

WHEN *BAEHR* MEETS *ROMER*: FAMILY LAW ISSUES AFTER AMENDMENT 2

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My assignment for this conference is to consider family law issues in the wake of Amendment 2 and the Supreme Court's decision in *Romer v. Evans*.¹ This gives me an interesting opportunity to try to pull together the *Romer* decision and the issues raised by the Hawaii Supreme Court's ruling concerning same-sex marriage in *Baehr v. Lewin*.² At first glance, there are a number of parallels. Doctrinally, both decisions are based on theories of equal protection. Both cases are counted as substantial victories for the gay rights movement, and both might be criticized as instances of judicial activism. Certainly, both cases have provoked significant commentary in academic and popular media.

Upon closer examination, however, there is much less common ground here. Neither Amendment 2 nor the *Romer* opinion addresses the many complex legal questions that affect gay and lesbian families. Moreover, in *Baehr*, the Hawaii Supreme Court entirely avoided the troublesome problems of political decision-making that Amendment 2 and the *Romer* decision suggest.

This essay offers a series of observations that link the family law questions raised by *Baehr* with the political process issues raised by *Romer*. Part I considers the *Baehr* case and its effects in Hawaii and other states, including Colorado. Part II contrasts the role of courts engaged in constitutional review with the role of courts in the everyday controversies that are the grist of the family law mill. Part III explores the effects of the *Romer* decision on questions concerning gay and lesbian marriage and family life.

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1. 116 S. Ct. 1620 (1996).

2. 852 P.2d 44 (Haw. 1993).

I.

The litigation in *Baehr* involved three same-sex couples in Hawaii who had been denied marriage licenses. The plaintiffs claimed that this denial violated their rights to privacy, equal protection, and due process under the Hawaii Constitution. Although they lost at the trial court level, the Hawaii Supreme Court reversed, concluding that the marriage licensing statute could be sustained as constitutional only if the state could demonstrate that it has a compelling interest in limiting marriage to male-female couples.³

The Hawaii Supreme Court did not accept all of the plaintiffs' arguments. The court agreed that the right of privacy in the Hawaii Constitution incorporates a fundamental right to marry, but rejected the argument that this right should be extended to same-sex couples.⁴ The court's holding was based on the equal protection clause of the Hawaii Constitution, which is more elaborate than its Fourteenth Amendment analogue. It reads: "No person shall . . . be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry."⁵ The court held that statutory categorizations based on sex are "suspect" for purposes of equal protection review;⁶ therefore, the sex-based limitation in the marriage license statute was presumptively unconstitutional.⁷ The Hawaii court rejected the State's argument that the statute was not discriminatory because it treated men and women similarly.⁸ This aspect of the court's holding followed the

3. See *id.* at 68.

4. See *id.* at 55-57; see also HAW. CONST. art. I, § 6 ("The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.").

5. HAW. CONST. art. I, § 5. In contrast, the Equal Protection Clause of the Fourteenth Amendment reads: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 2.

6. See *Baehr*, 852 P.2d at 64-67.

7. See *id.* at 68. The state will be required to overcome the presumption that the statute is unconstitutional "by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights." *Id.* For an account of the background of this litigation, see Paul M. Barrett, *I Do / No You Don't: How Hawaii Became Ground Zero in Battle over Gay Marriages*, WALL ST. J., June 17, 1996, at A1. See also David Tuller, *Making Waves*, S.F. CHRON., June 23, 1996, at 1Z3.

8. See *Baehr*, 852 P.2d at 57-64, 67-68.

reasoning of the United States Supreme Court in *Loving v. Virginia*,⁹ which held that Virginia's anti-miscegenation statute constituted racial discrimination. Although the dissent rejected the analogy between interracial and same-sex marriage, the arguments are largely identical at a formal level.

A little more than three years have passed since the Hawaii Supreme Court's ruling in *Baehr*, and the case has generated a series of waves, moving first across Hawaii, and then over the mainland. In the year after the decision, the Hawaii Legislature took a variety of steps in response to the ruling. The legislature joined the debate by enacting an extensive political and policy statement disputing the conclusions and the legitimacy of the court's opinion in *Baehr*.¹⁰ In this remarkable document, the legislature asserted that any change in Hawaii's marriage licensing laws "must come from either the legislature or a constitutional convention, not the judiciary."¹¹ While acknowledging that the court "has the right to pass on the constitutionality" of the statute, the Act described the question before the court in *Baehr* as "essentially one of policy."¹² The legislature accused the court of "encroach[ing] on the functions of the legislature in its law-making function, thereby impinging on the separation of powers of the respective branches of government."¹³ In addition, the Act disputed the applicability of the *Loving* decision and the Hawaii equal protection clause to the question of same-sex marriage. To emphasize this point, the legislature amended the Hawaii statutes to state explicitly that marriages shall only be between a man and a woman.¹⁴ In a different type of defensive maneuver, the Hawaii Legislature also established the Commission on Sexual Orientation and the Law.¹⁵ This commission was charged with examining the legal and economic benefits extended to opposite-sex couples and making recommendations to the legislature on whether to extend similar benefits to same-sex couples.

9. 388 U.S. 1 (1967).

10. See Act of June 22, 1994, No. 217, § 1, 1994 Haw. Sess. Laws, Act 217.

11. *Id.*

12. *Id.*

13. *Id.*

14. See *id.* §§ 2-4. This was less explicit in the previous version of the statute. See generally *Baehr*, 852 P.2d at 48-50.

15. See Act of June 22, 1994, No. 217, § 6, 1994 Haw. Sess. Laws, Act 217.

The court in *Baehr* was clearly concerned with the many state-conferred rights and benefits that flow from legal recognition of marriage.¹⁶ Enactment of a comprehensive domestic partnership ordinance extending these benefits to same-sex couples, as an alternative to recognition of same-sex marriage, might have satisfied the court that the denial of marriage rights was sufficiently narrowly drawn.¹⁷ However, the commission's report, submitted in December 1995, urged both legalization of same-sex marriage and enactment of a comprehensive domestic partnership law.¹⁸

During the Hawaii Legislature's 1996 session, a series of different proposals was introduced to resolve the conflict created by *Baehr*. One bill, providing for a statewide vote on a constitutional amendment to ban same-sex marriages, was approved by the state house, but defeated by the senate.¹⁹ Another bill, providing for a statewide system of domestic partnerships, was approved by the state senate but defeated by the house.²⁰ By the time the legislative session ended, neither bill had been enacted. Thus, when the trial on remand took place in September 1996, Hawaii's marriage law was essentially the same as it had been when the Hawaii Supreme Court ruling was issued in 1993.

