Answering Brief at 21-23, *Baehr* (No. 20371). In the plaintiffs' words, "[s]ubstituting 'sex' for 'race' and 'women and men' for 'the white and the Negro,' you have, of course, the identical argument made by the [Hawaii] Director [of Health]." *Id.* at 22-23.

40. *Id.* at 34.

41. Compare Brief of Amici Curiae In Support of Plaintiffs-Appellees, Gay and Lesbian Advocates & Defenders, NOW, NOW Foundation, NOW Legal Defense & Education Fund, National Center for Lesbian Rights, NW Women's Law Center, People for the American Way, Asian-American Legal Defense & Education Fund, Mexican-American Legal Defense & Education Fund at 4, n.2, *Baehr* (No. 20371) with Brief of Amici Curiae States of Nebraska, Alabama, California, Colorado, Georgia, Idaho, Michigan, Mississippi, Missouri, South Carolina and South Dakota in Support of the Defendant-Appellant, *Baehr* (No. 20371) ("Eleven States [support Hawaii]'s position that the Hawaii Constitution may not accord rights to its citizens that may be objectionable to some other states . . . . With the exception of Michigan, a mere fifty years ago each of these States could

### C. *The Political Debate about the Analogy*

Between the court's bombshell opinion in 1993 and the case's second arrival to the court in mid-1997, the use of the *Loving* analogy shifted to other venues in Hawaii. Between 1993 and 1997, the message of supposed equivalence between interracial and same-sex marriage was preached relentlessly in newspaper editorials, columns by activists, and legislative speeches.

Both major Hawaii newspapers have openly supported same-sex marriage from the beginning. Within a week after the *Baehr* decision, the HONOLULU ADVERTISER had this to say about the issue:

By granting license [sic] to marry to gays and lesbians, will Hawaii go beyond tolerance to officially sanctioning (and indeed rewarding) a relationship outside the norm of the standards of the majority of the community? The answer, today, is yes. Yet society's standards are constantly evolving. There was a time not long ago when most states had laws against marriage between persons of different races.<sup>42</sup>

Several weeks later, after the supreme court rejected the State's Motion for Reconsideration, the HONOLULU STAR-BULLETIN was even more blunt. "The battle for acceptance and equal rights for gays isn't over by a long shot," it announced. "Many Americans still consider homosexuality to be immoral and a form of mental illness." The paper was not subtle in how it characterized these Americans: "Fear and ignorance have long been the enemies of sound public policy. Ethnic cleansers, Ku Klux Klansmen, fascists and witch burners have used them to deny people life, liberty and happiness throughout history."<sup>43</sup>

The drumbeat continued throughout the 1994 legislative session, inside and outside of the state capitol. In April, when the legislature passed a bill in response to the *Baehr* decision, legislators supportive of same-sex unions began "playing the *Loving* card." "I've heard the argument that there is no discrimination because members of both genders are equally forbidden from marrying anyone of the same gender," said Senator Matt Matsunaga on the floor of the Senate. "But similar arguments failed to save the laws against inter-racial marriage in which everyone was equally forbidden to marry anyone of a different race. Parallel discriminations are

have made these same arguments about interracial marriage. By the time of the U.S. Supreme Court's decision in *Loving v. Virginia*, the states of Alabama, Georgia, Missouri, Mississippi and South Carolina outlawed interracial marriage.").

42. Editorial, *Gay marriage: Moving beyond tolerance*, HONOLULU ADVERTISER, May 9, 1993, at B2.

43. *Gay marriage decision is a civil rights victory*, HONOLULU STAR-BULL., May 31, 1993.

still, nonetheless, discriminations."<sup>44</sup> In response, Senator Stan Koki shot back: "This is not an issue about civil rights. Blacks and minorities have suffered economic hardship. They've been treated as second class — in the back of the bus, separate bathrooms. None of this applies here in this case."<sup>45</sup> The final text of the bill included a lengthy discussion of *Loving* in its opening section, and explicitly rejected the *Loving* analogy. This provoked one Representative to compare the bill to discriminatory Jim Crow laws.<sup>46</sup>

This pattern of attack was also displayed to great effect in the 1995 Report of the Commission on Sexual Orientation and the Law.<sup>47</sup> The Chairman of the Commission, Thomas P. Gill, was a member of the Board of Directors of the local ACLU, and a strong supporter of same-sex marriage.<sup>48</sup> The Majority Report spent a full four pages discussing *Loving*, offering analogies to the same-sex marriage debate. The opponents of same-sex marriage, they charged, were making the same kinds of arguments that had been made thirty years earlier: appeals to religion, morality and public health; unwillingness to recognize existing relationships; unwarranted fears of economic disruption; concerns about children; and appeals to public opinion. "The Commission favors the belief of John F. Kennedy: 'If we cannot end our differences, at least we can help make the world safe for diversity.'"<sup>49</sup> The minority opinion, however, challenged the Majority's caricature of their position, and challenged the *Loving* analogy as well.<sup>50</sup>

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44. 1994 SENATE JOURNAL 450 (Haw.). Senator Andrew Levin seconded his point: "I have a very difficult time distinguishing between the *Loving* decision in 1967, which said that inter-racial marriages cannot be prohibited. . . . The situation hasn't changed. And now we face a very, very similar issue with respect to same-sex couples." *Id.* at 451. Their colleague, the late Senator Richard Matsuura, also spoke at some length about his experiences with racial prejudice as a young man in Georgia. However, he voted in favor of the bill for other reasons. *Id.* at 447.

45. *Id.* at 450. Shortly thereafter, Senator Rick Reed added: "It is offensive to equate homosexual behavior with ethnicity, as some members of this body and other[s] have done in their attempt to make the homosexual campaign for minority status, and the special rights this nation affords minorities, comparable to the civil rights movement on behalf of Blacks and other legitimate minorities in our country." *Id.* at 452.

46. 1994 HAW. SESS. LAWS 217 (Relating to Marriage). Representative Cynthia Thielen compared it to supporting Japanese American internments and segregation: "As a child, I visited the Deep South with my mother. In a store, I walked up to a drinking fountain to get a drink. A man rushed over and told me I couldn't use that drinking fountain. When I asked why, because I was thirsty, he said it was for 'coloreds only.' And then I saw the sign above the fountain - 'colored' - and the other fountain with a sign above it, saying 'whites'. Hawaii's Supreme Court will tell us if we today have enacted a 'whites only' law - and this is the proper role for the Court." She too voted for the bill. 1994 HOUSE JOURNAL 655-56 (Haw.).

47. See LEGISLATIVE REFERENCE BUREAU, STATE OF HAWAII, REPORT OF THE COMMISSION ON SEXUAL ORIENTATION AND THE LAW (Dec. 8, 1995). The official two-page summary of the Commission Report stated that "the reasons advanced by those who support this denial [of same-sex marriage licenses] show a close parallel to the landmark case of *Loving v. Virginia*." *Id.* at iii.

48. See *id.* at 194 appendix F-2 (citing *Coalition Forms To Support Same-Sex Marriage and Oppose State Constitutional Amendment* (ACLU Press Release), Oct. 27, 1993).

49. *Id.* at 29.

50. See *id.* at 47. The minority opinion stated: "The majority's argument relies on the tenuous

The majority responded in a condescending tone to the minority: "The Minority apparently thinks our Supreme Court was misguided when it cited *Loving*. The majority agrees with the Supreme Court."<sup>51</sup>

In particular, "the *Loving* card" was played during the 1996 and 1997 legislative sessions, in an effort to stop a proposed amendment in the Hawaii Constitution. During this period, the *Loving* analogy was invoked in at least seven editorials in the HONOLULU ADVERTISER and HONOLULU STAR-BULLETIN.<sup>52</sup> In one case, when the ADVERTISER published a dissenting view by the late Rex E. Lee, former Solicitor General of the United States, it felt compelled to attack him directly in the same section. "Consider what the results would have been if a constitutional ban on interracial marriages had been proposed in the deep South before the civil rights era," it hissed. "Of course it would have passed. And of course it would have been wrong."<sup>53</sup> With that, the former Solicitor General's well-reasoned beliefs were slandered with the brush of bigotry.

When the proposed constitutional amendment came to the Hawaii House floor for third reading in early 1997, Representative Ed Case made an impassioned speech against it. In words that some might call eloquent, and others might call inflammatory, he made the following set of analogies:

So, to the black children of Arkansas in the early 1950s, whom the majority didn't want to attend white schools, this no vote is for you. To the Japanese-American internees of World War II, who should have been protected by our Constitution from ma-

assumption that the present legal status of gay marriages parallels the laws against interracial marriages in the 1960s . . . . Race and gender are immutable characteristics. Clearly, sexual orientation is not in the same category—sexual orientation is known to change and is, to a large extent, behavioral . . . . Homosexual marital rights are simply not civil rights." *Id.*

51. *Id.* at 101 (majority response to minority opinion). The majority also stated, "[t]he opposition to interracial marriage (called miscegenation) was as emotional and passionate in the 1960's as the opposition to same-gender marriage now. Many of the same reasons, including destruction of existing society, were given then as they are now. The *Loving* case did not cause the collapse of society in Virginia or elsewhere, and the arguments now seem ridiculous, particularly in Hawaii." *Id.*

52. Editorial, *Legislators Hold Cards in Gay Marriage Issue*, HONOLULU STAR-BULL., Jan. 24, 1997, (viewed on April 22, 1998) <<http://starbulletin.com/97/01/24/editorial/index.html>>; Editorial, *Preparing for Battle on Same-Sex Marriage*, HONOLULU STAR-BULL., Nov. 13, 1997, (viewed on April 22, 1998) <<http://starbulletin.com/97/11/13/editorial/index.html>>; Editorial, *Same-Sex Marriage: Don't Amend the Constitution*, HONOLULU ADVERTISER, Mar. 3, 1996, at B2; Editorial, *Same-Sex Marriage Foes are Struggling*, HONOLULU STAR-BULL., Apr. 13, 1996, at B2; Editorial, *Same-Sex Marriage Issue far From Settled*, HONOLULU STAR-BULL., Dec. 5, 1996, at A18; Editorial, *Same-Sex Marriage: Public Opinion vs. the Law*, HONOLULU ADVERTISER, Feb. 24, 1996, (viewed on April 22, 1998) <<http://starbulletin.com/97/11/13/editorial/index.html>>; Editorial, *Same-Sex Marriage: Public Opinion vs. the Law*, HONOLULU ADVERTISER, Apr. 6, 1996, at A6 (same title as previous editorial, but different text).

53. *Same-Sex Marriage: Don't Amend the Constitution*, *supra* note 52. (responding to Rex E. Lee, *Same-sex unions: Let Voters Decide*, HONOLULU ADVERTISER, Mar. 3, 1996, at B3).

majority America, but at least had a Constitution from which to seek protection, this no vote is for you. To all of the interracial couples of the past, present and future, whom the majority didn't want to marry, this no vote is for you . . . . To those who fear the rise of the thought police and the drive to homogenize a country and state whose greatest strengths are their diversity, this no vote is for you. To all of the minorities of the past, and to those minorities of the future whose circumstances we cannot even imagine today, this no vote is for you. This no vote is for us all.<sup>54</sup>

In the face of such strident attacks, the Reverend Marc Alexander, Executive Director of the Hawaii Catholic Conference offered the following response on behalf of his fellow citizens:

Our Aloha State has been in turmoil since the Hawaii State Supreme Court decision in *Baehr v. Miike* in May of 1993 which forced the issue of 'same-sex marriage' into the public forum. The public discourse which has transpired has helped the people of Hawaii realize how important the institution of marriage really is. In 1991 some 49% of the people of Hawaii opposed 'same-sex marriage.' As of last year, that figure had increased to almost 75% of the people of Hawaii, a people known for their 'aloha' and tolerance. In fact, just last week some 7,000 people rallied in a very dignified and respectful way in favor of traditional marriage. The people who gathered came from across our state. We were ordinary people, normally silent, young and old, married and single, from every ethnic group in Hawaii, religious and non-religious. Looking at the masses I couldn't help but think that this group had nothing in common except that Hawaii is our home and we are convinced that marriage should not be redefined. The 75% of the people who want marriage to be marriage can hardly be compared to Southern white racists of the 50's and 60's or to religious bigots. No, we just want what is best for our community and our children. And we want our right and power to determine public policy returned to us. We approved our State Constitution and we have the right to change it.<sup>55</sup>

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54. 1997 HOUSE JOURNAL 119 (Haw.).

55. *Testimony of Father Mark Alexander, Executive Director of the Hawaii Catholic Conference* (Feb. 3, 1997) (viewed on April 22, 1998) <<http://www.pono.net/policy/samesex-marriage/t960127w.html>>. Other testimony of the Hawaii Catholic Conference spanning the length of the debate in Hawaii can be found at this website.

Nevertheless, the rhetorical onslaught continued. Senator Avery Chumbley, co-chair of the Hawaii Senate Judiciary Committee, expressed sentiments similar to those of Representative Case when the final text of the Amendment came to the Senate floor several months later:

Apart from the constitution itself, I believe that America's commitment to fairness and quality is best captured in the words of Dr. Martin Luther King, 'I have a dream,' he said, 'that some day my children will be judged not by the color of their skin but rather by the content of their character.' And as legislators, it is a daily challenge that we make real this dream and to ensure that distinctions imposed by the law are based on genuine and substantial governmental interests and not based on fear, ignorance, or prejudice.<sup>56</sup>

Senator Chumbley gave some indication of what he meant by "fear, ignorance, or prejudice" by stating:

Most of the opposition to same-sex marriage and reciprocal benefits came from persons who stated that they were so motivated by strong religious beliefs. I understand that religious beliefs compel some people to oppose same-sex marriage because these relationships involve what some consider aberrant and deviant sexual behavior. I struggled in talking with these persons who were sometimes ill-informed and, unfortunately, responding from fear rather than from a place of tolerance and understanding. . . . In the end, I am willing to acknowledge that political pressure was brought and bought by persons both within and outside of Hawaii, which allowed for the 'majority' to be able to overrule the minority.<sup>57</sup>

It is little wonder, then, that in the Hawaii House Chamber, on that same day, Representative Gene Ward made a speech in support of the Marriage Amendment that reflected his clear understanding of the dynamics of the situation, and the politics of the *Loving* analogy: "Using Judge Levinson's logic in the *Loving* case and the compelling State interest by which it was framed, Mr. Speaker, it's tantamount to me asking you do you still beat your wife."<sup>58</sup>

In short, while the positive formulation of the *Loving* analogy has appeared from time to time, when the pressure is on, it is the accusation of "no better than Jim Crow" that gets thrown into the debate. When the debate grows fierce, the argument takes on a razor's edge. Consider, for in-

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56. 1997 SENATE JOURNAL at 766 (Haw. 1997).

57. *Id.* Senator Chumbley, by the way, voted in support of the proposed Amendment.

58. 1997 HOUSE JOURNAL 920 (Haw.).

stance, the meaning of radio and TV ads aired in 1997 with the following set of images:

- (1) Japanese-Americans being forced into internment camps,
- (2) dramatic footage from marches during the civil rights movement, and then
- (3) a message: "Threatens the rights of all."<sup>59</sup>

The clear message is that preserving marriage under existing law is no different than imprisoning or attacking ethnic minorities. This is not a legal argument but simply "playing the *Loving* card."

Ironically, this message has been broadcast to the same citizens who live, day by day, at work, in neighborhoods, in religious communities, and in the public square alongside neighbors who call themselves "gay" and "lesbian." Most of these citizens of Hawaii are able both to support the existing marriage law *and* still respect their neighbors. Despite this negative media campaign—or perhaps because of it—seventy percent of citizens of Hawaii continue to oppose the legalization of "same-sex marriage," especially if it is forced upon them by the judiciary.<sup>60</sup> At this point, when the rubber of progressive legal theory hits the road of public argument, much of what has been grandly theorized about in the academy comes to a screeching halt. Even with the ACLU out spending their opponents two to-one, the proposed constitutional amendment passed the legislature, and will go before the voters of Hawaii on November 3, 1998.<sup>61</sup> The citizens of Hawaii can count on seeing more propaganda during the coming year.<sup>62</sup>

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59. See, for example, television ad aired on KGMB-TV, Apr. 20, 1996, at 6:19 P.M. The message was prepared by the Coalition for Equality and Diversity, an ACLU-sponsored group.

60. See, e.g., Robbie Dingeman, *Most Residents Still Against Same-Sex Unions, Poll Finds*, HONOLULU ADVERTISER, Nov. 5, 1997, at A14 ("The poll found that 69 percent favored 'traditional' male-female marriage, while 23 percent said that same-sex marriages should be allowed. Another 8 percent didn't know or refused to say."); *Voters Strongly Oppose Gay Unions*, HONOLULU STAR-BULL., Feb. 24, 1997, (viewed April 22, 1998) <<http://starbulletin.com/97/02/24/news/story2.html>> ("[S]entiments about legalizing same-gender marriage essentially remain the same as a year ago, with 70 percent of respondents saying they were against it.")

61. The proposed Marriage Amendment, which would become Article I, Section 23 of the Hawaii State Constitution, reads as follows: "The legislature shall have the power to reserve marriage to opposite-sex couples." H.B. 117, 19th Leg. (Haw. 1997) (enacted). On April 29, 1997, the proposed Marriage Amendment was approved by the Senate with 25 Ayes and 0 Nays, 1997 SENATE JOURNAL 766 (Haw.), and in the House with 44 Ayes, 6 Nays, and 1 Excused. 1997 HOUSE JOURNAL 922 (Haw.). See David Orgon Coolidge, *At Last, Hawaiians Have Their Say on Gay Marriage*, WALL STREET JOURNAL, Apr. 23, 1997, at A19.

62. According to Elizabeth Birch, executive director of the Washington, D.C. based Human Rights Campaign (HRC), "This is a fight of historic proportions." Peter Freiberg, *Gay Groups Preparing to Wage War in Hawaii*, WASHINGTON BLADE, June 20, 1997, at 23. HRC and other national gay and lesbian rights groups are working closely with the local organization opposing the Marriage Amendment, Marriage-Project Hawaii. *Id.* A new organization has been formed to oppose the Amendment, called Save Our Constitution. HRC has hired former state legislator Jacke Young as a consultant for the campaign. *Aloha Nuptials*, WASHINGTON BLADE, Feb. 6, 1998, at 16. On the other side, a new organization, Save Traditional Marriage-'98 (STM), has been formed to

#### D. *The Power and Purchase of the Analogy*

What, then, can be said in summary about the power and purchase of the *Loving* analogy, as it appears on the ground in Hawaii where the marriage debate has gone the furthest? It would appear that the *Loving* analogy is not so much an argument about heterosexism, since that is a complex argument more suited to legal conferences than to radio and television propaganda. Instead, it has been used as a *blunt instrument* to achieve certain goals, among them (1) claiming the moral high ground of civil rights, and (2) intimidating and shaming one's opposition and the general public. This has been done not by offering legal arguments, but by projecting emotional images and associations. The goal of playing "the *Loving* card" is to soften up the public, so it will not mobilize. After all, the plaintiffs, their attorneys, and the organizations advancing their campaign win if the public does nothing. The advocates are not trying to *convince* the public of anything, except to stay home. By definition, they are trying to circumvent the democratic process and achieve their results through the anti-majoritarian courts.

### III. PROBLEMS WITH THE *LOVING* ANALOGY

There are some facts, however, which do not fit neatly into the claimed analogy between *Loving* and *Baehr*. Indeed, it can be argued that the two issues, and cases, are fundamentally different.

#### A. *States and Statutes*

First, perhaps the most striking difference is a comparison of the two states under discussion. The State of Virginia was a hotbed of racial polarization in virtually every area of social life. While Virginia had a substantial African-American population, the power elites in Virginia were overwhelmingly white.<sup>63</sup> Long after other states had repealed their anti-misce-

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campaign for the passage of the Marriage Amendment. Its Co-Chairs are Diane Ho Kurtz, executive vice-president of Hawaii Biotechnology Group, Inc., and Bill Paul, former Chairman of the Hawaii Chamber of Commerce and the Hawaii Visitors Bureau. Before the fight is over, millions of dollars will probably be poured into the campaign. See Mike Yuen, *New Isle PAC Hopes to Derail Gay Marriages: A Hawaii Constitution Amendment Would Give Legislators the Power*, HONOLULU STAR-BULL., Nov. 12, 1997, at A1.

63. It hardly needs comment, but white dominance is obvious from the campaign launched in support of the anti-miscegenation law in the 1920s; the Massive Resistance against the U.S. Supreme Court's *Brown* decision; the State's open warfare against the NAACP; and the Supreme Court of Appeals' decision in *Naim v. Naim*. See ROBERT A. PRATT, *THE COLOR OF THEIR SKIN: EDUCATION AND RACE IN RICHMOND, VIRGINIA, 1954-89* (1992) (on Massive Resistance); MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961*, at 247-51, 272-82 (1994) (on Massive Resistance and the attack on the NAACP); Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to Loving v. Virginia*, 21 U.C. DAVIS

generation laws, the State of Virginia was among those Southern States holding on to the bitter end.<sup>64</sup>

In contrast, Hawaii is probably the only state in which whites—or *haoles*—constitute less than a majority. For this reason, supporters of “same-sex marriage” expected Hawaii to be sympathetic to their cause.<sup>65</sup> To be sure, Hawaii is hardly a hotbed of “anti-gay” sentiment, either in its culture or in its laws. Quite the contrary, Hawaii considers itself far more tolerant and “progressive” than the rest of the country when it comes to same-sex couples. And so it is, both before and after *Baehr*.<sup>66</sup> Before the 1993 plurality opinion in *Baehr*, however, neither Hawaii nor other States showed any sign of seriously debating their definitions of marriage. Indeed in other states, the question of marriage had been taken off the table by gay and lesbian legal strategists.<sup>67</sup>

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L. REV. 421, 422-25 (1988) (on the campaign for the anti-miscegenation statute); Robert A. Pratt, *Crossing the Color Line: An Historical Assessment and Personal Narrative of Loving v. Virginia*, 41 HOW. L.J. (forthcoming 1998); Gregory Michael Dorr, Principled Expediency: Eugenics, *Naim v. Naim*, and the Supreme Court (1997) (unpublished manuscript, on file with author) (giving the full story of *Naim v. Naim*).

64. See generally ROBERT SICKELS, RACE, MARRIAGE AND THE LAW (1972).

65. According to the 1990 census, 61.8% of the population of Hawaii is “Asian or Pacific Islander,” 33.4 % is “Caucasian,” and the remaining 5% of residents are “black,” “American Indiana, Eskimo or Aleut,” or “Other”. See ANTHONY MICHAEL OLIVER, HAWAII FACT AND REFERENCE BOOK 12 (1995). This diversity was triumphed by early commentators from the mainland as a likely source of support for “same-sex marriage”. See, e.g., Andrew Koppelman, *No Fantasy Island: Gay Rites Gain Momentum in Hawaii*, NEW REPUBLIC, Aug. 7, 1995, at 23 (“The State is the most racially diverse in the U.S., and traditional Hawaiian culture is very tolerant of same-sex relationships.”); Deb Price, *Seeking the Right to Marry for Gay Couples*, HONOLULU STAR-BULL., Jan. 5, 1993, at A12 (“[I]n Hawaii—known for its fruit salad of ethnic and racial groups and its privacy guarantees—gay couples are feeling lucky.”). But see Dingeman, *supra* note 60; *Voters Strongly Oppose Gay Unions*, *supra* note 60.