During the past year, the prospect of legalized same-sex marriage in Hawaii generated an enormous public response in other states. Most of the interest in the case was prompted by the traditional conflict of laws rule that recognizes a marriage that is

16. See *Baehr*, 852 P.2d at 59.

17. See Thomas F. Coleman, *The Hawaii Legislature Has Compelling Reasons to Adopt a Comprehensive Domestic Partnership Act*, 5 LAW & SEXUALITY 541 (1995).

18. See HAWAII COMM'N ON SEXUAL ORIENTATION AND THE LAW, REPORT 1-23 (Dec. 1995). The commission described domestic partnership as a "separate but equal" solution, and stated its view that adoption of domestic partnership would not be sufficient to meet the equal protection test articulated in *Baehr*. *Id.*

19. See *Gay Marriages Split Hawaii Legislature; Senate Says Yes, House Says Let Public Vote*, PHOENIX GAZETTE, Mar. 6, 1996, at A11 (referring to H.R. 2367, 18th Leg. (Haw. 1996)); see also H.R. 2667, 18th Leg. (Haw. 1996); H.R. 3732, 18th Leg. (Haw. 1996); S. 2501, 18th Leg. (Haw. 1996); S. 3114, 18th Leg. (Haw. 1996) (proposing referenda on the same-sex marriage issue).

20. See S. 2419, 18th Leg. (Haw. 1996); see also H.R. 4030, 18th Leg. (Haw. 1996). The bill, which proposed a system of family partnerships, passed in the senate by a 14-11 vote. See *Gay Marriages Split Hawaii Legislature; Senate Says Yes, House Says Let Public Vote*, *supra* note 19, at A11. Reportedly, a bill to legalize same-sex marriage died in the House Judiciary Committee. See Claudine Kriss, *Hawaii Tables Gay Marriage Bill*, USA TODAY, Jan. 25, 1996, at 3A.

valid in the place of celebration as valid everywhere.²¹ Another frequently heard argument was that the Full Faith and Credit Clause of the United States Constitution would require other states to recognize the validity of same-sex marriages solemnized in Hawaii under *Baehr*.²² Newspapers were suddenly filled with accounts of same-sex couples across the country waiting to fly to Hawaii to tie the knot. Concerned about this prospect, legislators in thirty-five states moved to prevent the situation in which their states would be obligated to recognize same-sex marriages if they became valid in Hawaii. These efforts were successful in fifteen states, but failed in many others, including Colorado.²³

21. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971). Many states have statutes codifying this rule. See, e.g., COLO. REV. STAT. § 14-2-112 (1987). This rule is subject to a public policy exception, which sometimes is reflected in "marriage evasion" statutes. See 1 HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 2.9, at 158 (practitioner's ed., 2d ed., 1987) (listing marriage evasion statutes adopted by Illinois, Massachusetts, Vermont, and Wisconsin).

22. The conflict of laws and full faith and credit issues have generated significant academic commentary. See Barbara J. Cox, *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033, 1062-1117; Deborah M. Henson, *Will Same-Sex Marriages Be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States' Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii's Baehr v. Lewin*, 32 U. LOUISVILLE J. FAM. L. 551, 584-91 (1993-94); Joseph W. Hovermill, *A Conflict of Laws and Morals: The Choice of Law Implications of Hawaii's Recognition of Same-Sex Marriages*, 53 MD. L. REV. 450 (1994); see also Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745 (1995). Students have also written on the topic. See, e.g., Thomas M. Keane, Note, *Aloha, Marriage? Constitutional and Choice of Law Arguments for Recognition of Same-Sex Marriages*, 47 STAN. L. REV. 499 (1995); Candace L. Sage, Note, *Sister-State Recognition of Valid Same-Sex Marriages: Baehr v. Lewin—How Will It Play in Peoria?*, 28 IND. L. REV. 115 (1994).

23. See David W. Dunlap, *Foes of Gay Marriage Are Foiled in California Senate*, N.Y. TIMES, Sept. 6, 1996, at A24. The states that adopted this legislation include: ALASKA STAT. § 25-05.011 (Michie 1996); ARIZ. REV. STAT. ANN. § 25-101 (West Supp. 1996); GA. CODE ANN. § 19-3-3.1 (Michie Supp. 1996); IDAHO CODE § 32-209 (1996); 750 ILL. COMP. STAT. 5/212 (West, WESTLAW through all 1996 legislation); KAN. STAT. ANN. §§ 23-101, -106 (1995); LA. CIV. CODE ANN. arts. 86-89 (West Supp. 1997); N.C. GEN. STAT. § 51-1.2 (Michie, WESTLAW through all 1996 legislation); S.C. CODE ANN. § 20-1-15 (Law Co-op Supp. 1996); S.D. CODIFIED LAWS § 25-1-1 (Michie Supp. 1996); TENN. CODE ANN. §§ 36-3-103, -111, -113, -306 (1996); UTAH CODE ANN. § 30-1-2(5) (1995).

Similar legislation was also introduced in the following states: Alabama, California, Delaware, Iowa, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. See David W. Dunlap, *Fearing a Toehold for Gay Marriages, Conservatives Rush to Bar*

In March 1996, the Colorado General Assembly passed a bill that prohibited same-sex marriages.²⁴ As in other states, the debate was intense. It culminated in a suspenseful week when the bill was in the Governor's office, awaiting his signature or veto. With his veto message, Governor Roy Romer stepped squarely into the debate. He stated his support for the Colorado law that reserved marriage "for the union of a man and a woman," and asserted his belief that "decisions on this subject should be made by Coloradans and not by people in other states."²⁵ Adopting a compromise position, the Governor stated that he would sign the legislation because it was Colorado's "strong public policy to recognize only marriages from other states that are between a man and a woman," but only if the bill also provided for a commission to "review and evaluate the legal and policy issues involved in recognizing same-sex relationships."²⁶

The campaign against same-sex marriage reached Congress in June 1996, with the introduction of H.R. 3396, the Defense of Marriage Act. This bill denied federal recognition to same-sex marriages, and permitted states to deny full faith and credit to same-sex marriages from other states.²⁷ This bill enjoyed broad bipartisan support and quickly passed both houses by large margins.²⁸ It was supported by both Senator Dole, a cosponsor of

the Door, N.Y. TIMES, Mar. 6, 1996, at A13; Philip Greenberg & Gerald B. Gasman, *Federal, State Bills Challenge Same-Sex Marriages*, NAT'L L.J., June 3, 1996, at B8.

24. See H.R. 1291, 60th Gen. Assembly, 2d Sess. (Colo. 1996). See generally Thomas Frank, *Same-Sex Marriage Ban Advances*, DENV. POST, Mar. 12, 1996, at B1; Thomas Frank, *Showdown Near on Same-Sex Marriage Ban*, DENV. POST, Mar. 5, 1996, at B1; Thomas Frank, *State Lawmakers of Two Minds on Matrimony*, DENV. POST, Feb. 28, 1996, at A1.