66. For instance, in 1991 Hawaii added “sexual orientation” to the list of protected classifications under its fair employment statute. HAW. REV. STAT. §§ 368-1, 378-1, 378-3 (1997). In addition, “Reciprocal Beneficiaries” (RB) legislation was passed during the 1997 legislative session. See 1997 HAW. SESS. LAWS ch. 383. The RB law allows certain benefits previously limited to married couples to be extended to two individuals who are otherwise ineligible to marry. Unlike a domestic partnership statute, which would be intended to apply only to persons in an “intimate” (i.e. sexual) relationship, RBs can also be a parent and child, or two brothers, or two sisters, or two close friends. The two individuals need not live together, or even reside in Hawaii. Two days after the Governor allowed the bill to become law without his signature, it was challenged in court by a group of Hawaii employers. As of this writing, a consent decree has been entered that drastically narrows the scope of employers covered by the statute, and surprisingly few persons have signed up under the law. See Op. ATT’Y GEN., No. 97-05 (Haw. Aug. 14, 1997) (offering a narrower interpretation of the Act than some had expected); *Hawaii’s Domestic Partners Law a Bust*, WASHINGTON TIMES, Dec. 25, 1997, at A14 (updating the narrative, and reporting that while the State expected at least 20,000 people to sign up as RBs, only 5,000 individuals had obtained applications, and only 296 couples had officially registered with the State as of Dec. 10, 1997); Linda Hosek, *Reciprocal Benefits Limited: A Deal Would Exempt Most Firms from Having to Pay Health Benefits*, HONOLULU STAR-BULL., Sept. 26, 1997, (viewed April 22, 1998) <<http://starbulletin.com/97/09/26/news/story1.html>> (describing the proposed consent decree).

67. See ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE, *supra* note 7, at 57 (“The issue of gay marriage was impaled on these failures to make any legal headway. Lacking success in the marriage forum, lawyers and activists concentrated their energies on issues for which there were

One can also see differences in the marriage laws themselves. In Virginia, the anti-miscegenation law was partially a leftover from slavery, and partially the product of a zealous campaign by social scientists and helping professionals aimed at "improving" society.<sup>68</sup> Under the anti-miscegenation law, it was a *felony* if a white and a black person married each other.<sup>69</sup>

In Hawaii, in contrast, the marriage law is positive, not prohibitory. It was enacted under the Hawaiian Kingdom and, in this particular respect, has remained unchanged since statehood. In the state's words, "Section 572-1 [the marriage statute] does not compel any action from homosexual couples. It imposes no penalties or other sanctions upon them. Their relationships are not disturbed in any manner by the law."<sup>70</sup> In Hawaii, no one was charged with a felony; the State simply sent them a polite letter and returned their marriage applications.<sup>71</sup>

This, of course, points out another crucial difference: The *Lovings* could be found guilty of a felony because there was somewhere else—right across the river—where they *could* marry.<sup>72</sup> The anti-miscegenation laws were badges and incidents of slavery and products of eugenic social engineers. In this respect, Southern anti-miscegenation laws ran counter to the Western tradition of marriage law. All one has to do is to look at any standard history of Western law, from Roman times to the present, to see that

tangible legal successes."). Even after the *Baehr* case began, there was still reluctance on the part of national gay rights organizations to support it. See Paul M. Barrett, *I Do/No You Don't: How Hawaii Became Ground Zero in Battle Over Gay Marriages*, WALL STREET JOURNAL, June 17, 1996, at A1 ("The Hawaii case was a big topic at the twice-yearly meetings of the Roundtable, a group of high-profile gay and lesbian lawyers. 'We had arguments, discussions, debates, some very heated,' recounts Mr. Wolfson, a participant.").

68. In the words of Phil Hirschkop, who participated in the oral argument before the U.S. Supreme Court, "These are slavery laws, pure and simple." Transcript of Oral Argument at 2, *Loving* (No. 395), reprinted in 64 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 961 (Philip B. Kurland & Gerhard Casper eds., 1975). On the link between anti-miscegenation laws and eugenics, see generally Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL'Y 1 (1996); Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to Loving v. Virginia*, 21 U.C. DAVIS L. REV. 421 (1988).

69. Virginia's anti-miscegenation law provided that, "If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years." VA. CODE ANN. § 20-59 (Michie 1950), quoted in *Loving v. Virginia*, 388 U.S. 1, 4 (1967).

70. State's Motion for Judgment on the Pleadings at 18, *Baehr v. Miiike*, (No. 91-1394-05) (Haw. Cir. Ct. 1991).

71. *Baehr*, 852 P.2d at 44, 49-50 n.3 (providing history and text of the Department of Health letter to the plaintiffs rejecting their marriage applications). Hawaii's current policy is to put marriage licenses from same-sex couples on hold, pending the results of the *Baehr* litigation. See, i.e., Ruth Shiroma, *Marriage Licenses Withheld from Homosexual Pair*, HONOLULU ADVERTISER, June 18, 1994.

72. The Lovings married in Washington, D.C. in June, 1958. See *Loving*, 388 U.S. at 1, 2.

marriage has been understood to involve the union of a man and a woman.<sup>73</sup>

In contrast, there was no place, and is no place, for same-sex couples to go to get married. To legalize "same-sex marriage," marriage itself will first have to be redefined.<sup>74</sup>

### B. Differences in Litigating: Activists, Plaintiffs and Lawyers

There are other important differences between *Loving* and *Baehr*. These concern differences between the plaintiffs, the way in which the cases were launched, the interaction between plaintiffs, lawyers and interest groups, and the public response to the decisions.

*Loving* began quite differently than *Baehr*, and the differences are telling. No one "planned" the *Loving* case. Mildred and Richard Loving were not activists.<sup>75</sup> They were an ordinary man and woman from rural Virginia, who grew up and fell in love in communities which were relatively tolerant of interracial couples. They did not begin by challenging Virginia's anti-miscegenation laws; when they decided to marry, Richard knew about the Virginia statute, so they got married in 1958, in Washington, D.C. They then moved back to their community, thinking that their marriage was safe, but they were wrong. The *Loving* case began when someone tipped off the Caroline County Sheriff that Richard and Mildred had gotten married, and the sheriff arrested them.

After being indicted by a grand jury, they pled guilty to violating Virginia's Racial Integrity Act. On January 6, 1959, Judge Leon Bazile sentenced them to one year in jail. Judge Bazile agreed to suspend their sentences, however, if they agreed not to reside together in Virginia as husband and wife for a period of twenty-five years.<sup>76</sup> In Professor Pratt's

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73. See for example, the excellent analysis by JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION (1997). The late John Boswell, in contrast, argued that same-sex unions were a recognized feature of early Christian tradition. See JOHN BOSWELL, SAME-SEX UNIONS IN PREMODERN EUROPE (1994). His claims were bold, and widely broadcast, but they appear to have little basis. Even William Eskridge, who is generally enthusiastic about accounts of pre-modern same-sex unions, is less than confident about Boswell's conclusions: "It seems likely that the Church did sanction these brotherhood ceremonies and that there is some likelihood that the brothers so joined enjoyed relationships of affinity and erotic possibilities." ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE, *supra* note 7, at 27. For more pointed critiques of Boswell's claims, see Brent D. Shaw, *A Groom of One's Own? The Medieval Church and the Question of Gay Marriage*, NEW REPUBLIC, July 1994, at 18-25, 33-38, 40-41; Robin Darling Young, *Gay Marriage: Reimagining Church History*, FIRST THINGS, Nov. 1994, at 43-48; and Constance Woods, *Same-Sex Unions or Semantic Illusions?*, COMMUNIO, Summer 1995, at 316.

74. For a description and critical discussion of these proposed redefinitions, see Coolidge, *supra* note 1, at 28-42.

75. For a fuller narrative of the Loving family and the *Loving* case, see Pratt, *supra* note 63; SICKELS, *supra* note 3, at 76-110.

76. Judge Bazile's opinion is printed in VIRGINIA BRIEFS AND RECORDS, No. 6163, *Loving*

words, "The Lovings paid their court fees of \$36.29 each and moved to Washington, D.C., where they would spend their next five years in exile."<sup>77</sup>

"The Lovings had not really been that interested in the civil rights movement, nor had they ever given much thought to challenging Virginia's law," as Pratt notes.<sup>78</sup> But during the 1963 debate over the civil rights bill, Mildred wrote a letter to U.S. Attorney General Robert Kennedy, asking if there was any way in which their conviction could be overturned. When Kennedy received the letter, he forwarded it to the ACLU, and Bernard Cohen, a local Alexandria attorney, took the case on a pro bono basis. He and Philip J. Hirschkop filed a class action suit in U.S. District Court, challenging the constitutionality of the anti-miscegenation law. Throughout the process, the Lovings did everything they could to stay out of public view. They did not even attend the oral argument offered on their behalf at the United States Supreme Court.<sup>79</sup>

Most civil rights organizations had deliberately avoided bringing lawsuits against anti-miscegenation laws. Their theory was that challenges to interracial marriage bans were politically toxic, and should therefore be strategically avoided, especially in the tense political atmosphere following *Brown v. Board of Education*. When the U.S. Supreme Court accepted *Loving*, however, the major civil rights groups easily coalesced, since they agreed on issues of principle.<sup>80</sup>

v. *Commonwealth* (1959). I thank Professor Pratt for unearthing this citation.

77. Pratt, *supra* note 63 (manuscript at 10). In 1963, when their attorneys filed suit challenging their sentence, the Lovings moved back to Virginia for the balance of their case. But between 1963 and 1967, they were in constant legal jeopardy. In *Loving v. Commonwealth*, the Virginia Supreme Court overturned the trial court's decision as "so unreasonable as to render the sentences void." 147 S.E.2d at 78, 83. They remanded the case for re-sentencing, but that process was pre-empted, and ultimately made moot, by the U.S. Supreme Court's decision in *Loving*.

78. Pratt, *supra* note 63 (manuscript at 11).

79. See Pratt, *supra* note 63 (manuscript at 14). They did, however, consent to participate in a press conference at Cohen and Hirschkop's office in Alexandria when the decision was announced. See Pratt, *supra* note 63 (manuscript at 14). As examples of the articles which followed, including the famous picture of the couple, see, e.g., *Court Kills Mixed Marriage Laws, Upholds King Contempt Conviction*, ATLANTA CONSTITUTION, June 13, 1967, at 1; Lyle Denniston, *Marriage Bans Voided*, WASHINGTON STAR, June 12, 1967, at A1; Charles McDowell Jr., *Miscegenation Ban Is Ended By High Court*, RICHMOND TIMES-DISPATCH, June 13, 1967, at A1; *State Couple 'Overjoyed' By Ruling*, RICHMOND TIMES-DISPATCH, June 13, 1967, at B1; Gene M. Wite, *Court Overturns Virginia's Ban on Mixed Marriages*, WASHINGTON POST, June 13, 1967, at A1. This time the verdict was also announced on the front page of the NEW YORK TIMES. See *Justices Upset All Bans On Interracial Marriage*, N.Y. TIMES, June 13, 1967, at 1.

80. See *Brown v. Board of Education*, 347 U.S. 483 (1954). On the reluctance of the NAACP and the NAACP Legal Defense and Educational Fund to become involved, see Pratt, *supra* note 63 (manuscript at 28-30 n.20). See also SICKELS, *supra* note 3, at 87-89; Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s-1960s*, 70 CHI.-KENT L. REV. 371, 423-30 (1994). Mark V. Tushnet notes in his book that Thurgood Marshall met with Roger Baldwin of the ACLU, and apparently cautioned Baldwin "that it was not useful to attack laws prohibiting interracial marriages 'because they are commonly circumvented and do not constitute a practical issue.'" MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961,

Consider the contrast with the *Baehr* case. *Baehr* was the brainchild of William Woods, founder of the Gay and Lesbian Community Center in Honolulu and a longtime gay activist. Woods had been planning the case for almost a decade.<sup>81</sup> The named plaintiff, Ninia Baehr, was recruited by Woods based on her previous work as an activist at the University of Hawaii.<sup>82</sup> In contrast to the Lovings, none of the same-sex couples had married elsewhere, for this was impossible. None had been exiled from Hawaii for applying for a marriage license. Instead, when their license applications were denied, as expected, they filed suit directly against the marriage statute and held a press conference in downtown Honolulu.<sup>83</sup>

At first, national gay and lesbian groups, and even the local ACLU, refused to help them. Once the lawsuit was underway, Dan Foley, the plaintiffs' attorney, did receive some help from the local ACLU and Lambda attorneys, but no one expected that the case would be successful. It was only after the Hawaii Supreme Court's decision in 1993 that Lambda joined as co-counsel.<sup>84</sup>

On May 5, 1993, the day of the Hawaii Supreme Court's decision, the three same-sex couples became instant celebrities.<sup>85</sup> Ninia Baehr, Genora Dancel and their lawyers have since carried on a nationwide campaign to publicize their relationship and their legal claims. From newspapers to prime time TV, from their ceremony on the edge of Haleakala volcano to the steps of the U.S. Capitol, Ninia and Genora have taken their case to the American people. Well-protected by their legal and political handlers, they are an extremely appealing couple.<sup>86</sup>

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at 44 (1994). Other than this, the issue of interracial marriage appears in Tushnet's book only in one footnote. That note observes that interracial marriage was treated differently by the U.S. Supreme Court than other civil rights issues, illustrating this by reference to the Court's (non-) decision in *Naim v. Naim*. *Id.* at 367 n.2.

81. According to Paul Barrett of the Wall Street Journal, "The couples were introduced to each other by Bill Woods, a local - and controversial - gay activist who knew about their common interest in marriage." Barrett, *supra* note 67. Indeed, at the time the suit was filed, on May 1, 1991, Woods had already been working on the "same-sex marriage" issue for nine years. Linda Hosek, *Three Same-Sex Pairs Sue to Wed*, HONOLULU STAR-BULL., May 1, 1991, at A3. A detailed chronology since 1980 of Woods' efforts to research and launch the case can be found in *Marriage-Digest* V1 #559 (Sept. 30, 1996) <MARRIAGE@abacus.oxy.edu> (an e-mail list-serve focused on "same-sex marriage"). Further information on the GLEA Foundation and the Hawaii Gay Marriage Project can be obtained from Woods at <HawaiiGay1@aol.com>.

82. Baehr was serving as Co-Coordinator of the University of Hawaii Women's Center. Her activism was evidently broad-ranging. See OLIVER, *supra* note 65, at 241. In October 29, 1992, Baehr traveled to Peru to participate in a press conference in support of Abimael Guzman, arrested leader of the Sendero Luminoso (Shining Path) guerrilla movement. *Id.*

83. Hosek, *supra* note 81; Barrett, *supra* note 67.

84. *Conspiracy Claim Ludicrous, Couples Say*, HONOLULU ADVERTISER, Aug. 26, 1996, at A2; Barrett, *supra* note 67.

85. Barrett, *supra* note 67 ("Meanwhile, the plaintiffs have been inundated by attention. . . . Ms. Baehr and Ms. Dancel have become celebrities in the gay community, appearing at fund-raisers from San Francisco to New York's Fire Island.").

86. Joe Melillo and Patrick Lagon have also given many interviews, but the third couple,

In *Baehr*, like in *Loving*, there was an initial reluctance to pursue the question of marriage on the part of national legal organizations because of concerns about strategy and timing. After all, it had been less than ten years since the U.S. Supreme Court had reaffirmed the rights of states to criminalize sodomy in *Bowers v. Hardwick*.<sup>87</sup> This was hardly an auspicious precedent for the legalization of same-sex marriage.

In *Baehr*, unlike in *Loving*, this reluctance has been deepened by disagreements within the gay and lesbian community about marriage itself. Some objected in principle to the institution of marriage, seeing it as an archaic and inherently heterosexist institution. They were (and still are) more interested in promoting anti-discrimination laws and domestic partnership benefits.<sup>88</sup> Once the *Baehr* decision arrived, however, and the struggle was inevitable, gay and lesbian groups began closing ranks. Advocates of same-sex marriage have intensified their arguments to their colleagues, and have succeeded in getting most gay and lesbian organizations to endorse the *right* to marry.<sup>89</sup> Nevertheless, the debate goes on.<sup>90</sup> For some, marriage is just the start of what they hope will be a deeper revolution in family law. David Chambers, a prominent law professor at the University of Michigan, has this to say about the meaning of same-sex marriage:

Antoinette Pregil and Tammy Rodrigues, are more reluctant. For profiles of the plaintiffs, see Susan Essoyan, *Life is quiet for Hawaii's Gay-Marriage Pioneers*, ARIZ. REPUBLIC, Sept. 9, 1996, at A1; *Discussion on Same-Sex Marriages Becoming Legal in Hawaii*, Interview by Brian Williams, MSNBC, Dec. 3, 1996, 1996 WL 16295816; *Gay Marriage Plaintiffs Genora Dancel and Ninia Baehr Discuss Their Desire to be Married*, Interview by Paula Zahn, CBS THIS MORNING, July 14, 1995, 1995 WL 3220631; Robert Castillo, *Toni and Tammy's Wedding: An Interview with Hawaii Marriage Plaintiff Toni Pregil*, (visited Nov. 6, 1997) <<http://www.suba.com/~outlines/enla-archives/april97/hawaiiwe.html>>; Alan Matsuoka, *And now, the trial . . .*, HONOLULU STAR-BULL., May 14, 1996, (viewed April 22, 1998) <<http://starbulletin.com/96/05/14/news/story1.html>>.

87. 478 U.S. 186 (1986). See generally Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551 (1993); Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643 (1993).

88. One prominent example is noted author Frank Browning. His reaction to the push for same-sex marriage is this: "The problem is with the shape of marriage itself. . . . We homosexuals have invented richer alternatives." *Why Marry?* N.Y. TIMES, Apr. 17, 1996, at A23.

89. See, e.g., *Marriage Resolution: Selected Signatories* (visited Mar. 21, 1998) <<http://www.lamdalegal.org/cgi/bin/pages/documents/record?record=142>>. The Resolution, initiated by Lambda Legal Defense & Education Fund, reads as follows: "Because marriage is a basic human right and an individual personal choice, RESOLVED, the State should not interfere with same-gender couples who choose to marry and share fully and equally in the rights, responsibilities, and commitment of civil marriage." *Id.*

90. See ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE, *supra* note 7, at 51-86 (the debate within the gay and lesbian community); Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567 (1994-1995); and William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1635-39 (1997).

If the law of marriage can be seen as facilitating the opportunities of two people to live an emotional life that they find satisfying—rather than as imposing a view of proper relationships—the law ought to be able to achieve the same for units of more than two . . . it seems at least as likely that the effect of permitting same-sex marriage will be to make society more receptive to the further evolution of the law. By ceasing to conceive of marriage as a partnership composed of one person of each sex, the state may become more receptive to units of three or more (all of which, of course, include at least two persons of the same sex) and to units composed of two people of the same sex but who are bound by friendship alone. All desirable changes in family law need not be made at once.<sup>91</sup>

Another difference between *Loving* and *Baehr* is the degree to which a “public education” campaign was thought to be necessary on the part of the plaintiffs. In *Loving*, the plaintiffs’ attorneys and allied groups concentrated on the lawsuit, and did not do a lot of “outreach.” There was surprisingly little coverage of the *Loving* case as it made its way through the courts.<sup>92</sup>

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91. David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 490-91 (1996). Chambers, a law professor at the University of Michigan, is also a resident of Vermont. He recently co-authored an amicus brief in the Vermont same-sex marriage case, *Baker v. Vermont*. See Brief of Amicus Curiae Parents and Friends of Lesbian and Gay Men of the Champlain Valley, Marble Valley, Barre/Montpelier, the Vermont Freedom to Marry Task Force, the ACLU of Vermont, and the American Civil Liberties Union. *Baker v. Vermont*, No. S1009-97Cnc (Vt. Sup. Ct., Dec. 17, 1997), *appeal docketed*, No. 98-32 (Vt. 1998).

92. A Library of Congress search of the RICHMOND TIMES-DISPATCH, WASHINGTON STAR, WASHINGTON POST, ATLANTA CONSTITUTION and NEW YORK TIMES unearthed no stories about the case between 1959 and 1964, the point at which the Lovings’ attorneys filed suit in U.S. District Court. (There may, however, have been articles in the Richmond Afro-American.) Thereafter, there were articles covering the initiation of the suit, and U.S. District Judge John D. Butzner’s refusal to grant a temporary restraining order that would allow the Lovings to visit their families in Virginia. See *Court Backs Ban on Mixed Marriages*, ATLANTA CONSTITUTION, Oct. 29, 1964, at 29; *‘Exiled’ Couple Sues to Void Ban on Interracial Marriage*, WASHINGTON STAR, Oct. 28, 1964, at A1; *Judge Denies Suit Against Marriage Ban*, WASHINGTON POST, Oct. 30, 1964; *Mixed Couple’s Plea Is Rejected*, RICHMOND TIMES-DISPATCH, Oct. 30, 1964; *State’s Interracial Marriage Ban Challenged in Federal Court*, RICHMOND TIMES-DISPATCH, Oct. 29, 1964, at 6; *White Man, Negro Wife Challenge Virginia Bans*, WASHINGTON POST, Oct. 29, 1964, at A3; *White-Negro Couple Fights Marriage Ban*, ATLANTA CONSTITUTION, Oct. 29, 1964, at 17. See also *Miscegenation Case to Go to State Court*, RICHMOND TIMES-DISPATCH, Feb. 13, 1965, (reporting the three-judge federal panel declining to rule on the validity of Virginia’s law). After the Virginia Supreme Court of Appeals upheld Virginia’s law in *Loving*, on March 7, 1966, a major profile of the Lovings appeared in Life Magazine: *The Crime of Being Married*, LIFE, Mar. 18, 1966, at 85-91. The next round of stories came when the case was accepted for review by the U.S. Supreme Court. See *High Court to Consider Lovings’ Case*, RICHMOND TIMES-DISPATCH, Dec. 13, 1966, at A1; *High Court to Rule on Miscegenation*, WASHINGTON STAR, Dec. 12, 1966, at A1; *Interracial Marriage Gets Review*, WASHINGTON POST, Dec. 13, 1966; Charlotte G. Moulton, *Supreme Court Upholds Hoffa Conviction*, ATLANTA CONSTITUTION, Dec. 13, 1966, at 2; *Supreme Court’s Actions*, N.Y. TIMES, Dec. 13, 1966,

In contrast, the supporters of "same-sex marriage" have created an entire organizational infrastructure to advance their "public education" efforts. In Hawaii, the Hawaii Equal Rights Marriage Project (HERMP), now renamed Marriage Project-Hawaii, has taken a central role. William Woods, meanwhile, continues his advocacy through the Hawaii Gay Marriage Project. Nationally, the Marriage Project, based at Lambda Legal Defense & Education Fund in New York City, is a center of coordination. The National Freedom to Marry Coalition, based at the Marriage Project, is uniting local and statewide "right to marry" organizations. The coalition encourages celebrations of National Freedom to Marry Day on February 12th, combining Lincoln's Birthday with Valentine's Day, based on the theme that equality plus love equals marriage.<sup>93</sup>

Developments in the periods preceding the decisions in *Loving* and *Baehr* were quite different. Between 1949 and 1967, there were frequent attacks on the constitutionality of anti-miscegenation laws.<sup>94</sup> These were accompanied by increasing attention from legal commentators.<sup>95</sup> Although

at 39. No stories appeared thereafter in the *TIMES-DISPATCH*, *STAR*, *POST*, *CONSTITUTION* or *NEW YORK TIMES* until the final decision was announced on June 12, 1967.