25. Letter from Roy Romer, Governor, State of Colorado, to the House of Representatives, State of Colorado (Mar. 25, 1996) (vetoing House Bill 96-1291) (on file with author); see Dick Foster, *Veto Draws Mixed Reaction; Contempt, Praise Greet Governor's Rejection of Same-Sex Marriage Bill*, ROCKY MTN. NEWS, Mar. 26, 1996, at 10A; Thomas Frank, *Same Sex Ban Vetoed; Romer Strives to Find Some Middle Ground*, DENV. POST, Mar. 26, 1996, at A1; Valerie Richardson, *Governor of Colorado Rejects Ban on Same-Sex Marriages: Romer Against Such Unions but Wants Panel to Study Bill*, WASH. TIMES, Mar. 26, 1996, at A3.

26. See Letter from Roy Romer, *supra* note 25.

27. See Defense of Marriage Act, H.R. 3396, 104th Cong. (1996). The committee report on the bill is H.R. No. 104-664 (1996) [hereinafter Committee Report]. For history on this legislation, see David W. Dunlap, *Fearing a Toehold for Gay Marriage, Conservatives Rush to Bar the Door*, N.Y. TIMES, Mar. 6, 1996, at A13. See also Adam Nagourney, *Christian Coalition Pushes for Showdown on Same-Sex Marriage*, N.Y. TIMES, May 30, 1996, at A19; Bob Sipchen, *Same Sex Marriage Moves to Forefront of Cultural Debate*, L.A. TIMES, Apr. 10, 1996, at 5.

28. The bill was passed by the House in July 1996, and it was passed by the

the legislation in the Senate, and by President Clinton.²⁹ After the bill was debated, however, many members of Congress who had supported the bill expressed some discomfort about it.³⁰ In the Senate, a measure attached by Senator Edward Kennedy would have prohibited job discrimination on the basis of sexual orientation. The Senate defeated this measure by a single vote.³¹ Moreover, when President Clinton signed the bill, he did it without fanfare in the early hours of a Saturday morning.³²

The opportunity to debate same-sex marriage simultaneously in thirty-five state legislatures and Congress was enormously important for the gay rights movement.³³ Same-sex marriage as a political issue is distinct from other issues affecting gays and lesbians. One reason for this distinction is the intense moral and religious opposition that the prospect of same-sex marriage provokes. In addition, because family law is regulated primarily by state governments, it presents important federalism issues that are much less significant in other debates.³⁴ These two differences moved this issue from the political wings onto the center stage in a very short time.³⁵

Senate on September 10, 1996. President Clinton signed the bill in the early morning hours on September 21, 1996. See generally Peter Baker, *President Quietly Signs Law Aimed at Gay Marriages*, WASH. POST, Sept. 22, 1996, at A21; Eric Schmitt, *Panel Passes Bill to Let States Refuse to Recognize Gay Marriage*, N.Y. TIMES, June 13, 1996, at A15; Eric Schmitt, *Senators Reject Both Job-Bias Ban and Gay Marriage*, N.Y. TIMES, Sept. 11, 1996, at A1; John E. Yang, *House Votes to Curb Gay Marriages*, WASH. POST, July 13, 1996, at A1; John E. Yang, *Senate Passes Bill Against Same-Sex Marriage*, WASH. POST, Sept. 11, 1996, at A1.

29. See Todd S. Purdum, *President Would Sign Legislation Striking at Homosexual Marriages*, N.Y. TIMES, May 23, 1996, at A1; Todd S. Purdum, *White House Is Avoiding Gay Marriage as an Issue*, N.Y. TIMES, May 16, 1996, at B9.

30. See, e.g., Yang, *House Votes to Curb Gay Marriages*, *supra* note 28, at A1 (quoting comments from Rep. Peter Deutsch, D-Fla.); Schmitt, *Panel Passes Bill to Let States Refuse to Recognize Gay Marriages*, *supra* note 28, at A15 (quoting comments from Rep. Sonny Bono, R-Calif.).

31. See Schmitt, *Senators Reject Both Job-Bias Ban and Gay Marriage*, *supra* note 28. The Senate supported the bill denying recognition of same-sex marriages by a vote of 85-14, but defeated the bill barring employment discrimination against homosexuals by a vote of only 50-49. See *id.*

32. See Baker, *supra* note 28.

33. Ironically, this was not an issue that was very high on gay rights agendas before the Hawaii court's decision in *Baehr*. See David W. Dunlap, *Gay Rights Advocates Question Effort to Defend Same-Sex Marriage*, N.Y. TIMES, June 7, 1996, at A12. See generally WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* 51-85 (1996).

34. For example, the last major national debate concerned policy toward gays in the military, which is an entirely national question.

35. See sources cited *supra* notes 27-29.

Our system tolerates a great deal of variation in the specifics of family law from state to state, and there is a significant history of experimentation and change in the details of family regulation. There are many contemporary examples of this: while all states now have non-fault grounds for divorce, a significant minority have retained fault grounds in their divorce statutes or permit financial incidents of divorce to be influenced by marital misconduct. Although common law marriages were once widely recognized, such marriages are now valid in only fourteen U.S. jurisdictions.³⁶ Thus, even without the legalization of same-sex marriage in Hawaii, state law varies widely on many issues of importance to gays and lesbians. Criminal prohibitions against sodomy, for example, remain on the books in twenty-four jurisdictions.³⁷ Some states authorize courts to use a parent's sexual orientation as a basis for denying custody.³⁸ In several states, a lesbian or gay couple can arrange for second parent adoptions in order to formalize the relationship between one partner's child and the other partner.³⁹ In other states, a same-sex partner can seek custody or visitation with a child raised jointly by the couple despite the absence of a formal parent-child relationship.⁴⁰

36. See *infra* note 60.

37. See generally Lisa M. Farabee, *Marriage, Equal Protection, and New Judicial Federalism: A View from the States*, 14 YALE L. & POL'Y REV. 237, 261 n.128 (1996). In two of these states, however, courts have concluded that the statutes violate state constitutional law. See *id.* at 247-48.

38. See, e.g., *Bottoms v. Bottoms*, 457 S.E.2d 102, 107-08 (Va. 1995); *Roe v. Roe*, 324 S.E.2d 691, 692-94 (Va. 1985). In other states, courts may inquire whether a parent's sexual orientation has an adverse effect on a child. See, e.g., *S.N.E. v. R.L.B.*, 699 P.2d 875, 879 (Alaska 1985); *Bezio v. Patenaude*, 410 N.E.2d 1207, 1216 (Mass. 1980); *In re Cabalquinto*, 669 P.2d 886 (Wash. 1983) (en banc). See generally Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 635-39 (1996) (describing the Nexus Test and Per Se Rule adopted by several courts).

39. Compare *In re M.M.D.*, 662 A.2d 837, 859 (D.C. 1995) (permitting stepparent adoption by same-sex partner), *In re K.M.*, 653 N.E.2d 888, 893-94 (Ill. App. Ct. 1995) (same), *In re Tammy*, 619 N.E.2d 315, 318-20 (Mass. 1993) (same), *In re H.N.R.*, 666 A.2d 535, 538 (N.J. Super. Ct. App. Div. 1995) (same), *In re Jacob*, 660 N.E.2d 397, 400-01 (N.Y. 1995) (same), and *In re B.L.V.B.*, 628 A.2d 1271, 1275-76 (Vt. 1993) (same), with *In re T.K.J.*, Nos. 95-CA0531, 95-CA0532, 1996 WL 316800, at *3-5 (Colo. Ct. App. June 13, 1996) (refusing to permit stepparent adoption by same-sex partner) *reh'g denied* (Aug. 1, 1996), *petition for cert. filed*, (Colo. Sept. 24, 1996) (No. 96-SC588), and *In re Angel Lace M.*, 516 N.W.2d 678, 684-85 (Wis. 1994) (same). See generally Sonja Larsen, Annotation, *Adoption of Child by Same-Sex Partners*, 27 A.L.R. 5th 54 (1995).

40. See, e.g., *A.C. v. C.B.*, 829 P.2d 660, 664-65 (N.M. Ct. App. 1992); *Holtzman v. Knott*, 533 N.W.2d 419, 435 (Wis. 1995). But see *Alison D. v. Virginia M.*, 572

This diversity is evidence of the tradition that allocates responsibility for domestic relations matters to the states. These examples call to mind the famous argument by Justice Brandeis that the states serve as laboratories for experimentation.⁴¹ However, such experiments come at a cost because variation among state domestic relations laws also generates significant problems of choice of law, conflict of laws, and full faith and credit.⁴² Once a state, perhaps Hawaii, actually legalizes same-sex marriage, a wide variety of new conflict of laws problems will inevitably arise, despite the efforts of Congress or the state legislatures to stem the tide.⁴³

These conflicts raise serious federalism problems, which cannot be resolved by resorting to slogans about states' rights or individual liberty. In addressing these problems, courts and legislators usually begin by recognizing that each jurisdiction has an interest in defining and enforcing its own norms of family life, without being compelled to adopt another state's policy. Although this interest has no explicit constitutional grounding, it has the weight of tradition behind it; this same concern has dominated the campaign against interstate recognition of same-sex marriages.⁴⁴ However, each state also has a competing interest in having its policies and laws respected in other jurisdictions. This aspect of states' rights, which is constitutionally established with the Full Faith and Credit Clause,⁴⁵ encourages broader recognition of one state's marriages in other states, and at the national level as well.⁴⁶ A third consideration looks to the interests of

N.E.2d 27, 29-30 (N.Y. 1991) (per curiam).

41. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

42. See generally ALBERT EHRENZWERG, *CONFLICT OF LAWS* (1962).

43. See generally sources cited *supra* note 22.

44. See generally Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1821-26 (1995) (presenting a history of state and federal authority over domestic relations issues). See H.R. REP. NO. 104-664, at 6-10 (1996). The majority view, given in the committee report, is that the Defense of Marriage Act advances the government's interest in protecting state sovereignty and democratic self governance, see *id.* at 16-18, and that it is consistent with the Full Faith and Credit Clause, see *id.* at 24-30.

45. See generally LEA BRILMAYER, *CONFLICT OF LAWS* 111-42 (1991).

46. This question received some attention from opponents of the Defense of Marriage Act. See H.R. Rep. No. 104-664, at 37-43 (1996); see also Laurence H. Tribe, *Toward a Less Perfect Union*, N.Y. TIMES, May 26, 1996, § 1, at 11. There may be other state interests at stake; some commentators have observed that Hawaii may reap significant financial benefit from being the first state to legalize same-sex

individual citizens, who may find themselves traveling from one state to another and who will find it difficult if their marital status changes as they do so. These individual interests enjoy some degree of constitutional protection as well.⁴⁷

It may be a very long time before the Defense of Marriage Act reaches the United States Supreme Court. When it does, the Court will have a rare opportunity to consider a number of unprecedented constitutional questions. Are marriages entitled to full faith and credit under the Constitution? Does the Act exceed the scope of Congress's power under Article IV? Does Congress infringe on states' prerogatives if it refuses federal recognition for some marriages formalized within a state?⁴⁸ In the meantime, however, the real action in gay and lesbian family law will continue to take place in the state courts and legislatures, just as thousands of everyday disputes work their way through the legal system.

II.

With the *Baehr* decision, the Hawaii Supreme Court has taken what seems to be a highly activist stance.⁴⁹ This step is all the more dramatic because it has potential effects far beyond Hawaii. Moreover, this decision moves far beyond the federal constitutional law governing same-sex relationships, which has been dominated by the Supreme Court's 1986 decision in *Bowers*

marriage, both in human capital terms, from possible in-migration, and from an increase in the state's tourism industry. See Brown, *supra* note 22, at 752-818.

47. See, e.g., *Williams v. North Carolina*, 317 U.S. 287 (1942) (holding that plaintiff's state of domicile may grant a divorce decree that must be recognized in all other states) (overruling *Haddock v. Haddock*, 201 U.S. 562 (1906)). See also *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel); *Hicklin v. Orbeck*, 437 U.S. 518 (1978) (Article IV's Privileges and Immunities Clause); *Baldwin v. Fish and Game Comm'n of Montana*, 436 U.S. 371 (1978) (privileges and immunities).

48. A related issue is whether the Defense of Marriage Act violates the equal protection principles articulated in *Romer*. See *infra* notes 84-110 and accompanying text.

49. Even for those who oppose judicial activism, however, the state law variety is arguably less objectionable than the federal variety. Hawaii, like most other states, permits amendments of its constitution by a mere majority vote. See Farabee, *supra* note 37, at 249 n.64. However, Hawaii does not permit citizen initiatives. See *id.* at 249-50 n.65. See generally GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 12-13 (1982) (suggesting that updating laws through judicial action is less problematic when constitutions are easily changed).

v. Hardwick.⁵⁰ Two factors set the *Baehr* case apart from the rest of the landscape in this area. First, the holding was based on a provision of the Hawaii Constitution that has no counterpart in the United States Constitution.⁵¹ Second, the nature of the classification in the Hawaii marriage license statute allowed the Hawaii court to subsume sexual orientation into the legal category of sex discrimination.⁵² These differences place the *Baehr* decision largely outside the shadow cast by the Supreme Court's privacy doctrine.⁵³ Remarkably, none of the opinions issued by the Hawaii court make any reference to *Bowers*. The plurality decision treats both sexual activity and sexual orientation as irrelevant,⁵⁴ and the dissent takes largely the same approach.⁵⁵

In carrying out the task of constitutional review, the Hawaii Supreme Court engages in a function that is distinct from the more usual role of state courts in family law cases.⁵⁶ State courts play a substantial role in defining and elaborating the legal norms of family life, but this ordinarily takes place through

50. 478 U.S. 186 (1986).