93. See the extensive websites of the Freedom to Marry Coalition at <<http://www.ftm.org>>, and the Lambda Legal Defense and Education Fund's Marriage Project at <<http://www.lambdalegal.org>>. See also NATIONAL GAY AND LESBIAN TASK FORCE POLICY INSTITUTE, *TO HAVE AND TO HOLD: ORGANIZING FOR OUR RIGHT TO MARRY* (Robert Bray & Beth Barrett eds., 1995) (providing strategic advice for the debate). The newly-formed Federation of Statewide Lesbian, Gay, Bisexual and Transgender Political Organizations has announced a coordinated nationwide campaign March 21-27, 1999 "which will include marches, rallies, and lobbying in state capitals." Peter Freiberg, *50 State Capital Event Set for Spring of 1999; 'It's So Important to Focus on State Issues'*, *WASHINGTON BLADE*, April 24, 1998, at 1, 18; and M. Jane Taylor, *50 State 'Action' Date Set for Week of March 1999*, *WASHINGTON BLADE*, May 8, 1998, at 18. For more on the Federation, see <<http://www.ngltf.org/Press/-fed2.html>>.

94. See, e.g., *McLaughlin v. Florida*, 379 U.S. 184 (1964) (striking down a Florida law forbidding interracial sexual relations, but declining to rule on the constitutionality of Florida's anti-miscegenation statute); *Jackson v. State*, 72 So.2d 116 (Ala 1954), *cert. denied*, 348 U.S. 888 (1954) (upholding Alabama's anti-miscegenation statute); *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948) (striking down California's anti-miscegenation statute as unconstitutional); *Naim v. Naim*, 87 S.E. 2d 749 (Va. 1955), *remanded* 350 U.S. 891 (1955), *aff'd*, 90 S.E.2d 849, *app. dismissed*, 350 U.S. 985 (1956) (upholding Virginia's anti-miscegenation statute; the U.S. Supreme Court ultimately declines review).

95. Shortly before *Loving* was decided, an important exchange of views was published in the Virginia Law Review. Compare Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224 (1966) (arguing that Virginia's law was constitutional), with Walter Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189 (1966) (arguing the unconstitutionality of Virginia's statute). The Supreme Court cited Wadlington's article in their opinion. See *Loving*, 388 U.S. at 5 n.4, 6 n.6. But the issue had been simmering in scholarly circles for some time. See Harvey M. Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 GEO. L.J. 49 (1964); Note, *Constitutionality of Anti-Miscegenation Statutes*, 58 YALE L.J. 472 (1949); Note, *The Constitutionality of Miscegenation Statutes*, 1 HOW. L.J. 87 (1955); Archibald Cox, Foreword, *Constitutional Adjudication and the Promotion of Human Rights: The Supreme Court, 1965 Term*, 80 HARV. L. REV. 91 (1966); Jerold D. Cummins & John L. Kane, Comment, *Miscegenation, the Constitution, and Science*, 38 *DICTA* 24 (1961); Wayne A. Melton, *Constitutionality of State Anti-Miscegenation Statutes*, 5 SW. L.J. 451 (1951); Cyrus E. Phillips IV, Note, *Miscegenation: The Courts and the Constitution*, 8 WM. & MARY L. REV. 133 (1966); C.D. Shokes, Note, *The Serbonian*

the litigation was mostly unsuccessful, fourteen of the twenty-nine states with anti-miscegenation laws had repealed them by the time of the *Loving* decision, leaving only sixteen of the fifty states with laws to be overruled.<sup>96</sup> The Federal Constitution had included the Fourteenth Amendment for a century, and when the U.S. Supreme Court finally gave these laws the *coup de grace*, their judgment in *Loving* was unanimous.<sup>97</sup>

The situation with *Baehr* is quite different. Before *Baehr*, as we have already seen, no marriage laws had been successfully challenged.<sup>98</sup> While legal scholarship on same-sex marriage was increasing before *Baehr*, it had not assumed its current flood-like proportions.<sup>99</sup> While thirty-five states permitted interracial marriages before *Loving*, no states permitted same-sex marriages before *Baehr*. As we have seen, even the original *Baehr* opinion was split 2-1-2.<sup>100</sup>

In short, *Loving* was the end of a process of constitutional and popular deliberation stretching over decades, if not a century. *Baehr*, on the other hand, was the surprising beginning of a legal revolution, catapulted by two state court justices over the heads of their own people.

The public responses to *Loving* and *Baehr*, not surprisingly, have also been quite different. There was no "massive resistance" to *Loving*, and no

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*Bog of Miscegenation*, 21 ROCKY MN. L. REV. 425 (1948-1949); Note, *Statutory Ban on Interracial Marriage Invalidated by Fourteenth Amendment*, 1 STAN L. REV. 289 (1949); Irving G. Tragen, Comment, *Statutory Prohibitions Against Interracial Marriage*, 32 CAL. L. REV. 269, 267 (1944); Andrew D. Weinberger, *A Reappraisal of the Constitutionality of Miscegenation Statutes*, 42 CORNELL L.Q. 208 (1957); John H. Wilham, Jr., Note, *Racial Inter-marriage — A Constitutional Problem*, 11 W. RESERVE L. REV. 93 (1959); Edward T. Wright, Comment, *Interracial Marriage: A Survey of Statutes and Their Interpretations*, 1 MERCER L. REV. 83 (1949).

96. These states were Arizona, California (after *Perez*), Colorado, Idaho, Indiana, Maryland, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, and Wyoming. *Loving*, 388 U.S. 1, 6 n.5.

97. Justice Stewart concurred in the judgment of the Court, but offered a much simpler opinion: "I have previously expressed the belief that 'it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor.' *McLaughlin v. Florida*, 379 U.S. 184, 198 (concurring opinion). Because I adhere to that belief, I concur in the judgment of the Court." *Loving*, 388 U.S. at 13.

98. See *supra* note 4 (listing several key prior same-sex marriage cases). For a discussion of the history of the gay marriage movement, including a full list of the pre-*Baehr* cases, see ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE*, *supra* note 7, at 42-62, 232-233, n. 24.

99. Using Appendix A in *Wardle*, *supra* note 3, I find roughly forty-one law review articles between January 1990 through December 1993 (counting all 1993 articles as pre-*Baehr* except for those explicitly about the *Baehr* decision). For post-*Baehr* articles, see *infra*, note 110.

100. See *supra* note 17 (plurality opinion by Levinson, J. and Moon, J. with concurrence by Burns, J.; dissent by Heen, J., which Hayashi, J., would have joined, if the decision had been issued before he retired). Since the 1993 opinion, three new Justices have joined Levinson and Moon. One, Justice Paula Nakayama, added her vote to Levinson and Moon's ruling when the Hawaii Supreme Court responded to the Attorney General's Motion for Reconsideration. *Baehr v. Lewin*, 852 P.2d 44, 74-75 (Haw. 1993). The other two Justices, Robert Klein and Mario Ramil, have not addressed the issue on the court. Klein, however, heard and dismissed the original *Baehr* complaint, so he may recuse himself.

move to amend the Virginia Constitution.<sup>101</sup> Indeed, in the Epilogue to *SIMPLE JUSTICE*, the classic work on *Brown v. Board of Education*, Richard Kluger notes that "in 1967, with barely a murmur of objection in the land, the Court ruled in *Loving v. Virginia* that state laws forbidding [what had been considered] that most detestable of all rites—the joining of a white and a Negro in holy matrimony—were unconstitutional."<sup>102</sup> Once the case was over, the issue of anti-miscegenation laws faded into virtual obscurity, to become mostly the province of historians and legal theorists.<sup>103</sup> With the twenty-fifth and thirtieth anniversaries of the *Loving* case, however, interest in the drama of Richard and Mildred Loving has revived, and new scholarly works are beginning to appear.<sup>104</sup>

101. The day after the U.S. Supreme Court's decision, the editorial board of the RICHMOND TIMES-DISPATCH had this to say: "Considerable attention is being given nationally to the Supreme Court's action yesterday in throwing out Virginia's law which made interracial marriage a crime. The ruling, affecting miscegenation laws in 16 states, is important from the historical standpoint, but few observers had entertained any serious doubts as to what the court would do on the issue. . . . The decision was in line with many others on racial matters that have been handed down in recent years." *A Day in Court*, RICHMOND TIMES-DISPATCH, June 13, 1967, at A12.

102. RICHARD KLUGER, *SIMPLE JUSTICE* 751 (1975) (emphasis added). There were isolated incidents of resistance, but they were all localized, and were addressed relatively quickly. See SICKELS, *supra* note 3, at 111-16 (giving narrative of events in various states).

103. One major profile of the Lovings appeared after the decision. See Simeon Booker, *The Couple that Rocked the Courts*, EBONY, Sept. 1967, at 78-84 (cited in SICKELS, *supra* note 3, at 161). In the years immediately following, several law review articles appeared, one dissertation was written, the only full-length book (to date) about the case appeared, and the briefs and oral arguments were published. See 64 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 687-1007 (Philip B. Kurland & Gerhard Casper eds., 1975); SICKELS, *supra* note 3; Rev. Robert F. Drinan, *The Loving Decision and the Freedom to Marry*, 29 OHIO ST. L.J. 358 (1968); Sidney L. Moore, Note, *Loving v. Virginia*, 19 MERCER L. REV. 257 (1968); John M. Pittman, Note, *Loving v. Virginia*, 21 ARK. L. REV. 439 (1967); Chang Moon Sohn, Principle and Expediency in Judicial Review: Miscegenation Cases in the Supreme Court 30 n.46 (1970) (unpublished Ph.D. dissertation, Columbia University) (cited in Pratt, *supra* note 63 (manuscript at 30 n.46)). Thereafter, with the lone exception of A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS, THE COLONIAL PERIOD (1978), attention to anti-miscegenation laws generally, and *Loving* in particular, fell dormant.

104. In the late 1980s, interest in anti-miscegenation laws and the *Loving* case began to revive, much of it inspired by legal historians and critical race theorists. See F. JAMES DAVIS, WHO IS BLACK? ONE NATION'S DEFINITION (1991); IAN HANEY-LOPEZ, WHITE BY LAW: THE SOCIAL CONSTRUCTION OF RACE (1996); A. LEON HIGGINBOTHAM, SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS (1996); EDWARD J. LARSON, SEX, RACE, AND SCIENCE: EUGENICS IN THE DEEP SOUTH (1995); SAMUEL N. PINCUS, THE VIRGINIA SUPREME COURT, BLACKS AND THE LAW, 1870-1902 (1990); Steven A. Bank, *Anti-Miscegenation Laws and the Dilemma of Symmetry: The Understanding of Equality in the Civil Rights Act of 1875*, 2 U. CHI. L. SCH. ROUNDTABLE 303 (1995); Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063 (1993); A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L. J. 1967 (1989); Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL'Y 1, 19-23 (1996); Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to Loving v. Virginia*, 21 U.C. DAVIS L. REV. 421 (1988); Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of "Race" in Twentieth-Century America*, J. AM. HIST., June 1996, at 45-69; Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s-1960s*, 70 CHI.-KENT L. REV. 371 (1994).

At least two Ph.D. candidates are currently writing on the issue: Melissa Cole, at the College

"Barely a murmur of objection in the land," however, is not the phrase that comes to mind for the response of the people of Hawaii—or the American people generally—to the prospect of legalized same-sex marriage.<sup>105</sup> In less than three years, thirty states have passed laws rejecting the decisions of the Hawaii courts.<sup>106</sup> The United States Congress—with the support of President William Jefferson Clinton—has done likewise.<sup>107</sup> In re-

of William and Mary, and Gregory Michael Dorr, at the University of Virginia. See Gregory Michael Dorr, *Principled Expediency: Eugenics, Naim v. Naim, and the Supreme Court* (1997) (unpublished manuscript, on file with author). Meanwhile, University of Georgia historian Robert A. Pratt has recently published *Crossing the Color Line: An Historical Assessment and Personal Narrative of Loving v. Virginia*, 41 HOW. L.J. (forthcoming 1998) (manuscript on file with author), and is preparing a full-length book on the history of both the Loving family and the *Loving* case.