51. See *supra* note 5 and accompanying text.

52. For commentary exploring the overlapping nature of discrimination based on sex and discrimination based on sexual orientation, see Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995). See also Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187.

53. The section of the plurality opinion that holds that the right to privacy in the Hawaii Constitution does not include a fundamental right to same-sex marriage relies heavily on precedent from the U.S. Supreme Court. See *Baehr v. Lewin*, 852 P.2d 44, 55-57 (Haw. 1993).

54. See *id.* at 51 n.11, 53 n.14.

55. See *id.* at 71 n.3 (Heen, J., dissenting). There is a hint of sex, however, in the dissent's statement that the legislative purpose behind the statute is "fostering and protecting the propagation of the human race through heterosexual marriages." *Id.* at 74 (Heen, J., dissenting). Mary Anne Case has argued that "coupling" is both defining and problematic for gay men and lesbians, suggesting that the presence of a couple may focus attention on the sexual aspect of their relationship, a subject to which courts may react negatively. See 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). Considering her account, one interesting similarity between both the *Baehr* plurality opinion and the *Romer* majority opinion is that sex is (conspicuously) absent in both. See *infra* notes 106-107 and accompanying text.

56. State courts sometimes rule that state legislation in the family law area is unconstitutional. See, e.g., *Curtis v. Kline*, 666 A.2d 265, 269-70 (Pa. 1995) (concluding that a statute permitting courts to order divorced parents to provide funds for their children's college educations violates the Equal Protection Clause of the Fourteenth Amendment).

exercise of their common law powers or the process of interpretation and enforcement of state domestic relations statutes.⁵⁷ Unlike other fields of law, the powers accorded to state courts by family law statutes are extremely broad.⁵⁸ Family law statutes direct courts to do equity or achieve justice in particular cases, often with very little guidance from the legislature. Over time, through appellate review, courts interlineate more specific content into these statutes. This gives a strong common law flavor to what is nominally statutory law.

When confronted with new family situations falling outside or in between the terms of statutory family law, courts have not hesitated to plow new ground. In addressing such cases, courts occasionally create new remedies, deny recovery entirely, or expand the existing legal categories to include what was formerly outside. This pattern has become familiar in cases involving gay and lesbian family relationships.⁵⁹ Although both the process of legal change and the debate concerning same-sex families are relatively new, several centuries of history speak to marriage-like, nonmarital, and heterosexual relationships.

There is an analogy to common law marriage that operates on several levels here. Common law marriage represents an effort by courts to regularize the relationships in informal families.⁶⁰ Its value as an institution lies primarily in the fact that it does not create new institutions and rules, but assimilates these families to the norms established by society and the status

57. This extensive judicial role has a long history in American family law. See generally MICHAEL GROSSBERG, *GOVERNING THE HEARTH* 12-16, 289-307 (1985) (describing "judicial domination" of Nineteenth Century family law). See also *id.* at 62-63 (breach of promise to marry); *id.* at 69-91, 95-100 (common law marriage), 200-28 (rights of illegitimate children), 236-53 (child custody).

58. See generally Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 *TUL. L. REV.* 1165, 1168-85 (1986) (advocating a restructuring of divorce law to reduce discretion and create predictability); Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 *MICH. L. REV.* 2215, 2228-31 (1991) (suggesting that discretion is necessary to the decisions required in family law).

59. See, e.g., cases cited *supra* notes 38-39 and *infra* note 71.

60. See GROSSBERG, *supra* note 57, at 69-75. See generally 1 CLARK, *supra* note 21, § 2.4, at 103 n.11 (listing 14 jurisdictions that continue to recognize common law marriage: Alabama, Colorado, District of Columbia, Georgia, Idaho, Iowa, Kansas, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Texas). The list has been reduced since Professor Clark's treatise was published; Georgia has recently abolished the institution of common law marriage with a statute providing that such marriages contracted after January 1, 1997, will no longer be recognized. See GA. CODE ANN. § 19-3-1.1 (1996).

categories created by law. States with common law marriage rules have less need to develop new legal rules for property disputes between cohabitants,⁶¹ fewer problems providing social security benefits for dependent "spouses,"⁶² and fewer children categorized as fatherless or illegitimate.⁶³

The argument in favor of recognizing same-sex marriage parallels the argument in favor of common law marriage. Andrew Sullivan argues that legal recognition of loving, stable, and responsible same-sex relationships, especially through the institution of marriage, is not a radical step, but a "profoundly humanizing, traditionalizing step," which would extend to gays and lesbians more socially acceptable roles within the larger society and buttress rather than undermine the ethic of heterosexual marriage.⁶⁴ In a similar vein, William Eskridge suggests that "same-sex marriage is good for gay people and good for America, and for the same reason: it civilizes gays and it civilizes America."⁶⁵ However, same-sex marriage is still widely debated within the gay and lesbian community precisely because assimilation to the conventional societal norm of marriage is not a universally shared goal.⁶⁶

Despite its widespread acceptance during the early history of our nation, many states banned common law marriage by statute during a period of family law reform at the turn of the century. The campaign against common law marriage treated it as a moral issue.⁶⁷ Once states passed statutes abolishing common law

61. Cf. *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979); *Morone v. Morone*, 413 N.E.2d 1154 (N.Y. 1980). It is very likely that the couples in these cases would have been deemed married in a common law marriage state.

62. Cf. *Renshaw v. Heckler*, 787 F.2d 50 (2d Cir. 1986); *Dolan v. Celebrezze*, 381 F.2d 231 (2d Cir. 1967). Common law marriage rules would have permitted these claimants to collect benefits without the complication of conflict of laws rules or presumptions of marital validity.

63. See, e.g., *Stanley v. Illinois*, 405 U.S. 645 (1972).

64. See ANDREW SULLIVAN, *VIRTUALLY NORMAL* 178-87 (1995).

65. ESKRIDGE, *supra* note 33, at 8.

66. See *id.* at 51-85; Nitya Duclos, *Some Complicating Thoughts on Same-Sex Marriage*, 1 *LAW & SEXUALITY* 31 (1991); Steven K. Homer, *Against Marriage*, 29 *HARV. C.R.-C.L. L. REV.* 505 (1994); Nancy D. Polikoff, *We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage"*, 79 *VA. L. REV.* 1535 (1993); David W. Dunlap, *Some Gay Rights Advocates Question Drive to Defend Same-Sex Marriage*, *N.Y. TIMES*, June 7, 1996, at A12.

67. See GROSSBERG, *supra* note 57, at 86-100.

marriage, courts largely respected those policy determinations.⁶⁸ However, this has created other problems. Except in the small minority of states retaining common law marriage, contemporary courts struggle with how to treat property, support, parenting, and other interests of nonmarried, opposite-sex couples. Moreover, the continuing validity of common law marriage in some states has made it necessary for courts to develop conflict of laws rules governing the recognition of these marriages in other states.⁶⁹

In contrast to the debate over common law marriage at the turn of the century, the debate over same-sex marriage in Hawaii today is framed in constitutional terms. Declaring the state marriage statutes to be unconstitutional is a much more dramatic step than the development of new common law remedies. Thus, it is hardly surprising that courts presented with these issues in the decades before *Baehr* uniformly rejected the constitutional arguments for same-sex marriage.⁷⁰ During the same period, however, a number of courts were persuaded to quietly change other rules, where their common law powers permitted, making them more inclusive of gay and lesbian family relationships.⁷¹

Some writers describe the courts' proper lawmaking role as one of provoking legal debate and change in light of significant changes in the social and legal landscape.⁷² If this is done with a constitutional ruling, however, the stakes are very high. A constitutional holding limits the terms on which a new accommo-

68. Courts in some states have given less effect to the policy against common law marriage at the margins. For example, some courts have ignored the statutory abolition of common law marriage when developing rules regarding the validity of common law marriages contracted in another state, see 1 CLARK, *supra* note 21, § 2.4, at 117-20, or in determining whether to allow financial recovery outside the marital property and support rules in situations once characterized as common law marriage, see *supra* note 61.

69. See 1 CLARK, *supra* note 21, § 2.4, at 117-20.

70. See *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974); see also *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971). For a decision after *Baehr*, see *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995).

71. See, e.g., *In re Kowalski*, 478 N.W.2d 790 (Minn. Ct. App. 1991); *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49 (N.Y. 1989); see also cases cited *supra* notes 39-40. But see *In re Estate of Cooper*, 564 N.Y.S.2d 684 (N.Y. Sur. Ct. 1990); *De Santo v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984).

72. See, e.g., CALABRESI, *supra* note 49; EVA R. RUBIN, *THE SUPREME COURT AND THE AMERICAN FAMILY* (1986).

dation of different interests can be achieved. In addition, an incorrect resolution of a constitutional issue cannot be easily reworked. This can deprive the legislative branch of its opportunity to participate in the debate, unless it does so with a constitutional amendment, which is a serious (and often difficult) matter.⁷³ Conversely, with a holding based on common law or statutory interpretation, the legislature retains the ultimate power to determine the shape of the law.

In retrospect, the Hawaii Supreme Court's decision in *Baehr* was remarkably successful in provoking the type of debate and change this theory envisions—not only in Hawaii, but across the nation. There are signs in the plurality opinion that the court may have intended to prompt reconsideration of the existing law. The opinion strikes a middle ground, refusing to hold that the fundamental right to marry includes a right to same-sex marriage. The court avoids issues of sex and sexual orientation, ultimately emphasizing not marriage itself, but the “multiplicity of rights and benefits” that the state allocates on the basis of marital status.⁷⁴ This holding could be read—and has been—as an invitation to the Hawaii Legislature to address the problem of discrimination in granting these rights and privileges. The legislature could achieve this goal through changes in state policy short of legalization of same-sex marriage, for example, by implementing a statewide domestic partnership system.⁷⁵

One result of the nationwide debate about same-sex marriage during the last six months has been the emergence of new support for domestic partnership registration laws. This suggestion is clearly intended to serve as a compromise between the claims of same-sex couples for full legal recognition of their marriages, and the demands of social conservatives that “marriage” be reserved for traditionally constituted male-female relationships. The tension between these conflicting positions has propelled commentators with diverse views—from Roy Romer to William Safire to Ann Landers—to advocate something like domestic partnership laws as a solution.⁷⁶

73. See CALABRESI, *supra* note 49, at 11.

74. See *Baehr v. Lewin*, 852 P.2d 44, 58-59 (Haw. 1993).

75. If the Hawaii Legislature had established such a system, the argument that the classification based on sex in the marriage statutes was a narrowly tailored one would have been a much easier argument to make. See Coleman, *supra* note 17.

76. See Ann Landers, *Landers Draws the Line at Same-Sex Marriage*, SALT LAKE CITY TRIB., July 21, 1996, at J3; William Safire, *Same-Sex Marriage Nears*,

The new moderate view is that "marriage" should be limited to heterosexual couples, but that it is unjust to deny same-sex couples access to legal incidents of marriage. Carefully drafted domestic partnership legislation at the state level could grant same-sex couples many of the benefits presently available under state marriage law. However, this would have to be a legislative solution, and the Hawaii experience suggests that such a compromise will not be easily reached. Many conservatives object to any social or legal recognition of same-sex couples, and many gays and lesbians object to a "solution" which continues to identify their families as less than fully equal to those that are more traditionally constituted.⁷⁷

Another intermediate view is that same-sex marriage or domestic partnership legislation is a sensible idea, but that it should be left to the political branches of government to enact this type of change.⁷⁸ Based on the last six months of legislative activity, it seems unlikely that the political branches will take dramatic action along these lines very soon. In a number of these debates, however, there are indications that political ambivalence about the same-sex marriage issue may have shifted the balance of power on other gay rights questions as well.⁷⁹

III.

As a family law specialist, and as a Coloradan, I am interested in *Romer* because, in Colorado, every legal question is potentially a political one. In the first instance, most gay and lesbian family law issues will necessarily be judicial questions.⁸⁰

N.Y. TIMES, Apr. 29, 1996, at A27; see also *infra* note 78. For Governor Romer's view, see *supra* note 25.

77. There are other limits to a domestic partnership approach. Such partnerships would not have the same potential for recognition across state lines that marriages would, even in the wake of the Defense of Marriage Act.

78. See Melanie Kirkpatrick, *Rule of Law: Gay Marriage: Who Should Decide?*, WALL ST. J., Mar. 13, 1996, at A15; George F. Will, *And Now Pronounce Them Spouse and Spouse*, WASH. POST, May 19, 1996, at C9; see also Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 6, 23-27 (1994).

79. See *supra* text accompanying note 31 (regarding support in the Senate for a bill barring employment discrimination on the basis of sexual orientation).

80. To date, Colorado appellate courts have not shown much inclination to broaden the categories of domestic relations law to include gays and lesbians. See, e.g., *In re T.K.J.*, No. 96-SC588, 1996 WL 316800 (Colo. Ct. App. June 13, 1996) (denying same-sex stepparent adoption under Colorado statutes), *cert. denied* (Jan. 21, 1997). Yet, unlike other states, Colorado courts have not permitted the use of

As state courts develop new legal norms, these norms will remain subject to veto by the state legislature, and subject to the prospect of further lawmaking by the state's voters. Due to the relative ease of Colorado's ballot initiative process, this possibility exists even where the courts engage in constitutional review. This year's ballot included a constitutional family law measure—known as the parental rights initiative⁸¹—and it would not be surprising to see others in the future.