Recent legal scholarship on *Loving*, as we have already noted, has emphasized its alleged analogy with the current campaign for same-sex marriage. See *supra*, note 7. However, "Law and the Politics of Marriage: *Loving v. Virginia* After 30 Years," the conference at which this paper was first presented, has resulted in several new papers which provide a more contextual, and less potentially anachronistic, reading of *Loving* and its place in the story of federal constitutional law. In addition to those in the instant issue of the B.Y.U. JOURNAL OF PUBLIC LAW, papers are being prepared for publication in 41 HOW. L.J. (forthcoming 1998), and \_\_ CATHOLIC U. L. REV. (forthcoming 1998). See, e.g., Lynn D. Wardle, *Loving v. Virginia and the Constitutional Right to Marry*, 1790-1990, 41 HOW. L.J. (forthcoming 1998) (manuscript on file with author), and Laurence C. Nolan, *Equality and Marriage, From Loving to Zablocki*, 41 HOW. L.J. (forthcoming 1998) (manuscript on file with author). For coverage of the conference on *Loving*, see David Wagner, *Something Old, Something New*, INSIGHT, Jan. 5, 1998, at 22-23; Bob Roehr, *Drawing Parallels: 'Loving' and Same Sex Marriage*, In Newsweekly, (Boston, MA), Dec. 7, 1997, at 1, 12; and Mark Pattison, *How Could Courts Justify—or Deny—Same Sex Marriage?*, CATHOLIC HERALD (Sacramento, CA), Dec. 6, 1997 (wire story distributed by Catholic News Service).

105. Andrew Sullivan has argued that if "same-sex marriage" is legalized, then ninety percent of the gay and lesbian legal agenda will be achieved overnight. See ANDREW SULLIVAN, VIRTUALLY NORMAL 185 (1995). His opponents agree, which may explain why *Baehr* has generated such an intense reaction. Tom Stoddard has described it as "a nationwide political riot against same-sex marriage." Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967, 988 (1997). Or one can call it "using the law to make social change."

106. In addition to Hawaii, which passed such legislation in 1994, these States include: Utah (1995); Alaska, Arizona, Delaware, Georgia, Idaho, Illinois, Kansas, Michigan, Missouri, North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, and Tennessee (1996); Arkansas, Florida, Indiana, Maine, Minnesota, Mississippi, Montana, North Dakota, and Virginia (1997); and, as of May, 1998, Alabama, Iowa, Kentucky and the State of Washington. To date, Nevada and Massachusetts are the only States in which no marriage recognition bills have been introduced. Shortly after the Hawaii trial court's decision in December, 1996, former Governor William Weld of Massachusetts voiced his opinion that couples who might marry in Hawaii and move to Massachusetts "would be entitled to all the benefits and burdens of marriage." *Weld: Mass. Would Honor Out-of-State Gay Unions; Marriage Ruling Stayed in Hawaii*, BOSTON GLOBE, Dec. 5, 1996, at A1. Since then, however, his successor has offered his similar assurances.

For regular updates on State legislation, see <<http://www.pono.net>> ("In Defense of Marriage" page of the Hawaii Catholic Conference); and <<http://www.ftm.org>> (The website of the Freedom to Marry Coalition).

107. See The Defense of Marriage Act, Pub. L. No. 104-199 (1996). As enacted, the Act has two provisions: (1) it clarifies that the Full Faith and Credit Clause of the Constitution does not require that same-sex marriages be recognized by other states; and (2) it defines marriage for purposes of federal law as the union of one man and one woman. Section 2, which addresses Full Faith and Credit, is codified at 28 U.S.C. § 1738C (1996). Section 3, which defines marriage for purposes of federal law, is codified at 1 U.S.C. § 7 (1996). On February 7, 1997, the U.S. General Accounting Office (GAO) released a follow-up report, agreed to as part of the legislative negotiations surrounding the Defense of Marriage Act. The report, GAO/OGC-97-16, can be found at

sponse, Lambda has already announced that as soon as possible, they will challenge the Defense of Marriage Act.<sup>108</sup> Articles advocating the legalization of same-sex marriage are pouring out of law reviews post-*Baehr*, many of them “playing the *Loving* card.”<sup>109</sup> Consistent with this, most of the legal academy has reacted with predictable disdain toward the Defense of Marriage Act.<sup>110</sup> Nevertheless, state and federal legislative bodies con-

<<http://www.gao.gov>>. It identified 1,049 Federal laws based upon marital status.

108. In Lambda’s words: “Harkening back to the not-so-long-ago ugly days of past discrimination against those who chose to marry the ‘wrong’ kind of person (such as interracial or interfaith couples), and the days when Americans had to ‘go to Reno’ just to get a civil divorce, these state and federal anti-marriage bills are unconstitutional, divisive, wrong, and cruel. They can and must be stopped now, state by state.” *1998 Anti-Marriage Bills Status Report* (Mar. 10, 1998) <<http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=51>>. The same section of the website also includes an *Anti-Marriage Legislation Map* <<http://www.lambdalegal.org/cgi-bin/pages/states/antimarrriage-map>> and a legal memorandum on the Defense of Marriage Act. *See Constitutional and Legal Defects in H.R. 3396 and S. 1740, the Proposed Federal Legislation on Marriage and the Constitution* (Sept. 1, 1996) <<http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=80>>.

109. Using Appendix A in Wardle, *supra* note 3, I find two articles about *Baehr* in 1993 and twenty-five in 1994. In a Westlaw search for subsequent years—counting only articles primarily about same-sex marriage (not about adoption, domestic partnership, *Romer v. Evans* generally, or gay/lesbian jurisprudence generally)—I find roughly thirty-five articles in 1995, thirty-four in 1996, and at least thirty-five in 1997. In short, there have been *more than one hundred* law review articles primarily about “same-sex marriage” published in English-language law reviews since the 1993 *Baehr* decision. For a partial list of those that address the question of “the *Loving* analogy,” see *supra*, note 7.

110. As one might expect, there is already a flood of law review articles attacking the Defense of Marriage Act, many of them written by prominent advocates of same-sex marriage. *See, e.g.*, STRASSER, *LEGALLY WED*, *supra* note 7, at 127-58; Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. (forthcoming 1997); Mark Strasser, *Loving the Romer Out for Baehr: On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279 (1997); Evan Wolfson & Michael F. Melcher, *The Supreme Court’s Decision in Romer v. Evans and its Implications for the Defense of Marriage Act*, 16 QLR 217 (1996); Evan Wolfson & Michael F. Melcher, *DOMA’s House Divided: An Argument Against the Defense of Marriage Act*, 44-SEP FED. LAW. 30 (1997), reprinted in 58-JAN OR. ST. B. BULL. 17 (1998). Lynn Wardle has responded to Wolfson and Melcher in *DOMA: Protecting Federalism in Family Law*, 45-JAN FED. LAW. 30 (1998).

Other articles on the Defense of Marriage Act include James M. Donovan, *DOMA: An Unconstitutional Establishment of Fundamental Christianism*, 4 MICH. J. GENDER & L. 335 (1997); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997); Melissa Rothstein, *The Defense of Marriage Act and Federalism: A States’ Rights Argument in Defense of Same-Sex Marriages*, 31 FAM. L.Q. 571 (1997) (1997 Schwab Essay Winner); Scott Ruskay-Kidd, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435 (1997); Leonard G. Brown III, Comment, *Constitutionality Defending Marriage: The Defense of Marriage Act, Romer v. Evans and the Cultural Battle They Represent*, 19 CAMPBELL L. REV. 159 (1997); Diane M. Guillerman, Comment, *The Defense of Marriage Act: The Latest Maneuver in the Continuing Battle to Legalize Same-Sex Marriage*, 34 HOUS. L. REV. 425 (1997); Christopher J. Hayes, Note, *Married Filing Jointly: Federal Recognition of Same-Sex Marriages Under the Internal Revenue Code*, 47 HASTINGS L.J. 1593; Julie L. B. Johnson, Comment, *The Meaning of “General Laws”: The Extent of Congress’s Power under the Full Faith and Credit Clause and the Constitutionality of the Defense of Marriage Act*, 145 U. PA. L. REV. 1611 (1997); Timothy Joseph Keefer, Note, *DOMA As a Defensible Exercise of Congressional Power Under the Full-Faith-And-Credit Clause*, 54 WASH. & LEE L. REV. 1635 (1997); Jon-Peter Kelly, *Act of Infidelity: Why the Defense of Marriage Act is Unfaithful to the Constitution*, 7 CORNELL J.L. & PUB. POL’Y 203 (1997); Melissa Provost, Comment,

tinue to reaffirm their judgment that marriage is indeed a unique, male-female sexual community. The people of Hawaii may well amend their own constitution before the drama is over.<sup>111</sup> Advocates of “same-sex marriage” have “played the *Loving* card” in *Baehr* so that it would turn out like *Loving*, but it hasn’t—at least not yet.<sup>112</sup>

### C. *A Tale of Two Amici*

A comparison of amici in *Loving* and *Baehr* sheds additional light on the differences between the two cases. Some organizations, such as the NAACP and the NAACP Legal Defense & Education Fund, Inc., filed in *Loving* but not in *Baehr*.<sup>113</sup> Other organizations that existed in 1967 did not file in *Loving*, but did file in *Baehr*.<sup>114</sup> Among those that filed in both

*Disregarding the Constitution in the Name of Defending Marriage: The Unconstitutionality of the Defense of Marriage Act*, 8 SETON HALL CONST. L.J. 157 (1997); Barbara A. Robb, Note, *The Constitutionality of the Defense of Marriage Act in the Wake of Romer v. Evans*, 32 NEW ENG. L. REV. 263 (1997); Mark Tanney, Note and Comment, *The Defense of Marriage Act: A “Bare Desire to Harm” An Unpopular Minority Cannot Constitute a Legitimate Governmental Interest*, 19 THOMAS JEFFERSON L. REV. 99 (1997); Alec Walen, Essay, *The “Defense of Marriage Act” and Authoritarian Morality*, 5 WM. & MARY BILL RTS. J. 619 (1997); E. Todd Wilkowski, Comment, *The Defense of Marriage Act: Will it be the Final Word in the Debate over Legal Recognition of Same-Sex Unions?*, 8 REGENT U. L. REV. 195 (1997).

111. *Supra*, note 61.

112. The Alaska Legislature has just passed a proposed Marriage Amendment onto the November 3, 1998 ballot, designed to overturn judicially-mandated “same-sex marriage.” S.J.R. 42 (Ak. 1998) (enacted). The proposed Marriage Amendment passed the Senate on April 16, 1998 by a vote of 14-6. *Senate: One Man, One Woman*, ANCHORAGE DAILY NEWS, Apr. 17, 1998, at A1, A14. On May 11, an amended version of S.J.R. 42 passed the House by a vote of 28-12, and the Senate concurred in the amendments. *Marriage Measure on Ballot*, ANCHORAGE DAILY NEWS, May 12, 1998, at A1, A8. The Amendment was introduced in response to a decision by Anchorage Superior Court Judge Peter J. Michalski, holding that the State’s marriage and marriage recognition laws merit strict scrutiny under the Privacy Clause of the Alaska State Constitution. *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998).

113. See Brief of Amicus Curiae the NAACP, *Loving* (No. 395), reprinted in LANDMARK BRIEFS AND ARGUMENTS, *supra* note 103, at 887; Brief of Amicus Curiae the NAACP Legal Defense and Educational Fund, *Loving* (No. 395), reprinted in LANDMARK BRIEFS AND ARGUMENTS, *supra* note 103, at 905. Despite the presence of other national civil rights organizations on briefs in *Baehr* (e.g. the Mexican-American Legal Defense & Education Fund), the NAACP has not joined the effort to link interracial marriage and same-sex marriage.

114. This would include Agudath Israel, American Friends Service Committee, The Church of Jesus Christ of Latter-day Saints, Lutheran Church-Missouri Synod, National Association of Evangelicals, Southern Baptist Convention, and two organizations which had just formed: Christian Legal Society and the National Organization of Women (NOW).