My own view is that just as there are reasons to be cautious about norm-changing through constitutional litigation, there are reasons to be cautious about constitution-changing in the service of a particular vision of family law. Other commentators have discussed the drawbacks of lawmaking through constitutional initiatives, and many of the general criticisms apply with equal or greater force in the family law setting.⁸² These initiatives allow little room for compromise or collaboration, or for careful drafting and revision in order to better address the complex realities of the family problems that courts confront daily.⁸³ Yet, the voters in future Colorado elections may be faced with ballot measures proposing to enact constitutional or statutory provisions concerning same-sex marriage, domestic partnership, inheritance, or adoption.

In the wake of *Romer*, it is interesting to consider how the results of *Baehr*-type litigation and other issues of gay and lesbian family law could be affected by similar ballot campaigns.⁸⁴

sexual orientation as a factor in deciding divorce or custody cases. *Cf.* cases cited *supra* note 38.

81. The Parental Rights Amendment, Amendment 17 on the ballot, would have added language to Article II, Section 3 of the Colorado Constitution providing that parents have a "natural, essential and inalienable right . . . to direct and control the upbringing, education, values and discipline of their children." *See generally* Michelle Dally Johnston, *Parental Rights Stirs a Tempest*, DENV. POST, Sept. 22, 1996, at A1. Ironically, this language derives from the Supreme Court's decision in *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925), which challenged an Oregon ballot measure requiring all children to attend public school. The Colorado measure was defeated.

82. *See generally* Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 U. COLO. L. REV. 47 (1995).

83. *See id.*

84. Amendment 2 provided:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian, or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the

Has *Romer* done anything to reallocate the lawmaking balance of power between the legislature, courts, and voters in the area of family law? Conservative commentary on the *Romer* decision suggests that it has just such broad implications.⁸⁵ Justice Scalia's dissenting opinion in *Romer* seems to argue that the majority has foreclosed the Colorado voters from regulating sexual morality.⁸⁶ Justice Scalia considered the Court's 1986 decision in *Bowers v. Hardwick*⁸⁷ to be controlling of the issues in *Romer*, stating: "If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely disfavoring homosexual conduct."⁸⁸ If we accept this account of the *Bowers* decision, we might even conclude that the case was overruled sub silentio in *Romer*, and that a ballot measure or state statute prohibiting same-sex marriage would be unconstitutional. These are cheering thoughts for proponents of same-sex marriage rights,

basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

COLO. CONST., art II, § 30b. What if the Court had decided *Romer* differently? Would constitutional language like the language in Amendment 2 have prevented the Hawaii court from reaching its decision in *Baehr*? Would it have prevented Colorado (as a "department" of the state government) from adopting common law rules or statutory interpretations addressing gay and lesbian family relationships?

85. Testimony presented in the House Judiciary Committee hearings on the Defense of Marriage Act implied that a Court that could decide *Romer* in favor of the plaintiffs would stop at nothing to advance a gay rights agenda. See *Defense of Marriage Act: Hearings on H.R. 3396 Before the Subcomm. on the Constitution of the House Judiciary Comm.*, 104th Cong. (1996). Some liberals have also read the majority opinion in *Romer* broadly enough to reverse or drastically cut back on the holding in *Bowers*. See, e.g., Tribe, *supra* note 46.

86. Justice Scalia's dissent describes Amendment 2 as "a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws." *Romer v. Evans*, 116 S. Ct. 1620, 1629 (1996) (Scalia, J., dissenting); see also *id.* at 1637 ("Amendment 2 is designed to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans . . ."). He also suggests that the Court has concluded that the "perceived social harm of homosexuality" is not "a legitimate concern of government." *Id.* at 1636. The evidence he cites of Coloradans' "seeming tolerance" is the decriminalization of sodomy that occurred in 1971. See *id.* at 1633.

87. 478 U.S. 186 (1986).

88. *Romer*, 116 S. Ct. at 1631 (Scalia, J., dissenting); see also *id.* at 1633 ("*Bowers* alone suffices to answer all constitutional objections."). Scalia notes in his opinion that the respondents did not urge overruling *Bowers*. See *id.* at 1630 (Scalia, J., dissenting). He does not point out, however, that the petitioner did not rely on *Bowers*, either.

but a more sober reading of the majority opinion leaves far less room for comfort.

The majority opinion in *Romer* emphasizes the broad sweep of Amendment 2.⁸⁹ The Court discusses the many different legal protections that Amendment 2 withdraws from homosexuals,⁹⁰ rejecting the State's argument that the law simply denies homosexuals any "special rights."⁹¹ The Court is quite explicit that Amendment 2 fails the conventional equal protection inquiry because of its extraordinary breadth. The majority opinion comments that the Court can only examine the relationship between a law's classification and its purpose if the law is "narrow enough in scope and grounded in a sufficient factual context."⁹² In this situation, however, the Court declined to credit the purposes argued on behalf of Amendment 2, because the disabilities it imposes are so broad, and the classification it creates is so narrow.⁹³ In effect, the Court concludes that Amendment 2 is not a rational means of protecting "other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality."⁹⁴ Because the law does not appear rational when considered in light of this purpose, the Court concludes "that Amendment 2 classifies homosexuals not to further a proper legislative end, but to make them unequal to everyone else."⁹⁵

The majority opinion does not focus on constitutional ballot initiatives. The Court does not hold that Amendment 2 violates the Equal Protection Clause because it is a constitutional rather than a statutory measure. The Court does not say anything to suggest that lawmaking by initiative is constitutionally suspect. However, both of these factors seem to play a role in the central holding. Amendment 2 is more "sweeping" in its effects because it is enshrined in the state's constitution rather than in its statutes; and it is more difficult to identify, and perhaps to credit, the state's "legislative interests" where the legislative process was not utilized.

89. For the majority, *Romer* has nothing to do with sex, while for the dissent, it has everything to do with sex. *Cf. supra* text accompanying note 86.

90. *See Romer*, 116 S. Ct. at 1625-27.

91. *Id.*

92. *Id.* at 1627.

93. *See id.* at 1628-29.

94. *Id.* at 1629.