Many other organizations which did not exist at the time of *Loving* have filed amicus briefs in *Baehr*. These briefs from the *Baehr v. Miike* appeal (and others, such as those filed by Attorneys General, legislators, and academic experts) can be found online at <<http://www.cs.unt.edu/home/hughes/index.html>>. Briefs filed in support of the marriage law include those of the American Center for Law and Justice (ACLJ), Coral Ridge Ministries Media Inc., et al., Hawaii’s Future Today, the Rutherford Institute, the Independent Women’s Forum, the National Association for Research and Therapy of Homosexuality, Inc., and various denominational and ecumenical organizations which joined the Christian Legal Society brief. Briefs filed against the marriage law include those of the Madison Society of Hawaii, Na Mamo O Hawaii, the Gay and Lesbian Advocates & Defenders, NOW Foundation, NOW Legal Defense & Education Fund, National Center for Lesbian Rights,

cases, there are three variations. Some supported the plaintiffs in both cases.<sup>115</sup> Other attorneys general supported the State in both cases.<sup>116</sup> The Roman Catholic Church supported the Lovings in 1967, but the State in 1997.<sup>117</sup>

It is particularly interesting to contrast two amici who have been involved in both *Loving* and *Baehr*: The Japanese-American Citizens League (JACL) and the Roman Catholic Church. Both organizations have done so in a manner consistent with their principles, yet they agreed about *Loving* and disagree about *Baehr*. Why the difference between these organizations?

In 1967, the JACL submitted a lengthy amicus brief in support of the Lovings. At that time, their argument about marriage was as follows:

Freedom in marriage concerns one of the most basic and fundamental rights of the individual, rooted, indeed, in one of man's biological drives. The mutual exercise by two individuals of such a right—a noble goal otherwise promoted and blessed by society—should not be converted into a crime or otherwise stigmatized by law merely because of race.<sup>118</sup>

In 1994, however, the Honolulu chapter of the JACL became one of the first non-gay organizations in Hawaii to support same-sex marriage. When it took its position to the JACL National Board, they strongly endorsed it. The Associate Director, Carol Hayashino, argued that “the same-sex issue was a very natural progression in our direction as a civil rights organization.” She added that the “rationale being used to oppose “same-

Northwest Women's Law Center, People for the American Way, Asian-American Legal Defense & Education Fund, and the Mexican-American Legal Defense & Education Fund.

115. Two groups fit this description: the ACLU and the Japanese American Citizens League (JACL). In *Loving* the ACLU did not file, but was a key participant through their pro bono attorneys, Cohen and Hirschkop. In *Baehr* they filed a separate brief. See Brief of Amicus Curiae the American Civil Liberties Union of Hawaii Foundation, *Baehr v. Miike* (Haw. 1997) (No. 20371). On the JACL, see *infra*, notes 118-23.

116. It is worth noting, however, that only one state, North Carolina, filed a brief on behalf of Virginia's anti-miscegenation law. See Brief of Amicus Curiae the State of North Carolina, *Loving*, (No. 395), reprinted in LANDMARK BRIEFS AND ARGUMENTS, *supra* note 103, at 951. (It would be interesting to know if efforts were made to contact Attorneys General in the other states which still had anti-miscegenation laws at the time that *Loving* was briefed.) In contrast, eleven state Attorneys General joined a brief on behalf of Hawaii. Brief of Amici Curiae the States of Nebraska, Alabama, California, Colorado, Georgia, Idaho, Michigan, Mississippi, Missouri, South Carolina and South Dakota in Support of the Defendant-Appellant, *Baehr* (Haw. 1997) (No. 20371).

117. The *Loving* brief was filed by sixteen Bishops, along with the National Catholic Conference for Interracial Justice and the National Catholic Social Action Conference. See Brief of Amici Curiae National Catholic Conference for Interracial Justice, et al., *Loving*, (No. 395), reprinted in LANDMARK BRIEFS AND ARGUMENTS, *supra* note 103, at 925. The *Baehr* brief was filed by the Hawaii Catholic Conference, an arm of the Diocese of Honolulu. See Brief of Amicus Curiae Hawaii Catholic Conference, *Baehr* (Haw. 1997) (No. 20371).

118. Brief of Amicus Curiae Japanese American Citizens League at 3, 10-11, *Loving* (No. 395), reprinted in LANDMARK BRIEFS AND ARGUMENTS, *supra* note 103, at 856, 863-64.

sex marriages" is very similar to the arguments once used to prohibit Asians from marrying whites: It's immoral, it would be harmful to society." This triggered the public resignation of its general counsel, Allen Kato, who described same-sex marriage as "morally wrong."<sup>119</sup> This set off a huge debate within the organization, which came to a head at the 1994 JACL national convention in Salt Lake City. On August 6, after intense debate, Congressman Norman Mineta (D-San Jose) made the following plea to the members of the council:

Where would we be today if the NAACP, or the National Council of La Raza, or the Anti-Defamation League of B'nai Brith, or the National Gay and Lesbian Task Force, had taken the position that redress was a Japanese American issue - and had nothing to do with African-Americans, Hispanic Americans, Jews or gay and lesbian Americans?<sup>120</sup>

After this impassioned plea, the national council voted 50-38 to support the board.<sup>121</sup> Within a year, however, newspapers were reporting that the entire national headquarters staff in San Francisco had been laid off. The layoffs were partly in retaliation for their involvement in this issue, according to some parties, and the word on the street was that "the nation's oldest and most influential Asian-American civil rights group is threatening to unravel."<sup>122</sup>

Meanwhile, the Honolulu JACL chapter forged onward, filing amicus briefs at both the trial and appellate levels in the *Baehr* case. Its argument about marriage now sounds like this:

The State's rhetoric against same-sex marriages is strikingly similar to the arguments made in a bygone era against interracial marriages. For centuries, ignorant and racist lawmakers and jurists alike decried mixed-race relationships . . . Today, for many, the idea that couples of the same sex might legally marry is equally absurd. However, public disapproval, should not bar this Honorable Court from equally enforcing the laws

119. Steven A. Chin, *Asian Group Split on Gay Rights; Japanese American Citizens League's Counsel Quits Over Board's Support of Same-Sex Marriages*, SAN FRANCISCO EXAMINER, June 19, 1994, at B1.

120. Steven A. Chin, *Vote for Gay Marriage Followed Uphill Fight; Issue Divides Japanese American Citizens League*, SAN FRANCISCO EXAMINER, Aug. 10, 1994, at A4.

121. See *id.*

122. Dennis Akizuki, *Rights Group for Japanese Fighting for Life; Issues Split Old, Young Members*, NEW ORLEANS TIMES-PICAYUNE, May 21, 1995, at A2 (reporting that "[T]he nation's oldest and most influential Asian-American civil rights group is threatening to unravel . . . Rep. Norman Mineta of San Jose, a JACL member, declined to be interviewed about the turmoil, instead issuing a three-sentence statement. 'JACL plays an absolutely vital role in the civil rights movement, and has for many years,' Mineta said. 'I am hopeful that . . . JACL will emerge with renewed strength. It's too important an institution to the Japanese-American community to be allowed to fail.'")

of this state, including the right to marry . . . . Again, in the words of this Court: “[C]onstitutional law may mandate, like it or not, that customs change with an evolving social order . . . . In substance, the State’s policy is based on crude stereotypes, not any meaningful effort to ensure that children are raised in supportive and loving homes.<sup>123</sup>

It concludes with these words:

Notwithstanding the fact that our great state has dispelled the myth of interracial marriages, the State continues to hurl similar arguments that same-sex marriages would have deplorable effects on our community and its children. This Court should not turn back the clock on social justice by denying the right to marriage to persons based on sex, in the same way marriages were at one time denied to persons based on race.<sup>124</sup>

Now, the JACL considers sex to be just as irrelevant to marriage as race. Evidently, what really matters now is solely the individuals who are involved.

In 1967, the Roman Catholic Church also joined the attack on Virginia’s anti-miscegenation law. The Church had a long history of opposition to compulsory sterilization laws, and as we have already seen, these laws were also tightly entwined with anti-miscegenation laws.<sup>125</sup> An amicus curie brief was filed by 16 Bishops and Cardinals, including Bishop John Russell of Richmond, Virginia, joined by the National Catholic Conference for Interracial Justice, represented by the late William Lewers, and the National Catholic Social Action Conference, represented by William Bentley Ball, soon to become famous for arguing *Wisconsin v. Yoder*.<sup>126</sup>

123. Brief of Amicus Curiae Japanese American Citizens League of Honolulu at 4, 6, 10, *Baehr v. Muike* (No. 91-1394-05) (Haw. Cir. Ct. Oct. 25, 1996). See also Japanese American Citizens League of Honolulu Amicus Curiae Brief at 1,3,5, *Baehr* (Haw. 1997) (No.20371).

124. *Id.* at 10.

125. See Larson, SEX, RACE, AND SCIENCE: EUGENICS IN THE DEEP SOUTH, 107-15, 142-45, 150-52 (1995) (describing Catholic opposition to proposed eugenics laws).

126. See *supra* note 117. Reverend Lewers served as the Director of the Center for Civil and Human Rights at Notre Dame Law School until he passed away on April 19, 1997. William Bentley Ball continues to argue cases before the Supreme Court. See his *MERE CREATURES OF THE STATE? EDUCATION, RELIGION AND THE COURTS—A VIEW FROM THE COURTROOM* (1994). In the *Loving* case, the following Bishops signed onto the amicus brief: John J. Russell, Bishop of Richmond; Lawrence Cardinal Shehan, Archbishop of Baltimore; Paul A. Hallinan, Archbishop of Atlanta; Philip M. Hanna, Archbishop of New Orleans; Robert E. Lucy, Archbishop of San Antonio; Joseph B. Brunini, Apostolic Administrator of Natchez-Jackson; Lawrence M. DeFalco, Bishop of Amarillo; Joseph A. Dirick, Apostolic Administrator of Nashville; Thomas K. Gorman, Bishop of Dallas-Ft. Worth; Joseph H. Hodges, Bishop of Wheeling; John L. Morkovsky, Apostolic Administrator of Galveston-Houston; Victor J. Reed, Bishop of Oklahoma City and Tulsa; L.J. Reicher, Bishop of Austin; Thomas Tschoepe, Bishop of San Angelo; Ernest L. Unterkoefer, Bishop of Charleston; and Vincent S. Water, Bishop of Raleigh.

In that brief, the Bishops and Cardinals made no arguments about the definition of marriage as such. They assumed "marriage" to be an independent social institution, based on the union of a man and a woman. The only issue was to what extent the state could legitimately regulate that institution. The real question in this case, they argued, was whether a state's desire to restrict marriage on racial grounds should take precedence over the free exercise of religion and the right to bear children. Based on a combination of First Amendment and Due Process grounds, they argued that it should not, quoting the familiar texts from *Maynard v. Hill*, *Meyer v. Nebraska* and *Skinner v. Oklahoma* that all later appeared in *Loving*.<sup>127</sup>

In 1967, the JACL and the Catholic Church agreed about the meaning of marriage. By 1997, their understandings had diverged. As we have seen, the current JACL brief simply assumes that race and sex are equally irrelevant to marriage, and what matters is the association of individuals. In contrast, the Catholic Church has continued to argue that marriage is a unique sexual community and social institution, *entered into* by a man and a woman. While the state recognizes it, and religious communities bless it, marriage has an existence and integrity of its own in the social order.<sup>128</sup> In the words of the Most Reverend Francis X. DiLorenzo, Bishop of Honolulu:

We are not fooled by the rhetoric of 'civil rights' and 'equality.' Hawaii is a very tolerant state. The Catholic Church has strongly supported civil rights. We are publicly committed to a pluralistic society with liberty and justice for all. T[he Commission on Sexual Orientation and the Law], however, is up to something very different. In the name of 'equality' for individuals, it seeks to redefine marriage as an institution. This mixes apples and oranges. Every individual is equal before the law, and rightfully so. But marriage is not a creation of the law; it precedes the law . . . . To use these great traditions [of individual liberties] of our people to attack the crucial institution of marriage is to treat our people as a group of fools. The Church did not define marriage, but it will defend it.<sup>129</sup>

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127. Brief of Amicus Curiae Japanese American Citizens League of Honolulu at 6, 12-13, 15, 20-21 (quoting *Maynard*, *Meyer*, and *Skinner*); See also *Loving*, 388 U.S. 1, 7, 12.

128. "The community of marriage is different from all other communities and sexual relationships, including those communities that restrict themselves only to males or only to females. The uniqueness of the marital community grows out of physical characteristics that at once distinguish males and females and make it possible for them to unite in a conjugal bond. In no other community can two people physically unite themselves and their respective bloodlines to establish a common life which also creates and nurtures new life, therefore linking the wider human family across the generations." Brief of Amicus Curiae Hawaii Catholic Conference at 8-9, *Baehr* (Haw. 1997) (No. 20371).

129. Most Reverend Francis X. DiLorenzo, *Can't 'Redefine' Marriage*, HONOLULU ADVERTISER, Jan. 10, 1996, at A12. Bishop Kenneth A. Angell of Burlington, Vermont has also filed

From the Church's point of view, however "thin" the language of the law may be when it comes to describing marriage, supporting marriage is a fully legitimate goal of the law. Indeed, the Church argues that a marriage law is not a "sex-based classification" at all, in the sense of preferring one sex over the other; it is a law that recognizes the reality of the *union* of the sexes.<sup>130</sup>

In their Post Trial Memorandum in *Baehr*, the plaintiffs attacked all the amicus briefs submitted by their opponents.<sup>131</sup> Yet they had little to say about the Catholic brief. They simply asserted, without any further argument, that the definitional approach to marriage "was rejected by the Supreme Court of Hawaii in *Baehr v. Lewin* as an 'exercise in tortured and conclusory sophistry,'" and stated that "the amicus curiae brief of the Hawaii Catholic Conference must be viewed accordingly."<sup>132</sup> The words "exercise in tortured and conclusory sophistry," of course, come from the plurality's discussion of *Loving*. Once again, the plaintiffs simply "played the *Loving* card."

#### IV. CONCLUSION: BEYOND THE POLITICS OF ANALOGY

There is no straightforward relationship between *Loving v. Virginia* and *Baehr v. Miike*. Both sides in the debate about legalizing "same-sex marriage" agree that *Loving* is a case about racial equality and the freedom to marry. Both sides also agree that *Loving* has something to say to our present time. There, however, the agreement ends. One side, in support of same-sex marriage, wants to use *Loving* to remove the current debate about marriage from the democratic process. This makes their use of *Loving* a transparent example of the politics of analogy.

What seems to have eluded the proponents of the *Loving* analogy in Hawaii is the possibility that there may be a different point of view that is at least as thoughtful and principled as theirs. Instead, they are convinced that their cause is so righteous, and that their opponents are so unrighteous, that this cannot be conceded. Opponents must be treated as the equivalent of racists by playing the *Loving* card. When the number of dissenters rises, these advocates become even more firmly convinced that the definition of marriage cannot be allowed to be decided by "We the People," but must be decided in the judiciary instead.

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an amicus brief in *Baker v. Vermont*, the current "same-sex marriage" case on appeal to the Vermont Supreme Court. Brief Amicus Curiae, The Roman Catholic Diocese of Burlington Vermont and the Burlington Vermont Stake of the Church of Jesus Christ of Latter-day Saints, *Baker* (1998) (No. 98-32).

130. *Id.* ("Except in [*Baehr*], the term 'sex' has been used only to refer to legal classifications which disadvantage one sex over the other.")

131. See Plaintiffs' Post Trial Memorandum at 35-41, *Baehr* (No. 91-1394-05).

132. *Id.* at 40-41.

The advocates of same-sex marriage sponsor National Freedom to Marry Day on Lincoln's Birthday, but fail to recall the Lincoln who courageously critiqued the U.S. Supreme Court for its decision in the *Dred Scott* case: "[I]f the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having, to that extent, practically resigned their government into the hands of that eminent tribunal."<sup>133</sup> This same President Lincoln whom they say they revere also supported government "of the people, by the people, and for the people."<sup>134</sup>

After the proposed Marriage Amendment passed the Hawaii Legislature in April, attorney Dan Foley's only response was to say that he hopes the Hawaii Supreme Court pre-empts it.<sup>135</sup> Evidently he believes that the question of marriage is too dangerous to be decided by the people. It never seems to occur to him, and his allies, that perhaps lawyers are too dangerous to be left with the question of marriage. There is a great irony in this. The plaintiffs claim that their goal is to be treated as equal citizens, yet their attorneys want to withdraw the resolution of the question from their fellow citizens. Are citizens too dangerous to be trusted with any judgments about the common good?<sup>136</sup> Is *Loving* now the paradigm for every important and controversial public policy question?

From a Catholic point of view — and not only a Catholic point of view — things look very different. Just as the Virginia courts were trying to redefine marriage for their purposes, thereby distorting its genuine meaning, the Hawaii Courts have been trying to do the same thing. The content is different, but the strategy is the same: The State is attempting to redefine marriage to achieve its ideal of an improved society, rather than recognizing and building on the most crucial pre-political society of all, the unique community of marriage, based upon the *union* of the two sexes.<sup>137</sup>

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133. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861) in ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1859-1865 at 221 (D.E. Fehrenbacher ed., 1989).

134. *Id.* at 536 (quoting from the *Gettysburg Address* (Nov. 19, 1863)).

135. William Kresnak, *Lawyer Says Case Isn't Over*, HONOLULU ADVERTISER, April 17, 1997 at A7 (stating Foley's opinion that the passage of the Marriage Amendment will not end the case because the legislature will have to pass a new law banning same-sex marriage, and the Court will rule before they do).

136. On the importance of popular participation in fundamental lawmaking, see, THE END OF DEMOCRACY? THE JUDICIAL USURPATION OF POLITICS (1997); Mary Ann Glendon, A NATION UNDER LAWYERS (1994); Richard D. Parker, "HERE, THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO (1994). The important trilogy by Christopher Wolfe offers a paradigm of how constitutional interpretation can be both principled and modest, without resorting to either an amoral positivism or a purely results-oriented activism; see THE RISE OF MODERN JUDICIAL REVIEW, rev. ed. (1994), HOW TO READ THE CONSTITUTION (1996), and JUDICIAL ACTIVISM, rev. ed. (1997).

137. This similarity of strategies between the Virginia and Hawaii courts prompts a deeper question: Will the sins of slavery, segregation, and racism, which have so stained American history,

In *Loving v. Commonwealth*, the courts of Virginia, using the rhetoric of divine plan, were prepared to deconstruct and redefine marriage in order to achieve racist goals. In their universe, race meant everything. Their ultimate goal was a society based on "racial integrity."<sup>138</sup> These courts turned a case about marriage into a case about race.

In *Baehr v. Lewin*, a plurality of the Supreme Court of Hawaii, using the rhetoric of state power, is prepared to deconstruct and redefine marriage in order to advance its vision of social transformation. In its universe, individualism means everything. Its ultimate goal is a society based solely on individual equality, in which the only two players are individuals and the State.<sup>139</sup> It has turned a case about marriage into a case about individuals.

Therefore, just as *Loving* represents the triumph of marriage over racism, so the proposed Marriage Amendment to the Hawaii Constitution, and the Defense of Marriage Act represent the triumph of marriage over *-isms* that unjustly use the courts to deconstruct civil society and pit the individual against marriage, the democratic process, and ultimately liberty itself.<sup>140</sup> To paraphrase the words of the Hawaii Supreme Court:

With all due respect to the Hawaii Supreme Court of the current era, we do not believe that judges are the ultimate authorities on the subject of Popular Will, and, as the controversy surrounding *Baehr* amply demonstrates, a constitutional amendment may mandate, like it or not, that courts change with an evolving democratic order.<sup>141</sup>

haunt every future effort to encourage civil society alongside civil rights? One can only hope and pray it will not be so. But if it does, to quote Lincoln once more, "The Almighty has his own purposes," and we will only be able to say, through our tears, that "The judgments of the Lord are true and righteous altogether." Abraham Lincoln, *Second Inaugural Address* (Mar. 4, 1865), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1859-1865 at 687.

138. Judge Bazile's infamous words about "Almighty God" were evidently written in 1965 when he rejected Cohen and Hirschkop's motion to set his original decision aside. See Pratt, *Crossing the Color Line*, *supra* note 63 (manuscript at 12, on file with author) (quoting *Loving*). On March 7, 1966, the Virginia Supreme Court of Appeals upheld his decision, but did not repeat his inflammatory statement. *Loving*, 147 S.E.2d 78. Nevertheless, the U.S. Supreme Court quoted Judge Bazile in *Loving*, 388 U.S. at 3, and the rest is history.

139. Thus the plurality in *Baehr v. Lewin* refers to marriage as "a state-conferred legal partnership status," and speaks of "the state's role as the exclusive progenitor of the marital partnership," and "the state's monopoly on the business of marriage creation." *Baehr*, 852 P.2d at 58.

140. Eventually, the U.S. Supreme Court may need to defend the reality of marriage against the ideology of individualism, just as it defended it against the ideology of racism. Wherever and whenever the case arises that finally makes it to the Court, we can hope that the Supreme Court will still defend the integration of the sexes in marriage. If it does not, a long and difficult battle for the Federal Marriage Amendment may be required in order to settle the matter.

141. See *Baehr v. Lewin*, 852 P.2d 44, 63 (Haw. 1993).

Now what is the point of these counter-analogies? Am I simply throwing out a rhetorical red herring? Anyone sympathetic to the legalization of same-sex marriage may be offended, perhaps even outraged, by them. How dare I compare the *Baehr* Court to the *Commonwealth* Court?

But that is precisely the point: when all is said and done, the *Loving* analogy is not the real issue. Analogies can be clever, and sometimes politically powerful, but they rest on a theory. Therefore, if we want to transcend rhetorical punches and counter punches, we must move beyond the politics of analogy and engage our differences directly, respectfully, and unapologetically.<sup>142</sup>

Those who believe that marriage is simply state-endorsed intimacy see an analogy between *Loving* and *Baehr*, because they have *first* redefined marriage in those terms, and have *then* made the analogy. To them, both the Virginia and Hawaii statutes distort the truth about marriage. Those, in turn, who believe that marriage is a unique male-female sexual community are going to see an analogy between *Commonwealth* and *Baehr*, because both decisions distort the truth about marriage. The former distorting the definition of marriage to support racism, and the latter distorting marriage in support of "same-sex marriage." There is more than one *Loving* analogy, if there is any analogy at all.

If this is so—and I suggest that it is—let us see it for what it is. Then let us move beyond it, and stop the unsophisticated game of playing the *Loving* card and calling our opponents bigots. Instead, let us focus on the real and difficult issues that confront us: *Who* decides what is marriage: the people, directly or through their elected representatives, or the courts? *What is* marriage: A contract between autonomous individuals? An intimate, committed relationship? A unique male-female sexual community? And, perhaps most importantly, how shall we co-exist peacefully in a society where people disagree about the answer to these questions?

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142. For a beginning of such a dialogue, see papers from the following three symposia: (1) Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, responded to by John M. Finnis, *The Good of Marriage and the Morality of Sexual Relations: Historical and Philosophical Observations* (both forthcoming in 1997 AM. J. JURIS.). (2) Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261 (1995), responded to by Robert P. George and Gerard V. Bradley, *Marriage and the Liberal Imagination*, *id.* at 321, followed by Macedo's *Reply to Critics*, *id.* at 329. (3) John M. Finnis, *Law, Morality, and 'Sexual Orientation,'* 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 11 (1995), responded to by Michael J. Perry, *The Morality of Homosexual Conduct: A Response to John Finnis*, *id.* at 41, both of whom are then evaluated by Paul J. Weithman, *A Propos of Professor Perry: A Plea for Philosophy in Sexual Ethics*, *id.* at 75.