95. *Id.*

The Court's opinion in *Romer* does not endorse the Colorado Supreme Court's conclusion that Amendment 2 burdens a fundamental right of political participation, and it does not conclude that gays and lesbians constitute a suspect class.⁹⁶ Of course, the decision can and will be characterized more broadly in constitutional argument on behalf of gays and lesbians. For example, less than a week after the *Romer* decision, Laurence Tribe cited the case in suggesting that the Defense of Marriage Act might violate the Due Process Clause of the Fifth Amendment, "on the ground that it singles out same-sex relationships for unfavorable legal treatment for no discernible reason beyond public animosity to homosexuals."⁹⁷

There is remarkably little common ground between the majority and dissenting opinions in *Romer*; they address entirely different questions. Justice Scalia's dissent celebrates the rough and tumble of the political process, characterizing the debate over Amendment 2 as a "culture war"⁹⁸ and repeatedly defending the motives he attributes to the voters who supported it. He paints a picture of gays and lesbians as a politically powerful group on a dangerous crusade against traditional values,⁹⁹ equating Amendment 2 with the federal campaign against polygamy in the Utah territory a century ago. He is scathing in his criticism of the majority opinion and the other members of the Court, accusing the Court of "insulting" the voters in Colorado with its holding.¹⁰⁰

Against this barrage, Justice Kennedy's majority opinion is extremely restrained. The Court makes it clear that public animosity toward gays and lesbians is not a legitimate legislative purpose.¹⁰¹ However, the Court does not assert, as the dissent

96. Justice Scalia is surely correct in noting this. See *Romer*, 116 S. Ct. at 1632 n.1 (Scalia, J., dissenting).

97. Letter from Professor Laurence H. Tribe, Harvard University, to Senator Edward Kennedy, May 26, 1996, 142 CONG. REC. S5931-33 (June 6, 1996).

98. See *Romer*, 116 S. Ct. at 1637 (Scalia, J., dissenting); see also *id.* at 1629 (Scalia, J., dissenting) (referring to "Kulturkampf" and "cultural debate").

99. See *id.* at 1635 (Scalia, J., dissenting); see also Editorial, *Law and Justice*, NAT'L L.J., June 3, 1996, at A18 (suggesting that the dissent, "while eloquent and forceful, betrays some animus of its own").

100. See *Romer*, 116 S. Ct. at 1637 (Scalia, J., dissenting).

101. See *id.* at 1629. The opinion asserts that "[l]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 1628. The Court concludes "that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do." *Id.* at 1629.

alleges, "that opposition to homosexuality is as reprehensible as racial or religious bias."¹⁰² It does not "pronounc[e] that 'animosity' toward homosexuality . . . is evil."¹⁰³ The Court does not portray Coloradans "as a society fallen victim to pointless, hate-filled 'gay-bashing,'"¹⁰⁴ or "verbally disparag[e] as bigotry adherence to traditional values."¹⁰⁵

There is another striking difference between these two opinions. For the majority, this case apparently has nothing to do with sex acts of any variety. The majority does not address the purpose that the dissenters assert lies behind Amendment 2: preservation of traditional sexual morality. The majority does not discuss *Bowers*, which the dissenters see as dispositive. These omissions are less surprising, however, in view of the fact that the State of Colorado did not claim that the purpose of Amendment 2 was to regulate sexual morality, and did not argue that the case was controlled by *Bowers*.¹⁰⁶ This makes Justice Scalia's impassioned concern with sexual morality all the more impressive. Evidently, the dissenters see everything concerned with gays and lesbians as being fundamentally about sex. Their opinion says as much, in fact, when it relies on precedents that define the class of gays and lesbians solely with respect to their sexual behavior.¹⁰⁷

Since the majority did not see this as a case about sexual morality, we have no indication of what these six members of the Court would do if some subsequent case presented a statute or constitutional provision that was more explicitly about sex. This could be presented directly, as with the sodomy statute consid-

102. *Id.* at 1629 (Scalia, J., dissenting).

103. *Id.* (Scalia, J., dissenting).

104. *Id.* at 1633 (Scalia, J., dissenting).

105. *Id.* at 1637 (Scalia, J., dissenting).

106. The petitioner's brief in *Romer* did not argue that the purpose of Amendment 2 was to preserve traditional sexual morality. In summarizing the state's interests, the brief hinted that this was a concern, asserting that Amendment 2 "promotes freedom of choice (relating to matters of personal and familial privacy, religion, and association), furthers several legitimate societal concerns (relating to the integrity of the civil rights laws and the contours of social and moral norms), and achieves statewide uniformity." Petitioner's Brief at 39-40, *Romer v. Evans*, 116 S. Ct. 1620 (1996) (No. 94-1039). However, in the pages that follow, this brief discusses three of these interests in more detail without elaborating or referring again to the concern with "moral and social norms."

107. Justice Scalia refers to sodomy as "homosexual conduct" and writes that sodomy laws "criminalize the behavior that defines the class." *Romer*, 116 S. Ct. at 1631 (Scalia, J., dissenting) (citing *Padula v. Webster*, 822 F.2d 97, 103 (1987)).

ered in *Bowers*, or indirectly, as with a law limiting access to the legal status of marriage.¹⁰⁸ If the Court applied the equal protection analysis announced in *Romer*, would it uphold the Defense of Marriage Act,¹⁰⁹ or a state statute or constitutional provision that denied same-sex couples the right to marry?¹¹⁰ Justice Scalia's arguments in *Romer* would make much more sense in the context of a challenge to laws regulating family life, and might well draw broader support on the Court.

Assuming that both *Bowers* and *Romer* are good law, it is not easy to predict how the Court will treat laws denying same-sex couples the opportunity to marry, to adopt children together, or to file joint income tax returns. Are these laws more like the criminal sodomy statute sustained in *Bowers*, or more like the broad disability under the constitutional provision held unconstitutional in *Romer*? Are family law questions about sex, or are they about civil rights?

This is, finally, what it is that links *Baehr* and *Romer*. Both cases inhabit a world beyond *Bowers*. Remarkably, neither decision is about sex. In both cases, gays and lesbians appear in three dimensions, no longer defined entirely by what Justice Scalia calls "homosexual conduct." *Baehr* is important because with it, the Hawaii Supreme Court places family law questions into what can now be described as a *Romer* framework rather than a *Bowers* framework.

This is an extremely important step, and I think it is no accident that it comes from a state supreme court. The practice of judging in family law cases demands a complex understanding of families. State court judges work every day with a wide range of family forms and the many legal ramifications of family status. Ultimately, the Hawaii Supreme Court's insight, drawn from that experience, is that marriage and the family have more to do with

108. Only three of the Justices who participated in the *Bowers* decision are still on the Court: Rehnquist, Stevens, and O'Connor. Of these three, Justices Rehnquist and O'Connor voted with the majority, and Justice Stevens joined the dissent. Assuming that these three votes would remain the same, and given that Justices Scalia and Thomas have indicated their support for the *Bowers* decision in the *Romer* dissent, *Bowers* would remain in place unless Justices Kennedy, Souter, Breyer, and Ginsburg all voted with Justice Stevens to overrule it.

109. This issue is considered in the committee report on the Defense of Marriage Act. See Committee Report, *supra* note 27, at 22-24; see also Letter from Professor Laurence H. Tribe, *supra* note 97.

110. See, e.g., statutes cited *supra* note 23.

civil rights than with sex. The question that remains is whether the federal bench will follow suit.

